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INFORMED BUDGETEER: CASE STUDY—SEQUESTERS & SPENDING FROM THE HIGHWAY TRUST FUND

The last several *Bulletins* have examined the various past and present procedures of sequestration as a mechanism for enforcing budgetary goals. Surely with so many ways a sequester can be triggered, no part of the budget is beyond the reach of all such enforcement tools, right?

The short answer may well be—"No." Spending from the Highway Trust Fund (HTF) may not factor into the implementation of any of the sequestration mechanisms that already have been or may be triggered under current law. In light of the recent enactment of the latest highway bill (or more precisely—though it takes longer to say—the surface transportation bill), it is an appropriate time to examine how it might be that the spending activity from the Highway Trust Fund is exempt from statutory budget enforcement.

To understand why HTF spending on highways and transit could be interpreted as being invisible to sequestration, one must be familiar with the various budgetary levers in the HTF as well as how each sequestration process works, and then examine the intersection (if any) between the elements of both sides of the equation.

Discretionary vs. Mandatory, and How the HTF Is Not Normal

A previous *Budget Bulletin* examined in detail the many layers of complexity surrounding the operation of spending from the HTF, but a brief summary here is worthwhile.

As a result of the Budget Enforcement Act of 1990, all federal programs are divided into two kinds of spending—discretionary and mandatory.

Discretionary spending is comprised of accounts that are under the jurisdiction of the Appropriations Committee. Each year in appropriation bills, Congress provides an appropriation—also called **budget authority**—for each discretionary account that represents the amount of commitments that an agency can enter into for the program(s) operated under that account. When the agency writes a check to the employee or vendor for services or goods rendered, that check represents the **outlays** flowing from that account at the Treasury.

Mandatory spending (also known as direct spending) is spending under the jurisdiction of authorizing committees and results from authorizing legislation that establishes programs with certain parameters that determine who the federal government should write checks to and when and why.

Sometimes the authorizing law for mandatory programs sets a **definite** amount of budget authority, which has the effect of limiting the amount of outlays to that amount of budget authority.

But more often, the authorizing law simply defines circumstances in which the government will write a check, and the law provides an **indefinite** amount of budget authority that floats to the level sufficient to cover the amount of outlays that eventually go out the door. Examples of mandatory spending include Social Security, Medicare, Medicaid, and civilian and military pensions. (One confusing wrinkle to this is that some mandatory programs, like Medicaid, are appropriated entitlements, which means that, while they are under the jurisdiction of and are scored against the authorizing committees, they do receive a liquidating appropriation in annual appropriation bills.)

In nearly every case, a spending account that receives an appropriation of discretionary budget authority results in outlays that are also classified as discretionary. And in nearly every case, the budget authority and outlays that are the measurements of the operation of mandatory spending programs are both classified identically—as mandatory.

But when it comes to the operation of the HTF, the usual conventions do not apply, as a result of long-evolving jurisdictional arrangements and historical artifact.

For highway and transit spending programs, legislation (in the form of the periodic highway bill, occurring roughly every five years or so) from the various relevant authorizing committees sets the level of budget authority, which is classified as mandatory. (More precisely, the highway bill sets contract authority—a form of budget authority—that allows agencies to enter into obligations in advance of collecting the revenues that will eventually "enable you to make outlays to liquidate the obligations." See OMB Circular A-11.)

While the periodic highway bill can affect and has affected outlays, it typically does not seek to control most outlays that eventually flow from the HTF. Instead, outlays for transportation programs spent out of the HTF are classified as discretionary because they are usually controlled by the Appropriations Committee through the annual Transportation, Housing and Urban Development, and Related Agencies (THUD) Appropriations Bill.

How does the Appropriations Committee control outlays (thereby making the outlays discretionary)? Through a feature that is almost unique to the HTF—the THUD bill sets **obligation limitations** (also known as **oblims**) on how much of the mandatory budget authority previously enacted by the highway bill may be obligated (i.e., committed by the government for goods or services resulting in federal outlays) by the Department of Transportation on programs under the HTF.

Catalogue of Sequester Mechanisms

There are two stages where budget authority and/or outlays can become involved with a sequestration mechanism.

The first stage occurs in determining whether a sequestration is even triggered. In most cases, this involves measuring enacted legislation against some limit or target. (The exception is the fallback sequester under the Budget Control Act, which has already been triggered because of the failure of the Supercommittee process last fall to result in any enacted legislation reducing the deficit.)

The second stage occurs after the Office of Management and Budget (OMB) determines that it must prepare a sequester order for the President; OMB then determines which spending programs are subject to the sequester and which programs are exempt from the across-the-board reductions mandated in the sequester order.

Mini-History. Once upon a time (1991-2002), under the Budget Enforcement Act (BEA), the amount of discretionary spending was limited by caps on certain categories (e.g., defense and non-defense) of such spending, with one cap placed on budget authority (BA) and a separate cap placed on outlays. If enacted legislation exceeded either the BA or outlay cap for a category, there would be an across-the-board reduction of budgetary resources in every non-exempt account in that category sufficient to bring the resulting BA or outlay total down to the level of the relevant cap.

Under the BEA, the enacted obligation limitations for HTF programs were included in the universe of sequesterable budgetary resources and were subject to such a sequester order. Indeed, OMB issued a sequester order in 1991 with an across-the board reduction of 0.0013 percent of domestic discretionary accounts, including a reduction of $209,315 in HTF obligation limitations (out of a total of $16.1 billion that had been enacted for programs in the HTF).

By the end (1998-2002) of the BEA period, there were even separate outlay caps for highways and for mass transit. (Because BA for these programs is mandatory, not discretionary, there were no separate discretionary BA caps for these programs. The obligation limitations set for these programs in the THUD bill did not count against the discretionary BA caps because obligation limitations are not budget authority; they just limit the use of already enacted budget authority.) If either of these two outlay caps were exceeded, the BEA required OMB to sequester obligation limitations (in the relevant highway or mass transit category only) sufficiently to reduce outlays in that category to the cap level.

At the same time, BEA had established a pay-as-you-go (PAYGO) enforcement process that would trigger a sequester of all non-exempt programs with mandatory outlays if the cumulative effect of enacting mandatory spending and revenue legislation each year resulted in an increase in the deficit. Outlays from the HTF were not part of this calculus because PAYGO looked at only mandatory outlays, and HTF outlays were classified by the BEA as discretionary.

All of these mechanisms expired at the end of 2002.

S-PAYGO. In 2010, Congress enacted the Statutory Pay-As-You-Go Act (S-PAYGO), reviving much of the expired PAYGO process that had existed under the BEA, but changing it somewhat. S-PAYGO requires OMB to keep track of enacted legislation that changes revenues and mandatory outlays and to determine if the cumulative effect of such legislation increases the deficit.

Can legislation affecting HTF outlays cause a deficit increase that contributes towards a sequester occurring under S-PAYGO? Unlikely. It is rare that Congress enacts legislation resulting in HTF outlays that are scored as mandatory. Most of the time, HTF outlays result from appropriation bills, whose discretionary outlays are not counted on the S-PAYGO scorecard. (See Box on Page 4 for comprehensive summary of how HTF spending elements intersect with the various sequester procedures.)

If there is a S-PAYGO sequester, can it affect enacted levels of mandatory budget authority for the HTF? No. Section 11(d) of S-PAYGO took pains to add the following language to the list of accounts under section 255 of the Balanced Budget and Emergency Deficit Control Act (BBEDCA) that would be exempt from any reduction in mandatory-only budget authority that would occur under a S-PAYGO sequester order:

> (j) SPLIT TREATMENT PROGRAMS.—Each of the following programs shall be exempt from any order under this part [i.e., Part C of BBEDCA] to the extent that the budgetary resources [i.e., mandatory budget authority] of such programs are subject to obligation limitations in appropriations bills [emphasis added]:
>
> Federal-Aid Highways (69–8083–0–7–401)
> Highway Traffic Safety Grants (69–8020–0–7–401)
> Operations and Research NHTSA and National Driver Register (69–8016–0–7–401)
> Motor Carrier Safety Operations and Programs (69–8159–0–7–401)
> Motor Carrier Safety Grants (69–8158–0–7–401)
> Formula and Bus Grants (69–8350–0–7–401)
> Grants-In-Aid for Airports (69–8106–0–7–402)

The first six of the seven exempted split-treatment accounts are programs in the HTF, so the budgetary resources (i.e, mandatory budget authority, which is typically enacted as contract authority) of those HTF accounts are exempt from a S-PAYGO sequester.

BCA Fallback Sequestration (under section 251A of BBEDCA). In 2011, Congress enacted the Budget Control Act (BCA), creating the fallback sequester mechanism, which will first take effect on January 2, 2013 (and then in each subsequent year through 2021), reducing both direct spending (mandatory) programs as well as discretionary appropriations.

The question for whether the fallback sequesters is triggered is not the same question for determining whether other sequester mechanisms are triggered (does enacted legislation exceed some limit or target?). Instead, the fallback sequester **has already been triggered** by the failure of the Supercommittee process to result in enacted legislation reducing the deficit. So there is no issue of whether or how HTF spending triggers the fallback sequester.

When the fallback sequester occurs on January 2, 2013, can it affect the HTF? Contract authority in the HTF is immune from the direct-spending reduction portion of the fallback sequester because the BCA (see section 302) directed OMB to use the same list of accounts exempted from a S-PAYGO sequester in determining what should be exempt from the fallback sequester:

> [Section 251A(8) of BBEDCA] IMPLEMENTING DIRECT SPENDING REDUCTIONS.—. . .OMB shall prepare and the President shall order a sequestration, effective upon issuance, of nonexempt direct spending to achieve the direct spending reduction calculated pursuant to paragraphs (5) and (6). **When implementing the sequestration of direct spending pursuant to this paragraph, OMB shall follow the procedures specified in section 6 of the Statutory Pay- As-You-Go Act of 2010, the exemptions specified in section 255**. . . [emphasis added]

Also, the fallback sequester under section 251A is one of the sequester orders that can occur "under this part" (Part C) of BBEDCA, so the mandatory budget authority in the HTF would have been exempt from reductions to mandatory accounts in the fallback sequester anyway by virtue of the exemption added (as section 255(j) of BBEDCA) by the 2010 S-PAYGO act, regardless of the bolded language included in section 251A(8) directing OMB what to exempt.

But what about the budgetary resources that are the discretionary obligation limitations set in the THUD appropriation bill? Are they subject to the $39 billion reduction in non-defense discretionary budgetary resources that will occur under the first installment of the fallback sequester? Section 251A(7) of BBEDCA, which tells OMB what do to discretionary resources in the fallback sequester, is (unlike section 251A(8)) silent on the matter:

> (7) IMPLEMENTING DISCRETIONARY REDUCTIONS.—
> (A) FISCAL YEAR 2013.—On January 2, 2013, for fiscal year 2013, OMB shall calculate and the President shall order a sequestration . . . to reduce each account within the [defense] category or non[-defense] category by a dollar amount calculated by multiplying the baseline level of budgetary resources in that account at that time by a uniform percentage necessary to achieve— . . . .

(ii) for the revised non[-defense] category, an amount equal to the nondefense function discretionary reduction calculated pursuant to paragraph (6).

Section 251A(7) does not exempt obligation limitations from being considered budgetary resources for purposes of implementing the discretionary portion of the fallback sequester. But the fallback sequester's reduction of discretionary budget authority in 2013 under section 251A(7) will result from a sequester order that will be issued "under this part" (Part C) of BBEDCA. And section 255(j) of BBEDCA does exempt certain split treatment programs from any sequester. But it only

DO HTF PROGRAMS TRIGGER SEQUESTERS AND ARE THEY SUBJECT TO SEQUESTERS?

Sequester Procedure Under:	**What Does OMB Look At To Decide If A Sequester is Required?**	**Is Activity in the HTF Relevant for Determining Whether a Sequester Is Needed?**	**If a Sequester is Required, What Does OMB Sequester?**	**Is Activity in the HTF Subject to Reduction Under a Sequester?**
S-PAYGO	Whether the on-budget deficit increases over relevant periods because of legislated changes in revenues and mandatory outlays.	**NO**—HTF outlays are discretionary, not mandatory. S-PAYGO only looks at mandatory outlays (and revenues) to trigger sequestration. S-PAYGO pays no attention to mandatory BA, such as the HTF BA.	Non-exempt mandatory programs only.	**NO**—Section 11(d) of S-PAYGO added section 255(j) to BBEDCA exempting "split treatment programs" whose budgetary resources are subject to obligation limitations in appropriation bills.
Section 251(a) of BBEDCA (as added by the BCA) to Enforce Discretionary Caps on Defense and Non-Defense BA	Whether enacted appropriation bills for 2013 (or subsequent years) exceed the statutory limit on BA. There is no limit on outlays or oblims.	**NO**—The THUD bill does not provide BA for the HTF.* It sets oblims instead, and oblims are not measured against the BA cap. HTF outlays are discretionary, but the discretionary caps are on BA only, not outlays.	Non-exempt 2013 BA in each category where the total appropriated exceeds the cap level.	**MAYBE?/ MAYBE NOT?**—** Previously, sequesters under 251(a) reduced oblims. This part of law not changed, but unknown whether OMB will apply S-PAYGO's exemption for split treatment programs to other sequesters.
Fallback Sequester Under 251A of BBEDCA (as added by the BCA) Because of Failure of the Supercommittee	Whether the Supercommittee failed and by how much. The Supercommittee DID totally fail.	**NO**—because the fallback sequester is 100% the result of the failure of the Supercommittee.	Non-exempt mandatory outlays and discretionary BA, split 50/50 between defense and non-defense.	**NO**—For mandatory accounts portion of fallback seq., Section 251A(8) of BBEDCA directs OMB to follow the exemptions in S-PAYGO. For discretionary accounts portion of fallback seq., see cell above.

*except for about $2 billion in BA appropriated for mass transit programs in the HTF.

**Currently unknown

exempts "budgetary resources of such programs [to the extent they] are subject to obligation limitations in appropriations bills." It does not appear to exempt the obligation limitations themselves (which are also defined as budgetary resources subject to sequester elsewhere in BBEDCA).

Enforcing BCA Discretionary Caps (under section 251(a) of BBEDCA). The BCA set caps **on discretionary budget authority only** for certain categories of programs for 2012-2021. Can legislation affecting the level HTF budgetary resources contribute to a breach of the BCA cap on discretionary budget authority so that it requires a sequester to get back to the cap?

No. Because HTF budget authority is mandatory, the enacted BA in the highway bill does not count against the statutory cap on non-defense discretionary BA. Therefore, BA in the HTF is not included in the measurement of whether the non-defense discretionary BA cap has been exceeded and whether a sequester is needed.

As for the obligation limitations enacted in the THUD bill, those oblims are not budget authority (rather, they are just limits on previously enacted budget authority), so they also are not included in the measurement of whether the non-defense discretionary BA cap has been exceeded and whether a sequester is needed.

But if the total amount of non-defense appropriations for a year exceeds the non-defense discretionary BA cap, can the resulting sequester that would be ordered affect the budgetary resources (obligation limitations) of the HTF?

Hmmmm. Section 251(a) of BBEDCA, as brought back to life by the BCA, is silent on this, just like it was silent when section 251(a) was in effect from 1991-2002. Back then, as a result of that silence (as already mentioned), if there was a sequester to remedy a breach in the relevant discretionary cap, OMB would reduce enacted HTF obligation limitations along with the budget authority appropriated for all affected accounts in that category.

So what is different now? No new language was enacted in BCA to specifically exempt HTF oblims from a sequester under section 251(a). The only new language since 2002 dealing with an exemption for HTF programs was in the S-PAYGO law, to exempt the HTF from a sequester of mandatory budgetary resources (and, by reference in the BCA, to exempt the HTF from the mandatory portion of the fallback sequester). Could that same exemption language possibly apply to a sequester on the discretionary side, thereby exempting HTF oblims from those kinds of sequester actions too?

It is difficult to guess the legal reasoning that could result in exempting enacted 2013 obligation limitations from any sequester affecting discretionary spending. But the answer is solely in OMB's hands right now (it appears no member of Congress has expressly asked OMB to opine on the whys and wherefores of this issue like they have asked on other uncertainties surrounding the implementation of the BCA).

Summary of Analysis. From the discussion above, it is clearly the case that enacted levels of spending for the HTF are totally irrelevant for determining whether any of the three current sequester mechanisms are triggered. This is highly unusual—even federal activities that are exempt from the effects of a sequester (tax policies as well as many spending programs, especially entitlements) are counted for determining whether a sequester should occur. So even when a program that is exempt from a sequester increases the deficit or exceeds a limit and triggers a sequester, non-exempt spending programs are sequestered to make up for that violation.

While spending from the HTF cannot be a factor in triggering any of the sequester mechanisms, will any HTF spending be subject to any of the sequesters of discretionary spending? If OMB decides somehow to wrestle what appears to be an exemption for only HTF mandatory budget authority into an exemption for discretionary obligation limitations, then the HTF will be exempt from any reduction when any of the sequester mechanisms are implemented.

Highway spending legislation would then share the privilege that Social Security has—it does not factor into whether a sequester occurs, and it is not subject to any reduction if a sequester is triggered. Anyway, in about a month, budgeteers might not have to wonder anymore. Last week, Congress sent to the President the Sequestration Transparency Act of 2012. If he signs it into law, OMB will have 30 days to report to Congress on the effects of the fallback sequester.

If Sequesters Don't Limit Highway Spending, What Does?

Some might argue that even if it turns out there is no limitation of spending on highways and transit via the statutory enforcement of sequestration, there is some congressional budget enforcement. But this is very thin soup—watery even.

First, the House does not even enforce outlays (for highways or anything else)—it has no budget point of order against a bill that comes to the House floor that exceeds a committee's outlay allocation. (The House does have a point of order against legislation that exceeds the total outlay limit in the budget resolution, but this point of order is rarely, if ever, raised; if it lies against a bill, it is more likely waived by the rule accompanying the bill to the floor.)

The Senate does have points of order to enforce a committee's allocation for both budget authority and outlays, but when it comes to the highway bill, the Senate routinely waives any point of order that a Senator may raise against it. Further, the outlay enforcement in the Senate is of especially little value this year since the chairman of the Senate Budget Committee decided he had the right to ignore the BCA and set an enforceable outlay level for 2013 that is significantly higher than the baseline level required by the BCA.

Current-law revenues dedicated to the HTF are insufficient to cover the baseline outlay levels for highways and transit, much less pay for any increase in spending above the baseline. The last two highway bills resulted in the HTF going broke. TEA-21 pretended that the spending levels set out in 1998 would be adjusted if actual HTF revenue came in lower than projections, but Congress subsequently changed the law when it turned out that revenues did indeed come in lower, and prevented the required spending reductions from occurring.

The subsequent highway bill, SAFETEA-LU continued the habit of planning to spend more from the HTF than the dedicated revenues deposited into it. In order to pay for that extra spending, Congress transferred about $30 billion from the Treasury to the HTF right before SAFETEA-LU was enacted in 2005, and has enacted three laws in 2008, 2009, and 2010 transferring an additional $35 billion from the Treasury.

This year, some members of the highway bill conference committee argued that this latest bill should not set up a situation where additional transfers will be needed in order for the HTF to be able to continue to send checks to states. But in the end, the highway bill that was enacted this month transferred another $21.2 billion of money that the Treasury already had to the HTF to try to keep the HTF from going broke at least through December 31, 2014.

Clearly the current enforcement system—which might result in exempting HTF spending from sequestration and does not score transfers from the Treasury as spending even though it increases the debt—needs some improvement in transparency. Some have attempted such improvements, but with little success to date. Over the past few years, several participants in the annual meeting of scorekeepers (whose members include the majority and minority staffs of the House and Senate Budget Committees, CBO, and OMB) have proposed to make the HTF an entirely mandatory program (for both BA and outlays) with a baseline treatment that would guarantee that any legislation transferring money from the Treasury would be scored.

In addition, for the last two years, the President's budget has proposed (see pp. 172-176 of *Analytical Perspectives* for the 2013 budget) a variant that would end the current "split treatment" of the HTF. If the split treatment were to end, then presumably the exemption accorded to these split treatment accounts in the S-PAYGO law (and, perhaps by interpretation, may be extended to the BCA sequester mechanisms) would no longer be relevant or needed. Then highway and transit programs could be subject to the same statutory enforcement that applies to most other non-entitlement programs.