

### Executive Summary

The unallotment law authorizes the executive branch to reduce spending under enacted appropriations to prevent a state budget deficit when revenues are less than anticipated.

The Commissioner of Management and Budget may reduce general fund spending under the unallotment power only after all of the following occur:

- A balanced budget has been enacted into law
- The commissioner has determined that revenues will be less than originally anticipated
- The governor has approved the unallotment
- The commissioner has sought advice from the Legislative Advisory Commission

It also appears that the Commissioner of Management and Budget must exhaust the budget reserve before unallotting general fund appropriations.

The unallotment law grants executive branch officials broad discretion in choosing which spending to reduce to prevent a deficit. Appropriations to the judiciary and legislature and for two other specific purposes are not subject to allotment and, thus, are likely exempt. Money in the state’s risk management (self-insurance) fund is explicitly exempt. But all other appropriations and transfers are generally subject to unallotment, including the following:

- Appropriations to constitutional officers
- Appropriations made in prior biennia that remain unspent
- Interfund transfers
- Appropriations for state intergovernmental aid and other statutory entitlement programs

The unallotment statute also authorizes the Commissioner of Management and Budget to suspend or defer statutory requirements or obligations that would prevent effecting the reductions. The exact scope of this authority is unclear—for example, the extent to which it allows “rewriting” state aid formulas or other program parameters to put into effect targeted spending reductions.

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## Conditions and Procedures for Unallotment

The unallotment law<sup>1</sup> specifies conditions under which the executive branch can reduce expenditures to prevent a budget deficit when revenues are less than anticipated. The key part of the law provides:

(a) If the commissioner [of management and budget<sup>2</sup> ] determines that probable receipts for the general fund will be less than anticipated, and that the amount available for the remainder of the biennium will be less than needed, the commissioner shall, with the approval of the governor, and after consulting the legislative advisory commission, reduce the amount in the budget reserve account as needed to balance expenditures with revenue.

(b) An additional deficit shall, with the approval of the governor, and after consulting the legislative advisory commission, be made up by reducing unexpended allotments of any prior appropriation or transfer. Notwithstanding any other law to the contrary, the commissioner is empowered to defer or suspend prior statutorily created obligations which would prevent effecting such reductions. (See Appendix A at the end of this publication for the complete text of [Minnesota Statutes, section 16A.152.](#))

### To use unallotment, MMB must determine that a deficit exists.

The first prerequisite to unallotment is that the Commissioner of Minnesota Management and Budget (MMB) “determines that probable receipts for the general fund will be less than anticipated, and that the amount available for the remainder of the biennium will be less than needed ....”

The statute does not specify when or how the commissioner determines that a shortfall exists.<sup>3</sup> For example, the statute does not require that this determination be made in connection with the state revenue and expenditure forecasts that the commissioner issues each February and November.<sup>4</sup>

A forecast projecting a shortfall almost certainly would constitute a determination that “the amount available for the remainder of the biennium will be less than needed.” It also is likely that the commissioner could make this determination without issuing a formal forecast.

### A balanced budget must be enacted before unallotment can be used.

Although the language of the statute does not explicitly address this issue, the Minnesota Supreme Court has ruled that unallotment may not be used until a balanced budget has been enacted into law.

<sup>1</sup> [Minn. Stat. § 16A.152, subd. 4.](#)

<sup>2</sup> Prior to 2009, the legislature vested the unallotment power in the commissioner of the Department of Finance, MMB’s precursor agency.

<sup>3</sup> The statute requires that the Commissioner of Management and Budget determine both that: (1) probable receipts for the general fund will be less than anticipated; and (2) the amount available for the remainder of the biennium will be less than needed. Thus, unallotment cannot be used if there is a sufficient general fund balance to cover a shortfall in receipts. It also appears that unallotment cannot be used if the projected general fund deficit is caused exclusively by higher than anticipated expenditures, instead of lower than expected receipts.

<sup>4</sup> The Commissioner of Management and Budget must prepare forecasts in November and February. [Minn. Stat. § 16A.103.](#)

The statute does not specify what the baseline revenues are that the commissioner must determine will now be “less than anticipated” to permit use of unallotment. In the 2010 case of *Brayton v. Pawlenty*,<sup>5</sup> the Supreme Court held that these baseline revenues (at least initially) are to be determined by reference to an enacted, balanced budget for the biennium. In *Brayton*, Governor Tim Pawlenty vetoed a tax increase and used unallotment to reduce spending under enacted appropriations to match forecasted general fund revenue absent the tax increase. As a result, no balanced budget had been enacted. Thus, the *Brayton* decision requires enactment of a balanced budget before unallotment may be used.<sup>6</sup>

## **The governor must approve unallotments.**

After the Commissioner of Management and Budget determines that the amount available for the biennium is less than needed, the governor must approve the commissioner’s actions before the commissioner can either reduce the amount in the budget reserve or reduce allotments.

## **MMB must consult the Legislative Advisory Commission before unallotting and notify legislative committees afterwards.**

The Commissioner of Management and Budget must consult with the Legislative Advisory Commission (LAC)<sup>7</sup> before reducing the amount in the budget reserve to deal with a projected budget deficit and before reducing allotments. The law requires only consultation with the LAC and does not give the LAC authority to act on the executive branch’s proposed actions.

In other circumstances (e.g., review of federal funds), a separate law allows the Commissioner of Management and Budget to seek review by submitting requests to individual members of the LAC, without a commission meeting (unless one of the LAC members requests further review).<sup>8</sup> The unallotment law does not specifically authorize this method of individual consultation, implying that consultation must be with the full LAC at a meeting.

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<sup>5</sup> 781 N.W.2d 357 (Minn. 2010).

<sup>6</sup> In the words of the court:

[W]e cannot conclude that the Legislature intended to authorize the executive branch to use the unallotment process to balance the budget for an entire biennium when balanced spending and revenue legislation has not been initially agreed upon by the Legislature and the Governor. Instead, we conclude that the Legislature intended the unallotment authority to serve the more narrow purpose of providing a mechanism by which the executive branch could address unanticipated deficits that occur after a balanced budget has previously been enacted. *Brayton*, 781 N.W.2d at 366-67 (footnote omitted).

<sup>7</sup> The LAC consists of six members: the majority leader of the Senate and the speaker of the House (or their designees); the chairs of the Senate committee on finance and the House committee on ways and means; and the chairs of the Senate and House budget committees or divisions “responsible for overseeing the items being considered.” [Minn. Stat. § 3.30](#). It is not clear who the appropriate budget committee chairs would be to consider proposed uses of the budget reserve or proposed unallotments. For an unallotment that affects items within more than one budget committee or division, the LAC has held these meetings with an expanded membership (beyond the statutory six members) that includes all of the affected budget committee chairs.

<sup>8</sup> See [Minn. Stat. §§ 3.30, subd. 2](#) (“A recommendation of the commission must be made at a meeting of the commission unless a written recommendation is signed by all the members entitled to vote on the item.”) and [3.3005](#) (federal money expenditure review).

The commissioner also must notify certain legislative committees within 15 days after reducing allotments. The notice must be written and must specify:

- 1) the amount of the reduction in the allotment;
- 2) the agency and programs affected;
- 3) the amount of any payment withheld; and
- 4) any additional information the commissioner determines is appropriate.<sup>9</sup>

## **The budget reserve likely must be exhausted before unallotment can be used.**

The executive branch clearly **may** use the budget reserve account to help eliminate an anticipated general fund shortfall. It appears that the executive branch **must** use the budget reserve account before using unallotment authority, although this is not clear.

The law provides that when the Commissioner of Management and Budget determines that a shortfall exists, “the commissioner shall, with the approval of the governor, and after consulting the Legislative Advisory Commission, reduce the amount in the budget reserve account as needed to balance expenditures with revenue.”<sup>10</sup>

The use of the word “shall” suggests that use of the budget reserve account is a mandatory first step in eliminating a projected shortfall.<sup>11</sup> However, the fact that the statute requires approval of the governor creates some ambiguity. Arguably, the governor could disapprove use of the budget reserve—if the governor had no authority, the language requiring his or her approval arguably would be meaningless.<sup>12</sup> On the other hand, the approval of the governor could be read to refer not to use of the budget reserve, but rather to the determination that there is a general fund shortfall.

The legislative history appears to support the interpretation that the commissioner must use the entire budget reserve before unallotting. Until 1983, the law permitted the executive branch: (a) to make transfers from the budget reserve account; (b) to reduce allotments; or (c) to make any combination of transfers and reductions. In 1983, the legislature eliminated executive branch authority to make any combination of budget reserve transfers and reductions and replaced it with language authorizing unallotment to make up any “additional deficit” (implying that the budget reserve must be used first).<sup>13</sup>

<sup>9</sup> [Minn. Stat. § 16A.152, subd. 6.](#)

<sup>10</sup> [Minn. Stat. § 16A.152, subd. 4\(a\).](#)

<sup>11</sup> [Minn. Stat. § 645.44, subd. 16](#) (defining “shall” as “mandatory”).

<sup>12</sup> Language in another subdivision, governing use of the budget reserve, provides that “The budget reserve may be used when a negative budgetary balance is projected and when objective measures, such as reduced growth in total wages, retail sales, or employment, reflect downturns in the state’s economy.” [Minn. Stat. § 16A.152, subd. 3](#). The use of the term “may” in this subdivision could be used to support an argument that unallotment can be used before using the budget reserve.

<sup>13</sup> [Laws 1983, ch. 342, art. 18, § 1.](#)

Although use of the budget reserve was not an issue in the *Brayton* case (it had already been exhausted), the dissenting justices viewed using the budget reserve as mandatory.<sup>14</sup>

## **The law does not impose specific timing requirements on the use of unallotment.**

The statutory duty to reduce allotments is mandatory to the extent needed to make up a projected deficit not solved by use of the budget reserve account. However, the statute does not specify a timetable. To be effective, unallotment would have to occur in time to eliminate the projected deficit within the biennium. Arguably, the Commissioner of Management and Budget must unallot immediately once the statutory conditions that require unallotment have been determined to exist, and the commissioner has approval of the governor and has consulted the LAC. However, the authors understand that it has been common for commissioners and governors to wait until after the legislature had an opportunity to rewrite the budget before unallotting. The requirement to obtain the governor's approval and to consult with the LAC may imply that the commissioner has some discretion in the timing of unallotment.

## **Constitutionality of Unallotment Law**

Because the unallotment law grants the executive branch extraordinary power to modify appropriations enacted by law, some have questioned whether this is an unconstitutional delegation of legislative power to the executive branch. In one case, *Rukavina v. Pawlenty*, the Minnesota Court of Appeals held that unallotment authority does not unconstitutionally delegate legislative power. Rather, it enables the executive branch to protect the state from financial crisis in a manner designated by the legislature.<sup>15</sup>

In *Brayton v. Pawlenty*, the plaintiffs challenged the constitutionality of the statute as applied in that case. However, the Supreme Court invalidated the unallotment at issue as not authorized by the statute and, thus, did not reach the statute's constitutionality. Two justices who concurred in the court's opinion noted that the "sweeping discretion" granted to the executive branch by the statute "raises serious separation of powers concerns."<sup>16</sup> In contrast, the three dissenting justices concluded that the unallotment statute does not unconstitutionally delegate legislative power to the executive branch because it provides sufficient controls to guide and restrict the Commissioner of Management and Budget's use of this authority.<sup>17</sup>

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<sup>14</sup> "[T]he Commissioner must first exhaust the budget reserve account before invoking the unallotment authority." *Brayton*, 781 N.W.2d at 378 (Gildea, L., dissenting).

<sup>15</sup> *Rukavina v. Pawlenty*, 684 N.W.2d 525, 535 (Minn. App.), *review denied* (Minn. 2004).

<sup>16</sup> *Brayton*, 781 N.W.2d at 369 (Page, A., and Anderson, P., concurring).

<sup>17</sup> *Id.* at 375-81 (Gildea, L., dissenting).

## Items Subject to Unallotment

### Allotments are administrative limits on appropriations.

Since the unallotment authority applies to “allotments” of appropriations, it is important to determine what an allotment is. The statute defines an allotment as:

“Allotment” means a limit placed by the commissioner [of management and budget] on the amount to be spent or encumbered during a period of time pursuant to an appropriation.<sup>18</sup>

Under this definition, an allotment is an administrative limit the Commissioner of Management and Budget places on the spending of an appropriation. An allotment may limit the amount of an appropriation that can be spent in a specific period of time (e.g., a month or quarter).

### The law imposes few limits on the type or amounts of appropriations that may be unallotted.

When the appropriate circumstances exist and the appropriate process has been followed, the commissioner appears to have broad authority to reduce allotments as necessary to erase the deficit.

- No programs are exempt from the unallotment authority.<sup>19</sup>
- The commissioner is not required to make across-the-board cuts.
- No maximum percentage limits how much the commissioner can cut from any program.<sup>20</sup>
- The statute authorizes the commissioner to defer or suspend statutory obligations that would otherwise prevent the unallotment.

The statute contains two further provisions governing unallotment:

(d) In reducing allotments, the commissioner may consider other sources of revenue available to recipients of state appropriations and may apply allotment reductions based on all sources of revenue available.

<sup>18</sup> [Minn. Stat. § 16A.011, subd. 3.](#)

<sup>19</sup> The legislature has enacted some narrow exceptions to this general rule. [Minn. Stat. §§ 16B.85, subd. 2\(e\)](#) (risk management fund); [477A.011, subd. 36\(y\)](#) (onetime 2010 local government aid payment to the city of Coon Rapids—the legislature repealed this provision in 2013).

<sup>20</sup> By contrast, in a temporary provision enacted in 1993, the legislature required the Commissioner of Finance to uniformly unallot all appropriations in November 1993 if the forecast indicated the budget reserve and cash flow account would not be funded at \$400 million for the 1994-95 biennium. [Laws 1993, 1st spec. sess., ch. 4, § 2](#) The law limited the unallotment to no more than 1 percent of biennial appropriations. Various appropriations were exempted, such as those for debt service, maximum effort school loans, and Aid to Families with Dependent Children. Because revenue exceeded the original estimates, the commissioner did not unallot appropriations in November 1993.

(e) In like manner, the commissioner shall reduce allotments to an agency by the amount of any saving that can be made over previous spending plans through a reduction in prices or other cause.

Paragraph (d) seems purely discretionary and provides the commissioner additional flexibility in reducing allotments.<sup>21</sup>

Paragraph (e), on the other hand, is mandatory. The commissioner is required to reduce allotments by the amount of savings that can be achieved. Arguably, these reductions must occur before the commissioner reduces other allotments.

## **The exact scope of MMB’s authority to divide appropriations into allotments is unclear.**

The statute explicitly authorizes the Commissioner of Management and Budget to set “allotment periods.”<sup>22</sup> The statute may also authorize the commissioner to set allotments as part of the power to approve agency spending plans. These plans, by statute, must certify “the amount required for each activity is accurate and is consistent with legislative intent....”<sup>23</sup> It is not clear that the commissioner has broader authority to define allotments as to other aspects of an appropriation.

## **Unallotment likely does not apply to appropriations for the judiciary or legislature.**

The unallotment statute does not specifically exempt appropriations to the legislative or judicial branches. However, [Minnesota Statutes, section 16A.14](#), subdivision 2a, provides that:

The allotment and encumbrance system does not apply to:

- 1) appropriations for the courts or the legislature;
- 2) payment of unemployment benefits; and
- 3) transactions within the defined contribution funds administered by the Minnesota State Retirement System.

If the courts and the legislature are not subject to the allotment system, it is likely they are not subject to the executive authority to reduce allotments.<sup>24</sup>

<sup>21</sup> For example, one method of cutting aids to counties and cities is to reduce aid payments based on the local government’s amount of “levy plus aid,” rather than simply the amount of state aid received. This can spread the cuts across cities and counties in proportion to their total budget resources, rather than the amount of state money they receive. The legislature may have added paragraph (d) to grant the Commissioner of Management and Budget this type of flexibility, as discussed later in this publication.

<sup>22</sup> [Minn. Stat. § 16A.14, subd. 1.](#)

<sup>23</sup> [Minn. Stat. § 16A.14, subd. 3.](#)

<sup>24</sup> In 1986, the executive branch unallotted funds from the appropriations to the legislature and the judicial branch. In 2003, the governor issued an unallotment order that applied to the legislative and judicial branches. The Senate and the judicial branch objected to the unallotment as illegal. Patricia Lopez, “Did Pawlenty prune wrong branches?” *Star Tribune* (Feb. 12, 2003). This dispute was resolved without the executive branch explicitly conceding that the unallotment power did not apply, but with both branches agreeing to “voluntary” reductions

## Appropriations to constitutional officers likely can be unalloted.

Unlike appropriations to the judiciary and legislature, the unallotment authority appears to apply to appropriations to constitutional officers (the governor, lieutenant governor, secretary of state, auditor, and attorney general). Neither the statutory definition of allotment nor the unallotment statute exempts appropriations to constitutional officers. However, the state constitution likely imposes some outer limits on unallotting appropriations to constitutional officers.

For example, it would probably not be permissible to unallot the entire budget of a constitutional officer and expect either that other state agencies would carry out the officer's functions or that the functions would not be performed at all. In the *Mattson* case,<sup>25</sup> the Minnesota Supreme Court held a law that transferred the state treasurer's functions and appropriations to other state agencies was unconstitutional because it violated the constitution's distribution of executive powers among the constitutional officers. Any unallotment of appropriations to a constitutional officer would likely be analyzed from the perspective of its impact on the constitutional duties and responsibilities of the affected officer.

## Unspent appropriations for prior biennia may be unalloted.

The unallotment provisions explicitly extend to any "unexpended allotments of any prior appropriation or transfer."<sup>26</sup> The Court of Appeals in 2004 held that this allowed unallotment of appropriations and transfers made in previous biennia that were still unspent.<sup>27</sup> Most appropriations lapse by the end of the biennium,<sup>28</sup> so this authority does not have wide application. However, some appropriations, either by their own terms or by statute (e.g., appropriations for permanent improvements) do not lapse and are subject to unallotment.<sup>29</sup>

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of the amounts specified in the original order. "Three government branches settle dispute on budget cuts," *Star Tribune* (Feb. 13, 2003). In a letter to Speaker Steve Sviggum, Commissioner of Finance Dan McElroy stated:

I understand that there are some concerns about the unallotment process and how it may or may not apply to the legislature and the courts. I recognize that there are differences in the encumbrance processes that state agencies must follow, and as a result, propose another way to resolve the issue.

I hope that you might volunteer to participate in this effort to meet balanced budget requirements. I have made a similar request to the courts.

Copy of letter in authors' files.

The dissent in *Brayton* states that the statute exempts the judiciary and legislature from the unallotment power. *Brayton*, 781 N.W.2d at 379 (Gildea, L., dissenting).

<sup>25</sup> *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777 (Minn. 1986). In contrast, the Minnesota Supreme Court held that a state statute modifying the duties of the state auditor did not violate the separation of powers clause, in part because the statute allowed the state auditor to retain significant duties and responsibilities for audits of Minnesota counties. *Otto v. Wright County*, 910 N.W.2d 446 (Minn. 2018).

<sup>26</sup> [Minn. Stat. § 16A.152, subd. 4\(b\)](#) [emphasis added].

<sup>27</sup> *Rukavina*, 684 N.W.2d at 534.

<sup>28</sup> [Minn. Stat. § 16A.28](#).

<sup>29</sup> [Minn. Stat. § 16A.28, subd. 5](#) (appropriations for permanent improvements do not lapse). Many appropriations for permanent improvements are made from the bond proceeds fund. These appropriations could not be

## MMB may unallot interfund transfers.

Interfund transfers may be unallotted if the transfer is made from the general fund to another fund. This authority likely also applies to prior transfers from the undesignated portion of the general fund to an account within the fund (e.g., the stadium reserve account).

The general unallotment provisions apply to “any prior appropriation *or transfer*.”<sup>30</sup> Unlike typical appropriations, however, the timing of unallotment of an interfund transfer raises questions. As a practical matter, once a regular appropriation has been spent, it can no longer be unallotted. The money is simply no longer in the state treasury; it has been used to pay salaries, to award aid or other finance assistance, or to purchase goods and services. In the language of the unallotment statute, this allotment has been expended.<sup>31</sup> However, for a transfer, this may not be case. The money may have been transferred from the general fund to a dedicated fund but may remain unspent in the dedicated fund, or it may be unclear if the money has been spent when the dedicated fund receives money from both transfers and other sources.

A 2004 Court of Appeals case addressed this issue.<sup>32</sup> In 2003, the Commissioner of Finance unallotted \$49 million of interfund transfers from the general fund to the Minnesota Minerals 21st Century Fund. The transfers had been made before the biennium in which the deficit occurred, but money remained in the minerals fund.<sup>33</sup> The court rejected the plaintiffs’ argument that the transfer was “expended” when the transfer was completed and held that the money remaining in the minerals fund was in fact “unexpended” within the meaning of the unallotment statute.<sup>34</sup> Implicitly, the court held that the transferred money must be paid out of the state treasury to be expended.<sup>35</sup>

## MMB may eliminate deficits in nongeneral funds with unallotment with fewer prerequisites.

[Minnesota Statutes, section 16A.152](#), subdivision 4(c), provides for reductions in allotments in funds other than the general fund as needed to eliminate projected shortfalls in those funds. For the purpose of unallotment, each fund is considered separately. If a deficit is projected in the current biennium in a

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unallotted to solve a general fund budget deficit. However, unexpended general fund appropriations for permanent improvements from prior biennia could be unallotted.

<sup>30</sup> [Minn. Stat. § 16A.152, subd. 4\(b\)](#) [emphasis added].

<sup>31</sup> The statutory authority applies to “unexpended allotments.” [Minn. Stat. § 16A.152, subd. 4\(b\)](#).

<sup>32</sup> *Rukavina*, 684 N.W.2d 525.

<sup>33</sup> According to the court, the legislature appropriated or transferred “approximately \$60 million” to the fund. At the time of the unallotment, no money in the fund was “encumbered or obligated” for any project. *Id.* at 529. Although it is not explicitly stated in the court’s opinion, these transfers or appropriations were made in 1999, 2000, and 2001. The deficit resulting in the unallotment occurred in the fiscal year 2002-03 biennium.

<sup>34</sup> *Id.* at 534-35.

<sup>35</sup> In this case, all of the money in the fund originated with the interfund transfers or appropriations. As a result, the court did not need to face the issue of how to determine whether a transfer was unexpended when a fund has both direct revenues (e.g., fees or tax revenues deposited in the fund) and interfund transfers and some of this money had been paid out of the state treasury. In such a case, unless the appropriation specifies the source of the funding (beyond the fund), it may be unclear whether the transferred funds or the fund’s direct revenues were expended. For example, should a “first-in-first-out” rule apply to determine the source of the money expended?

fund other than the general fund, the commissioner may unallot appropriations from that fund without first consulting the Legislative Advisory Commission, obtaining the governor's approval, or drawing down the budget reserve.

## **Unallotment likely does not apply to a requirement to deposit revenues in a special fund.**

It is likely not permissible to unallot deposits of revenue into special funds in order to increase general fund resources. As described above, the statute allows unallotting transfers from the general fund to another fund. But a provision directing the deposit of money in a dedicated fund, outside of the general fund, is not an appropriation for which an allotment may be established. Thus, there is no allotment to reduce. Appropriations are authorizations to “expend or encumber an amount in the treasury.”<sup>36</sup> These deposit provisions do not permit spending of the revenue. Rather, they simply direct an executive branch official to place receipts from a specific source into the separate fund. A separate legislative appropriation is required to permit spending of the money. These appropriations can be unallotted, but doing so will not provide resources to the general fund.

## **The unallotment power applies to appropriations for state aid payments.**

The unallotment power likely extends to appropriations of state aid to schools and other local government units. The power of the Commissioner of Management and Budget to reduce allotments to prevent a general fund deficit applies to all general fund appropriations; the statute does not exempt or limit the appropriations to which it applies.<sup>37</sup> Thus, it seems reasonable to conclude that the unallotment power provided in [Minnesota Statutes, section 16A.152](#) includes allotments of appropriations of state aids. This interpretation is confirmed by past practices and the history of amendments to the statute. During the early 1980s, the Commissioner of Finance unallotted both school aid and aid to cities and counties.<sup>38</sup> For a short period of time during 1981, the unallotment statute provided an exemption for state aid paid to school districts.<sup>39</sup> Since then, the statute has not limited the types of appropriations that may be unallotted.

As discussed above, the statute allows allotments that limit payments under an appropriation during a specific period of time. With this authority, the commissioner could reduce the allotment of local government aid to be paid in July, while not reducing the allotment for December.

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<sup>36</sup> [Minn. Stat. § 16A.011, subd. 4.](#)

<sup>37</sup> As described above, certain appropriations are not subject to the allotment system, such as appropriations to the legislative and judicial branches of government.

<sup>38</sup> Letter from Val Vikmanis, Acting Commissioner of Finance to Speaker Harry Sieben (Jan. 5, 1982) (copy in the authors' files). This letter notes that a legal challenge to the unallotment by the city of Duluth was rejected.

<sup>39</sup> This limitation was added in the first law enacted by the 1981 Legislature and in response to an unallotment in 1980. [Laws 1981, ch. 1, § 2.](#) The same 1981 Legislature later eliminated it. [Laws 1981, 3rd spec. sess., ch. 2, art. 2, § 3, codified at Minn. Stat. § 16A.15, subd. 1 \(1982\).](#)

## The extent that MMB can use unallotment to rewrite state aid formulas is unclear.

The law is not clear on whether the Commissioner of Management and Budget can develop formulas to reduce allotments of state aid appropriations. The commissioner may be able to cut state aid payments using a newly developed formula, if the formula considers other revenues (i.e., in addition to the state aid) available to recipients of the state aid.

The statute explicitly authorizes the commissioner to “consider other sources of revenue available to recipients of state appropriations and may apply allotment reductions based on all sources of revenue available.”<sup>40</sup> The legislature added this provision to the statute in 1983.<sup>41</sup> Its exact effect is unclear. However, it may allow the commissioner to cut state aid using formulas that take into account other revenues available to the recipients.

It is unlikely that the commissioner can establish separate allotments for each recipient of state aid and, then, selectively reduce the amounts for individual local governments. Arguably, the commissioner cannot do so because the individual payments are not separate allotments that can be reduced.

Reductions, instead, must be across broader categories (i.e., a percentage of aid). Given this limitation, it is possible that the legislature, in adding the “consider other sources of revenues” language, sought to give the commissioner more discretion to allocate state aid cuts. Some arguments that support this view include the following:

- Even before the language was added to the statute, the commissioner could “pick and choose” among all allotments in imposing reductions. Thus, the language was not necessary to allow the commissioner to choose among allotments based on other revenues. Given that, the 1983 amendment could have been intended to also allow the commissioner to make state aid cuts in this manner, even if the individual aid entitlements are not separate allotments.
- Prior to the 1983 amendment, the authors of this publication understand that legislative discussions occurred regarding the best way to cut aid to schools and other local units when reductions are made. These discussions typically focused on whether aid should be cut across the board (i.e., as a simple fraction of aid) or in proportion to broader measures of the local unit’s revenues (typically levy plus aid). Since 1983, legislatively enacted aid reductions usually have been distributed in the latter fashion. Some local governments rely much more heavily on state aid than others. Therefore, across-the-board cuts in aid fall more heavily on these units relative to their resources than on units less dependent on aid. These aid-dependent units tend to be local governments with smaller local tax bases and/or greater evidence of need under the formulas.
- The wording of the second half of the sentence of the 1983 amendment lends support to this view. It states the commissioner “may apply allotment reductions based on all sources of revenue available.”<sup>42</sup> In this regard, it is worth noting the subtle difference in language—

<sup>40</sup> Minn. Stat. § 16A.152, subd. 4(d).

<sup>41</sup> Laws 1983, ch. 342, art. 18, § 1, codified as Minn. Stat. § 16A.15, subd. 1 (1984) (since renumbered to be § 16A.152, subd. 4).

<sup>42</sup> Minn. Stat. § 16A.152, subd. 4(d) [emphasis added].

“apply[ing]” a reduction, as opposed to simply reducing allotments. This could suggest developing formulas or other mechanisms for cuts.

## Effects of Unallotment on Future Spending and Budgets

### The law is unclear if later receipt of sufficient revenue automatically restores allotments or deferred statutory obligations.

The law is unclear as to whether a reduced allotment reverts to its original level if sufficient revenues are received during the biennium to eliminate a previously anticipated budget deficit.

On one hand, an allotment is defined as an administrative limit placed on an appropriation. The statute granting the executive authority to reduce allotments does not reduce the underlying appropriation, which remains unchanged in law. Further, to put in effect an unallotment, the statute authorizes the executive to “defer or suspend” statutory obligations that would prevent effectuating the reductions. It can be argued that the terms “defer or suspend” imply that the unallotment is temporary and therefore, the unallotment ceases to have effect if there is no longer a projected deficit. Once the reduction in allotment ceases to have effect, there is authority to spend money pursuant to the original appropriation.<sup>43</sup>

On the other hand, the statute provides only for reducing allotments. The statute does not mention reinstatement of previously reduced allotments. The lack of a statutory provision that reinstates unallotted money arguably means there is no authority or requirement to make these reinstatements.

There is a stronger argument that the Commissioner of Management and Budget has authority (as opposed to a duty) to increase a previously reduced allotment if the reduction were no longer needed to prevent a general fund shortfall. An allotment is a limit placed by the commissioner on the use of the appropriation. As long as the appropriation authority has not expired, the commissioner arguably could reverse an allotment reduction. In practice, commissioners have proposed or performed this reversal on at least two occasions.<sup>44</sup>

<sup>43</sup> In her *Brayton* dissent, Justice (now Chief Justice) Gildea appears to believe that unallotted spending is automatically reauthorized if adequate revenues are received (presumably within the biennium). She states, “The unallotment itself does not impact the appropriation legislation; it merely delays incurring the obligation until revenue is in place to pay for it.” *Brayton*, 781 N.W.2d at 379 (Gildea, L., dissenting).

<sup>44</sup> At least one Commissioner of Finance held the view that unallotments could be restored during the biennium. (This is different than requiring an unallotment to be restored, of course.) During the early 1980s, the Department of Finance used the unallotment statute in this manner to manage the state’s cash flow problems. For example, in the fall of 1980, the commissioner unallotted school and local aid payments and then re-allotted them when the state had sufficient money later in the fiscal year. See letter from Val Vikmanis (Jan. 5, 1982). More recently, a Commissioner of Management and Budget used a similar rationale under authority of [Minnesota Statutes, section 16A.152](#), subdivision 4, paragraph (c), to eliminate a projected deficit in the Arts and Cultural Heritage Fund. The commissioner stated that he may reverse all or part of the allotment reductions should a subsequent budget forecast reveal that sales tax collections had improved during the fiscal year 2016-2017 biennium. Letter from Myron Frans, Commissioner of Management and Budget to Speaker Kurt Daudt and others (April 1, 2016) (copy in authors’ files).

It seems likely, however, that past entitlements (e.g., aid payments to political subdivisions) that were unallotted would not spring back into effect if sufficient revenues exist in a subsequent fiscal year.<sup>45</sup>

## **Unallotment has little effect beyond the current biennium.**

Once the biennium ends, most appropriations expire. Specifically, [Minnesota Statutes, section 16A.28](#) provides that most appropriations “lapse” at the end of the fiscal year or biennium. Once the appropriation has lapsed, the legal authority to spend money under it has ended and unallotment is therefore irrelevant.<sup>46</sup> However, some appropriations are not subject to the lapse statute. An unallotment of one of these appropriations could, in theory, become null, and the authority to spend under the appropriation could resume in the next biennium if there is sufficient money in the fund from which the appropriation was made. However, the statute makes no provision for such a result.

## **The law does not specify how unallotments are to be reflected in the base budget.**

The law specifying the format for the governor’s budget proposal does not explicitly address the effect of unallotments on the base budget. It provides in part that:

Tables listing expenditures for the next biennium must show the appropriation base for each year. The appropriation base is the amount appropriated for the second year of the current biennium. The tables must separately show any adjustments to the base required by current law or policies of the commissioner of management and budget.<sup>47</sup>

The statute is not entirely clear regarding how an amount that is unallotted in one biennium should be reflected in an agency’s base budget when the governor submits a budget proposal for the next biennium. On one hand, the statute defines the base as the “amount appropriated.” A literal reading of the statute would exclude the effect of unallotment. The amount appropriated generally would be the amount specified by the law (i.e., before any reduction under the unallotment statute). Moreover, the reference in the last sentence quoted above to “policies of the commissioner” would appear to allow latitude for the governor to treat an unallotment as an adjustment to the base, but one that must be shown separately.

By agreement, legislative and executive fiscal staff have resolved this ambiguity for purposes of budget planning and legislation tracking. Staff track unallotment as a onetime event that does not affect the base budget amount for the unallotted program or activity in subsequent fiscal years.<sup>48</sup>

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<sup>45</sup> This, in fact, has been the practice to date. Commissioners of Finance and Management and Budget have unallotted various aids to local governments over the years. These reductions have all been treated as permanent reductions for the fiscal years in which they were made. This money is not repaid when there are sufficient revenues in a later year. However, the statutory aid formulas and open appropriations do continue in effect in future fiscal years, unless the legislature rewrites or repeals them.

<sup>46</sup> A 1981 memorandum by the attorney general reaches the same conclusion because, among other things, “It appears axiomatic that appropriations and available funds must be considered together ....” Memo from Mike Miles, Assistant Attorney General, to Wayne S. Burggraaf, Commissioner of Finance, pp. 7, 9 (April 15, 1981). However, an exemption could occur if a “specific authorizing appropriation” provided otherwise.

<sup>47</sup> [Minn. Stat. § 16A.11, subd. 3\(b\)](#).

<sup>48</sup> [Minn. Stat. § 16A.152, subd. 4\(a\)](#) [emphasis added].

## MMB cannot unallot appropriations for future biennia.

The commissioner does not have the power during the current biennium to unallot appropriations for the next biennium for several reasons.

- **The plain language of the statute limits the power to the current biennium.** The unallotment statute explicitly refers to the current biennium. Its language provides: “If the commissioner determines ... that the amount available for the *remainder of the biennium* will be less than needed [then the commissioner may draw down the budget reserve and, if that is insufficient, unallot].”<sup>49</sup>
- **There is little policy rationale for extending the power to the next biennium.** It seems unlikely that the legislature intended to give such extraordinary power to the executive branch when it is not needed. The policy purpose of the unallotment power was to provide a method of ensuring the budget will be balanced as required by the constitution. In doing so, it invests extraordinary powers in the Commissioner of Management and Budget and the governor (i.e., to unilaterally reduce valid appropriations enacted by law after only notice to and comment by a small group of legislators). There is no need to vest such power in the executive branch for the appropriations in the next biennium, since the legislature and governor can make these decisions when they enact the new budget for that biennium.
- **Many of the underlying appropriations have yet to be made.** The statutory definition of an “allotment” as a limit on the amount to be spent “pursuant to an appropriation” means allotment can occur only after there has been an appropriation. If there has not been an appropriation, there cannot be an allotment, and it would seem to follow that there cannot be a reduction in an allotment. This conclusion is reinforced by the provision of the unallotment law that a deficit must be made up “by reducing unexpended allotments of any *prior appropriation* or transfer.”<sup>50</sup> Most appropriations for the next biennium will not be made until the legislature and governor act to adopt a budget.

However, the legislature has already authorized a significant portion of annual general fund spending via ongoing, statutory appropriations, including the appropriations for debt service and certain state aid and benefit programs.<sup>51</sup> But it is highly unlikely that the sum of these statutory appropriations would exceed the general fund revenue projected for the next biennium. Thus, as a practical matter, it is highly improbable that a Commissioner of Management and Budget could now (or at some other time during the current biennium) find there is a deficit in the next biennium based solely on these statutory appropriations.

- **It is inconsistent with the Supreme Court’s ruling in *Brayton*.** The *Brayton* opinion makes clear that the unallotment power is authorized only when revenues are less than originally anticipated when a balanced budget was enacted.<sup>52</sup> Since the budget could not yet have been enacted for a future biennium, unallotment would not be available.

<sup>49</sup> Minn. Stat. § 16A.152, subd. 4(a) [emphasis added].

<sup>50</sup> Minn. Stat. § 16A.152, subd. 4(b) [emphasis added].

<sup>51</sup> See, e.g., Minn. Stat. § 290A.23 (open statutory appropriation for property tax refund programs); § 477A.03 (open statutory appropriations for local government aid and county program aid).

<sup>52</sup> *Brayton*, 781 N.W.2d at 366-69.

## Appendix: Minnesota Statutes 2018 § 16A.152

### 16A.152 BUDGET RESERVE AND CASH FLOW ACCOUNTS.

Subdivision 1. **Cash flow account established.** A cash flow account is created in the general fund in the state treasury. Amounts in the cash flow account shall remain in the account until drawn down and used to meet cash flow deficiencies resulting from uneven distribution of revenue collections and required expenditures during a fiscal year.

Subd. 1a. **Budget reserve.** A budget reserve account is created in the general fund in the state treasury. The commissioner of management and budget shall transfer to the budget reserve account on July 1 of each odd-numbered year any amounts specifically appropriated by law to the budget reserve.

Subd. 1b. **Budget reserve level.** (a) The commissioner of management and budget shall calculate the budget reserve level by multiplying the current biennium's general fund nondedicated revenues and the most recent budget reserve percentage under subdivision 8.

(b) If, on the basis of a November forecast of general fund revenues and expenditures, the commissioner of management and budget determines that there will be a positive unrestricted general fund balance at the close of the biennium and that the provisions of subdivision 2, paragraph (a), clauses (1), (2), (3), and (4), are satisfied, the commissioner shall transfer to the budget reserve account in the general fund the amount necessary to increase the budget reserve to the budget reserve level determined under paragraph (a). The amount of the transfer authorized in this paragraph shall not exceed 33 percent of the positive unrestricted general fund balance determined in the forecast.

Subd. 2. **Additional revenues; priority.** (a) If on the basis of a forecast of general fund revenues and expenditures, the commissioner of management and budget determines that there will be a positive unrestricted budgetary general fund balance at the close of the biennium, the commissioner of management and budget must allocate money to the following accounts and purposes in priority order:

- (1) the cash flow account established in subdivision 1 until that account reaches \$350,000,000;
- (2) the budget reserve account established in subdivision 1a until that account reaches \$1,596,522,000;
- (3) the amount necessary to increase the aid payment schedule for school district aids and credits payments in section 127A.45 to not more than 90 percent rounded to the nearest tenth of a percent without exceeding the amount available and with any remaining funds deposited in the budget reserve;
- (4) the amount necessary to restore all or a portion of the net aid reductions under section 127A.441 and to reduce the property tax revenue recognition shift under section 123B.75, subdivision 5, by the same amount; and
- (5) the clean water fund established in section 114D.50 until \$22,000,000 has been transferred into the fund.

(b) The amounts necessary to meet the requirements of this section are appropriated from the general fund within two weeks after the forecast is released or, in the case of transfers under paragraph

(a), clauses (3) and (4), as necessary to meet the appropriations schedules otherwise established in statute.

(c) The commissioner of management and budget shall certify the total dollar amount of the reductions under paragraph (a), clauses (3) and (4), to the commissioner of education. The commissioner of education shall increase the aid payment percentage and reduce the property tax shift percentage by these amounts and apply those reductions to the current fiscal year and thereafter.

(d) Paragraph (a), clause (5), expires after the entire amount of the transfer has been made.

Subd. 3. **Use.** The use of the budget reserve should be governed by principles based on the full economic cycle rather than the budget cycle. The budget reserve may be used when a negative budgetary balance is projected and when objective measures, such as reduced growth in total wages, retail sales, or employment, reflect downturns in the state's economy.

Subd. 4. **Reduction.** (a) If the commissioner determines that probable receipts for the general fund will be less than anticipated, and that the amount available for the remainder of the biennium will be less than needed, the commissioner shall, with the approval of the governor, and after consulting the Legislative Advisory Commission, reduce the amount in the budget reserve account as needed to balance expenditures with revenue.

(b) An additional deficit shall, with the approval of the governor, and after consulting the Legislative Advisory Commission, be made up by reducing unexpended allotments of any prior appropriation or transfer. Notwithstanding any other law to the contrary, the commissioner is empowered to defer or suspend prior statutorily created obligations which would prevent effecting such reductions.

(c) If the commissioner determines that probable receipts for any other fund, appropriation, or item will be less than anticipated, and that the amount available for the remainder of the term of the appropriation or for any allotment period will be less than needed, the commissioner shall notify the agency concerned and then reduce the amount allotted or to be allotted so as to prevent a deficit.

(d) In reducing allotments, the commissioner may consider other sources of revenue available to recipients of state appropriations and may apply allotment reductions based on all sources of revenue available.

(e) In like manner, the commissioner shall reduce allotments to an agency by the amount of any saving that can be made over previous spending plans through a reduction in prices or other cause.

Subd. 5. **Restoration.** The restoration of the budget reserve should be governed by principles based on the full economic cycle rather than the budget cycle. Restoration of the budget reserve should occur when objective measures, such as increased growth in total wages, retail sales, or employment, reflect upturns in the state's economy. The budget reserve should be restored before new or increased spending commitments are made.

Subd. 6. **Notice to committees.** The commissioner shall notify the committees on finance and taxes and tax laws of the senate and the committees on ways and means and taxes of the house of representatives of a reduction in an allotment under this section. The notice must be in writing and delivered within 15 days of the commissioner's act. The notice must specify:

(1) the amount of the reduction in the allotment;

- (2) the agency and programs affected;
- (3) the amount of any payment withheld; and
- (4) any additional information the commissioner determines is appropriate.

Subd. 7. **Delay; reduction.** The commissioner may delay paying up to 15 percent of an appropriation to a special taxing district or a system of higher education in that entity's fiscal year for up to 60 days after the start of its next fiscal year. The delayed amount is subject to allotment reduction under subdivision 4.

Subd. 8. **Report on budget reserve percentage.** (a) The commissioner of management and budget shall develop and annually review a methodology for evaluating the adequacy of the budget reserve based on the volatility of Minnesota's general fund tax structure. The review must take into consideration relevant statistical and economic literature. After completing the review, the commissioner may revise the methodology if necessary. The commissioner must use the methodology to annually estimate the percentage of the current biennium's general fund nondedicated revenues recommended as a budget reserve.

(b) By September 30 of each year, the commissioner shall report the percentage of the current biennium's general fund nondedicated revenue that is recommended as a budget reserve to the chairs and ranking minority members of the senate Committee on Finance, the house of representatives Committee on Ways and Means, and the senate and house of representatives Committees on Taxes. The report must also specify:

- (1) whether the commissioner revised the recommendation as a result of significant changes in the mix of general fund taxes or the base of one or more general fund taxes;
- (2) whether the commissioner revised the recommendation as a result of a revision to the methodology; and
- (3) any additional appropriate information.



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