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INFORMED BUDGETEER

**REVENGE OF THE KILLER (B)s ??
 THEY TELL BUDGET RES. TO BUZZ OFF**

- On June 11, the House and Senate 302(b)s were dislodged from the appropriations bottleneck when Congressional leadership and the two Appropriations Committee chairmen came to an agreement with the Administration. That same day the House issued its 302(b) allocations to the 13 subcommittees. The Senate Appropriations Committee agreed to its set of suballocations on June 19th. While the "top line" remains exactly the same as the level set in the 2004 budget resolution (\$784.7 billion), the agreement was carefully negotiated to free up \$5.2 billion for more nondefense spending than was contemplated by the resolution (see table below – especially last line).

	2002	2003 Regular Approps.	2003 Enacted Supp.	2004	change, 2003 over 2002/a	change, 2004 over 2003 b/
Budget Resolution						
Defense	361.0	392.1	62.8	400.1	26.0%	2.0%
Nondefense						
Regular Appropriations	373.7	373.7	16.4	382.4	4.4%	2.3%
Increase in advances in the 2003 Omnibus	--	--	--	2.2		
Subtotal, Nondefense	373.7	373.7	16.4	384.6	4.4%	2.9%
Total, Budget Resolution	734.7	765.8	79.2	784.7	15.0%	2.5%
Appropriations Agreement						
Defense	361.0	392.1	62.8	397.1	26.0%	1.3%
Nondefense						
Regular Appropriations	373.7	373.7	16.4	387.6	4.4%	2.9%
Shift increase in advances from '04 to '03	--	2.2	--	--		
Additional 2003 Supplemental Request	--	--	--	--		
Disaster Assistance	--	1.6	--	--		
IRS administrative expenses for 2003 tax bill	--	0.1	--	--		
Subtotal, Nondefense	373.7	377.6	16.4	387.6	5.4%	2.7%
Total, Approps Agreement	734.7	769.7	79.2	784.7	15.5%	1.9%
Difference, Agreement less Resolution						
Defense	--	--	--	-3.0		
Nondefense	--	3.9	--	3.0		
Total	--	3.9	--	--		
Nondefense, Regular Approps.	--	--	--	5.2		

Source: SBC Republican Staff
 a/ Comparison includes enacted supplemental provided for 2003.
 b/ Comparison excludes enacted supplemental provided for 2003.

- Because there is no firewall, a shift of \$3 billion from defense to nondefense was proposed by congressional negotiators and accepted by the Administration. Budgeteers would view this as a valid accommodation, as the Congress and the president are always free to rearrange spending priorities.
- The other approach used to provide more room for nondefense spending, however, is problematic. The plan is to rescind \$2.2 billion of advance appropriations that were enacted for 2004 (in the 2003 omnibus appropriations bill), thereby freeing up room under the 2004 allocation. The \$2.2 billion that had been appropriated for education programs will instead be appropriated for 2003, most likely in the Labor-HHS bill for 2004, which must be enacted before September 30, 2003 so that the \$2.2 billion can still count as 2003 budget authority. While the *Bulletin* has reviewed the mechanics of advance appropriations previously (see 6/3/03, 3/31/03, & 7/29/02), other features related to this device are worth special note.
- First, recall that one of the only two criticisms the President aimed at the 2003 omnibus appropriations bill when he signed it three months ago dealt with this \$2.2 billion advance appropriation: "Unfortunately, the Congress chose to circumvent the spending limit for FY 2003 by borrowing \$2.2 billion in funding from FY 2004. This action must be corrected by adjusting both the 2004 budget allocations and appropriations, and holding advance appropriations constant with the level enacted last year. I will ask the Leadership to ensure this happens."

- While the budget resolution explicitly and purposefully implemented this fix that the President demanded in his signing statement, the recent appropriations deal undoes that fix. But undoing it is not as simple as the wave of a magic wand; there is a point of order against increasing 2003 appropriations by this \$2.2 billion, because 2003 appropriations enacted to date are exactly equal to the level allowed by the resolution for 2003. Though key parties related to the deal appear to have agreed to it, a 60-vote point of order would still be available to any Senator wishing to raise it against the bill that appropriates the \$2.2 billion for 2003.
- Other observers of the 302(b) process have additional criticisms of the appropriations agreement. For example, the ranking member of the House Appropriations Committee says the process is a sham because the budget resolution overpromises spending, as if that has never happened before. The *Bulletin* (June 2, 2003) has provided data on how budget resolutions back to 2001 "overcommitted" spending by using across-the-board offsets in function 920 - Allowances. The table below shows how Democratic-controlled Congresses exercised this technique in budget resolutions during the 1990-1995 period.

YEAR	920		NET	OFFSET AS A % OF GROSS
	GROSS	OFFSET		
1990	502.0	-19.4	482.6	3.9
1992	513.2	-0.2	513.0	0.0
1993	510.2	-4.1	506.1	0.8
1995	517.4	-6.6	510.8	1.3

Source: SBC Republican Staff based on conference reports on budget resolution for years shown. NOTE: 1991 & 1994 are not shown because the respective conference reports did not display a discretionary level for those years and the 920 offset was zero.

- As for the 302(b) allocations themselves, many in the press have seized on one of the largest differences between the two sets - reporting that the Senate Homeland Security subcommittee is the "biggest loser," with \$890 million less than its House counterpart. Allow the *Bulletin* to clarify: apples to apples, the total House and Senate allocations are identical, as are the respective suballocations for the two Homeland Security subcommittees (in fact, 7 of the 13 bills have matching allocations, including the Homeland Security bill).

Subcommittees	2003 a/	Pres.	2004		Senate less House	Senate less Pres.
	Enacted	Budget b/	House	Senate		
Agriculture	18,096	16,983	17,005	17,005	--	0.022
CJS	39,201	37,679	37,914	37,014	-0.900	-0.665
Defense	364,243	371,699	368,662	368,662	--	-3.037
DC	0.509	0.421	0.466	0.495	0.029	0.074
Energy & Water	25,856	26,801	27,080	27,313	0.233	0.512
Foreign Ops	16,227	18,889	17,120	18,093	0.973	-0.796
Interior	19,463	19,555	19,627	19,627	--	0.072
Labor, HHS	132,069	137,595	138,036	137,601	-0.435	0.006
Legislative	3,343	3,802	3,512	3,612	0.100	-0.190
Mil Con	10,546	9,235	9,196	9,196	--	-0.039
Trans., Treas. c/	28,259	27,462	27,502	27,502	--	0.040
Homeland Security	21,267	27,114	29,411	28,521	-0.890	1.407
VA, HUD	86,717	89,635	90,034	90,034	--	0.399
TOTAL	765.796	786.870	785.565	784.675	-0.890	-2.195

Source: Senate Budget Committee Republican Staff
 a/ The 2003 figures include the levels enacted in the FY 2003 appropriation bills, as estimated in CBO's March baseline. They do not include the \$79.2 billion in budget authority from the 2003 supplemental (P.L. 108-11) or the \$1.7 billion additional supplemental request for 2003 reflected in the June 11th agreement.
 b/ CBO Reestimate of President's Request
 c/ Includes mass transit budget authority of \$1.436 billion in 2003 and \$1.461 billion in 2004.

- The \$890 million figure is key. The President requested this amount in 2004 for BioShield - a program to develop countermeasures for public health threats. The 2004 budget resolution included a reserve fund in the Senate to implement this exactly as the President proposed - the allocation would only be released when legislation creating BioShield as a mandatory (not discretionary) spending program is reported by the HELP committee. But the resolution included a different reserve fund mechanism for the House: the House Budget Committee chairman would revise the appropriate committee allocations

when either the authorizing or the appropriations committee reports such legislation. With the expectation that the House is going to make this new program discretionary and that the House Budget Committee chairman will increase their 302(a) allocation, the House appropriators voted on June 17 to update their original 302(b) allocations by the additional \$890 million. Under the terms of the Senate's reserve fund, the Senate Appropriations Committee cannot expect a comparable adjustment. Ultimately, the Congress and the Administration will have to decide once and for all how to fund this new program.

ASBESTOS BILL MAKES IT TO MARKUP; BUT BUDGET HURDLES MAY LOOM

- Last week, the Senate Judiciary Committee finally began, but did not complete, its markup of S. 1125, the Fairness in Asbestos Injury Resolution Act of 2003. Because there is no reported bill yet, CBO has not done a cost estimate; therefore, any speculation regarding points of order at this stage is purely hypothetical. Still, the introduced version of S.1125 provides a basis for allowing the *Bulletin* to think out loud about its potential budgetary implications and any resulting Budget Act points of order.
- At the outset, the bill appears to include several features with budgetary significance. The bill would shut down the current morass of litigation for asbestos injury claims that has developed under state law and would replace it with a federal system for adjudicating and administering such claims.
- The bill would create a U.S. Court of Asbestos Claims (with five judges) to hear claims and an Office of Asbestos Injury Claims Resolution (OAICR) to administer a fund to provide compensation (though the source of funds to cover the costs of operating these new entities appears murky). The bill would require involved parties, such as defendant manufacturers and insurers, to pay a defined amount into the fund. Additionally it would establish criteria for determining who is eligible to file claims with the Asbestos Court. For those who meet the criteria, the bill states that such a claimant "shall be entitled to an award in an amount" provided in a benefit table. Finally, the bill would authorize the Administrator of OAICR "to borrow [from the Treasury? the public?] in a calendar year an amount not to exceed anticipated contributions to the fund in the following calendar year for purposes of carrying out the obligations of the fund."

Some Say It's Private and Voluntary, But It's Not

- While some argue that this schema is a private solution for the drag that the asbestos lawsuits have caused the economy, precedents indicate that the bill would federalize the asbestos litigation problem instead. When the federal government uses its sovereign power to require individuals to make payments to the federal government that will then be used to achieve some public policy purpose, it is standard practice to recognize those required payments as federal revenues (or taxes). People pay them because federal law says that they have to. Over the past decade, several similar legislative proposals have been treated as part of the federal budget, including the existing universal service fund, as well as proposals Congress considered in 1994 for reforming the nation's health insurance system and in 1998 for a national tobacco settlement (neither of which were enacted).
- Assume for a moment that the bill could successfully limit total payments to the amounts paid into the fund (see next section). If so, it would be difficult to argue that such a bill would cause an increase in the deficit over the long term, because the outlays would match the revenues. So no budget problem, right?
- Not exactly. The legislation would still face a 302(f) point of order. Why? – because an increase in revenues cannot be used to offset the increased spending that would be charged against the Judiciary Committee's allocation. And the Committee has no room in its allocation (from the budget resolution under section 302 of the Budget Act) for even \$1 in increased spending. So even though this bill does not resemble the typical "tax and spend" proposals that budget rules are designed to thwart, it would run afoul of the rules nonetheless.

Backstop or No Backstop?

- One key point in the negotiations surrounding the bill has been whether it should include a "backstop" (where the federal government would make good on valid claims even if the fund runs dry). While some suggest that the introduced version does not include a federal backstop, the bill itself suggests otherwise.
- For another thought experiment, assume that somehow (in a way the *Bulletin's* imagination can not yet conjure) the bill can be written so that the fund's receipts would count on the spending side (as negative outlays) rather than the revenue side of the budget. Would outlays be expected to net out to zero over time? Not likely under the introduced version – but why?
- The money to be paid into the fund would be limited to a specific, well-understood amount (contributors, arguably, would have a contractual guarantee in the bill that they will not have to contribute anything above that amount). But the language of the bill appears to create an unlimited right for claimants to receive compensation, as long as the eligibility criteria are met and regardless of whether the fund runs out of money – in other words, an entitlement. This entitlement is not capped: the bill has no mechanism that would provide for a reduction in the awards to successful claimants or cut off eligible claimants once the fund is exhausted. Buttressing this interpretation of an open-ended entitlement is that the fund may borrow from the Treasury without any guarantee that "anticipated contributions" into the fund will materialize in the subsequent year to repay.
- Therefore, absent a legislative instruction to the contrary, it is quite possible a court would order the federal government to satisfy legitimate claims (out of the claims and judgments account in the Treasury), even if the asbestos fund is empty. (Of course, given political realities, it is likely that Congress would be pressured to step in and sustain an insolvent fund long before the courts became involved.) If that feature remains unchanged by the time the bill is reported, then it is likely the bill would also be scored with the difference between the amount expected to be paid into the fund (say, \$108 billion) and the total estimated amount claimants would be eligible to receive.
- If the potential payout exceeds the amount of expected collections over the next 10 years, then the legislation would be subject to a 302(f) point of order for exceeding the Committee's allocation. (If the excess payments were estimated to occur not until after 2013, the same budgetary concern would be posed by the bill, but there would be no point of order because there is no way to enforce a budget resolution outside its window – in this case, 10 years.) The *Bulletin* looks forward to seeing how the version of the bill that emerges from the markup (and the associated CBO cost estimate) addresses these questions.

WASTE, FRAUD, AND ABUSE PROGRAMS: HOUSE BUDGET COMMITTEE HEARING, 6/18

- Section 301 of the FY2004 Budget Resolution instructs most authorizing committees to identify changes in law for mandatory spending programs under their jurisdictions that will achieve savings through the elimination of waste, fraud, and abuse. The goal set for each committee is to identify one percent in savings for each dollar they spend. The committees are to report their findings by September 2nd. The House Committee on the Budget recently held a hearing on waste, fraud, and abuse with GAO Comptroller General David M. Walker and Robert S. McIntyre, director of Citizens for Tax Justice. For more information on waste, fraud, and abuse in government programs from General Walker's testimony, please visit our website and click on the *Waste, Fraud, and Abuse* icon.
- The *Bulletin* noted with regret published accounts that the ranking member of the Senate Ag. Committee believes that the Budget Committees' request to investigate waste, fraud, and abuse is unrealistic and should be "ignored." SBC prefers that authorizing committees provide recommendations for savings within their jurisdictions. If those recommendations are not provided, the Budget Committees will feel free to develop them. For example, a majority of the Senate already supports lower payment limits for farm programs ...