

THE LEGISLATIVE SERVICES GROUP'S

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Wednesday, November 30, 2011

Legislative Schedules

Week of November 28, 2011

House

Wednesday — meets at noon for legislative business — one suspension plus H.R. 3094, NLRB reform.

Thursday and Friday — meets at noon on Thursday and 9 a.m. on Friday for legislative business — H.R. 3463, abolition of public finance of presidential campaigns, and H.R. 527 and H.R. 3010, regulatory flexibility and reform bills.

Senate

The Senate will convene today at 9:30 a.m. for morning business. At 11:00 a.m. the Senate will vote on the motion to invoke cloture on S. 1867, the defense authorization bill.

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House Leaders May Delay Highway Bill To 2012

Bill Drafting, Markups, House Floor Action Tough To Complete By Dec. 15, "Pay-Fors" To Fill Highway Trust Fund Revenue Hole May Be Controversial

While the staffers for the House Transportation and Infrastructure Committee have been frantically preparing to introduce their surface transportation reauthorization bill next Monday (December 5) and mark the bill up in committee later next week, House Republican leaders will meet this morning and may decide to postpone floor action on the transportation bill until early next year, which would also probably delay T&I Committee action until next year as well.

On November 17, House Speaker John Boehner (R

-OH) pledged to move a five-year surface transportation reauthorization and energy production bill to the House floor "by the end of the year." But as the leadership staff have been reviewing the remainder of the 2011 calendar and its precious few days before Christmas, it has become difficult for them to fit the extensive year-end agenda into the number of days left — even without the surface transportation bill.

As the calendar on page 5 shows, after this week, there are only two weeks left until the expiration of the current continuing

appropriations resolution on Friday, December 16.

The expiration of the CR is a logical time for Congress to leave town, and the passage of the final "must-pass" appropriations measure of the year is the traditional sign for members to go home.

If the House cannot finish its work by Friday the 16th (or the following Saturday), then the next logical stopping point would be Friday, December 23. But no legislators really want to be stuck in DC that close to Christmas (not to mention during Hanukkah, which starts on the 20th), and, as the say-

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Can FY12 Highway Level Be Raised Above \$39.1B?

Infrastructure advocates, faced with "austerity budgets" and stagnant Highway Trust Fund revenues, rejoiced when the Senate Environment and Public Works Committee earlier this month approved a bipartisan bill that would set the main spending number for the federal-aid highway program at an all-time high of \$41.564 billion in fiscal year 2012.

That was the good news. The bad news was that

less than a week later, the House and Senate Appropriations Committees released their final FY 2012 appropriations bill for the Department of Transportation, which sets the same highway spending number at \$39.144 billion — \$2.42 billion below what is envisioned by the EPW bill. This lower level has since been enacted into law.

The question, then, is this: will it be possible (or,

rather, permissible) for the surface transportation reauthorization bill to set the final FY 2012 highway obligation limitation at a level that is higher than the \$39.144 billion now set in law by the appropriators?

From a legal perspective, of course any new law can repeal or replace any previously enacted law, and where two laws directly contradict each other but

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2012 Highway \$\$\$

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do not repeal or amend each other, doctrines of statutory construction say that the more recently enacted law trumps the older law.

From the perspective of precedent, there are a few precedents, but they are not recent:

- For FY 1979, the appropriations act (P.L. 95-355) first set the highway ob limit at \$7.95 billion, then three months later, the authorization law (P.L. 95-599) raised the ob limit to \$8.50 billion.
- For FY 1986, the appropriations act (P.L. 99-190) first set the highway ob limit at \$12.75 billion (which was lowered to \$12.20 billion by a Gramm-Rudman sequester), and was then increased by the budget reconciliation act (P.L. 99-272) to \$13.13 billion.
- For FY 1987, the appropriations act (P.L. 99-591) first set the highway ob limit at \$13.00 billion, while the subsequent authorization law (P.L. 100-17) actually lowered the ob limit to \$12.35 billion.

The Fiscal Year 2012 Highway Funding Level

	<u>Appropriations Act</u>	<u>Senate EPW Bill</u>
Highway Oblig. Limit.	\$ 39,143,583,000	\$ 41,564,000,000
Difference		\$ 2,420,417,000
FY 2012 Outlays From Difference If		
Ob Limit Increased Near Start of Fiscal Year		\$ 605,104,250

There were other cases where an authorized ob limit was enacted after an appropriated ob limit and changed the legislative language but not the dollar amount.

But none of the precedents listed above are truly relevant, because they all occurred before the 1987 budget summit agreement changed the way that the budget process accounts for the outlays from transportation trust fund programs.

Prior to the 1987 budget summit, both contract authority and the Treasury outlays that eventually stem from contract authority were classified as mandatory spending and were allocated to the authorizing committees of jurisdiction. After the summit, the outlays from contract authority subject to obligation limitation were classified as discretionary and allocated to the Appropriations Committees.

Since the spending limits in the Congressional budget process are enforced through allocations to committees, splitting the transportation contract authority programs in this way between mandatory and discretionary inadvertently created some loopholes and some bizarre incentives and disincentives that have plagued these programs ever since. (No other programs in the federal budget are split between mandatory and discretionary classification in this way.)

In the current instance, the regular budget process assigns the Appropriations Committees about \$1.3 trillion dollars in discretionary outlays for the upcoming fiscal year (and the appropriators are only concerned with the upcoming year, not years after that). In that context, varying the highway obligation total up or down by few billion dollars matters less than a tenth of a percent of their total outlay allocation — so long as it is legislation from the Appropriations Committees that sets the level.

But if another committee tries to add money to this total after the appropriations law has been enacted, the total outlays from the Treasury would have to come from that committee's allocation, not the appropriators' allocation. And while the Senate Appropriations Committee's FY 2012 discretionary outlay allocation is a healthy \$1.262 trillion, the Environment and Public Works Committee's 2012 allocation is only about one-fourth of one percent of that amount (\$3.2 billion).

In the universe of \$1,262 billion per year of outlays, it is easy to find room for an extra few hundred million per year. In the universe of

HOUSE MAY VOTE TO END RAIL LABOR STRIKE NEXT WEEK

The three top House Republican leaders issued a statement yesterday that the House would vote on emergency legislation next week to prevent a shutdown of major freight railroads due to a strike by a few of the myriad labor unions involved.

Speaker Boehner, Majority Leader Cantor, and Majority Leader McCarthy issued a joint statement that said, in part, that "While our hope is that the parties involved will find common ground and resolve the situation without congressional involvement, the House is prepared to take legislative action in the days ahead to avert a job-destroying shutdown of our nation's railroads, in the event such legislation proves necessary."

The cooling-off period following the Presidential Emergency Board's report expires at midnight on December 5, which would allow a strike by the remaining unions that have not reached settlement on December 6.

However, a promise by the Republican House to act legislatively to stop a railroad strike does not necessarily mean that Democrats in the Senate would act on the bill or that the President would sign it — it would all depend on how each side thought a short strike would affect the fate of the negotiations. (No one, presumably, wants a long railroad strike in times of economic distress.)

Hyperlinks to relevant documents can be found on page 11 of this issue.

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\$3.2 billion per year of outlays, it is much harder to find an extra few hundred million per year.

The table below shows the Environment and Public Works Committee's latest one-year and ten-year outlay allocations and how the relatively few programs over which EPW has outlay jurisdiction stack up.

Under the regular budget rules, if the EPW Committee wants to find an extra several hundred million dollars in 2012 (and \$2.4 billion over ten years), they would have to make corresponding cuts in a vari-

ety of popular fish and wildlife and environmental programs, or revolving funds at the Corps of Engineers or Tennessee Valley Authority that are difficult to cut.

This problem — EPW's lack of outlays for increased 2012 highway spending — is completely separate from the problem of whether or not the Highway Trust Fund will have the money to support such spending. (*Ed. Note:* Under the current system, Highway Trust Fund solvency is not a procedural necessity, though it certainly should be.)

In previous years, the annual budget resolution got around this problem by establishing a "reserve fund" for surface transportation that allowed the Senate EPW (and

House T&I) budget allocations to be increased if the tax-writing committees provided equivalent amounts of extra tax revenues. But there was not a budget resolution enacted for FY 2012, and the Budget Control Act nullified all of the reserve funds from the FY 2010 budget that were still in effect.

Of course, Congress's internal budget rules are only as binding as Congress wants them to be, and can be waived by an explicit vote of a simple majority in the House and three-fifths of the Senate or by the refusal of all members on the floor to raise an objection. But in the current environment, someone would probably raise an objection to the extra spending, requiring a vote.

Where Could the EPW Committee Find Room To Increase FY12 Highway Spending?

The EPW bill would set a FY 2012 highway obligation limitation of \$41.564 billion -- but the FY 2012 DOT appropriations law has already set a 2012 obligation limitation of \$39.144 billion. Therefore, enactment of the EPW bill would increase highway spending by \$2.42 billion in 2012. Under existing budget rules, the EPW Committee would have to cut the outlays for other programs under its jurisdiction by up to \$600 million in FY 2012 (depending on the date of enactment) and by the full \$2.42 billion over the next ten years in order to make room for the extra FY 2012 spending. This would be difficult to impossible, since EPW does not have many outlays under its jurisdiction...

			<u>FY 2012</u>	<u>Ten-Year</u>
Outlay Allocation to Enviro. and Public Works Committee, 9/7/2011			3,191	32,142
CBO August Baseline Outlay Assumptions for Major EPW Accounts:				
<u>Account #</u>	<u>Bureau</u>	<u>Account</u>		
69 8083 0 7 401	Fed. Highway Adm.	Federal-Aid Highways	787	7,475
96 8862 0 7 301	Corps of Engineers	Rivers & Harbors Fund	519	5,796
64 4110 0 3 271	Tenn. Valley Auth.	TVA Fund	500	5,000
14 8151 0 7 303	Nat'l Park Service	Sport Fish Restoration	445	4,593
14 5029 0 2 303	Fish & Wildlife Serv.	Wildlife Restoration	386	4,769
70 8349 0 7 304	U.S. Coast Guard	Maritime Oil Spill Program	225	1,194
96 8333 0 7 301	Corps of Engineers	Coastal Wetlands Restoration	97	863
14 5143 0 2 302	Fish & Wildlife Serv.	Coop. Endang. Species Fund	62	612
14 1618 0 1 302	Dept. of Interior	Nat'l Resource Damage Fund	55	595
14 5137 0 2 303	Fish & Wildlife Serv.	Migratory Bird Conservation	46	486
All Other EPW Mandatory Outlay Accounts			69	759

Comparing "Current Law" Levels of Surface Transportation Funding — Revised

The following table shows actual levels of Highway Trust Fund contract authority and corresponding obligation limitation for the now-expired fiscal year 2011 and an updated estimate of the annualized current law levels for those programs in fiscal 2012. The FY 2012 obligation limitation numbers are taken from the 2012 Department of Transportation Appropriations Act, enacted into law on November 18 as Public Law 112-55. The FY 2012 contract authority numbers are exactly twice the six-month totals provided for the first half of 2012 in Public Law 112-30. However: the federal-aid highways contract authority total is not spelled out in the text of P.L. 112-30; it is inferred from prior year levels. A correction has been made from earlier estimates.

Section 2210 of Division B of Public Law 112-10 rescinded all "Unobligated balances of funds" from a wide variety of contract authority earmarked in sections of the 1991 ISTEA law and prior authorization laws. At the time (April 2011), the Congressional Budget Office estimated that these rescissions would total \$630 million (CBO rounds such numbers to the million). When added to another rescission of precisely \$2.500 billion, CBO estimated that these rescissions would reduce the FY 2011 total FHWA contract authority level from \$43.042 billion to \$39.912 billion, which became the new FHWA spending level in CBO's August 2011 baseline.

However, when FHWA actually implemented the section 2210 rescission, they only found and rescinded \$354,719,908 in unobligated balances, not \$630,000,000. So the actual annualized level of FY 2011 FHWA contract authority is that much higher than the CBO baseline number of \$39.912 billion, or \$40.187 billion. If no other legislative action is taken, the new CBO baseline released in February 2012 will probably be raised to \$40.187 billion in contract authority as well.

	Contract Authority For FY 2011 From P.L. 112-5	Oblig. Limitation For FY 2011 From P.L. 112-10	Contract Authority For FY 2012 (12-Mo.) From P.L. 112-30 x 2	Oblig. Limitation For FY 2012 From From P.L. 112-55
Federal Highway Administration				
Federal-aid Highways (subject to limit)	\$ 42,303,152,420	\$ 41,107,000,000	\$ 39,448,432,512	\$ 39,143,583,000
Equity Bonus (exempt from limit)	\$ 639,000,000	no limitation	\$ 639,000,000	no limitation
Emergency relief (truly mandatory)	\$ 100,000,000	no limitation	\$ 100,000,000	no limitation
TOTAL FHWA NEW RESOURCES (HTF)	\$ 43,042,152,420	\$ 41,846,000,000	\$ 40,187,432,512	\$ 39,882,583,000
Federal Motor Carrier Safety Admin.				
Operations and Programs	\$ 244,144,000	\$ 245,000,000	\$ 244,144,000	\$ 247,724,000
Motor Carrier Safety Grants:				
Motor Carrier Safety Grants	\$ 209,000,000	\$ 212,070,000	\$ 212,000,000	\$ 212,000,000
CDL Improvement Grants	\$ 25,000,000	\$ 25,000,000	\$ 30,000,000	\$ 30,000,000
Border Enforcement Grants	\$ 32,000,000	\$ 32,000,000	\$ 32,000,000	\$ 32,000,000
PRISM Grants	\$ 5,000,000	\$ 5,000,000	\$ 5,000,000	\$ 5,000,000
CV Info Systems & Networks	\$ 25,000,000	\$ 25,000,000	\$ 25,000,000	\$ 25,000,000
Safety Data Improvement Grants	\$ 3,000,000	\$ 3,000,000	\$ 3,000,000	\$ 3,000,000
CDL Modernization Grants	\$ 8,000,000	\$ 8,000,000	\$ -	\$ -
Total, Motor Carrier Safety Grants	\$ 307,000,000	\$ 310,070,000	\$ 307,000,000	\$ 307,000,000
TOTAL FMCSA (HTF ONLY)	\$ 551,144,000	\$ 555,070,000	\$ 551,144,000	\$ 554,724,000
National Highway Traffic Safety Admin.				
Operations and Research	\$ 108,244,000	\$ 105,500,000	\$ 108,244,000	\$ 109,500,000
National Driver Register	\$ 4,116,000	\$ 4,000,000	\$ 4,116,000	\$ -
Highway Traffic Safety Grants:				
Chapter 4 Safety Programs	\$ 235,000,000	\$ 235,000,000	\$ 235,000,000	\$ 235,000,000
Occupant Protection Grants	\$ 25,000,000	\$ 25,000,000	\$ 25,000,000	\$ 25,000,000
Safety Belt Grants	\$ 124,500,000	\$ 124,500,000	\$ 48,500,000	\$ 48,500,000
State Traffic Safety IT	\$ 34,500,000	\$ 34,500,000	\$ 34,500,000	\$ 34,500,000
DUI Incentive Grants	\$ 139,000,000	\$ 139,000,000	\$ 139,000,000	\$ 139,000,000
High Visibility Enforcement	\$ 29,000,000	\$ 29,000,000	\$ 29,000,000	\$ 29,000,000
Motorcyclist Safety Grants	\$ 7,000,000	\$ 7,000,000	\$ 7,000,000	\$ 7,000,000
Booster Seat Grants	\$ 7,000,000	\$ 7,000,000	\$ 7,000,000	\$ 7,000,000
Administrative Expenses	\$ 25,328,000	\$ 18,500,000	\$ 25,328,000	\$ 25,328,000
Total, Highway Traffic Safety Grants	\$ 626,328,000	\$ 619,500,000	\$ 550,328,000	\$ 550,328,000
TOTAL NHTSA (HTF ONLY)	\$ 738,688,000	\$ 729,000,000	\$ 662,688,000	\$ 659,828,000
Federal Transit Administration				
Formula and Bus Grants	\$ 8,360,565,000	\$ 8,343,171,000	\$ 8,360,565,000	\$ 8,360,565,000
TOTAL HIGHWAY TRUST FUND RESOURCES	\$ 52,692,549,420	\$ 51,473,241,000	\$ 49,761,829,512	\$ 49,457,700,000

House Highway Bill

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ing goes, a lot of things can happen in Congress when the members are trapped here the week before Christmas, and most of them are bad.

Given the likely length of the surface bill, the profound changes it will make in current policy, and the promises of Speaker Boehner and T&I chairman John Mica (R-FL) to have a relatively open amendment process on the House floor for major legislation, it would probably take at least two full days for the House to debate the bill and a fair spectrum of amendments adequately. (The 2005 SAFETEA-LU law took a day and a half of House floor time, and that was with a somewhat restrictive amendment process and strong Democratic support to hurry things up. With a more open amendment process, a lot of energy stuff that requires more committees be given debate time and amendments, and likely Democratic opposition, two full days seems a conservative estimate.)

This would mean that if House leaders decide to move the surface and energy bill this year, they would have two options:

- Spend half of the final week of session (two-ish days of the period from December 12 to the 15th or 16th) on this bill; or...
- Stay in session an extra week just to accommodate the transportation bill, which runs the risk of unexpected delays pushing up against members' planned holiday vacations.

Neither option seems particularly attractive to House leaders, which is a big reason why they are considering pushing the transportation and energy bill back to January or February.

Needless to say, if the floor date is postponed, the release of the details of the bill, the introduction of the text of the bill, and the committee markups of the bill will likely be

postponed until next year as well. (Chairmen traditionally don't like unveiling controversial bills only to have them sit out for weeks of delay, allowing opponents of particular provision time to rally support and lobby legislators to amend the bill.)

In addition, GOP leaders may not be completely certain that elements of the draft bill won't blow up in their faces. Chairman Mica released a fairly vague outline of the policy provisions of his bill on June 7, but the fine print of some of the structural reforms and program consolidations is likely to draw opposition from some interest groups and legislators.

More importantly, the numbers in the bill will probably cause intense controversy. The ultra-low funding totals proposed by Mica in June are now inoperative, but his bill will still likely not as high in FY 2012 and 2013 as the spending totals assumed in the Senate bill. It is not known how the Mica bill will divide Highway Trust Fund spending between highways and transit, a likely source of contention.

But the biggest potential bombshells are the "pay-fors" that would help fill the "revenue hole" in the Highway Trust Fund illustrated in the tables on the following page.

Even if the Mica bill starts highway funding from the lower, Appropriations Committee 2012 level of \$39.1 billion in obligation limitation (instead of \$41.6 billion as assumed in the Congressional Budget Office's baseline), the bill would still need around \$50 billion in additional Highway Trust Fund deposits above and beyond current law anticipated tax receipts just so the Trust Fund will still be running on fumes on the last day of a five-year bill.

However, House Budget Committee chairman Paul Ryan (R-WI) has been insisting all year on a ten-fiscal-year Trust Fund self-

House Schedule, Dec. 2011 - Feb. 2012

(Days not in session are in ~~gray strikethrough type~~)

December 2011				
Mon	Tue	Wed	Thu	Fri
			1	2
5	6	7	8	9
12	13	14	15	16
19	20	21	22	23
26	27	28	29	30
January 2012				
2	3	4	5	6
9	10	11	12	13
16	17	18	19	20
23	24	25	26	27
30	31			
February 2012				
		1	2	3
6	7	8	9	10
13	14	15	16	17
20	21	22	23	24
27	28	29		

sufficiency window. According to the last CBO baseline, this would require about \$140 billion of new revenues over ten years, and even if the lower FY 2012 appropriated funding totals are assumed (plus inflation) over the next decade, that number would still be around \$110 billion.

Although some of the Natural Resources Committee's oil and gas exploration bills (H.R. 3410 for offshore exploration, H.R. 3407 for ANWR exploration, H.R. 3408 for shale and H.R. 3409 for coal) that may be attached to the transportation bill will raise new revenues for the federal government, the CBO cost estimates have not been released. But T&I ranking member Nick Rahall (D-WV) has a letter from CBO from three years ago saying that offshore oil drilling proposals similar to H.R. 3410 would only raise about \$2 billion over ten years. And a 2008 Congressional Research Service of ANWR legislation projected that expanded ANWR drilling would bring in be-

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House Highway Bill

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tween \$38 billion (with oil at \$80 a barrel) and \$60 billion (with oil at \$125 per barrel) in additional federal royalties over 30 years, but there are subsequent indications that the overwhelming majority of that money would be brought into the Treasury after a five-year highway bill was over.

Just looking at the Highway Account of the Highway Trust Fund by itself, the ten-year revenue hole is quite daunting. It is \$102 billion at the original CBO baseline spending levels and would probably be around \$80 billion if one were to lower the spending totals for each year to adjust for the lower appropriated 2012 spending level and

instead inflate that in future years. Even a shortfall of \$80 billion over ten years is more money than the \$51 billion that the entire Mass Transit Account is scheduled to bring in in excise taxes and interest over that same period.

TW believes that House leaders are considering raising the lion's share of the money to fill the \$100+ billion ten-year revenue hole with some kind of unrelated offset that has nothing at all to do with transportation (or energy).

If this is the case, then the plan would fly in the face of the intent of the authors of the Congressional Budget Act of 1974, who established the principle (in section 401 of that law) that trust funds with contract authority should only be allowed to continue to exist so long as at least 90 percent of their spending was

supported by taxes "related to the purposes for which such outlays are or will be made".

Senate Finance Committee chairman Max Baucus (D-MT) has been trying to find just \$12 billion in offsets for a two-year bill that comply with section 401 of the Budget Act but so far has not found bipartisan success. Abandoning 35 years of budget discipline (if that is indeed the intent of House leaders) would affect the debate on the surface transportation bill in unknown ways.

[Senate bill update: the Banking and Commerce Committees hope to mark up their portions of the bill before Congress leaves town in two to three weeks, but there is still no timetable for a Finance Committee meeting.]

How Deep A "Revenue Hole" Must The House Transportation Bill Fill?

Congressional Budget Office August 2011 Baseline Projections for the Highway Trust Fund (Billions of Dollars)

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
<u>HTF Assumed Budgetary Resources</u>												
Highway Obligation Limitation	41.1	41.1	41.6	42.2	42.9	43.5	44.3	45.1	46.1	47.0	48.0	48.9
Exempt Highway Obligations	0.7	0.7	0.7	0.7	0.7	0.7	0.7	0.7	0.7	0.7	0.7	0.7
FMCSA and NHTSA HTF Obligations	1.3	1.3	1.3	1.3	1.3	1.4	1.4	1.4	1.5	1.5	1.5	1.6
FTA Formula/Bus Oblig. Limitation	8.3	8.3	8.4	8.6	8.7	8.8	9.0	9.2	9.3	9.5	9.7	9.9
<u>Highway Account Cash Flow</u>												
Beginning of Year Balance	8.9	20.7	14.2	4.2	-8.4	-21.2	-33.0	-44.0	-55.0	-65.6	-76.3	-87.7
Flex to Mass Transit	-1.0	-1.0	-1.0	-1.0	-1.0	-1.0	-1.0	-1.0	-1.0	-1.0	-1.0	-1.0
Revenues and Interest	30.2	31.1	33.0	32.6	33.4	34.5	35.2	35.5	35.7	35.8	36.0	36.3
General Fund Transfer	14.7	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Outlays	32.0	36.7	42.0	44.2	45.2	45.4	45.5	45.1	45.3	45.6	46.4	47.0
End of Fiscal Year Balance (HA)	20.7	14.2	4.2	-8.4	-21.2	-33.0	-44.0	-55.0	-65.6	-76.3	-87.7	-98.4
2/5/10-Year Hole With \$4b Min. Balance			2 Years	12.4		5 Years	48.0				10 Years	102.4
<u>Mass Transit Account - Cash Flow</u>												
Beginning of Fiscal Year Balance	5.2	8.5	7.0	4.5	1.5	-2.0	-5.6	-9.2	-12.9	-16.8	-20.8	-25.0
Est. Flex Transfer From HA	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
Revenues & Interest	4.8	4.9	5.0	4.9	4.9	5.1	5.1	5.2	5.2	5.2	5.2	5.2
Transfer From General Fund	4.8	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Outlays	7.4	7.4	8.4	9.0	9.4	9.6	9.7	9.9	10.0	10.2	10.4	10.6
End of Fiscal Year Balance (MTA)	8.5	7.0	4.5	1.5	-2.0	-5.6	-9.2	-12.9	-16.8	-20.8	-25.0	-29.4
2/5/10-Year Hole With \$2b Min. Balance			2 Years	0.5		5 Years	11.2				10 Years	31.4
TOTAL REVENUE HOLE WITH MIN. BALANCES			2 YEARS	12.9		5 YEARS	59.2				10 YEARS	133.8

However....

The FY 2012 obligation limitation for the highway program enacted into law last month was \$39.1 billion, not \$41.6 billion. If this level stands, CBO will re-base in February at lower levels for 2012-2021. This would save about \$2.2 billion in outlays over two years and less easy-to-calculate levels farther on down the line. Using conservative outlay assumptions, the new revenue hole based on the enacted FY 2012 spending number (inflated in future years) might look like this:

TOTAL REVENUE HOLE WITH MIN. BALANCES	2 YEARS	10.7	5 YEARS	50-ish	10 YEARS	110-ish
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Final Action On FAA Reauthorization Bill Still Possible By End Of Year

(*Ed. Note:* This probably sounds like a broken record, for which we are very, very sorry. What can you do?)

Congressional staffers are gearing up behind the scenes in hopes of getting a final Federal Aviation Administration reauthorization bill sent to the President's desk by the end of December (albeit four years overdue).

Staff are scheduled to meet this week in hopes to get all of the paperwork finalized for all of the various parts of the bill not under direct negotiation between chairmen Mica and Rockefeller or between Speaker Boehner and Leader Reid.

The limited number of floor days between now and the end of the year (Congress hopes to be gone for

the year before the current CR expires on Friday December 16) and the large number of more important bills that will be demanding floor time may limit the ability of the leadership to bring the FAA bill forward this year.

In particular, the problem will be whether or not whatever final compromises that are made in the FAA bill can gain the unanimous consent of all 100 Senators. If the answer is yes, then the Senate can bring up the final bill, from start to finish, in a handful of hours. If the answer is no, then the Senate has to spend two to three full days running the cloture clock on the final bill, which might not be possible in the last two weeks of the session.

CORRECTIONS

In the last issue of *TW*, we reported that Sen. Tom Carper (D-DE) spoke of offering a future amendment to the highway bill on sport fishing funding, when it was in fact his neighbor, Sen. Ben Cardin (D-MD).

In the last issue of *TW*, we reported that "the annual appropriations bills" had included a 60 percent cap on the maximum federal share of new start funding since 2002. This cap was not actually in the bills but was in the joint explanatory statements of managers accompanying the conference reports on those bills. (The FTA's website on this matter is also, technically, inaccurate: http://www.fta.dot.gov/grants/13094_3559.html)

American Airlines Corporate Parent Files For Chapter 11 Bankruptcy

AMR Corp., the parent company of American Airlines, filed for bankruptcy reorganization under chapter 11 of the federal bankruptcy code on November 29. At the same time, eight-year AMR chairman and CEO Gerald Arpey retired/resigned and was replaced by Thomas Horton.

Bankruptcy reorganization could provide the company an opportunity to shed its expensive pension obligations to retirees (and stick the federal government, through the Pension Benefit Guaranty Corporation, with the cost) as some of its major competitors have already

used bankruptcy to do. This would make American more competitive with its major "legacy" competitors United and Delta, which have (like American) been in business since the 1920s, and would put American on a more even footing with younger competitors which, naturally, don't have nearly as many generations of retirees to support.

The prospect of shedding pension obligations and other debts through bankruptcy may have had something to do with Arpey's retirement. Arpey was quoted in a 2010 interview as saying that "I believe there is something misguided about how

we measure success, if success is bankruptcy, giving pension obligations to taxpayers and not paying back creditors. By that measure, we have failed."

<http://tinyurl.com/7wobk6c>

Horton said in a statement that "we must address our cost structure, including labor costs, to enable us to capitalize on these foundational strengths and secure our future. Our very substantial cost disadvantage compared to our larger competitors, all of which restructured their costs and debt through Chapter 11, has become increasingly untenable..."

Major U.S. Airline Bankruptcies Since 2000

<u>Date of Filing</u>	<u>Carrier</u>	<u>Emerged</u>	<u>Major Actions Taken in Bankruptcy</u>
January 10, 2001	TWA (3rd time)	Did not emerge	Sold to American
August 11, 2002	US Airways	March 31, 2003	Liquidated pilots' pensions
December 9, 2002	United Airlines	February 1, 2006	Liquidated all employee pensions
September 12, 2004	US Airways (2nd time)	September 16, 2005	Sold to America West
September 14, 2005	Delta Air Lines	April 30, 2007	Liquidated pilots' pensions
September 14, 2005	Northwest Airlines	May 31, 2007	Negotiated significant cost savings
November 29, 2011	American Airlines		

2012 Appropriations Endgame Soon At Hand

President Obama signed the first regular appropriations bills for fiscal year 2012 into law on November 18, including the Transportation-Housing appropriations bill. (Well, he was in Bali and the bill was in DC, but he authorized the autopen machine to affix his signature thereto.) The three-bill “minibus” package is now Public Law 112-55.

However, the enactment of three bills still leaves nine bills to go. The House has passed five of those nine, while the Senate has only taken up and passed one of them (Military Construction, H.R. 2055).

Before Thanksgiving, the Senate was working on passing the Energy and Water appropriations bill (H.R. 2354), and Majority Leader Reid had hoped to use that bill as a vehicle to add the Financial Services and State/Foreign Operations bills to form a second “minibus” package.

But that plan stalled because the parties could not agree on how

many amendments to allow, and the Senate has suspended work on that bill and turned to the defense authorization bill this week.

Funding for the agencies under the nine remaining bills is being provided by a stopgap continuing resolution that expires at midnight on Friday, December 16. The number of additional bills that the House and Senate have time to debate and amend on the chamber floors before that date is perilously close to zero.

Accordingly, the most likely course of action is for as many of the nine remaining bills as possible to be combined into one omnibus package. And the most efficient way for the Appropriations Committees to do that is to present the House and Senate with a conference report settling differences on a bill that both chambers have already passed, to foreclose the possibility of further amendments. The only regular appropriations bill that could be used for this is MilCon, the only bill left that has passed both chambers and

on which the Senate has already requested a conference.

Accordingly, the telltale sign that Congress is a day or two away from releasing the final omnibus package will be when the House formally moves to agree a conference with the Senate on H.R. 2112 and appoints conferees. This will mean that the omnibus is imminent.

The unresolved question is: how many bills will be incorporated into the omnibus package? Ideally, all nine remaining bills would be included, ending the FY 2012 general appropriations process before calendar year 2012 actually begins. But the partisan differences on the Labor-HHS-Education bill’s program funding levels are so vast that the bill could get left out and extended in a CR through September 30, 2012. And the disaster relief funding levels in the Homeland Security bill have been the biggest House versus Senate disagreement in the 2012 appropriations process thus far.

House Passes Coast Guard Reauthorization Over White House Opposition

The House of Representatives passed H.R. 2838, the Coast Guard reauthorization bill for fiscal years 2012-2014, by voice vote on November 15 despite White House opposition to a provision of the bill.

A Statement of Administration Policy from the White House Office of Management and Budget dated November 3 says that “The Administration strongly opposes House passage of H.R. 2838 because it includes a provision that would require the Coast Guard to decommission the icebreaker USCGC POLAR STAR.” However, the SAP lacked the magic words to the effect of “the President’s senior advisers would recommend that he veto the bill,” and thus, in OMB-speak, “strongly opposes” without the veto threat almost always means “the President will sign this bill if he really has to but would prefer for

his allies in Congress to fight to change the offending provision so that doesn’t happen.”

To help explore the icebreaker and related issues, the House Transportation and Infrastructure Committee is holding a hearing on Coast Guard Arctic operations tomorrow at which the Coast Guard Commandant is scheduled to testify.

The House considered most of the offered amendments to H.R. 2838 on November 4 before shelving the legislation for a time, as listed in a prior issue of *TW*. When the House resumed amendment debate on H.R. 2838 on November 15, the House took the following actions:

- **Landry (LA) #10** to clarify rules relating to combustible liquids — offered and withdrawn.
- **Pierluisi (PR) #11** to clarify the application of the Passenger Ves-

sel Services Act to Puerto Rico — agreed to by recorded vote of 322 yeas, 100 nays.

- **Young (AK) #12** to decommission the icebreaker STORIS for museum use — agreed to by voice vote.
- **Larsen (WA)** motion to recommit with instructions to amend the bill by prohibit the Coast Guard from awarding a contract to anyone convicted of fraud or other specified criminal offenses — failed by recorded vote of 189 yeas, 235 nays.

The Senate Commerce, Science and Transportation Committee has approved its own bill (S. 1665) but has not yet filed the report.

Super Committee's Failure Sets the Stage For Future Fiscal Debates

The Joint Select Committee on Deficit Reduction (a.k.a. the "Super Committee") died as scheduled on November 23 without even voting on any proposals to reduce the federal deficit. (The committee had been charged with reducing the deficit by at least \$1.2 trillion over the next decade.)

The failure of the Super Committee to produce any legislation throws the short term Congressional agenda into uncertainty, since the filibuster-proof, amendment-proof Super Committee bill was an extremely attractive vehicle that would have doubtless been used to give several other major provisions a ride to the White House.

Beyond that short term, the August 2011 Budget Control Act requires significant cuts in federal spending, particularly in defense, starting in January 2013 totaling \$109 billion per year over nine years.

Short term. This Congress will have to work with President Obama to extend some or all of the popular "temporary" programs and tax breaks that seem to get extended every December.

The inset box in the center of this page lists the major expiring areas of fiscal policy and the amount that the Congressional Budget Office said that the last one-year extensions of these policies, in December 2010, added to the deficit in both fiscal years 2011 and over the ten-year FY 2011-2020 period.

(Tax provisions in particular tend to cut across fiscal years, since the tax code collects from individuals based on calendar years, and from business based on whatever fiscal year they use, and the change in tax receipts often does not show up fully in the Treasury until several months after the tax year ends.)

The four major areas of expiring provisions include the next extension of unemployment insurance, the extension of the partial tax holi-

day on payroll taxes, both of which are top priorities of President Obama and the latter of which is strongly supported by Congressional Republicans. The Medicare "doc fix" would continue to prevent a cut in Medicare payments to doctors that was supposed to take effect in January 2007. And an ever-expanding package of extensions to tax provisions that expire on December 31 is also on the table. A list of all of the miscellaneous tax extenders from last year can be found in title VII of this document:

<http://tinyurl.com/2vtm8xj>

In December 2010, the unemployment insurance, payroll tax holiday, and miscellaneous tax extenders were all packaged into one bill, while the Medicare doc fix was in a

Provisions Expiring December 31, 2011	Cost of Last Extension	
	In 2011	10-Year
Unemployment Insurance	34.5	56.5
2% Payroll Tax Holiday	67.2	111.7
Medicare SGR "Doc Fix"	9.6	14.9
Misceaneous Tax Extenders	27.6	55.3
Total (in Billions of \$\$)	138.9	238.4

separate bill, both of which were signed into law by President Obama. The tax extender bill also carried a two-year extension of all of the Bush Administration's 2001 and 2003 tax cuts for individuals and businesses.

The deadline for extending these items varies. Over the last decade, Congress has waited until as late of October of the following year to extend some of the miscellaneous tax provisions, since the changes in law were not absolutely essential until businesses were filing their tax returns for previous tax years. But in early January, the unemployed will lose benefits, doctors will get 20+ percent cuts in Medicare reimbursements, and workers will see their payroll tax rates increased from 4.2 to 6.2 percent of their paycheck.

As the tax extenders debate in particular progresses, it would be a natural vehicle for a change in tax laws to provide extra deposits in the Highway Trust Fund. There is ample precedent for this — it was the 1997 tax package that transferred the 4.3 cents per gallon fuel tax to the Highway Trust Fund that the 1998 TEA21 law then spent, and the ethanol-related provisions adding billions of dollars to the HTF were enacted in a 2004 tax package and then spent by the 2005 SAFETEA-LU law.

Future cuts. The Budget Control Act counted on the Super Committee lowering the deficit by \$1.2 trillion over ten years, and provided for an alternative process to make up that amount through automatic cuts in future spending if the Super Committee failed in its task.

These spending cuts, however, are not scheduled to take effect until January 2, 2012, a date that was picked very carefully, since it is the last full day of the current 112th Congress. (The 113th Congress, to be elected in November 2012, starts at noon on January 3).

This strongly implies that, once the 2012 elections are past, a lame duck session of Congress with the proper insulation from the whims of the electorate can fine-tune, or repeal outright, the automatic spending cuts. Since the expiration of the 2001 and 2003 Bush tax cuts for all income levels is scheduled to take place on December 31, 2012, the future of the tax cuts will undoubtedly be tied into the decision of what to do with the automatic spending cuts.

The spending cuts would mean an across-the-board 7.8 percent cut on all FY 2013 discretionary appropriations. However, as noted in an article with a justifiably large headline on the following page...

CONTINUED ON NEXT PAGE

Transpo. Trust Funds May Be Mostly Exempt From Sequesters

Because the Super Committee failed to produce a bill, the Budget Control Act of 2011 requires that a series of sizable automatic spending cuts take place starting on January 2, 2013 (for fiscal 2013) and on October 1 of every following year through 2021. Part of this process would lower the annual statutory caps on discretionary budget authority substantially — but this is not in itself a problem for programs funded by contract authority from the transportation trust funds, since those obligation limitations fall into a loophole in the budget process. All the authorities are in agreement that since caps on discretionary budget authority clearly don't apply to transportation obligation limitations, lowering those caps won't affect those obligation limitations, either.

Caps on discretionary outlays, under the current budget scheme, do have some effect on the transportation trust fund contract authority programs since they can force the Appropriations Committees to make hard choices between programs, pitting highway and transit spending against other domestic programs for scarce outlays. But the Budget Control Act's fallback procedures do not give the Appropriations Committee any kind of outlay ceiling — only ceilings on budget authority (which, as noted earlier, do not apply to transportation trust fund programs).

But what about contract authority itself? How would the Budget Control Act's cuts affect contract authority?

The rest of the process would be “sequesters” — automatic cuts made in spending that has already been enacted into law. These sequesters were first written into law in the 1985 Gramm-Rudman-Hollings statute. As amended, G-R-H requires the Office of Management and Budget (OMB) to issue orders canceling certain percentages of each budget account, all the way down to the program/project/activity level (so agencies cannot move money around between PPAs to lessen the blow of the spending cut). The FY 2013 sequester for non-exempt non-defense programs would be a cut of about 7.8 percent. To enforce the new sequester process, section 302 of the Budget Control Act created a new section 255A in Gramm-Rudman-Hollings, the pertinent part of which reads as follows:

Sec. 255A(8) 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, and the special rules specified in section 256, except that the percentage reduction for the Medicare programs specified in section 256(d) shall not be more than 2 percent for a fiscal year.

The key part in the above is “the exemptions specified in section 255.” Here is the relevant paragraph of section 255 of Gramm-Rudman-Hollings, which was added in February 2010 as part of the Statutory Pay-As-You-Go Act of 2010:

Sec. 255(j) Split Treatment Programs- Each of the following programs shall be exempt from any order under this part to the extent that the budgetary resources of such programs are subject to obligation limitations in appropriations bills:

- 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 authors of the Statutory PAYGO Act of 2010 apparently did not think that Congress would ever create a new deficit reduction regime without giving the Appropriations Committees a cap on their annual outlays (since deficits are caused by outlays directly). Caps on discretionary budget authority, like those in the Budget Control Act, have only an indirect effect on outlays (and thus only an indirect effect on the deficit itself in the short term) and, as shown above, completely leave out contract authority programs. But the BCA does not control the Appropriations Committee's outlays and thus, under the current system of budget scorekeeping, appears to give transportation trust fund programs an almost completely free ride. (The \$739 million per year of highway contract authority that is exempt from limitation would be subject to the 7.8 percent sequester in 2013, but the \$40+ billion highway program subject to limitation would be completely exempt from sequestration.) The Federal Transit Administration's new starts account would face significant cuts while its formula grants account would be exempt from cuts. The FAA Operations, F&E and Research accounts would face real financial hardship under the lower caps while the Airport Improvement Program would be exempt from pain. Amtrak and any hypothetical high-speed passenger rail funding would be severely constrained by the discretionary sequesters and lowered caps, disappointing rail advocates who will, no doubt, be very upset to see highway spending almost completely exempted from the BCA spending cuts.

The final say on how the sequesters will be implemented will be made by OMB at a later date, and they could, in theory, find some justification for interpreting the law differently than shown above. But the plain language of the statute seems to imply that highway, transit, safety and airport spending would be largely exempt from the automatic spending cuts scheduled to start taking place in January 2013 under current law. Congress and the President are, of course, free to pass a law amending the Budget Control Act and its procedures or changing them in any way at any time between now and the effective date of the first sequester on January 2, 2013.

NEW AND NOTABLE ON THE INTERNET

American Airlines Bankruptcy

The AMR Corp. homepage for information about its bankruptcy reorganization proceedings is here:

<http://www.aa.com/i18n/information/restructuring.jsp?anchorLocation=DirectURL&title=restructuring>

Coast Guard Reauthorization

The text of H.R. 2838 (the Coast Guard reauthorization bill) as passed by the House is here:

<http://www.gpo.gov/fdsys/pkg/BILLS-112hr2838eh/pdf/BILLS-112hr2838eh.pdf>

The text of the White House Statement of Administration Policy on the bill is here:

http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr2838_20111103.pdf

And the briefing memo for this week's House T&I hearing on Arctic icebreaking is here:

<http://republicans.transportation.house.gov/Media/file/112th/CGMT/Coast%20Guard%20Briefing%20Memo%202012-1-11.pdf>

Railroad Strike

The joint House GOP statement mentioned in the blurb on page 2 can be found here:

<http://www.speaker.gov/News/DocumentSingle.aspx?DocumentID=270486>

The report of the Presidential Emergency Board on this labor dispute can be found here:

http://www.nmb.gov/mediation/PEB243_FinalReport.pdf

A Congressional Research Service report, *The Railway Labor Act: Dispute Resolution Procedures and Congressional Authority to Intervene*, can be found here (emphasis on final paragraph):

http://assets.opencrs.com/rpts/RS20883_20020214.pdf

STATUS OF PENDING TRANSPORTATION-RELATED NOMINATIONS

Agency	Nominee	Position	Senate Committee	Latest Action
Amtrak Board of Directors	Albert DiClemente	Director for a term of five years	Commerce, Science and Transportation	Nomination reported 11/2/2011
Federal Maritime Commission	Rebecca Dye	Member for a term expiring 6/30/2015	Commerce, Science and Transportation	Nomination confirmed 4/14/2011
Federal Maritime Commission	Michael Khouri	Member for a term expiring 6/30/2016	Commerce, Science and Transportation	Nomination reported 11/2/2011
Federal Maritime Commission	Mario Cordero	Member for a term expiring 6/30/2014	Commerce, Science and Transportation	Nomination confirmed 4/14/2011
Nat'l Transportation Safety Board	Deborah Hersman	Chairman for a term of two years	Commerce, Science and Transportation	Nomination confirmed 8/2/2011
Nat'l Transportation Safety Board	Robert Sumwalt	Member for a term expiring 12/31/2016	Commerce, Science and Transportation	Nomination reported 11/2/2011
Surface Transportation Board	Ann Begeman	Member for a term expiring 12/31/2015	Commerce, Science and Transportation	Nomination confirmed 4/14/2011

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THIS WEEK IN COMMITTEE

Wednesday, November 30, 2011—House Transportation and Infrastructure — Subcommittee on Water Resources and Environment — Subcommittee hearing on the 2011 Missouri River flooding — *11:00 a.m., 2167 Rayburn.*

Thursday, December 1, 2011 — House Transportation and Infrastructure — Subcommittee on Coast Guard and Maritime Transportation — subcommittee hearing on U.S. Coast Guard Arctic operations — *11:00 a.m., 2167 Rayburn.*

STATUS OF MAJOR TRANSPORTATION BILLS — 112th CONGRESS

BILL	HOUSE ACTION	SENATE ACTION	RESOLUTION
FY 2011 Appropriations Bills (Final Action)	H.R. 1473 passed House 4/14/11 by a vote of 260-167	H.R. 1473 passed Senate 4/14/2011 by a vote of 81-19	Public Law 112-10 4/15/11
FY 2012 Congressional budget resolution	H. Con. Res. 34 passed House 4/15/11 by a vote of 235-193	No budget resolution needed due to sec. 106 of the debt limit law	
FY 2012 Transportation-HUD Appropriations	Draft bill approved by subcommittee on 9/8/11	S. 1596 rolled into H.R. 2112 which passed Senate 11/1/11	Public Law 112-55 11/18/11
FY 2012 Energy and Water Appropriations	H.R. 2354 passed House 7/15/11 by a vote of 219-196	H.R. 2354 considered on Senate floor starting on 11/14/11	
FY 2012 Homeland Security Appropriations	H.R. 2017 passed House 6/2/11 by a vote of 231-188	H.R. 2017 reported 9/7/11 S. Rept. 112-74	
Federal Aviation Admin. Reauthorization Bill	H.R. 658 passed the House on 4/1/11 by a vote of 223-196	S. 223 passed Senate amended 2/17/11 by a vote of 87-8	Senate appointed conferees on H.R. 658 on 4/7/11
Surface Transportation Reauthorization Bill		S. 1813 ordered reported, as amended, 11/9/11 by Senate EPW	
Short-Term Extension of Surface Transportation Laws	H.R. 2887 passed House 9/13/11	H.R. 2887 passed Senate 9/15/11	Public Law 112-30 9/16/11
Water Resources Development Act			
FY 2012 Coast Guard Authorization	H.R. 2838 passed House 11/15/11 by voice vote	S. 1665 ordered reported by Senate Commerce on 11/2/11	