



MEMORANDUM

To: Ben Hirst, Delta Air Lines

From: Paul D. Clement
Candice Chiu

Date: March 7, 2013

Re: **FAA Discretion Over Sequestration Cuts**

You asked us to evaluate the extent to which the Federal Aviation Administration (FAA) has discretion—in particular, in connection with the “programs, projects and activities” language in the Budget Control Act of 2011 (BCA)—to implement the sequester in a manner that minimizes any negative impact on FAA’s statutory objectives. Although the BCA imposes limitations on agency discretion, the FAA retains a degree of flexibility given the open-ended nature of its “accounts” and within-account “activities” and some limited statutory authority it has to transfer funds within FAA accounts.

I. Sequestration And Agency Discretion

At first glance, the BCA by design sharply limits or even eliminates executive branch discretion over what cuts are implemented. 2 U.S.C. §906(k) (“Effects of sequestration”) provides in relevant part:

“Except as otherwise provided, the same percentage sequestration shall apply to *all programs, projects, and activities* within a budget account (with programs, projects, and activities as delineated in the appropriation Act or accompanying report for the relevant fiscal year covering that account, or for accounts not included in appropriation Acts, as delineated in the most recently submitted President’s budget).”

Id. §906(k)(2) (emphasis added). Reductions, accordingly, must occur at the so-called “PPA level”—applying across-the-board to all “programs, projects, and activities” within an account. Agencies thus have no power to leave select programs intact or creatively tailor the size of cuts to a program’s purpose or importance. Rather, each program, project, and activity—unless exempt under §905 (“Exempt programs and activities”)—is subject to a uniform percentage reduction.

That said, the nondiscretionary mandate of §906(k)(2) elides two areas in which agencies retain significant room to maneuver:

First, the terms “programs, projects, and activities” have no standard definition. Neither the BCA nor the Balanced Budget and Emergency Deficit Control Act of 1985 (BBEDCA, or the “Gramm-Rudman-Hollings Act”), which first introduced the language, specified which agency components are “programs,” “projects,” or “activities.” Indeed, in an evaluation of the 1986 sequestration, the Comptroller General noted that it “found widespread confusion among the agencies in applying the program, project, and activity definitions,” and that the “confusion often reflected the ambiguities of the definitions themselves.” GAO, *Compliance Report for FY 1986: Balanced Budget and Emergency Deficit Control Act of 1985* 1 (1986). Nor has the Office of Management and Budget (OMB) defined the “programs, projects, and activities” within each agency; OMB’s September 2012 report laid out preliminary estimates of sequestration cuts to 897 specified budget *accounts*, but did not even attempt to disaggregate the component PPAs within each account.

To be sure, the BCA refers to the PPAs “as delineated in the appropriation Act or accompanying report for the relevant fiscal year.” Such acts and reports, however, do not always provide clear answers; for example, “it is not readily apparent” whether “all activities separately delineated in the relevant act or reports, or only ... those accompanied by a dollar amount” constitute standalone “programs, projects, and activities.” GAO, *Compliance Report for FY 1986*, at 6. Thus, “agencies ordinarily have the flexibility to adjust program execution within the appropriations act account level to suit actual requirements.” *Id.* at 7. An agency may choose to define a “program” broadly (*e.g.*, a massive multibillion initiative encompassing a wide array of operations, like “missile defense”) or narrowly (*e.g.*, a single missile system).

Second, agencies are free to apportion cuts *within* each program, project, or activity as they see fit, so long as they achieve the requisite percentage reduction. That discretion over how to implement cuts below the PPA line, moreover, is inextricably tied to where that PPA line lies; an agency’s flexibility is enhanced when the “program” is defined broadly to encompass a number of initiatives, and diminished when the “program” selectively targets a single initiative.

II. FAA Discretion

On February 22, 2013, the FAA announced that, as part of its planning for sequestration reductions, it is considering employee furloughs, the elimination of midnight shifts at, or closing of, air traffic control towers, and the reduction of equipment maintenance, provisioning, and support. The FAA, however, has some room to achieve the requisite cuts without necessarily resorting to these measures.

Both the most recent appropriations act and OMB's September 2012 sequestration report set forth the FAA's budget "accounts"—chief among them, Operations; Research, Engineering and Development (R,E&D); and Facilities and Equipment (F&E). Within those accounts, the FAA may have some degree of discretion over how it defines the "programs, projects, and activities." To take Operations as the example, the relevant appropriations act sets forth spending caps that, in effect, apportion the total appropriations amount (\$9,653,395,000) among seven categories of activity: (1) "air traffic organization activities," (2) "aviation safety activities," (3) "commercial space transportation activities," (4) "finance and management activities," (5) "human resources program activities," (6) "NextGen program activities," and (7) "staff offices."¹

That language underscores the uncertainties over how PPAs are defined: Congress did not expressly designate those categories as "programs" and noted them only in the course of describing caps on spending—leaving open at least a possibility that FAA could adopt broader or narrower PPA definitions for sequestration purposes. Notably, in a 2006 memorandum detailing its funding criteria, FAA enumerated *eighteen*—not seven—"Items funded by the Ops account." *See FAA, Funding Criteria for Operations, Facilities and Equipment, Research, Engineering and Development, and Grants-In-Aid for Airports Accounts*, Order 2500.8B, at 2-4, <http://www.faa.gov/documentLibrary/media/directives/nd/ND2500-8B.pdf>. That said, the better reading is likely that these categories of "activities" constitute all the "programs, projects, *and activities*" within the "Operations" account. FAA's 2013 budget estimates use those categories. *See FAA, Budget Estimates: Fiscal Year 2013*, at Exhibit II-2, http://www.dot.gov/sites/dot.dev/files/docs/faa_%20fy_%202013_budget_estimate.pdf.

In any event, even if those seven categories are the "programs, projects, and activities," they are sufficiently broad that FAA would still have flexibility in how it implements cuts. Because all seven categories would be subject to an equal percentage reduction, the FAA could not concentrate all the cuts in "air traffic

¹ "For necessary expenses of the Federal Aviation Administration, not otherwise provided for, including operations and research activities related to commercial space transportation, administrative expenses for research and development, establishment of air navigation facilities, the operation (including leasing) and maintenance of aircraft, subsidizing the cost of aeronautical charts and maps sold to the public, lease or purchase of passenger motor vehicles for replacement only, in addition to amounts made available by Public Law 108-176, \$9,653,395,000, of which \$5,060,694,000 shall be derived from the Airport and Airway Trust Fund, ***of which not to exceed \$7,442,738,000 shall be available for air traffic organization activities; not to exceed \$1,252,991,000 shall be available for aviation safety activities; not to exceed \$16,271,000 shall be available for commercial space transportation activities; not to exceed \$582,117,000 shall be available for finance and management activities; not to exceed \$98,858,000 shall be available for human resources program activities; not to exceed \$60,134,000 shall be available for NextGen program activities; and not to exceed \$200,286,000 shall be available for staff offices ...***" Consolidated and Continuing Appropriations Act of 2012, Pub. L. 112-55, at 95, <http://www.gpo.gov/fdsys/pkg/PLAW-112publ55/pdf/PLAW-112publ55.pdf>.

organization activities” while leaving “human resources program activities” intact. But the FAA could reduce “human resources program activities” by, for example, implementing a freeze on hiring and recruiting while leaving training initiatives intact. In this manner, the FAA retains some ability to conform cuts to the varying importance of components.

Finally, the FAA has some limited statutory authority to transfer funds between the “programs, projects, and activities” under the “Operations” account. This is critical because OMB has strongly urged agency heads facing sequestration cuts to “take into account funding flexibilities, including the availability of reprogramming and transfer authority.” See OMB, Memorandum from Jeffrey D. Zients to the Heads of Executive Department and Agencies, at 2 (Jan. 14, 2013). The appropriations act provided, after delineating the seven categories of activities, that “not to exceed 2 percent of any budget activity, except for aviation safety budget activity, may be transferred to any budget activity under this heading,” so long as “no transfer may increase or decrease any appropriation by more than 2 percent.” Pub. L. 112-55, at 95. Under that language, it appears that up to 2% of funds devoted to, for instance, “commercial space transportation activities,” could be transferred to “air traffic organization activities.” Such increased funds would mitigate to some degree the severity of the cuts to air traffic organization activities.²

Moreover, the FAA Modernization and Reform Act of 2012, Pub. L. 112-95, [http://www.faa.gov/regulations_policies/reauthorization/media/PLAW-112publ95\[1\].pdf](http://www.faa.gov/regulations_policies/reauthorization/media/PLAW-112publ95[1].pdf), contained a provision under “FAA Operations” entitled “Authority to *Transfer Funds*.” That provision—which applies “[n]otwithstanding any other provision of law”—conferred this “transfer” authority through the addition of 49 U.S.C. §106(k)(3). Section 106(k)(3) appears to empower the FAA, when the “Operations” appropriation proves insufficient, to shift pre-allocated “nonsafety-related” funds *within* the “Operations” account toward different, more essential purposes.³ What constitutes “nonsafety-related activities,” however, is left

² The Act further stated that “any transfer in excess of 2 percent shall be treated as a reprogramming of funds under section 405 of this Act and shall not be available for obligation or expenditure except in compliance with the procedures set forth in that section.” Consolidated and Continuing Appropriations Act, at 95. This authority is not likely to confer significant discretion in connection with sequestration, however, because among other restrictions §405 prohibits “us[ing] funds directed for a specific activity by either the House or Senate Committees on Appropriations for a different purpose.” *Id.* at 157.

³ **“Administering program within available funding.**— Notwithstanding any other provision of law, in each of fiscal years 2012 through 2015, if the Secretary determines that the funds appropriated under paragraph (1) are insufficient to meet the salary, operations, and maintenance expenses of the Federal Aviation Administration, as authorized by this section, ***the Secretary shall reduce nonsafety-related activities of the Administration as necessary to reduce such expenses to a level that can be met by the funding available under paragraph (1).***” 49 U.S.C. §106(k)(3).

undefined, and it is unclear whether an appropriation can be deemed “insufficient” as result of sequestration.

III. Furloughs As A Last Resort

Whatever the precise bounds of the FAA’s discretion in the face of sequestration, several factors indicate that employee furloughs should be a tool of last resort.

First, the legislative history of the BBEDCA indicates that personnel furloughs should only be utilized in extraordinary circumstances. The conference report accompanying the federal pay provision (a provision that the BCA retained, *see* 2 U.S.C. §906(g)) stated in no uncertain terms:

“The conference agreement provides that rates of pay for civilian employees (and rates of basic pay, basic subsistence allowances and basic quarters allowances for members of the uniformed services) may not be reduced pursuant to a sequestration order. The agreement retains the House position that a scheduled pay increase may not be reduced pursuant to an order and the Federal pay be treated as other components of administrative expenses. ***The conferees urge program managers to employ all other options available to them in order to achieve savings required under a sequestration order and resort to personnel furloughs only if other methods prove insufficient.***”

H.R. Conf. Rep. 99-433 (1985), at *Congressional Record*, vol. 131, p. 35776. All other means of reducing salary expenses—be it hiring freezes, early retirements, the release of temporary employees, or the non-renewal of contract hires—should be attempted in the first instance.

Second, by the FAA’s own admission, furloughs will invariably cause delays to travelers and thus come at the expense of the efficiency of the air traffic system. The “principal purpose” of the Federal Aviation Act of 1958, 49 U.S.C. §40101 *et seq.*, however, was to give the FAA “powers adequate to enable it to provide for the safe *and efficient* use of the navigable airspace by both civil and military operations.” H.R.Rep. 2360, at 1 (1958); *cf.* 49 U.S.C. §47101(7) (articulating, as the “policy of the United States,” that “airport construction and improvement projects that increase the capacity of facilities to accommodate passenger and cargo traffic be undertaken to the maximum feasible extent so that safety and efficiency increase and delays decrease”). Where alternatives exist, the FAA should use all tools at its disposal to avoid the absurd result of undermining a statutory objective behind the agency’s very creation.

Third, OMB’s memorandum to agency heads set forth “guiding principles ... in preparing plans to operate with reduced budgetary resources” that would be directly undermined by an immediate resort to furloughs. The principles place an emphasis on flexibility and operational continuity—requiring agencies, *inter alia*, to



“use any available flexibility to *reduce operational risks* and minimize impacts on *the agency’s core mission* in service of the American people” and “address *operational challenges* that could potentially have a significant deleterious effect on *the agency’s mission* or otherwise raise life, safety, or health concerns.” OMB Memorandum, at 2. Because furloughs would, as FAA has indicated, impede air traffic operations and threaten airspace efficiency in a highly intrusive and public manner, the FAA should do all within its power to avoid that disruption in accordance with OMB’s priorities.