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Aviation Spending Guarantee Mechanisms

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Summary

Since the 1971 creation of the user-supported airport and airway trust fund in the Airport and Airway Development and Revenue Acts of 1970 (P.L. 91-259) there has been disagreement over the appropriate use of the trust fund's revenues. Some Members of Congress viewed the trust fund as primarily a capital account that would fund the Federal Aviation Administration (FAA) airport and airway (mostly air traffic control) capital requirements. Others, including the Office of Management and Budget (OMB), some executive agencies, as well as some members of congressional appropriations and budget committees, viewed the trust fund as the basis for a user-pay system that would also fund some or all of the FAA's operations expenses.

Since 1976, Congress has passed and amended a series of legislative provisions designed to "guarantee" the full funding of FAA's capital programs. From FY1977 through FY1990, the guarantees consisted of a variety of "cap and penalty" provisions which set a legislated cap on the amount of aviation trust fund money that could be used to fund FAA operations. In addition, penalty mechanisms were put in place that would reduce the cap by formula amounts in proportion to the capital programs' shortfall of appropriated funding from their authorized amounts. Although the cap and penalty provisions had some apparent early success, there was growing resistance to passing appropriations bills that adhered to the penalties during the 1980s. In 1990, Congress removed the penalty. Some form of cap continued through 1998.

In 2000, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (P.L. 106-181; AIR21) included two new spending guarantees. One made it "out of order" in the House or Senate to consider legislation that fails to use all aviation trust fund receipts and interest annually. The second made it out of order to consider any bill that provides any funding for research or operations if it fails to fully fund AIP and F&E at their authorized levels. These guarantees were extended through FY2007 in Vision 100-Century of Aviation Reauthorization Act (P.L. 108-176; Vision 100). AIP has been nearly fully funded under these provisions. F&E has not during recent years.

Both the cap and penalty, and the point of order enforced guarantees have had mixed success. The success depends on the support that enforcing the mechanism has maintained during the appropriations process. The history of these guarantees indicates that the broader budgetary situation can trump the spending guarantees.

Aviation funding guarantees are expected to be considered in the FAA reauthorization debate during the 110th Congress and could include the current system, a modification of the current guarantees, a resurrection of a mechanism analogous to the cap and penalty provisions, a reconsideration of taking the trust fund "off-budget," or erecting budgetary "fire walls" as was done for the highway and transit programs in 1998. This report's analysis necessarily assumes the spending levels and program structure of the times. There is an alternative view that too much is spent on the FAA, which is not discussed in detail in this report.

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Aviation Spending Guarantee Mechanisms

Since the 1971 creation of the user-supported airport and airway trust fund under provisions of the Airport and Airway Development and Revenue Acts of 1970 (P.L. 91-259; the 1970 Act) there has been disagreement over the appropriate use of the trust fund's revenues. The disagreement centered on differing views of whether the trust fund's primary purpose was to fund airport and airway (mostly air traffic control) infrastructure and those who viewed the trust fund as a user pay mechanism that should be available to also fund part or all of FAA operations (mostly salaries), maintenance. This led, beginning in 1976, to the enactment of a series of legislative mechanisms (commonly referred to as "cap and penalty" provisions or "out of order" provisions) designed to assure that federal capital spending for U.S. airports and airways would be funded at their fully authorized levels. Some supporters also hoped that these provisions would also assure a significant general fund share for the Federal Aviation Administration's (FAA) operating budget. Such funding guarantee proposals have been part of every FAA reauthorization debate since 1976.

This report begins with a background discussion of the establishment of the Airport and Airway Trust fund (hereafter referred to as the aviation trust fund) and the spending policy conflict that arose from different views concerning the legitimate use of the trust fund revenue during both the debate over the creation of the trust fund and the first years of its existence. It then examines the twenty-two year era when Congress imposed a variety of "cap and penalty" provisions on aviation trust fund spending in an effort to both encourage full funding of the FAA's capital programs spending as well as assuring a significant general fund share to support the FAA's operations. The report then briefly examines the current spending guarantees that succeeded the cap and penalty provisions following passage of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21; P.L. 106-181) in March 2000, and that were continued through FY2007 by Vision 100 — Century of Aviation Reauthorization Act (P.L. 108-176). Finally, the report discusses a variety of spending guarantee options which may be discussed during the upcoming FAA reauthorization debate.

Background

The FAA budget is divided into four categories. Two of the categories, the Grants-in-Aid for Airports category (basically the Airport Improvement Program (AIP)) and the Facilities and Equipment (F&E) category are considered "capital" accounts or programs because they deal with the development of airport and airway infrastructure. The AIP is a program of capital grant-in-aid for airport development projects such as runways and taxiways, but also funds noise mitigation

and other airport projects.¹ F&E, which is also a capital program, pays for the equipping, housing (such as airport towers), and modernizing of the air traffic control system. The two non-capital categories include Research, Engineering and Development (RE&D) and Operations and Maintenance category (O&M). The RE&D category funds research in support of the AIP and F&E programs as well as safety research. The O&M account pays the salaries of all FAA employees (aviation related) and also funds some maintenance, safety, and administrative activities.

The issue of who should pay for the programs and activities of the FAA predates the creation of the aviation trust fund in 1971 by the Airport and Airway Development and Revenue Acts of 1970. Previously, the FAA's budget had been paid for out of the U.S. Treasury's general fund which is supported by general taxpayer revenues. No dedicated tax revenues were used to fund aviation use prior to implementation of the 1970 Act. The act authorized taxes on aviation users and dedicated their use to aviation purposes by crediting all these tax revenues to the aviation trust fund. Conflicts emerged immediately between those who viewed the aviation trust fund as a capital-only source of funding versus those who viewed it more as the basis of a full user-pay mechanism for all FAA funding. Studies by both the Congressional Budget Office (CBO) and the General Accounting Office (GAO) have concluded that the 1970 Act was intended to provide that the aviation trust fund would finance airport and airway capital needs and that remaining funds could then be used for the operating costs of the airway system (mostly for air traffic control operations) as well.² The issue of the appropriate general fund share of the FAA budget has long been one of the most contentious issues during the reauthorization debates. The general fund share within the context of aviation policy is to cover costs to the aviation system of government use (mostly military) and the benefits of the system to non-users.³ Aviation user groups have historically supported a larger general fund share than has the FAA, the Department of Transportation (DOT), the Office of Management and Budget (OMB) and the congressional budget and appropriations committees who often view, at least part of the general fund contribution as an unwarranted and/or unnecessary subsidization of civil aviation users by the general taxpayer.⁴

The Nixon Administration's FAA budget requests for FY1971 and FY1972 under the new trust fund system brought it into immediate conflict with Congress

¹ Prior to 1982 the aviation trust fund supported the AIP's forerunner program, the Airport Development Aid program (ADAP).

² U.S. Congressional Budget Office. *The Status of the Airport and Airway Trust Fund*. Washington, CBO, 1988. p. X, 1-7; And U.S. General Accounting Office. [Was the Airport and Airway Trust Fund Created Solely to Finance Aviation "Infrastructure." B-281779. Washington, GAO, 1999. 16 p.

³ An example of this benefit, for example, would be the benefit to both individuals and society of the delivery of donor organs to recipients.

⁴ Studies attempting to estimate the public interest share go back as far as 1946. Depending on the study, the public sector cost estimates have varied significantly (change in the military sector has had an impact in particular).

over the budgetary treatment of trust fund revenues.⁵ The Administration treated the new financing system as a user-pay system to fund all or nearly all of the FAA budget, whereas many Members of Congress viewed the trust fund as primarily a user-supported capital fund (although spending on FAA operations was allowable). Adding to the controversy, the Administration's first budget submissions of the trust fund era (the proposed FY1971 supplemental and the President's FY1972 budget proposal) proposed funding both airport and airway facilities at well below the minimum authorized amounts of \$280 million for airport grants and \$250 million for airway facilities. For FY1972, the budget proposed that the remaining trust fund balance be used to pay for FAA administration and operations costs. This would, however, have provided more trust fund financing, \$700 million, for operations than for airport grants and airway facilities combined. Many in Congress saw this holding-down of FAA capital spending to free up trust fund resources for FAA operations costs as a violation of the intent and spirit of the 1970 Act.⁶

A Note on the Unified Congressional Budget and the Aviation Trust Fund

The adoption of the 1970 Act followed closely on the heels of the 1969 congressional adoption of the unified budget concept, a change that would have ongoing influence on both the budgetary treatment of trust fund revenues and the operation of subsequent spending guarantees that rely on trust fund resources.⁷ Under the unified budget concept, all trust fund receipts and expenditures were made part of the annual federal budget. Consequently, trust fund amounts, collected and spent, influence the overall budget deficit or surplus totals. This, in turn, can have an impact on the budgetary treatment of trust fund-supported programs and activities. Although the inclusion of the aviation trust fund within the unified budget was not a major issue during debate over the trust fund's creation, the unified budget has, historically, had an impact on trust fund spending levels. Within the context of the unified budget, an excess of aviation trust fund revenues over expenditures can be seen as an offset in federal deficit computations. In some cases, however, the balance may be seen as having been spent on non-aviation programs or purposes.⁸ Because the balance is invested in short-term Treasury notes (the interest is paid to the

⁵ See U.S. Congressional Budget Office. *Status of Airport and Airway Trust Fund*. Washington, CBO, 1988. p. 3-11.

⁶ U.S. Congress. Senate. Committee on Commerce. Aviation Subcommittee. *Airport and Airway Development and Revenue Acts Amendments of 1971, Hearings on S. 1437*. Hearings held June 22 and 23, 1971. "Serial No. 92-19" 86 p. "To amend the Airport and Airway Development and Revenue Acts of 1970 to further clarify the intent of Congress as to the priorities for airway modernization and airport development, and for other purposes."

⁷ In making this decision Congress apparently relied on President Johnson's Commission on Budget Concepts. See President's Commission on Budget Concepts. p. 109. *Report of the President's Commission on Budget Concepts*. Washington, U.S. GPO 1967.

⁸ Because the mechanism of borrowing from the trust fund, in effect, moves the amount borrowed to the general fund, it is technically impossible to prove that these funds are spent on anything in particular. They become indistinct from all the other revenues flowing into the general fund.

aviation trust fund), the federal government is lending itself an amount roughly equal to the balance. This, in effect, frees up the money for spending elsewhere in the budget without pushing up the overall budget deficit or putting pressure on budgetary ceilings established by the congressional budget process. During the history of the aviation trust fund, concerns have been raised that this situation creates an incentive, for those whose priorities for non-aviation spending (or for deficit reduction) are higher than for aviation spending, to hold-down federal aviation trust-fund-supported spending on aviation. This situation, where the trust fund's unexpended balance (at times, somewhat inaccurately referred to as a surplus) is allowed to grow and is not spent on federal aviation programs and activities, has been opposed by much of the aviation community and by the transportation authorizing committees.⁹ The unexpended balance has also been a factor cited in attempts, since the creation of the trust fund, to legislate mechanisms that would encourage full funding of FAA's capital budgets and assure that the aviation trust fund revenues are spent for aviation purposes only.

Airport and Airway Development and Revenue Acts Amendments of 1971 (P.L. 92-174)

Although the Nixon Administration quickly agreed to increase airport grants for FY1972 to the \$280 million minimum, and expressed the intent to meet the minimum spending goals for both airport grants and airways facilities over the 10-year life of the trust fund's tax provisions, Congress passed the Airport and Airway Development and Revenue Acts Amendments of 1971, effectively banning the spending of trust fund money on FAA operations.¹⁰

The 1971 amendment was a strong congressional reaction consistent with many Members' perceptions that the Nixon Administration was ignoring the intent of Congress under the 1970 Act. The reaction embodied in the 1971 amendment went beyond merely clarifying Congress's intent and significantly narrowed the allowable use of trust fund revenues. The Amendment made the trust fund a capital-only account (although only temporarily).¹¹ The 1971 amendment eliminated the user-pay component. Ironically, by reinforcing the congressional intent that the trust fund be used primarily as a capital account, the 1971 amendment eliminated the secondary intent that private sector users, through taxes imposed under the 1970 Act, would help pay for the federal services they benefitted from (once capital needs of the airport and airway systems were met). The change, by making all non-capital components of the FAA's budget dependent on general fund revenues, left the FAA

⁹ Because there are outstanding commitments against these balances, the entire trust fund balance is generally not considered available for further spending and most observers consider the "uncommitted" balance to be a better indicator of the amount of trust fund resources that could be available for additional spending.

¹⁰ The Airport and Airway Development Act of 1970 authorized the taxes that supported the trust fund through FY1980.

¹¹ See U.S. General Accounting Office. *Congressional intent: whether or not the Airport and Airway Trust Fund Was Created Solely to Finance Aviation "Infrastructure."* "B-281779" Washington, GAO, 1999, 16 p.

more exposed to the fiscal pressures that emerged from the constrained general budgetary environment of the period. During FY1973-FY1976 the trust fund appropriated share of operations was zero. The general fund share of the total FAA appropriations was 56% for FY1973, 81% for FY1974, 83% for FY1975, and 65% for FY1976.¹² The uncommitted end-of-year balance grew to \$1.688 billion at the end of FY1976.¹³

The Cap and Penalty Era: FY1977-FY1998¹⁴

Airport and Airway Development Act Amendments of 1976 (1976 Act; P.L. 94-353) and the Aviation Safety and Noise Abatement Act of 1979 (1979 Act; P.L. 96-193, Section 201)

In 1976, during hearings on the aviation trust fund, Administration officials continued to assert that the 1970 Act was “intended to adopt a very broad user tax policy and to impose taxes that would pay for the full costs of the airways system including operation and maintenance.”¹⁵

In the end, although Congress acknowledged that the aviation taxes in the 1970 Act were intended to be user fees that could be used to fund both capital projects and some operations costs, concerns still remained in Congress that the Executive branch would deplete the trust fund to fully fund FAA operations and thereby constrain spending on airport and airway capital needs. Consequently, despite the implicit acknowledgment that some spending for FAA operations was appropriate, the 1976 Act included “cap and penalty” provisions, to prevent any “misuse” of funds by the Administration.¹⁶

¹² Ibid. p. 12.

¹³ CBO. *Status of the Airport and Airway Trust Fund*. p. 12.

¹⁴ The statistics used in Table 1 through Table 6 have been drawn from a number of sources. AIP and ADAP authorizations and obligation limitations for FY1977 through FY2004 were drawn from annual ADAP and AIP reports. Appropriations for F&E; R,E&D; O&M; FAA as a whole, and the trust fund share of O&M and general fund share of the FAA budget for FY1977-FY1998 were drawn from Table 3 in GAO report B-281779. The uncommitted aviation trust fund balances for FY1971-FY1988 were drawn from Table 2 of the Congressional Budget Office report, *Status of the Airport and Airway Trust Fund: a Special Study*. More recent trust fund balances were drawn from the Air Transport Association internet site at [<http://www.airlines.org/files/trustfund.pdf>]. CRS was unable to locate any record of the actual calculation of the cap and penalty amounts. The estimated figures in Tables 1-6 were calculated according to the legislation cited using the data shown in the tables. Authorizations for F&E and R,E&D were drawn from various authorization conference reports and data provided by FAA.

¹⁵ House. Ways and Means. *Status of the Airport and Airway Trust Fund*. p. 29.

¹⁶ P.L. 94-353 Section 6 (c) & (d), 90 Stat 871, 873 (1976). For a discussion see U.S. Congress. House. *Status of the Airport and Airway Trust Fund*. Hearing held Apr. 12-13, 1976. Washington, GPO, 1976. 179 p.

The Cap. Accordingly, Section 6 (d) of the act placed a cap on the use of trust fund revenues for costs of air navigation services of \$275 million for FY1977, \$275 million for FY1978, \$300 million for FY1979, and \$325 million for FY1980. No cap was authorized for FY1981 due to the lapsing of the FAA's authorization.

Table 1: Cap and Penalty Under the 1976 Act as Amended by the ASNAA 1979
(\$ in millions)

| | FY1977 | FY1978 | FY1979 | FY1980 | FY1981 |
|-------------------------|--------|--------|--------|--------|--------|
| ADAP (Auth) | \$510 | \$540 | \$575 | \$667 | \$450 |
| ADAP (Oblim) | 545 | 540 | 629 | 640 | 450 |
| F&E (Auth) | 250 | 250 | 250 | 250 | 0 |
| F&E (Approp) | 200 | 209 | 345 | 293 | 350 |
| TF share of O&M | 250 | 275 | 300 | 325 | 525 |
| Cap | 250 | 275 | 300 | 325 | 0 |
| GF Share of FAA Budget | 1,488 | 1,623 | 1,733 | 1,845 | 1,815 |
| %GF share of FAA Budget | 59% | 59% | 56% | 57% | 54% |
| Trust Fund Balance | 1,801 | 2,284 | 2,794 | 3,803 | 3,014 |

Source: see footnote 13. For explanation of table see text.

The Penalty. In addition, Section 6 (d) imposed a penalty clause that reduced these caps proportionally due to any failure to fund airport grants at the program's authorized obligation level.¹⁷ In effect, the caps would have been reduced by the same fraction of Airport Development Aid Program (ADAP) obligation limitation¹⁸ (ObLim) to ADAP authorization. For example, if ADAP grant ObLim was 3/4 of ADAP authorizations then the cap on trust fund operations spending would be reduced to 3/4 of the statutory cap for the fiscal year. In the 1979 Act, added a second penalty provision. The provision provided, for FY1980 and FY1981, that any failure to fully obligate F&E funding up to the appropriated level would lead to a

¹⁷ U.S. Congress. Committee of Conference. *Airport and Airway Development Act Amendments of 1976: Conference Report*. Senate Rept. 94-975. Washington, GPO, 1976. p. 22-24. Also CBO, *Status of the Airport and Airway Trust Fund*. p. 7-8.

¹⁸ The obligation limitation or limitation on obligations is a ceiling on the sum of all obligations that can be made within a fiscal year. The term is used for the ADAP and the AIP programs' funding. For the purpose of this report it is analogous to the appropriated amount.

reduction of the cap by an amount equal to the dollar shortfall.¹⁹ Supporters of this provision may have hoped this would encourage FAA to speed up its implementation of the NAS plan.

During FY1977-FY1981 no penalties were assessed. ADAP's obligation limitations equaled or exceeded its authorizations in FY1977-FY1979 and 1981. The \$17 million short fall in FY1980 did not lead to a penalty perhaps because F&E appropriations exceeded the F&E authorization by \$43 million, more than making up the difference.

The cap and penalty regime seems to have had a significant impact on the general fund share of FAA funding. Although the removal of the outright ban on O&M spending of trust fund resources (which were in effect from FY1973 to FY1976) lowered the general fund share of the FAA budget, it remained high under the 1976 Act, averaging 57% during FY1977-FY1981. The general fund share had averaged 71% under the 1971 Act.

The restriction on trust fund spending for operations in the 1971 Amendments act and the new provisions in the 1976 Act, succeeded in limiting trust fund spending on FAA operations and maintenance (O&M), but appropriations for the capital programs did not rise sufficiently to absorb the excess revenue created by the rising tax revenues dedicated to the trust fund. Over time, the uncommitted aviation trust fund balances continued to grow. On September 30, 1980 when the original aviation trust fund authorization expired, the fund had a projected uncommitted balance of roughly \$3.8 billion.

Disputes over what to do about the aviation trust fund balance, along with continuing disagreements over the valid use of trust fund revenues and whose taxes should support the fund, as well as concerns about deficit spending in general, all had a part in the legislative deadlock that led to the lapsing of the aviation trust fund's authorization on October 1, 1980. The gridlock on reauthorization continued for almost two years. Because of the absence of revenues during the lapse, while outlays from the trust fund continued, the uncommitted balance fell to just over \$2 billion at the end of FY1982.

¹⁹ P.L. 96-193 Section 201 (d); 94 Stat. 50,54.

Airport and Airway Improvement Act of 1982 (1982 Act; Title V of P.L. 97-248) as amended by the Surface Transportation Assistance Act of 1982 (STAA; P.L. 97-424, Section 426 (c))

The 1982 Act authorized the operation of the operation of the trust fund from September 1, 1982 through December 31, 1987, as well as reauthorizing the taxes supporting the trust fund.²⁰

Section 506 (c) of the 1982 Act significantly modified the existing “cap and penalty” provisions of the 1976 Act.²¹ Instead of setting dollar amounts to cap operations and maintenance spending from the trust fund, the 1982 Act set \$800 million for FY1982 but for later years established the cap as the amounts actually made available for AIP times a multiplier (2.44 for FY1983, 1.57 for FY1984, 1.39 for FY1985, 1.28 for FY1986, and 1.34 for FY1987). Four months later, however, Section 426 (c) of the STAA of 1982 included a provision that significantly reduced the caps for FY1983-FY1985.²² **Table 2** sets forth the cap amounts and related data.

The Cap under the 1982 Act, as amended. The amended Act retained the \$800 million cap for FY1982 but lowered the cap ratio (applied against funds made available for AIP) for the next three fiscal years as follows: 1.83 for FY1983; 1.25 for FY1984; 1.28 for FY1985. The ratios for the following two years remained the same at 1.28 for FY1986 and 1.34 for FY1987. Using ratios, in effect, made the cap flexible: the more funds were obligated for AIP the more money would be available from the trust fund for O&M. It was probably hoped this would make the spending on AIP more attractive to both OMB and the appropriations committees. There is no clear evidence, however, that it had this intended effect.

The Penalty. The basis of the penalty provision was changed from the amounts made available for airport grants under the 1976 Act to the amounts made available for F&E under the 1982 Act. The amounts authorized from the trust fund for O&M for any fiscal year were to be reduced by twice the amount that authorizations exceeded appropriations for F&E plus twice any F&E carryover funds from the previous year.²³ This change in the penalty provision appears to have been

²⁰ See U.S. Congress. Joint Committee on Taxation. *General Explanation of the Revenue Provisions of the Tax Equity and Fiscal Responsibility Act of 1982; Joint Committee Print*. Washington, GPO, 1983. p. 403-409. The Air Traffic Controller strike and the firing of the controllers in 1981 temporarily reduced personnel costs in 1981 and perhaps 1982.

²¹ 96 Stat 678. As mentioned earlier, the Aviation Safety and Noise Abatement Act of 1979 (P.L.96-193; 94 Stat 50,54) had, for FY1980, added a penalty provision which reduced the amount available for operations and maintenance on a dollar-for-dollar basis for any failure to obligate the fully authorized amount for F&E for FY1980-FY1981. For the new provisions see U.S. Congress. Senate. Committee of Conference. *Tax Equity and Fiscal Responsibility Act of 1982: Conference Report to accompany H.R. 4961*. Washington, GPO, 1982.p. 374-376, 704-707.

²² 96 Stat. 21.

²³ The carryover provision was probably a device to prevent carryover funds from being (continued...)

made for two reasons. First, the cap now already included incentives for higher spending on AIP. Second was the increase in authorizations for F&E (included in Section 506 of the 1982 Act) under the influence of the proposed NAS plan and the growing perception that the airway system needs (mostly for air traffic control) were great. In short, the cap would provide incentives for spending on AIP while the penalty provisions would protect the increased spending on F&E. The 1982 Act also restricted O&M spending to the direct costs required to operate, and maintain air navigation facilities.

Table 2. Cap and Penalty Under the 1982 Act, as Amended by the STAA 1982

(\$ in millions)

| | FY1982 | FY1983 | FY1984 | FY1985 | FY1986 | FY1987 |
|----------------------------------|--------|--------|--------|--------|---------|---------|
| AIP (Auth) | \$450 | \$800 | \$994 | \$987 | \$1,017 | \$1,017 |
| AIP (Oblim) | 450 | 805 | 800 | 925 | 885 | 1,025 |
| F&E (Auth) | 261 | 725 | 1,393 | 1,407 | 1,377 | 1,164 |
| F&E (Approp) | 261 | 625 | 750 | 1,358 | 895 | 805 |
| Cap (1983-1987 are estimates) | 800 | 1,474 | 1,000 | 1,184 | 1,133 | 1,374 |
| Penalty (estimates) | 0 | 200 | 1,286 | 98 | 964 | 718 |
| TF share of O&M | 810 | 1,227 | 0 | 1,110 | 427 | 621 |
| GF Share of Total FAA Budget | 1,482 | 1,302 | 2,586 | 1,589 | 2,298 | 2,337 |
| %GF share of FAA Budget | 48% | 32% | 59% | 30% | 48% | 47% |
| Trust Fund Balance (uncommitted) | 2,088 | 1,992 | 3,010 | 2,868 | 3,875 | 5,559 |

Source: see footnote 13. For explanation of table see text.

As can be seen in **Table 2**, during three of the six years shown, the appropriated level of the trust fund share for O&M appropriations conformed to the cap provisions of AAIA 1982, as amended. Five of the six years, FY1983-FY1987, however, were subject to penalties because AIP and F&E funding was less than their authorizations. For three of these years, however, FY1984-FY1986, the reduction in the trust fund share of operations was less than the penalty. Even so, the aggregate

²³ (...continued)

counted as current year “funds made available” under the penalty provision. This could have been seen as counting some of F&E appropriations in more than one year as a means of lessening a penalty assessment.

amount made available from the trust fund for O&M for FY1983-FY1987 was \$2.7 billion less than the aggregate of the caps for these five years.

The general fund share of the total FAA budget was somewhat lower than under the previous authorization, averaging 44% per year (down from an average of 57% for the previous five years). The size of the penalties in FY1984, FY1986, and FY1987 appears to have influenced the relatively high general fund share for those years.

The uncommitted balance of the trust fund increased nearly 180% from its FY1983 low of \$1.992 billion to its FY1987 high of \$5.559 billion.²⁴ Also, the uncommitted balance appears to have surged in the high penalty years of FY1984, FY1986, and FY1987.

The role of the cap and penalty provisions in causing the rapid growth of the trust fund's uncommitted balance and its role in maintaining the high general fund share increasingly became a focus of disagreement between authorizing and appropriating committees.²⁵ This led to struggles during the annual appropriations process between supporters of full adherence to the cap and penalty rules (often authorizing committee members) and those who felt the impact of the rules was excessive and would argue for a partial application of the penalties (often appropriations committee members).

The goal of the cap and penalty provisions continued to be to insure that the aviation trust fund operate primarily as a capital account supporting AIP and F&E while operating, in part, as a user pays system to support some operations spending. However, although the cap and penalty provisions restricted the spending on operations, they did not result in full appropriation of the authorized AIP and F&E funding levels. According to CBO,²⁶

Primarily because of program constraints, these provisions have merely altered the accounting for aviation spending, forcing the general fund to finance more of these expenditures ... In addition, there still remains an incentive to limit capital spending for aviation programs. Given the annual level of excise tax revenue from aviation, each dollar of aviation spending greater than these tax revenues must be funded by general revenues. Therefore, regardless of the actual accounting for aviation spending, each dollar reduction in spending on aviation either reduces the need for the general fund to finance aviation spending, or produces a trust fund surplus from which the Treasury can borrow to cover nonaviation expenditures.

²⁴ The restart of the trust fund may also have been a factor.

²⁵ See U.S. Congress. Senate. Committee on Appropriations. *Department of Transportation and Related Agencies Appropriations Bill, 1984: Report to Accompany H.R. 3329*. S.Rept. 98-179. See also U.S. Congress. House. Committee on Public Works and Transportation. *Airport and Airway Improvement Act of 1981, Hearing on H.R. 2043*. March 31, April 1-2, 1981. Washington, GPO 1981.

²⁶ CBO. *Status of the Airport and Airway Trust Fund: 1988*. p. 10-11.

As mentioned earlier, the uncommitted balance of the trust fund continued to rise during the the 1982 Act's authorization cycle, reaching \$5.559 billion at the end of FY1987.

Airport and Airway Safety and Capacity Expansion Act of 1987 (P.L. 100-223, 101 Stat 1492; 1987 Act)

The 1987 Act extended the excise taxes at existing rates and reauthorized FAA programs for three years. The act substantially increased the authorizations for both

Table 3. Cap and Penalty Under the Airport and Airway Safety and Capacity Expansion Act of 1987

(\$ in millions)

| | FY1988 | FY1989 | FY1990 |
|----------------------------------|---------|---------|---------|
| AIP (Auth) | \$1,700 | \$1,700 | \$1,700 |
| AIP (Oblim) | 1,269 | 1,400 | 1,425 |
| F&E (Auth) | 1,377 | 1,730 | 2,191 |
| F&E (Approp) | 1,108 | 1,384 | 1,721 |
| R, E & D (Auth) | 201 | 216 | 222 |
| R, E & D (Approp) | 153 | 160 | 170 |
| Cap (estimated) | 1,265 | 1,472 | 1,658 |
| Penalty (estimated) | 1,496 | 1,002 | 1,094 |
| Trust Fund share of O&M | 826 | 471 | 807 |
| GF Share of total FAA Budget | 2,358 | 2,974 | 3,017 |
| %GF share of FAA Budget | 41% | 47% | 42% |
| Trust Fund Balance (uncommitted) | 5,841 | 6,870 | 7,446 |

Source: see footnote 13. For explanation of table see text.

AIP and F&E. Air traffic had continued to surge during the previous authorization period, increasing the pressure on the airport and airway system capacity. The NAS plan's implementation had not progressed as quickly as planned in part for technological reasons. Some attributed delays in the capital projects to constraints on trust fund capital spending imposed for deficit reduction purposes.²⁷ Others,

²⁷ Ibid. Also U.S. Congress. House. Committee on Public Works and Transportation. Aviation Subcommittee. *Reauthorization of the Airport and Airway Trust Fund and Related Issues: Hearings*. Hearings held Feb. 24-25, Mar. 4-5, 1987. Washington, GAO, 1987. 1111 p.

however, argued that it was delays in implementation of the NAS plan that led to appropriations lagging behind authorizations.²⁸

The act also made changes to the existing “cap and penalty” provisions on O&M spending.

The Cap. The new provision (Section 105 (c)) amended the cap to 50% of the total annual appropriations for AIP, F&E, and RE&D.

The Penalty. Under Section 105, the annual caps would be reduced by twice the amount of any shortfall between the total of AIP obligation limitation and the appropriation for F&E and RE&D for each year, versus amounts specified in the act for each fiscal year (\$3.278 billion for FY1988, \$3.445 billion for FY1989, and \$3.863 billion for FY1990).

The act also added an additional penalty of sorts by directing a following year AIP appropriation increase equal to twice the difference between the current year authorization and current year appropriation for the three programs (referred to by some as “pop-up budget authority”).²⁹

As can be seen in **Table 3**, although the trust fund share of O& M funding was reduced substantially below the cap, the reduction only approximated the penalty amount during one year, FY1989. For FY1988 and FY1990, although the trust fund shares of O&M funding provided for amounts that were significantly below the caps, the reductions were not equal to the full penalties for those years. Despite this, the aggregate amount made available from the trust fund for O&M was nearly \$2.3 billion below the aggregate of the caps for these years and therefore roughly this amount would have remained credited to the aviation trust fund.

The general fund share remained over 40% during this authorization. During FY1989, the year that the penalty was fully assessed against the spending ceiling, the general fund share was 5-6% higher than in other years and this may indicate that the penalties could have had an effect on the general fund share. Also the uncommitted balance in the trust fund rose 18% in FY1989, compared to 5% in FY1988 and 8% in FY1990, indicating that the higher penalty assessment for FY1989 may have had a significant impact on the growth of the uncommitted balance.

Tax Trigger Provisions. In addition, the 1987 Act added a provision for FY1988-FY1989 that would trigger a reduction in the aviation tax rates, if the total

²⁸ See S.Rept. 100-198 p. 31. The Senate report for the 1989 Appropriations bill argued that major subsystems of the NAS were still in development and had not reached the stage where major expenditure of trust fund resources was feasible and, in any case, the NAS subsystems were behind schedule due to technical and managerial problems. The report also mentions the surge in ticket tax revenues from the increase in air travel in the preceding years and argued that the cap and penalties system had reduced the amount of trust fund money that would have been spent by \$3.3 billion.

²⁹ This budget authority does not appear to have resulted in an increase in amounts actually made available.

of the obligation limits for AIP and the appropriations for F&E and R,E&D for FY1988-FY1989 were less than 85% of the total amounts authorized for these programs. If this situation occurred, then in 1990, the GA fuel rates, ticket tax, and waybill tax would be reduced by 50%. The international departure tax would not be changed. The idea behind the tax penalty was that it would eliminate the incentive to hold down spending on capital improvements for budget deficit or non-aviation spending purposes because more revenue would be lost than could be saved in outlays or added to the unexpended balance.³⁰

The tax reduction trigger was never implemented. This was not only due to a reluctance to follow through on such a large percentage cut, but also because of pressure to reduce the overall federal budget deficit. The amounts appropriated for FY1988 and FY1989 together were just over 80% of the combined authorizations for those years. Without a legislative adjustment, the trigger would have taken effect on January 1, 1990. However, to meet its reconciliation target the House Ways and Means Committee proposed delaying the trigger mechanism for one year, estimating that this would save \$851 million in FY1990 and \$269 million for FY1991. Although supporters of the trigger mechanism, mostly on the authorizing committees, voiced opposition to an extension of the trigger date, an extension of the date to January 1, 1991 was included in the Revenue Reconciliation Act of 1989 (Title VII of the Omnibus Budget Reconciliation Act of 1989, P.L. 101-239).

At the end of FY1990 the uncommitted balance had grown to \$7.446 billion from \$5.559 billion at the beginning of FY1988.

As the 1990 FAA reauthorization approached, appropriators and budgeteers became more persistent in expressing their concerns. Among the complaints was that the “penalty clause” in Section 506 (c) of the AAIA had resulted in general fund overpayments for FAA expenses that, in effect, had the general taxpayer subsidizing aviation users. Congressional Budget Office testimony reflected this view

The current accumulated surplus in the aviation trust fund is illusory. While this surplus appears to indicate that private-sector users have paid more in taxes than they have received in services, the opposite is, in fact, the case. The uncommitted balance in the trust fund has developed, ironically, because private-sector users of the aviation system have received more in capital and operating spending than they have paid in taxes ... the Airport and Airway Trust Fund is particularly affected by provisions of law that restrict the level of trust fund financing of operations expenditures for the Federal Aviation Administration. These provisions tie the level of funding to the obligation limits for airport grants and the appropriations for capital and research expenditures. Generally speaking, the closer these appropriations are to their authorized levels, the greater the trust fund financing of operations. Largely because of technical problems in the modernization of the airway system, appropriations of capital expenditures have lagged behind authorizations. The result has been a low proportion of FAA

³⁰ Op. Cit. p. 11. Also GAO. Congress’ Intent. p. 8.; U.S. Congress. House. Committee on Ways and Means. *Explanation of the Airport and Airway Revenue Act of 1987: Committee Print*. Washington, GPO, 1987. 23 p. and U.S. Congress. Senate. Committee on Finance. *Explanation of the Airport and Airway Revenue Act of 1987: Committee Print*. Washington, GPO, 1987. 17 p.

spending being debited to the trust fund and an accompanying rise in its accumulated surplus.³¹

Omnibus Budget Reconciliation Act of 1990 (OBRA-90; P.L. 101-508)

OBRA-90 authorized FAA programs through FY1992 (Title IX of the act).³² OBRA-90 reflected concerns of the time with the budget deficit. Accordingly, the tax increases in the act were designed, in part, to contribute to federal budget deficit reduction. The increases in aviation taxes were to go to the general fund for deficit reduction through FY1992 and then to the aviation trust fund through FY1995. The

Table 4. Cap and Penalty Under OBRA-90

| | FY1991 | FY1992 | FY1993 |
|----------------------------------|---------|---------|---------|
| AIP (Auth) | \$1,800 | \$1,900 | \$2,025 |
| AIP (Oblim) | 1,800 | 1,900 | 1,800 |
| F&E (Auth) | 2,500 | 3,000 | 2,700 |
| F&E (Approp) | 2,095 | 2,409 | 2,302 |
| R, E & D (Auth) | 260 | 260 | 270 |
| R, E & D (Approp) | 205 | 218 | 230 |
| Total O&M Appropriations | 4,037 | 4,360 | 4,530 |
| Cap (estimated) | 2,003 | 2,138 | 2,315 |
| Penalty (repealed in 1990) | none | none | none |
| TF share of O&M | 2,003 | 2,110 | 2,279 |
| GF share of total FAA Budget | 2,034 | 2,250 | 2,251 |
| %GF share of FAA Budget | 25% | 25% | 25% |
| Trust Fund Balance (uncommitted) | 7,686 | 6,872 | 4,268 |

Source: see footnote 13. For explanation of table see text.

bill also included provisions allowing airports to levy a head tax, called a passenger facility charge (PFC) on each enplaning passenger. The PFC is not a federal tax but

³¹ U.S. Congress. House. Committee on Appropriations. *Transportation Appropriations Act, 1991*. H.Rept. 101-584. Washington, GPO, p. 39-40.

³² OBRA-90 authorized FAA programs through FY1992 only. The Airport and Airway Safety, Capacity, Noise Improvement and Intermodal Transportation Act of 1992, P.L. 102-581, reauthorized funding for aviation programs through FY1993.

a local tax levied with FAA permission. One of the rationales for allowing airports to levy PFCs was that PFCs would lessen the level of funding that would otherwise be needed for the AIP. This concern over deficit spending as well as the concerns over the growing unexpended balance of the trust fund and the large general fund share of the FAA budget, discussed in the previous section, may have also had an impact on the changes made in OBRA-90 to existing cap and penalty mechanisms.

The Cap. Section 9107 of OBRA-90 changed the cap to 75% of the remainder of the total amounts made available for AIP, F&E, RE &D, and O&M less the amounts made available for AIP, F&E, and R,E&D.³³

The Penalty. The penalty provision was eliminated. The tax trigger rate reduction mechanism was also eliminated.

The elimination of the penalty was part of an agreement between authorizing and appropriating committees that provided for full funding of AIP in return for the elimination of the penalty provisions. The agreement remained in effect for two years FY1991-FY1992 (the penalty was not reinstated, however).

Under the OBRA-90 mechanism, trust fund spending for O&M was equal to or slightly below the statutory cap. The overall general fund share of total FAA appropriations was 25% for FY1991-FY1993. The uncommitted balance dropped from an all time high of \$7.686 billion to \$4.268 billion in FY1993.

Federal Aviation Administration Reauthorization Act of 1994 (P.L. 103-305; 1994 Act)

The 1994 Act reauthorized funding for both FAA programs and the aviation trust fund through FY1996.

The Cap. Section 102 (b)(3) of the 1994 Act (108 Stat. 1571) altered the operations spending cap to the lesser of 50% of the amount of funding made available for F&E, AIP and R,E&D, or 70% of the total amounts made available to FAA, less the amounts made available from the trust fund for F&E, AIP, and R,E&D.

³³ Section 103 of the Airport and Airway Safety, Capacity, Noise Improvement, and Intermodal Transportation Act of 1992 (P.L. 102-581, 106 Stat. 4872) extended the OBRA-90 cap provision.

**Table 5. Cap under the Federal Aviation Administration
Reauthorization Act of 1994**

(\$ in millions)

| | FY1994 | FY1995 | FY1996 |
|-------------------------------------|---------|---------|---------|
| AIP (Auth) | \$2,970 | \$2,161 | \$2,214 |
| AIP (Oblim) | 1,690 | 1,450 | 1,450 |
| F&E (Auth) | 2,524 | 2,670 | 2,735 |
| F&E (Approp) | 2,055 | 1,960 | 1,855 |
| R, E & D (Auth) | 297 | 267 | 280 |
| R, E & D (Approp) | 254 | 252 | 186 |
| Total O & M Appropriations | 4,579 | 4,572 | 4,643 |
| Total FAA Appropriations | 8,578 | 8,234 | 8,134 |
| Cap (estimated) | 2,000 | 1,831 | 1,746 |
| TF share of O&M | 2,295 | 2,450 | 2,223 |
| GF share of total FAA Budget | 2,285 | 2,122 | 2,420 |
| %GF share of FAA Budget | 27% | 26% | 30% |
| Trust Fund Balance (uncommitted) | 3,667 | 5,127 | 2,377 |

Source: see footnote 13. For explanation of table see text.

For FY1994-FY1996 the trust fund share of O&M exceeded the statutory caps in each of the years. Because there was no penalty provision for the funding of AIP and F&E below the statutory caps and because opposition to the lack of adherence to the caps was insufficient to prevent passage of the transportation appropriations bill, Congress was able to fund FAA at a level that began reducing the unexpended balance in the trust fund.³⁴

Aviation Tax Authority Lapses. Although the reauthorization of aviation taxes had not been expected to be controversial, the legislative vehicle chosen, the budget reconciliation act of 1996, was vetoed by President Clinton over other provisions in the bill.³⁵ Authority to collect taxes for the aviation trust fund expired on January 1, 1996. Spending from the fund, however, continued. The lapse continued for nearly eight months, until August 27, 1996, when it was extended to

³⁴ See *Department of Transportation and Related Agencies Appropriations Bill, 1996*. H.Rept. 104-177. Washington, GPO, 1995. p. 45-46.

³⁵ See CRS Report 97-657, *Aviation Taxes and the Airport and Airway Trust Fund*, by John W. Fischer.

the end of the calendar year by the Small Business Job Protection Act of 1996 (P.L. 104-188). The authority lapsed again for roughly two months on January 1, 1997.³⁶ The trust fund did not receive an estimated \$4 billion during the first lapse and an estimated \$1 billion during the second. Because spending from the trust fund continued (spending was reauthorized under the 1996 Act discussed below) the uncommitted balances of the trust fund were drawn down substantially. The end-of-year uncommitted balance was \$1.354 billion for FY1997. It had been \$5.127 billion at the end of FY1995.

Federal Aviation Authorization Act of 1996 (P.L. 104-264; the 1996 Act)

Although the 1996 Act was debated during the period when the aviation taxes had lapsed, the act reauthorized FAA operations, AIP, and F&E and the trust fund expenditure authority for two years, through September 30, 1998, and authorized R,E&D for one year through September 30, 1997, but did not reauthorize the taxes that supported the trust fund.

Table 6. Cap Under the Federal Aviation Reauthorization Act of 1996
(\$ in millions)

| | FY1997 | FY1998 |
|----------------------------------|---------|---------|
| AIP (Auth) | \$2,280 | \$2,347 |
| AIP (Oblim) | 1,460 | 1,700 |
| F&E (Auth) | 2,068 | 2,129 |
| F&E (Approp) | 1,938 | 1,901 |
| R, E & D (Auth) | 209 | 227 |
| R, E & D (Approp) | 208 | 199 |
| Total O&M Appropriation | 4,955 | 4,579 |
| Total FAA Appropriation | 8,561 | 9,136 |
| Cap (estimated) | 1,803 | 1,900 |
| TF share of O&M | 1,700 | 1,902 |
| GF Share of Total FAA budget | 3,255 | 3,435 |
| %GF share of FAA Budget | 34% | 36% |
| Trust Fund Balance (uncommitted) | 1,345 | 4,339 |

Source: see footnote 13. For explanation of table see text.

³⁶ The Airport and Airway Trust Fund Reinstatement Act of 1997 (P.L. 105-2) authorized aviation taxes for the period March 7, 1997 through September 30, 1997.

The Cap. Section 103 (b)(3) of the 1996 Act (108 Stat. 1571) moved the operations spending cap to 72.5% of total amounts made available to FAA (general fund and trust fund) less the amounts made available from the trust fund from AIP, F&E, and R,E&D.

For the years FY1997-FY1998, the trust fund share of O&M was near or below the cap (see **Table 6**). The general fund share for these years increased to 34% and 36% respectively, roughly 10% above the previous authorization cycle, possibly in part reflecting adherence to the caps. However, from a low of \$1.345 billion, the uncommitted balance rebounded quickly to \$4.339 billion at the end of FY1998 following the passage of the Taxpayer Relief Act of 1997 (P.L. 105-34), which provided for a significant increase in revenues.

FAA Funding in the Cap and Penalty Era (FY1977-FY1998)

The success of the various cap and penalty provisions was mixed and its apparent successes were marked with unintended consequences. It is also difficult to determine cause and effect in separating out the impact of the cap and penalty provisions from other influences. Support for adherence to fully implementing the penalties appears to have been influenced by events such as the delays in FAA's implementation of the NAS. For example, this was reflected in years when the penalties were only partially imposed, in recognition that the authorization levels for F&E were based on optimistic assumptions. Also, especially in the mid-1990s, attempts to rein in the budget deficit had an impact on the budgetary treatment of trust fund revenues. In addition, because the penalties seem to put upward pressure on both the general fund share and the uncommitted trust fund balance, it is unclear that the mechanism provided for a net increase in overall FAA spending.

The first Cap and Penalty regime appears to have been successful in providing for funding of AIP for FY1977-FY1979 and for both AIP and F&E in FY1980 at levels near or very near to their authorized levels. However the uncommitted balance in the trust fund increased rapidly during this period and the general fund share remained over 50%. While supporters of trust fund spending on AIP and F&E and maintaining a substantial general fund share might see this as success, some critics would note that much of the trust fund money squeezed out of the operations budget was mostly retained in the trust fund and simply not spent.

During the 1980s, adherence to the penalty provisions varied from year to year probably due to the varying degree of support for implementing the penalties during the appropriations process. This was also a period when appropriators were skeptical of FAA's ability to successfully manage and spend the amounts authorized for F&E.

Eliminating the penalty under OBRA-90 led to a period in the 1990s when the capital programs were funded below the authorized levels and the trust fund share of O&M often exceeded the legislated caps. The 1990s, however, were also a period when there was a consensus that the overall federal budget deficit was a problem and this likely had an impact on the funding of AIP and F&E, and on the support for enforcing the cap provisions. As was mentioned earlier, the broader budget environment can trump the spending mechanisms.

Although the various “cap and penalty” mechanisms may have succeeded in restricting spending from the aviation trust fund on operations, they did not necessarily succeed in forcing full appropriation of authorized AIP and F&E funding levels in a number of years. The cap and penalty provisions, combined with the appropriations shortfalls, led also to the growth of the trust fund’s uncommitted balance. As a Congressional Budget Office (CBO) report explained,³⁷

Primarily because of program constraints, these provisions have merely altered the accounting for aviation spending, forcing the general fund to finance more of these expenditures.... In addition, there still remains an incentive to limit capital spending for aviation programs. Given the annual level of excise tax revenue from aviation, each dollar of aviation spending greater than these tax revenues must be funded by general revenues. Therefore, regardless of the actual accounting for aviation spending, each dollar reduction in spending on aviation either reduces the need for the general fund to finance aviation spending, or produces a trust fund surplus from which the Treasury can borrow to cover non-aviation expenditures.

In effect, within the context of the unified congressional budget, appropriators and budgeteers were more concerned about the overall size of the budget or deficit than whether below-authorized spending on AIP and F&E caused a squeezing-down of trust fund spending for O&M. If the intent of the cap and penalty provisions was essentially political, however, (i.e. to shore up support for the authorization bills among those who were concerned about trust fund spending on operations), then it may be viewed as being at least partially successful.

In the end the tax reduction trigger also proved somewhat ineffective. Although, as structured, the trigger should have removed the incentive to restrain spending on FAA’s capital and research programs, broader budgetary needs mitigated against this result.

Current FAA Funding Guarantees

During the reauthorization debate that preceded the passage of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (P.L. 106-181; AIR-21) supporters of spending guarantees wanted a mechanism that would resolve the three issues that manifested themselves under the cap and penalty provisions. First, they wanted legislation that would better assure full funding of the FAA capital budget accounts, AIP and F&E. Second, they wanted the legislation to assure that spending from the trust fund would roughly equal trust fund revenues each fiscal year and thereby prevent the accumulation of large balances in the fund. Third, they wanted an outcome that would continue a significant general fund share for the operations account. Provisions that would have accomplished this by taking the aviation trust fund off-budget or erecting budgetary “firewalls” to assure that all trust fund revenues and interest would be spent each year for aviation purposes never emerged from the conference committee. Instead AIR-21 provided for funding

³⁷ CBO. *Status of the Airport and Airway Trust Fund: 1988*. p. 10-11.

guarantees that were to be enforced by points-of-order. Vision-100 retained these provisions.

Guaranteed or Out-of-Order

There are two existing spending guarantees which are different from the previously discussed cap and penalty provisions. One makes it “out of order” in the House or Senate to consider legislation that does not use all aviation trust fund receipts and interest annually. The second, the “capital priority provision,” makes it “out of order” to consider any bill that provides a GF appropriation for any year under AIR-21 or Vision-100 for RE&D or O&M if the sum of the AIP obligation limitation and the appropriation for F&E are below their authorized levels. As a penalty of sorts, any failure to fully fund F&E will lead to an increased appropriation (sometimes informally referred to as “pop-up budget authority”) for AIP equal to the appropriations short fall for F&E.

On its face, the guarantee mechanism seemed to work as designed for FY2001 through FY2003.³⁸ Both F&E and AIP were funded at, or very near, their authorized levels. There were short-falls, but they were relatively small. F&E short-falls mostly reflected across-the-board appropriations rescissions and ranged from roughly \$6 million to \$39 million (for FY2002 funds provided for F&E actually exceeded its authorization by \$107 million). AIP’s short-falls ranged from \$60 to \$105 million. In FY2003 most observers felt that the guarantees were either working or being acquiesced to (at least regarding capital spending). The general fund share of total FAA appropriations varied from 17% for FY2001, 8% for FY2002, and 24% for FY2003.

The next three years, under Vision-100, were years of nearly full funding for AIP. Its obligation limitation was \$3.294 billion for FY2004, \$3.472 billion for FY2005, and \$3.515 billion for FY2006, just \$106 million, \$28 million, and \$85 million short of AIP’s authorized funding, respectively. F&E, however, did not fare so well during FY2004-FY2006. Its annual appropriation fell below its authorization as follows: \$320 million for FY2004; \$468 million for FY2005; and \$498 million for FY2006.³⁹ The general fund contribution for these years was 22% for FY2004, 20% for FY2005, and 18% for FY2006.

Although AIP did not share the same funding fate as F&E, the F&E experience makes it clear that, as was true with the “cap and penalty” provisions, the current

³⁸ There were no funding guarantees for FY1999 and FY2000. FAA’s authorization lapsed and the extension acts did not extend the cap and penalty provisions which were only authorized through FY1998. See CRS Report RS21621, *Surface Transportation and Aviation Extension Legislation: a Historical Perspective*, by John W. Fischer and Robert S. Kirk. The gap between authorized and appropriated amounts for AIP was \$460 million for FY1999 and \$624 million for FY2000; for F&E the gaps were \$97 million for FY1999 and \$655 million for FY2000. For FY1999 the general fund share dropped to 15%. For FY2000 there was no general fund contribution: the entire FAA budget was paid for from the aviation trust fund.

³⁹ Figures in this paragraph were drawn from FAA’s *Budget[s] in Brief*. 2003-2007.

spending guarantees can still be trumped by broader budget policy goals (such as deficit reduction) or by the spending priorities of appropriators. The experience of F&E lends credence to the view that AIP's funding success has more to do with the popularity of the program within Congress and around the country than the guarantees. Every congressional district has at least one NPIAS airport and nearly every county does also. Although F&E spending benefits localities across the nation, the federal spending involved does not garner the same local government and media attention across the nation as AIP grants.

Under AIR21 and Vision-100, beginning in FY2002, there has been a rapid draw-down of the aviation trust fund's uncommitted balance. From an FY2001 end-of-year uncommitted balance of \$7.3 billion to an estimated balance of \$1.9 billion for FY2005. According to GAO, part of this decline was due to overestimates of trust fund revenues. Actual revenues were \$383 million less than forecast for FY2001, \$2.3 billion less than forecast for FY2002, and \$1 billion less than forecast for FY2003 and FY2004.⁴⁰ Especially in FY2002, but perhaps also a factor in the later years was the post-911 drop in flying, especially at high fare levels. Because the funding guarantee requires that the spending of trust fund resources equal the estimated annual revenues, these overestimates have led to a drawing down of the trust fund's balances. The revenue could be an issue of concern during the reauthorization debate.

Waiver of the Points of Order. Congress, can and often does, waive all points of order against a bill. Spending guarantees that are enforced by point-of-order actions only work if they are raised by a member and if they have not been waived by rule. In the House, recent annual appropriations bills have had all points of order waived by the Rules Committee. Senators have chosen not to raise points of order against violations of the AIP and F&E funding guarantees.⁴¹ Points of order have not been allowed on appropriations bill conference reports. Also the "pop-up" AIP budget authority, which some viewed as part of the mechanism for preventing appropriators from spending any F&E short-fall for non-capital aviation spending, can and has been rescinded. Congress has been rescinding this pop-up budget authority in recent years. These rescissions allow appropriators to bring down the nominal total cost of the Transportation/Treasury Appropriations bills in the next budget year.

The questionable effectiveness of the spending guarantees has implications for the future of FAA spending. As discussed earlier, the uncommitted balance in the aviation trust fund dropped from \$7.674 billion for the end of FY2000 to a projected \$1.195 billion for the end of FY2006. The commitments to spend from the trust fund

⁴⁰ U.S. Government Accountability Office. *Federal Aviation Administration: An Analysis of the Financial Viability of the Airport and Airway Trust fund*. GAO-06-562T. Washington, GAO, 2005. p. 7-9.

⁴¹ In part, this may have been because, if a point of order were upheld, the entire AIP or F&E financing provision would be stricken from the bill that Senate conferees would take to conference. This absence of a funding provision could put the Senate conferees at a disadvantage in negotiating with House conferees over the contents of the bill to be voted out of conference.

have exceeded the trust fund income for each of these years. The resulting smaller trust fund cushion increases the likelihood that AIP and F&E spending could level off or even decline in the face of resistance to raising revenues or increasing general fund spending for FAA. The FAA program authorizations and the authorization of the taxes that provide revenue to the trust fund are scheduled to expire at the same time, September 30, 2007. Given the reduced size of the trust funds uncommitted balance, if the taxes supporting the fund are allowed to expire, the uncommitted balance could quickly become negative.

Funding Guarantee Options

Because of the nature of the topic, the analysis of the various spending guarantees in this report, necessarily, assumes the existing programmatic structure and funding levels of the times. Advocates of the guarantees view the fully authorized funding of the capital programs as well as a significant general fund share as a good thing. Over time, however, there has also been an alternative view, that too much was being spent on FAA programs. This view casts a more critical eye on AIP and F&E, whose funding the guarantees were specifically designed to assure. These critics often view the breadth of AIP spending and ever-widening project eligibilities as allowing for spending that is increasingly inefficient, unfocused and of questionable federal purpose. They are often critical, for example, of the amount of AIP's resources that go to projects at small local airports, that by their nature are questionable from a national mobility standpoint. They tend to view F&E spending as having often been wastefully managed and having pursued questionable technologies that have failed to pan-out. Some would even argue that by downsizing FAA programs and/or restricting program spending, it could be feasible to fund the entire FAA budget out of the trust fund and thereby ease the burden on the general taxpayer.

Despite questions about the effectiveness of existing and previous spending guarantee mechanisms, it may be unlikely that an FAA reauthorization bill would be enacted without language designed to encourage full funding of FAA's capital programs, including AIP. The guarantee language in an authorization bill emphasizes the importance that authorizers place on fully funding AIP and F&E. The provisions are seen by some as helping shore-up support for the overall authorization legislation while the bills work their way through the legislative process. Extending the current guarantees might be enough to maintain the political advantage during the reauthorization debate. Extending or making minor modifications to the existing "guarantees" would probably encounter the least resistance. Should spending guarantees become a major focus of legislative effort, there are a number of options could arise during the debate. It is important to keep in mind that as past history indicates, with the possible exception of the first option, all the options would almost certainly be opposed by the appropriations and budget committees in Congress as well as DOT and the Office of Management and Budget.

Come to an Agreement

As mentioned earlier, historically, the authorizing committees and appropriating committees have approached the funding of FAA programs and activities from different perspectives. Authorizing committees generally support the full authorized level of spending for AIP and F&E as the appropriate level of spending to meet the needs of the nation's airports and airways. Although also concerned about the needs of the airport and airway system, appropriators have viewed trust fund spending within the context of the unified congressional budget and the pressures of the overall budget environment of the time. This conflict of goals between the committees has meant that the AIP and F&E appropriations have often been less than their authorizations. On its face, the simplest way to resolve the disagreement between committees would be for the committees to come to an agreement on trust fund spending. An informal, negotiated "treaty" between the transportation authorizing and appropriating committees, although unusual, has been done at least once in the past. In 1990, the appropriations committees agreed to fully fund AIP and the authorizing committees agreed to eliminate the penalty portion of the penalty and cap regime.⁴² This option has the advantage of being the simplest. Its weakness is that any participant may abrogate the treaty. Under the treaty, AIP was fully funded for two years (FY1991, FY1992).

Impose New Cap and Penalty Provisions

A reimposition of something similar to the cap and penalty provisions of the 1970s or 1980s might be considered by some during reauthorization. The time the cap and penalty mechanism was probably at its most effective was when it was first authorized in 1976. At that time, support in Congress for the provisions was strong, perhaps because it followed closely on the previously mentioned conflicts over the appropriate use of trust fund money with the Nixon and Ford Administrations. This environment might have encouraged adherence to the cap and penalty provisions during the appropriations process.

As mentioned earlier, the success of the cap and penalty provisions has been mixed, and at times may have had a role in unintended consequences such as rapidly growing trust fund balances and, in the view of some, a higher than justified general fund share of the FAA budget. Also, the history of the cap and penalty indicates that, over time, it does not appear to have been successful in assuring the full funding of FAA capital programs such as AIP and F&E. During much of the cap and penalty era appropriators simply absorbed the penalty, allowed the unexpended balance of

⁴² The penalty was repealed in OBRA 1990 (P.L. 101-508, Sec. 9107). See *Department of Transportation and Related Agencies Appropriations Bill, 1991*. H.Rept. 101-584. Washington, Congress, House. Committee on Appropriations, 1990. p. 39-40. See also H.Rept. 102-156. p. 45. The agreement appears to have been promulgated primarily by the House authorization and appropriations committees, however, the Senate agreed to fully fund AIP for FY1991 during conference and for FY1992 recommended full funding for AIP in its reported version of the bill. Although the penalty was not reinstated thereafter, from FY1993-FY2000 AIP was funded significantly below its annual authorizations.

the aviation trust fund to increase as a result, and used this growing balance as an offset for spending elsewhere.

The historical cap and penalty provisions may not be compatible with the current law concerning the “Airport and Airway Trust Fund Guarantee.”⁴³ The guarantee requires that annual trust fund spending equal the estimated receipts for the year. The object of the guarantee is to assure the full spending each year’s trust fund receipts. The cap and penalty mechanism, on the other hand, is designed to limit and penalize certain kinds of spending.

Take the Aviation Trust Fund Off-Budget

Taking the aviation trust fund “off-budget” has, during past reauthorization debates, been proposed as a means of assuring that the tax revenues deposited in the trust fund are used for aviation purposes.⁴⁴ In theory, an off budget entity’s budget authority, receipts, outlays and, in most proposals, any deficit or surplus would not be counted in regard to the congressional or presidential budgets. If the trust fund were off-budget there would be no apparent incentive for budgeteers or appropriators to support spending less on aviation in order to be able to spend more on other government programs or activities. Proponents also argue that unexpended trust fund balances could no longer be used to mask the size of the federal budget deficit. Opponents of off-budget proposals often argue that trust fund revenues should not be separated from overall national needs and fiscal policies. Also, as mentioned earlier in regard with the aviation trust fund, the uncommitted balance has been much reduced in recent years and some are now more concerned about the trust fund going into deficit.

The trust fund’s revenues in and of themselves are not sufficient to cover all of FAA’s needs. This increases the likelihood that an off-budget aviation trust fund would not assure full funding for FAA capital programs. AIP and F&E would still have to compete with other aviation activities, such as operations, for the available trust fund resources in any given year.⁴⁵

Build Budgetary “Fire Walls”

Borrowing from surface transportation legislation, one alternative to taking the aviation trust fund off-budget would be to amend the Balanced Budget and Emergency Deficit Control Act of 1985 to create a discretionary spending guarantee (firewall) for the FAA’s spending.⁴⁶ This could be done by creating a separate budget

⁴³ See P.L. 106-181, Section 106.

⁴⁴ For further discussion see CRS Report RS20350, *Off-Budget Status of Federal Entities: Background and Current Proposals*, by Bill Heniff Jr.

⁴⁵ In 1999 the House passed H.R. 1000 which would have taken the aviation trust fund off-budget. The provision never emerged from conference with the Senate. The budget committee leadership had expressed strong opposition to the provision.

⁴⁶ For an explanation of the discretionary spending guarantees enacted for federal aid to (continued...)

category for aviation and annual spending caps for programs within the category. Funding from within this category could not be used to, in effect, off-set increased spending elsewhere in the budget thereby removing any incentive for restraining the spending of available trust fund revenues. In some ways, this mechanism has effects similar to going off-budget, but the budgetary resources are still counted as part of the unified congressional budget. This would prevent the reduction of FAA capital program spending to free up funding for spending elsewhere in the budget. It is uncertain how effective this would be for FAA spending.⁴⁷ This option would be subject to many of the same caveats as taking the aviation trust fund off-budget but would, in the eyes of proponents of full funding for AIP and F&E, have the advantage of setting annual funding guarantees that appropriators would have to abide by. Because this option reduces the appropriations committees' influence on spending, they could be expected to vigorously resist the change. Also because this option amends a budget act it would require the acquiescence of the House and Senate budget committees.

Rearrange Program Funding

Historically, the rationale underlying the cap and penalty provisions was that the reward for fully funding the AIP and F&E capital accounts with trust fund revenues would be to fund the full authorized trust fund amount for O&M and thereby lighten the demands for general fund support for the FAA budget. Recently, the funding of the Federal Transit Administration (FTA) underwent a change. Instead of using both trust fund and general fund monies to fund all programs, the FTA's formula programs are entirely paid for from the trust fund while the congressionally popular New Starts capital program is entirely funded out of the general fund. Although this goes against the historical rationale that trust fund resources should first pay for capital needs, it also puts advocates of spending constraints in the position that they have to cut a part of the FTA budget. For FAA, an analogous change would be to fund all of FAA's budget, except the well supported AIP program, with trust fund revenues and fund AIP with general fund revenues. This would require that those who wish to constrain FAA spending to cut the part of the FAA budget that has the broadest and deepest support in Congress. On the other hand, this option could leave AIP more exposed than other components of the FAA budget should a consensus for deficit reduction reemerge or should other priorities take precedence over AIP in the spending of general fund revenues.

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⁴⁶ (...continued)

highways and transit see CRS Report 98-749, *The Transportation Equity Act for the 21st Century (TEA21) and the Federal Budget*, by John W. Fischer.

⁴⁷ The transit account would be more analogous to the FAA's budget situation since both rely on general fund revenues to complete their budget needs.