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November 15, 2002

The Honorable Robert C. Byrd
Chairman
Committee on Appropriations
United States Senate

The Honorable Patty Murray
Chairman, Subcommittee on Transportation
and Related Agencies
Committee on Appropriations
United States Senate

Subject: *"Current Rate" in Continuing Resolution, Public Law 107-229, as Extended by Public Law 107-235, for Fiscal Year 2003 Highway Spending*

This responds to your letter of October 17, 2002, requesting our views regarding the level of highway spending set by the Office of Management and Budget (OMB) under the "Joint Resolution making continuing appropriations for the fiscal year 2003, and for other purposes," Public Law 107-229, 116 Stat. 1465 (2002)(Continuing Resolution), as extended by Public Law 107-235, 116 Stat. 1482 (2002), through October 11, 2002. Your letter asks whether OMB appropriately determined that the applicable obligation limitation under the continuing resolution for the federal-aid highway program of the Department of Transportation (DOT) for fiscal year 2003 was \$27.7 billion. This opinion provides our interpretation of section 101 of the Continuing Resolution as it applies to highway spending.¹

As explained below, we disagree with OMB's determination that the obligation limitation for the federal highway program was \$27.7 billion under the Continuing Resolution. Under section 101(11) of the Continuing Resolution, the "current rate" for highway spending for fiscal year 2003 relates back to the \$31.8 billion obligation limitation established for the highway program for fiscal year 2002 under the Department of Transportation and other Related Agencies Appropriations Act, 2002, Pub. L. No. 107-87, 115 Stat. 833, 841 (2001). Two provisions of the Continuing

¹ As you requested, our opinion does not consider the impact of Public Law 107-240, 116 Stat. 1492 (2002), which, among other changes, amended Pub. L. No. 107-229 by adding a new section 137 to address this issue.

Resolution that OMB has cited as the basis for its determination to reduce the level of spending for the highway program below the current rate are sections 110 and 111. Section 110 provides that for programs that had a complete distribution of appropriations at the beginning of the previous fiscal year, "similar distributions" shall not be made under the Continuing Resolution that would "impinge on [Congress'] final funding prerogatives." Pub. L. No. 107-229, § 110, 116 Stat. 1465, 1467 (2002). Section 111 provides that "only the most limited funding action" authorized by the Continuing Resolution shall be taken to continue programs. Pub. L. No. 107-229, § 111, 116 Stat. 1465, 1467 (2002).

We agree in principle with OMB that sections 110 and 111 of the Continuing Resolution are relevant in determining the initial distribution of budget authority for the highway program. However, for the reasons explained in detail below, we do not agree with OMB's application of section 110 to reduce the obligation limitation for the program from \$31.8 billion to \$27.7 billion. During a continuing resolution, the Federal Highway Administration (FHWA) distributes highway funds to the states on a pro-rata basis, rather than making a complete distribution for the program at the beginning of the fiscal year, as is its normal practice. Thus, FHWA's distribution of highway funds under the Continuing Resolution is not "similar" to the distributions made during the prior fiscal year under the regular Department of Transportation appropriations act and hence section 110 is not applicable. Further, FHWA's pro-rata distribution of available contract authority satisfies section 111.

Factual Background

At the start of fiscal year 2003, the Federal-Aid Highway Program was funded by the "Joint Resolution Making Continuing Appropriations for Fiscal Year 2003," Pub. L. No. 107-229, 116 Stat. 1465 (2002)(Continuing Resolution), as extended by Pub. L. No. 107-235, 116 Stat. 1482 (2002). The Continuing Resolution provided that for all federal programs for which appropriations acts for fiscal year 2003 had not yet been enacted, there was appropriated out of the Treasury such amounts at a "rate for operations not exceeding the current rate" (current rate) as may be necessary for continuing projects and activities. Pub. L. No. 107-229, § 101, 116 Stat. 1465 (2002). The Department of Transportation was covered by the continuing resolution. *Id.* at § 101(11). On September 30, 2002, FHWA sent guidance via electronic mail to the states for operating under the continuing resolution. Because the anticipated length of the continuing resolution was four days, FHWA's guidance informed the states that they would be "required to abide by the conditions of the Continuing Resolution and will limit obligations to 4/365ths of the FY 2002 obligation limitation."² The FHWA based its distributions to the states on the current rate of \$31.8 billion, since that was the previous fiscal year's obligation limitation under the 2002 DOT appropriations act.

² E-mail from Bob Fisher, Director, Budget Division FHWA, to FHWA Field Offices (September 30, 2002).

FHWA's pro-rata distribution was consistent with instructions regarding automatic apportionments under continuing resolution(s) found in OMB Bulletin No. 01-10, dated September 27, 2001.³ The Bulletin instructs the agencies to calculate the amount to be automatically apportioned by multiplying the rate provided by the continuing resolution by the lower of (a) the percentage of the year covered by the continuing resolution, or (b) the historical seasonal rate of obligations for the period of the year covered by the continuing resolution. In accordance with the instructions in this OMB Bulletin and consistent with identical procedures FHWA has followed under continuing resolutions in past years, FHWA distributed the highway funds by multiplying the percentage of the year covered by the Continuing Resolution by the \$31.8 billion rate for obligation limitations used in fiscal year 2002.

On October 3, 2002, FHWA received from OMB a written apportionment for the Federal-Aid Highways (Trust Fund) account. In a footnote to the apportionment schedule, OMB noted that "[p]ursuant to section 110 of P.L. 107-229, the obligation limitation is determined to be \$27.7 billion under the requirement that funding levels in a Continuing Resolution do not 'impinge on final funding prerogatives.'" In its October 7, 2002, guidance for operating under the continuing resolution as extended by Pub. L. No. 107-235, FHWA advised the states that their "distribution[s] would be based on 11/365ths of the lower of the obligation limitations set in the FY 2003 House and Senate marks, pursuant to P.L. 107-229, Section 110, as amended by P.L. 107-235, using FY 2002 shares."⁴ Thus, while OMB reduced the highway spending level under the Continuing Resolution to \$27.7 billion to correspond to the obligation limitation level contained in H.R. 5559, 107th Cong. 2d Sess. (2002), FHWA continued to apportion the funds to the states on a pro-rata basis according to its long-standing practice during continuing resolutions.

Apparently in response to OMB's determination to reduce the obligation limitation under the "current rate" requirement in the Continuing Resolution to \$27.7 billion, Congress decided to include a specific provision in its second amendment to the Continuing Resolution, which also extended its effective date through October 18,

³ Section 105(a)(1) of the Continuing Resolution states that for purposes of section 101, the term "rate for operations not exceeding the current rate" is to be given the meaning for such term contained in OMB Bulletin No. 01-10, substituting Fiscal Year 2002 for Fiscal Year 2001 each place the latter term appears. Pub. L. No. 107-229, § 105(a)(1), 116 Stat. at 1466.

⁴ E-mail from Bob Fisher, Director, Budget Division FHWA, to FHWA Field Offices (October 7, 2002).

2002, to address this issue.⁵ Section 137 of the Continuing Resolution, as added by Pub. L. No. 107-240, established an annual rate of operations of \$31.8 billion for the Federal-Aid Highway Program provided that total obligations for the program shall not exceed \$27.7 billion while operating under continuing resolutions. Pub. L. No. 107-240, § 137, 116 Stat. 1492, 1495 (2002).

With that explicit change in the rate for highway spending under the Continuing Resolution, FHWA had two more occasions to provide the states with further guidance for operating under a continuing resolution. On October 15, 2002, FHWA advised that “[p]ursuant to Sec. 137 of P.L. 107-229, as amended by H.J. Res. 122 [which became Pub. L. No. 107-240], the distribution of formula obligation limitation under the Continuing Resolution is now based on 18/365ths of an annual level of \$31.8 billion, using FY2002 shares. However, the total obligations for while [*sic*] operating under a Continuing Resolution cannot exceed \$27.7 billion.”⁶ This guidance was essentially repeated in FHWA’s guidance to the states issued on October 22, 2002, except that FHWA changed the percentage to reflect the extension of the continuing resolution through November 22, 2002, pursuant to Pub. L. No. 107-244, 116 Stat. 1503 (2002).⁷

Although the amendment to the Continuing Resolution contained in section 137 of Pub. L. No. 107-240 resolved the dispute about the level of spending and the applicable obligation limitation for the highway program under the Continuing Resolution, you asked whether OMB was justified in determining that the obligation limitation for the federal highway program was \$27.7 billion under the Continuing Resolution. As background for our analysis, the following briefly describes the financing structure for the Federal-Aid Highway Program.

⁵ See 148 Cong. Rec. H7828 (daily ed. Oct. 10, 2002)(statement of Rep. Young). In his floor statement, Chairman Young of the House Transportation and Infrastructure Committee stated the following regarding this provision:

“I am pleased that this resolution ensures that the Federal highway program will continue at the fiscal year 2002 rate of \$31.8 billion. This reverses the Office of Management and Budget’s surprising decision last week to reduce the highway program to a \$27.7 billion rate of operations. This decision was contrary to the Congress’ intent that programs be continued at the current rate until final appropriation bills can be agreed to and enacted.”

⁶ E-mail from Bob Fisher, Director, Budget Division FHWA, to FHWA Field Offices (October 15, 2002).

⁷ E-mail from Bob Fisher, Director, Budget Division FHWA, to FHWA Field Offices (October 22, 2002).

Financing for the Federal-Aid Highway Program

Funding for the Federal-Aid Highway Program (FAHP) is a complex, multi-step process that differs from many government-funded programs. The FAHP is essentially a “reimbursable” program, that is, the federal government reimburses states for costs actually incurred in building or repairing its highways. The Transportation Equity Act for the 21st Century (TEA-21) made significant changes to the budgetary treatment of federal highway and transit programs, including establishing “firewalls,” guarantees, and revenue aligned budget authority. Pub. L. No. 105-178, 112 Stat. 107 (1998). TEA-21 established new budget categories for identified highway and transit activities, effectively creating a budgetary “firewall” between those programs and other domestic discretionary programs. TEA-21, § 8101(a) & (c), 112 Stat. at 488. TEA-21 also “guaranteed” a minimum level of annual funding for programs in the new budget categories, totaling \$162 billion over a 6-year period for highways and \$36 billion for transit. TEA-21, §§ 8101(e) & 8103, 112 Stat. at 492. Finally, TEA-21 established a complex financing mechanism, Revenue Aligned Budget Authority (RABA), which adjusts guaranteed funding levels upward or downward if the levels of the highway account receipts increase or decrease from those projected in TEA-21. TEA-21, §§ 1105 & 8101(d), 112 Stat. at 130 and 490.

For fiscal year 2002, the RABA adjustment was a positive adjustment, increasing the total highway funding level by \$4.5 billion to about \$32 billion. The RABA adjustment for fiscal year 2003, however, is a negative adjustment of \$4.4 billion, which would have reduced the total highway funding level to about \$24 billion. However, to prevent a reduction in federal highway funding levels for fiscal year 2003, Congress suspended the negative RABA adjustment for fiscal year 2003, which restored the fiscal year funding level to the level defined in TEA-21. See 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States, Pub. L. No. 107-206, 116 Stat. 820, 898 (2002).

Most programs within the FAHP rely on contract authority made available according to the provisions of the authorization act without further legislative action. Although the states may incur obligations against available contract authority and such obligations represent binding commitments to reimburse the states for the federal share of a project’s costs, FHWA cannot make actual cash reimbursements until Congress appropriates amounts for such purposes. In other words, the appropriations acts are the source of the funds needed to liquidate the federal commitment. In addition, in its appropriations for the highway program, Congress typically places limitations, expressed as obligations limitations, on the levels of contract authority contained in the authorizing legislation. See, *e.g.*, Department of Transportation and other Related Agencies Appropriations Act, 2002, Pub. L. No. 107-87, 115 Stat. at 841. The annual appropriations acts allow Congress to control the highway program and make it responsive to current budgetary conditions.

At the beginning of each fiscal year, under the legislative scheme described above, OMB apportions the entire amount of contract authority, as reduced or augmented

through the RABA adjustment process, and FHWA allocates this amount to the states through a formula distribution. This, in effect, establishes lines of credit upon which the states may draw for a particular project. After OMB approves the requested apportionment, FHWA issues certificates to the states denoting the exact amount of each allocation. This allocation represents the new contract authority for each state and any unobligated balances of old contract authority. At the same time, OMB apportions the obligation limitation, as set forth in the applicable appropriations act, and FHWA allocates the appropriate obligation limit to each state. The applicable obligation limitation for fiscal year 2002 was \$31.8 billion, as set forth in the Department of Transportation and other Related Agencies Appropriations Act, 2002, Pub. L. No. 107-87, 115 Stat. at 841.

OMB's Position

By letter dated October 18, 2002, we asked OMB for an explanation of its determination of the proper level of highway spending under the continuing resolution.⁸ In response, OMB stated that it started its application of the continuing resolution to the Federal-Aid Highway Program with the fiscal year 2002 obligation limitation level of \$31.8 billion as “the maximum available resource—that is, the amount which is ‘not in excess of the current rate’ under section 101.”⁹ Thereafter, it reduced such maximum amount pursuant to its interpretation that section 110 limited the amount appropriated by section 101. Section 110 provides that,

“for those programs that had high initial rates of operation or complete distribution of fiscal year 2002 appropriations at the beginning of that fiscal year ... *similar distributions* of funds for fiscal year 2003 shall not be made and no grants shall be awarded for such programs funded by this resolution that would impinge on final funding prerogatives.” Pub. L. No. 107-229, § 110, 116 Stat. at 1467 (emphasis added).

OMB stated that this section, along with section 111, which states that “only the most limited funding action of that permitted in the joint resolution shall be taken in order to provide for continuation of projects and activities,” Pub. L. No. 107-229, § 111, 116 Stat. at 1467, serve to limit the total amount available under section 101.

OMB pointed out that “[t]he Federal-aid Highways program in fact had a ‘complete distribution’ of available resources through allocations made by FHWA to the States,

⁸ Letter from Anthony H. Gamboa, General Counsel, GAO, to Philip J. Perry, General Counsel, OMB, dated October 18, 2002.

⁹ Letter from Rosalyn J. Rettman, Associate General Counsel for Budget, OMB, to Alan Belkin, Assistant General Counsel, GAO, dated November 8, 2002.

upon enactment of the FY2002 appropriations.” Accordingly, OMB concluded that section 110 applied and that “to give meaning to section 110’s requirement to avoid executive actions that ‘would impinge on [Congress’] final funding prerogatives,’” it needed to adjust or limit the amount available for distribution. OMB looked to indicia of congressional intent regarding highway spending levels contemplated for fiscal year 2003 as expressed in the House and Senate versions of the Department of Transportation appropriations bills, namely S. 2808, 107th Cong. 2d Sess. (2002) and H.R. 5559, 107th Cong. 2d Sess. (2002). It noted that the lower of the two, H.R. 5559, contained an obligation limitation of \$27.7 billion that was lower than the actual fiscal year 2002 level.

OMB reasoned that,

“[b]ecause this is a program which traditionally makes available all of the budgetary resources subject to limitation for allocation to the States at the beginning of the fiscal year, had OMB apportioned the full amount of the FY2002 level, then any subsequent effort by Congress to enact an obligation limitation of less than \$31.8 billion, as indicated by the House action, could have been compromised.”

To refrain from “imping[ing] on final funding prerogatives,” OMB stated that it took a conservative approach and apportioned a total amount of \$27.7 billion to FHWA during the term of the Continuing Resolution.

Analysis

A. The Applicable Obligation Limitation for the Federal-Aid Highway Program Under the Continuing Resolution As Used in Section 101 is \$31.8 billion

Under the terms of section 101 of the Continuing Resolution, as amended, the applicable rate for the agencies and programs funded through the Continuing Resolution, including the highway program, is “a rate of operations not exceeding the current rate.” Pub. L. No. 107-229, 116 Stat. at 1465. Our office has consistently held that the term “current rate,” as used in continuing resolutions, is equivalent to the total dollars made available for obligation for the program in the prior fiscal year. B-255529, January 19, 1994; 64 Comp. Gen. 649, 651 (1985); 58 Comp. Gen. 530, 533 (1979). We note that there is no relevant legislative history to suggest that in using the term “current rate” in this Continuing Resolution Congress intended it to mean something other than its commonly understood meaning.¹⁰

¹⁰ See Footnote 5 for a brief discussion of the legislative history of section 137 of Pub. L. No. 107-240.

The fiscal year 2002 obligation limitation for the FAHP was \$31.8 billion. Pub. L. No. 107-87, 115 Stat. at 841. OMB agrees that under section 101 of the Continuing Resolution, the “current rate” for the highway program is \$31.8 billion for fiscal year 2003. Indeed, OMB began its analysis of the appropriate spending level for the highway program from that point. Accordingly, the current rate for highway spending under the continuing resolution pursuant to section 101 is \$31.8 billion.

B. Section 110 Does Not Limit the “Current Rate” as Defined in Section 101 Under the Circumstances Present Here

OMB determined that under sections 110 and 111 of the Continuing Resolution, it was required to reduce the obligation limitation below the level prescribed in section 101 to avoid impinging on Congress’ funding prerogatives. As described below, we disagree. Since FHWA distributes highway funds to the states under a continuing resolution on a pro-rata basis, which is entirely consistent with the direction in section 111 to fund projects under a continuing resolution in the most limited way possible, there was no basis for OMB to further reduce the level of highway funding under section 110.

Congress first used the language now contained in section 110 in a continuing resolution in 1995. Pub. L. No. 104-31, 109 Stat. 278, 281, § 113 (1995).¹¹ Based on the plain language of section 110, it only applies to programs that (1) had “high initial rates of operation or a complete distribution” of funds at the beginning of the prior fiscal year (assuming the normal appropriations process),¹² and where (2) a “similar distribution of funds” under the continuing resolution would impinge on Congress’ final funding prerogatives. In other words, section 110 can only be applied to reduce or limit the distribution of the “current rate” for a program as defined in section 101 if both prongs of the two-part test are met.¹³

¹¹ Our review did not reveal any relevant legislative history concerning the intent of Congress in adopting this language; nor has our office previously considered the legal effect or impact of this provision. OMB also did not identify any competent legislative, judicial or administrative guidance explaining the section 110 language.

¹² In fiscal year 2002, the highway program also operated under a continuing resolution until December 18, 2001. Pub. L. No. 107-44, § 107(a), 115 Stat. 253, 255 (2001), as amended by Pub. L. No. 107-83, 115 Stat. 822 (2001).

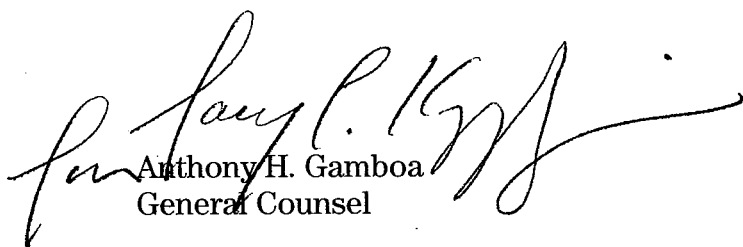
¹³ We note that in the event a continuing resolution is extended throughout the entire fiscal year, any amounts not distributed for a program because of the application of section 110 would presumably have to be made available by OMB, since the continuing resolution would then represent the final funding action by Congress for that fiscal year.

We agree that in a year in which the highway program is funded under the DOT appropriations act, the apportionment and allocation of the entire amount of contract authority and obligation limitation that takes place at the beginning of the year is equivalent to a “complete distribution” of appropriations within the meaning of section 110. The term “distribution,” as used in section 110, fairly read, captures the OMB apportionment and FHWA allocation process used for the financing scheme of the FAHP. *See generally*, Matter of Corrections to the Federal Highway Trust Fund, B-275490, Dec. 5, 1996. In a normal fiscal year, FHWA completely distributes or allocates funds to the states based on the obligation limitation contained in the appropriations act. Once FHWA distributes funds to the states, the states may obligate the funds after receiving approval from the Secretary of the Department of Transportation. See 23 U.S.C. § 106.

The reason for the application of section 110 is to avoid a “similar distribution[] of funds” under the Continuing Resolution that would impinge on Congress’ funding prerogatives. Where there is no “similar distribution,” there is no reason to invoke section 110. Here, the FHWA has not made distributions under the Continuing Resolution that are at all “similar” to the distributions made during a normal appropriations year. As explained earlier, during the term of a continuing resolution, FHWA’s consistent historical and current practice has been to allocate funds to the states on a pro-rata basis by multiplying the percentage of the year covered by the continuing resolution by the rate for the continuing resolution. This pro-rata allocation is consistent with section 111’s direction to provide for the continuation of projects and activities with “only the most limited funding action of that permitted.” Pub. L. No. 107-229, § 111, 116 Stat. at 1467. Allocating the highway funds on this pro-rata basis is not equivalent to a “similar distribution” of funds that occurs during a normal fiscal year. Accordingly, since FHWA does not make a complete distribution of highway funds under a continuing resolution, section 110 did not apply and should not have been invoked in these circumstances. In other words, since FHWA’s long-standing practice of distributing highway funds under a continuing resolution on a pro-rata basis fully protects congressional funding prerogatives, and does so in a manner that is consistent with section 111 (and is far more restrictive than would be true under section 110), OMB had no basis to further reduce the level of highway spending below the current rate established in fiscal year 2002 to avoid impinging on congressional funding prerogatives.

Accordingly, based on the facts and circumstances present here, we conclude that OMB’s determination to set the level of highway spending at \$27.7 billion was not justified under sections 110 and 111 of the Continuing Resolution. The current rate under section 101—\$31.8 billion—was the appropriate basis for pro-rata distributions to the states under the Continuing Resolution. If you have any questions concerning

this opinion, please contact me, Lynn Gibson, Managing Associate General Counsel,
or Alan Belkin, Assistant General Counsel, at (202) 512-5400.



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