Do We Still Need the Highway Trust Fund?

Within the next few months, Congress must address two separate but related problems involving the Highway Trust Fund. First, by the end of July, Congress must find a way to add money to the Trust Fund to pay for commitments of federal Trust Fund dollars incurred under previously enacted legislation. (If Congress does not add money to the Trust Fund, state governments will cease getting immediate reimbursements for payments incurred under those prior federal commitments by August.)

Once that immediate crisis has been averted, Congress must eventually enact legislation (hopefully by the deadline of October 1, but that deadline has been missed more often than not in recent decades) setting an appropriate level of federal investment in surface transportation programs for future years and determining the proper role of the Highway Trust Fund in that investment plan.

The fundamental problem is this: under current tax law, the excise taxes on gasoline, diesel fuel, tractor-trailers, and truck tires that support the Highway Trust Fund are only projected to bring in about $39 billion per year over the next decade, while new spending commitments to be drawn from the Trust Fund totaled $51 billion this year and would increase slightly under the legislation that Senate leaders want to write. This systematic over-commitment of the Trust Fund has averaged $12.5 billion per year over the last four fiscal years, and transfers from the general fund (sometimes partially paid for with unrelated offsets, sometimes not) have made up the difference.

The urgent debate over how to avert a Trust Fund slowdown this summer – a slowdown which would be caused by Congress's past systematic over-commitment of Trust Fund moneys – is obscuring the much-needed debate that should take place in the context of the next long-term surface transportation funding bill: has the Highway Trust Fund outlived its purpose? And what could, or should, replace it?

Means vs. Ends. Before we get into specifics, we need to clarify what kind of debate we are going to have. The 58-year history of the Highway Trust Fund is full of people arguing past each other. The example of the fight over mass transit funding from the late 1960s to 1982 is a good example.

Once the specifics of the proposed Interstate extensions through major cities became clear in the 1960s, residents of many big cities often did not like those plans, and a movement began among their legislators to ask for extra funding for mass transit instead of highways in those areas. The urban legislators had host of very valid arguments (environmental, metropolitan planning, congestion, etc.) as to why, in many instances, new mass transit was preferable to new highway construction in their cities.

But getting mass transit funding from the Appropriations Committees, who had so many competing demands for funding, was difficult. And the legislators who controlled the Highway Trust Fund were opposed to opening up the Trust Fund to mass transit spending. The highway legislators (often rural or suburban) used completely valid arguments about how, at the time, the Trust Fund was completely supported by the user taxes paid by highway users (not mass transit users), and how the legislative intent of the Trust Fund was that it be self-supporting and only pay for highway programs giving direct benefit to those who pay the highway user taxes.

Both sides were right – some areas needed mass transit more than they needed new highways, and the Trust Fund was indeed set up, legally and philosophically, as a way for highway users to self-finance the highway system and not divert money to other things. But the pro-highway legislators were making legalistic, process-based, "means" arguments, while the pro-transit legislators were all about the eventual outcome on the ground, the "ends" arguments. Since the two sides were having separate debates, they usually argued past each other.

(The fact that the pro-transit argument was completely ends-based and means-indifferent is exemplified by the various positions advocated by the late Sen. Ted Kennedy (D-MA), a strong transit advocate. In 1970 he introduced legislation proposing one giant Transportation Trust Fund for highways, mass transit, and aviation. (S. 4451, 91st Congress.) In 1972, he instead proposed legislation (S. 3825, 92nd Congress) to allow metropolitan areas to convert Highway Trust Fund highway apportionments into mass transit construction dollars. By 1975, having largely failed with his earlier proposals, Kennedy was sponsoring legislation (S. 1300, 94th Congress) to abolish the Highway Trust Fund entirely, feeling that mass transit stood a better chance vis-à-vis highways if they both had to go to begging to the Appropriations Committees. By 1978 he was back to advocating a version of his 1972 plan (S. 679, 95th Congress). These various proposals are abjectly inconsistent with any kind of logical means-based argument about funding sources and dedicated revenues, but are completely consistent with the ends-based argument that more mass transit funding was needed at the expense of highway funding, no matter the source.)

Fast forward to today. If you ask anyone involved in drafting or supporting surface transportation reauthorization legislation, their arguments are sure to be almost completely ends-based. America as a whole is woefully underinvesting in surface transportation infrastructure, they say. (True.) Crumbling infrastructure is a real hindrance to economic competiveness and growth, they say. (True.) Increased infrastructure spending will create jobs, both in construction and "downstream," they say. (Overblow, but still basically true.) Failing infrastructure creates safety hazards, they say. (True.)

But none of these valid arguments has anything whatsoever to do with the fundamental question: is a never-ending series of bailouts of the Highway Trust Fund by general revenues the best way to fund future infrastructure investments? Or are there alternative ways to fund the system that are equally effective but more honest and transparent? Observers should pay careful attention so that all of the ends-based pro-infrastructure arguments don't crowd out the long-past-due debate on the means to that end.

The Promises of 1956. To begin with, it is worth remembering that the Highway Trust Fund was intended to be a temporary funding mechanism for building the Interstate highway system. The 1956 law creating the Trust Fund provided $24.8 billion in contract authority to construct the Interstate system (the Commerce Department had already provided Congress with a written cost estimate attesting that this amount would be sufficient to build the entire system). This money was to be apportioned on a time delay, roughly $2 billion per year for thirteen years (FY 1957-1969). The 1956 law also contained a two-year authorization for the regular federal-aid highway program ($863 million per year, on average, for FY's 1958 and 1959), also drawn on the Trust Fund, and the 1956 law assumed that Congress would continue to authorize new contract authority for these programs on a two-year cycle from 1960-1969.

On the revenue side, the law increased the existing gasoline and diesel fuel excise taxes by 50 percent (from 2 cents per gallon to 3 cents per gallon) and increased various trucking excise taxes as well. But the law then provided that on July 1, 1972, the Highway Trust Fund would cease to exist (the gap between the contract authority running out in 1969 and the Trust Fund shutting down in 1972 was thought to be enough to allow the contract authority to be fully "spent down" via outlays of cash from the Treasury) and then the gasoline and diesel taxes would automatically revert to a lower rate of 1½ cents per gallon, which would be sufficient to fund the non-Interstate highway programs once the Interstate system was built.

Section 209(b) of the 1956 Interstate law laid out the underlying principle of the Trust Fund: "It is hereby declared to be the policy of the Congress that if it hereafter appears – (1) that the total receipts of the Trust Fund [exclusive of temporary loans from the general fund] will be less than the total expenditures from such Fund [exclusive of repayments of loans from the general fund]; or (2) that the distribution of the tax burden among the various classes of persons using the Federal-aid highways, or otherwise deriving benefits from such highways, is not equitable, the Congress shall enact legislation in order to bring about a balance of total receipts and total expenditures, or such equitable distribution, as the case may be."

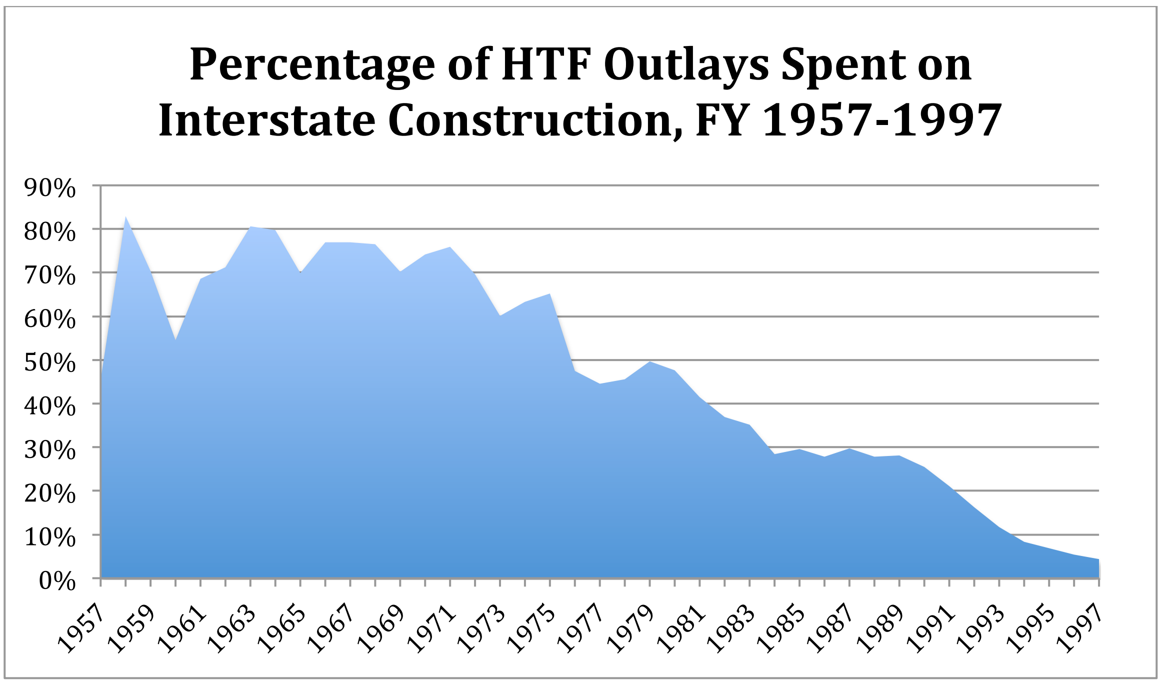
That section makes it clear that the Trust Fund was intended to be self-sufficient, not reliant on support from the general fund – and the emphasis on the relative tax-burden-to-system-benefit distribution makes it clear that any future taxes were intended to be levied on highway system users.

To add teeth to this policy, Congress also enacted section 209(g) of the 1956 law, the "Byrd test," to automatically slow down Interstate construction spending if the Treasury estimated that incoming tax receipts would be unable to support the spending levels.

This worked well at first – Congress increased the motor fuel taxes by another cent per gallon in 1959 to meet a revenue shortfall and avert automatic cuts under the Byrd test. But the estimated construction costs for the Interstate system kept going up (for the usual reasons, and also for the historically aberrant high inflation levels that took root in the late 1960s and bloomed in the 1970s), and Congress was forced to stretch out the increased construction money over more years. (Also, some of the most expensive Interstate segments took far longer to build than anticipated, due in large part to the "freeway rebellion" pro-transit movement and other reasons.)

As a result, in the 1970 highway bill, Congress (with little debate) extended the existing user taxes and the life of the Trust Fund for five more years (from an expiration date of 1972 to 1977). Then, starting with the 1976 highway bill, Congress began extending Trust Fund taxes and expenditure authority for the life of the authorizations in the bill plus two fiscal years.

All this time, while the missing Interstate segments continued their slow progress towards completion, Congress kept creating more and more non-Interstate highway programs on which to spend the Trust Fund's tax receipts. Then, in 1982, Congress and President Reagan doubled fuel taxes while creating a permanent set-aside for mass transit out of a separate account within the Trust Fund. The following chart shows what percentage of the Trust Fund's total annual outlays were spent on Interstate construction over the Trust Fund's first 40 years.



By the turn of the century, the Highway Trust Fund had been gradually transformed from the originally-intended temporary mechanism for building the Interstate highway system into a permanent mechanism for funding all manner of highway and mass transit spending.

The Intentions of 1974. In some respects, the late-1960s and early-1970s debate over how to fund mass transit was a subset of a larger debate in Congress over the budget. As best summarized in chapters II and III of Allen Schick's *Congress and Money* (Urban Institute Press, 1980), the Johnson Administration's attempt to fight the Vietnam War and build the Great Society at the same time caused ballooning federal deficits, which in turn required Congress to act repeatedly to increase the statutory ceiling on the public debt.

Then (as now), it was very difficult for Congress to find the votes to raise the debt limit. It prompted more public discussion of the deficit, and as Schick noted, although deficits are equal parts tax revenue and spending, people tend to blame spending first. So Congress started enacting the first-ever overall limitations on annual federal spending. (See title II of P.L. 90-218 (1967), title II of P.L. 90-364 (1968), title IV of P.L., 91-47 (1969), and titles IV and V of P.L. 91-305 (1970).)

Members of the Appropriations Committees were resentful of these limitations, and rightfully so, since most of the significant growth in spending had taken place outside the appropriations process, through "backdoor" spending under the jurisdiction of other committees. Much of this was in the Ways and Means and Finance Committees (Social Security, Medicare), but the "last straw" for the appropriators came from the Public Works Committees.

In March of 1972, the House Public Works panel brought to the House floor a bill (H.R. 11896, 92nd Congress) creating a new water pollution control program. Many of the authorizations in the bill were standard stuff (subject to later appropriation), but title II of the bill provided $18 billion in contract authority (drawn on the general fund of the Treasury) for grants to states for construction of water treatment plants over fiscal years 1973-1975.

$18 billion may not sound like that much money today, but in March 1972, the most recently completed fiscal year (FY 1971) had only seen total federal outlays (including Social Security) totaling $210 billion. An extra $18 billion in deficit spending, therefore, represented about 8.6 percent of one year's total federal spending. Let's compare that to today. The most recently completed fiscal year was FY 2013, and total federal outlays in FY 2013 were $3.455 trillion. 8.6 percent of that would be $296 billion. So the Public Works Committee's $18 billion in deficit-financed general fund contract authority for a new program in 1972 is the equivalent of almost $300 billion in deficit-financed general fund contract authority today. (Another way to compare the $18 billion: the FY 1971 unified federal deficit had been $23 billion.)

The chairman of the House Appropriations Committee, George Mahon (D-TX), took the unusual step of offering an amendment on the House floor to strip the contract authority out of the bill and replace it with authorizations for advance appropriations (where the FY 1972 appropriations bill would provide advance appropriations for FY 1973, etc.) in order to give states some certainty in advance of their own budget process. In a "Dear Colleague" letter to House members on March 27, Mahon wrote that "Just prior to World War II, 18% of the spending budget was classified as relatively uncontrollable. The current budget classifies 71% of spending as relatively uncontrollable under present law! Contract authorizations for waste treatment would continue to move us toward an almost complete abdication to the Executive Branch. This is unnecessary. Let's not do it!"

(The concerns about abdication to the Executive Branch related to presidential impoundment authority and the (valid) belief that presidents were more likely to impound multi-year contract authority than annual appropriations. Impoundments no longer exist.)

But the allure of being seen as doing something about water pollution proved stronger than Mahon's entreaties, and the House defeated his amendment by a vote of 161 to 232. The bill was then conferenced with a very similar Senate bill (S. 2770, 92nd Congress), a compromise version (retaining the $18 billion in general fund contract authority) passed the House and Senate on October 4, 1972, and then President Nixon vetoed the bill on October 17, saying that the bill's total price tag was "staggering," "budget-wrecking," and "unconscionable." But the following day, both the House (247 to 23) and Senate (52 to 12) overrode the veto, and the bill became Public Law 92-500.

However, Mahon had the last laugh. As part of the end-of-session wrap-up that week, Congress passed a debt ceiling increase (P.L. 92-599) containing yet another government-wide spending limitation and also establishing a Joint Committee to study ways for "improving congressional control of budgetary outlay and receipt totals" to report back by February 1973. Membership was to be split evenly between appropriators and tax committee members, with one leadership designee per party per chamber.

Mahon made sure that all seven of the House Appropriations members of the Joint Study Committee had backed his amendment to strike the contract authority from the water bill, whereas several of the Ways and Means members of the joint panel had also voted with Mahon on the water bill.

The Joint Study Committee produced the bill (H.R. 7130, 93rd Congress) that, after much debate in other committees and on the chamber floors, became the Congressional Budget Act of 1974. As Schick notes, both the appropriators and tax-writers had to give up some power in the final legislation in order to get what they wanted. The tax-writers got to protect the entitlement programs they had already created, and they were able to establish a new process that put an annual limit (internal within Congress) on how much money the appropriators could spend each year.

The appropriators, meanwhile, got a ban on most kinds of new backdoor spending, including a ban on any new contract authority from the general fund. The big programs with permanent appropriations created by Ways and Means/Finance, like Social Security, were grandfathered. As for programs that required recurring legislation providing new funding (like highways), the Budget Act allowed them to continue, but only if the contract authority was drawn on a trust fund that was user-financed.

The Senate actually had a debate on precisely how to define "user-financed." As originally reported in the Senate, the Budget Act only said that future contract authority had to drawn on a trust fund that had a "substantial portion" of its deposits coming from taxes on program beneficiaries (which the non-binding committee report said was supposed to mean 70 percent). Sen. Sam Nunn (D-GA) offered an amendment on the floor striking "substantial portion" and replacing it with "90 percent."

Nunn said that his amendment "would ensure that any legislation which draws from general revenues in excess of 10 percent of its funding and that is not now subject to the appropriations process, will be subject to the same backdoor controls which apply to all non-trust-fund items." The Senate adopted Nunn's amendment by a vote of 80 to 0, and the provision became law as part of section 401(d) of the Budget Act, which bans new contract authority unless it comes from a trust fund, "90 percent or more of the receipts of which consist or will consist of amounts (transferred from the general fund of the Treasury) equivalent to taxes (related to the purposes for which such outlays are or will be made) received in the Treasury under specified provisions of the Internal Revenue Code of 1954."

The original Budget Act was a hodgepodge of different processes, limitations, and points of order, and Congress learned by doing in the first few years. All of the enforcement mechanisms in the Budget Act were "points of order" to be raised on the floor of either chamber, which could be waived by majority vote. The Gramm-Rudman-Hollings legislation of 1985 elevated certain points of order to supermajority status in the Senate (requiring 60 votes to waive), but section 401 was not among them. And section 401 only prevents a bill from coming to the floor, killing the entire thing – it is not a "surgical" point of order like some others that can strike out an offending provision within a larger bill, so legislators are hesitant to raise it. Finally, most budget-busting legislation doesn't come to the Senate floor unless bill sponsors have already built a supermajority of 60 votes for one big vote on waiving all of the budget rules.

As a result, Congress has lately begun to allow violations of the 90-percent-self-financing rule. According to the Federal Highway Administration, over the first fifty years of the Highway Trust Fund (FYs 1957-2007), things worked as intended. $721 billion of the deposits in the Trust Fund (96 percent of the total) came from transfers of user taxes, and the other $30 billion (4 percent) came from interest on balances (which has to come from somewhere, namely, the general fund). (There was a brief period in the early 1980s where federal interest rates were in the high double digits and caused the interest share of total HTF deposits to rise to about 12 percent, but this was an aberration.)

Since then (FYs 2008-2014), using the President's revenue forecast for the remainder of FY 2014, the Trust Fund will have received $262 billion in user tax deposits by September 30 of this year (83 percent), interest on balances and penalty fees from truckers will total less than $500 million (rounded to zero percent), and the bailout transfers from unrelated general revenues will have totaled $52 billion (17 percent of the total).

We will look more at the future later in this article, but under the President's budget for the next five fiscal years (FYs 2015-2019), only 56 percent of HTF receipts ($196 billion) would come from user taxes while the other 44 percent ($152 billion) would come from business tax reform, unrelated to "the purposes for which [HTF] outlays are made." Under a ten-year plan offered by the chairman of the House Ways and Means Committee, 74 percent of the HTF receipts over FYs 2015-2023 would come from user taxes, while 26 percent would come from business tax reform.

These proposals raise a fundamental question: if one of the primary purposes of the Budget Act was to ban new contract authority drawn on general revenues, what is the functional difference (or the principled difference, for that matter) between (a.) creating new contract authority drawn directly on general revenues and (b.) creating new contract authority drawn on general revenues that have then been deposited in an unrelated trust fund account? (*Ed. Note:* In another context, section 1956 of title 18, United States Code has a name for trying to "conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds" of money. It's called "money laundering.")

The problem is particularly obvious in the President's budget, which would divide the Highway Trust Fund into four accounts (Highway, Mass Transit, Rail and Multimodal), the latter two of which would be 100 percent dependent on transfers from general revenues that have zero connection to surface transportation. So all of the rail and TIGER spending under the President's plan would be 100 percent general fund contract authority, laundered through a trust fund account.

The President's bill and the Ways and Means plan differ on the relative percentage of highway and mass transit spending that would be supported by unrelated general revenues laundered through the trust fund. But both plans are completely counter to one of the fundamental purposes of the modern budget process – the ban on new contract authority drawn on general revenues.

Above the Law? As alluded to above, from a Congressional point of view, there are two types of budget enforcement: internal and external. The internal procedures are those established by the Budget Act of 1974 and its amendments, as well as the rules of each chamber (prohibiting legislation on appropriations bills, etc.). These are enforced in the House and Senate via points of order, but there are two problems with this method of enforcement. First, internal rules are not self-enforcing – some Member of Congress has to stand up while a bill is under consideration and raise the point of order. If everyone tacitly decides to keep their mouth shut, or if people are distracted by other things, or lack the proper information, a point of order never gets raised.

The other problem is that each chamber can waive such points of order internally – via majority vote in the House (either through the Rules Committee or, more rarely, by overturning the ruling of the chair) and, in the Senate, via a motion to waive all budget-related points of order (which requires 60 votes).

Because the internal enforcement regime failed to prevent Congress and the President from creating huge federal deficits in the 1980s, a cry for external budget enforcement arose. ("External" meaning that even if both chambers of Congress try to ignore the restrictions by looking the other way or by waiving internal rules, the enforcement happens anyway, because the process is enshrined in law.) First, in

1985, Congress tried the poorly designed Gramm-Rudman-Hollings deficit-based sequestration process, which failed to control deficits. But in the Budget Enforcement Act of 1990, Congress jettisoned the G-R-H approach and instead created two new external enforcement schemes that helped lead directly to the first balanced budget in a generation seven years later.

The twin external enforcement provisions of 1990 were a matched set – one rule governed the Appropriations Committees, and the other rule governed everybody else. A statutory cap on total discretionary appropriations was written into law for each fiscal year, and a "pay-as-you-go" (PAYGO) system ensured that any new changes in mandatory spending from all of the non-Appropriations committees, or changes in taxes from the tax committees, had to even out to be deficit-neutral each year versus the current law baseline. Violations of either rule were enforced by automatic sequestration orders from the Office of Management and Budget.

The George W. Bush Administration allowed these enforcement procedures to expire in 2002 so as to make enactment of the 2003 tax cuts and Medicare Part D spending easier. Unsurprisingly, deficits went up. In 2010, Democrats brought back a version of the statutory PAYGO process, and in 2011, Republicans (through the debt-limit brinksmanship) and President Obama brought back the statutory caps on discretionary appropriations.

Why are these external budget enforcement mechanisms relevant to the Highway Trust Fund? Because, through a variety of oversights and legislative inconsistencies, under the current system, <u>the only on-budget programs in the entire federal government that are exempt from both the statutory PAYGO calculations and statutory discretionary spending caps are the Highway Trust Fund programs (and the Airport Improvement Program</u>). (On-budget excludes Social Security and the Postal Service, and there were a few temporary transition rules in the 2010 PAYGO law that have since expired.)

The reasons are too arcane to examine in detail, but because of a scorekeeping decision made in 1987, the 98 percent of HTF contract authority that is subject to annual obligation limitations in appropriations bills, together with AIP, are the only accounts in the entire federal budget where the budget authority (contract authority) is classified as mandatory while the outlays (dollars eventually leaving the Treasury) are classified as discretionary. Yes, the *only* such accounts in the entire federal government.

The problem: the statutory discretionary spending caps (intended to govern the Appropriations Committees) only limit discretionary budget authority, not outlays. And the statutory PAYGO process (intended to govern all the non-Appropriations committees) only limits mandatory outlays, not budget authority. Since the HTF and AIP programs are the only ones with mandatory BA and discretionary outlays, they are effectively exempt from both kinds of budget enforcement.

Defenders of the HTF used to say that it was "deficit-proof" since outlays have to slow down if the balance in the fund approaches zero (as it will this summer). But thanks to another loophole, the bailout transfers from the general fund are scored as "intragovernmental transfers" and are also exempt from all budgetary enforcement regimes and scoring.

In theory, a bill transferring $1 trillion from the general fund to the Highway Trust Fund with no offset would not trigger any statutory budget enforcement regime. A highway bill providing an extra $1 trillion in HTF contract authority above baseline levels would not trigger any statutory budget enforcement regime so long as the money was subject to obligation limitations in an appropriations bill. And an appropriations bill with an obligation limitation allowing USDOT to spend the entire $1 trillion in one year would not trigger any statutory budget enforcement regime. (The authorizing baseline and appropriations outlay violations might trigger internal Congressional budget procedures, but those can be waived internally by affirmative vote or by looking the other way. And a big enough GF to HTF transfer might hit the debt limit since HTF balances are invested in securities that count towards the limit.)

So the Highway Trust Fund (and the Airport Improvement Program) occupy a privileged state of exemption from both statutory budget enforcement mechanisms that is not available to any other federal programs, no matter how meritorious those other programs may be.

Repatriation. The political consensus for a "pay-for" for the next surface transportation reauthorization bill seems to be moving towards Ways and Means chairman Dave Camp's (R-MI) proposal for allowing U.S. companies with cash held overseas to repatriate that money to the United States by paying a one-time lower tax rate on the money. Under Camp's policy, the Joint Committee on Taxation estimates that such a repatriation program would deposit an estimated $126.4 billion into the Highway Trust Fund over the nine-year FY 2015-2023 period, with more deposits coming later rather than sooner:

Additional HTF Deposits Under Chairman Camp's Repatriation Proposal

(Billions of dollars)

FY15	FY16	FY17	FY18	FY19	FY20	FY21	FY22	FY23	Total
5.1	10.1	10.1	10.1	10.1	14.5	22.1	28.5	15.8	126.4

In the Administration's 2015 budget request, a more general term of "pro-business tax reform" was used, but White House officials have made encouraging noises about Camp's proposal. And Senate Environment and Public Works chairman Barbara Boxer (D-CA) also said that a consensus seems to be forming behind repatriation as a surface bill "pay-for."

So it is worth looking at what kinds of companies are holding this money overseas, how the money was made, and what kind of connection the money has to U.S. surface transportation infrastructure.

Very helpfully, Bloomberg did an analysis two months ago of how much cash was being held overseas by all of the U.S. companies listed in the S&P 500 index (which is most of the big ones). The Bloomberg survey indicated that major U.S. companies are holding almost $2 trillion of cash in overseas subsidiaries.

As shown in the table below, the companies involved run the gamut of big multinationals, but for the most part, those overseas profits weren't earned using much, if any, U.S. surface transportation infrastructure.

Some of the companies don't use transportation infrastructure at all – Google, for example, makes money in the virtual world, and much Microsoft profit comes from software downloads, not sales of disc-based software. The stuff made by Big Pharma is so small, lightweight, valuable, and subject to a rapid expiration date that it usually moves by air freight, not surface freight. A lot of that profit from Big Oil involves wells, refineries, tankers and consumers that never touch U.S. soil. Apple makes most of its products in China or Brazil, and the overseas sales of those iPads and iPhones to foreigners never touch U.S. soil. And the unholy financial magic of Citigroup and J.P. Morgan Chase is also, of course, largely untethered to physical infrastructure.

Cash Held Overseas by S&P 500-Listed U.S. Companies

(Billions of US dollars)

General Electric	110	Google	39
Microsoft	76	Hewlett-Packard	38
Pfizer	69	PepsiCo	34
Merck	57	Oracle	33
Apple	54	Chevron	31
IBM	52	Coca-Cola	31
Johnson & Johnson	51	JP Morgan Chase	29
Cisco	48	Amgen	26
Exxon Mobil	47	United Technologies	25
Citigroup	44	Abbot Laboratories	24
Procter & Gamble	42	Bristol-Myers Squibb	24
Total, 22 Largest Overseas Cash Holdings			**984**
Cash Held Overseas By 295 Smaller Companies			**963**
Total Cash Held Overseas by S&P 500 Companies			**1,947**

Source: Bloomberg, March 12, 2014

If the federal government is trying to wring back overseas profits made by Microsoft and Google from software downloads, then there is a much more logical case to be made for spending that money on expanding broadband access to the poor, or reinforcing the Internet backbone or the electrical grid instead of on highways and bridges. If the federal government wants to get some one-time tax money out of pharmaceutical companies, then using that money to pay for the permanent extension of the expiring R&D tax credit is much more logical than spending that money on roadways and subways. And to the extent that the overseas commerce of these companies does use U.S. infrastructure, that infrastructure is more about the airports and air traffic control maintained by the FAA and the ports and harbors maintained by the Corps of Engineers, not highways and mass transit.

Brief recap. So far, we have demonstrated four problems with the Highway Trust Fund as it is currently operated:

1. President Eisenhower and the 84th Congress created the Highway Trust Fund as a temporary entity to use increased highway user taxes to pay for the initial construction of the Interstate highway system. After the completion of the Interstate system, the original intention was for the Trust Fund to be abolished and the taxes to revert to a pre-1956 level. For a variety of reasons, Congress never allowed the Trust Fund to expire and never allowed the taxes to revert back to their lower levels.
2. One of the main goals of the 1974 Budget Act was to ban new contract authority drawn from the general fund and instead limit it to trust fund accounts that were at least 90 percent self-sufficient (reliant on specific taxes that had a relationship to the trust fund's spending). This was the case for the Highway Trust Fund for its first 50 years but has not been the case since then, and both the Obama Administration's plan and the House Ways and Means chairman's plan would both launder over $100 billion dollars of unrelated general fund money through the Highway Trust Fund, in order to create what is effectively new general fund contract authority in violation of the intent of the Budget Act.
3. The Highway Trust Fund programs (and the Airport Improvement Program) are the only on-budget programs in the entire federal budget that are exempt from both types of external, statutory budget restraint systems – PAYGO and the discretionary spending caps. This puts the HTF in a privileged situation above all other federal programs (save Social Security and the Postal Service, which are technically off-budget).
4. The "pay-for" being discussed most often for the next surface transportation bill – one-time repatriation of corporate overseas profits – has no logical connection to surface transportation funding.

The question then becomes: how can Congress continue to fund adequate surface transportation infrastructure investment while solving most, or all, of these problems with the Trust Fund?

Three separate issues. First, we need to divide the problem into three separate segments. First, there is the immediate need for yet another bailout of the Highway Trust Fund by the general fund before Congress adjourns in late July, in order to prevent the Highway Account of the Trust Fund from running out of money over the August recess. This short-term patch could be as small as $5 billion (if Congress only wants to get through the end of the fiscal year on September 30) or over $10 billion (if they want to get to December 31).

This first short-term bailout is necessary to give Congress and the Administration time to figure out what else to do with the longer-term solution, and will almost certainly be considered separately from the larger issue (at least in the House).

The second issue is some sort of "bridge" bailout starting in fiscal year 2015 to pay for the transition needed from the currently unsustainable Trust Fund spending/revenue mismatch until you get to an honest and sustainable funding system. (If you keep the Trust Fund and try to balance the books starting in FY 2015, then either the spending cuts would be so drastic as to shut down the program for a whole year, or the tax cuts would be so large and immediate as to be ruinous. And switching to any other kind of system between now and October 1 would be next to impossible.)

And the third issue is establishing the kind of honest funding and revenue mechanism you want to use moving forward to fund the surface transportation system. But what kind of system could that be?

Option #1. Abolish the Trust Fund. Going back to Senator Kennedy's proposal from 1975 (see title II of S. 1300, 94th Congress), one way to approach the problem would be to say that the Highway Trust Fund's time has passed and abolish it entirely. The existing Trust Fund taxes and their $39 billion per year in receipts would be deposited in the general fund. And everybody could go to the Appropriations Committee and ask for money each year and be placed on the same footing as all of the other discretionary programs.

In order for this to work, Congress and the President would have to amend the discretionary spending caps to allow the appropriators to spend that money. The current cap on-defense discretionary spending for FY 2015 is currently $492 billion. That would have to go up by at least the $39 billion level of the user taxes being deposited in the Trust Fund (to $531 billion) and, ideally, you could also increase the cap by the amount of whatever new tax reform/repatriation revenue you bring in so that the appropriators could, if they chose, continue to fund the current Trust Fund programs at their current levels, or higher, from the general fund.

Or, Congress could establish a separate cap and category for surface transportation appropriations separate from the main non-defense discretionary cap (either in the amount of $39 billion per year in the transferred taxes or higher if offset by unrelated taxes) to try and ensure that the appropriators continue to maintain a "floor" for future surface transportation appropriations. (The TEA-21 law did this for the outlays from the Trust Fund from 1998-2002.)

This proposal would provoke great howls of outrage from two different groups. The first would be the authorizing committees in the House and Senate, because this proposal would take way most of their power and authority over these programs (and thus would mean fewer interest groups would give them campaign donations so as to attempt to influence them). The second would be the state DOTs and the construction lobby who would say that the lack of a multi-year advance funding stream would make it extremely difficult to construct big projects.

There is no way around the complaints of that first group – this proposal would indeed represent a huge transfer of political power from the authorizing committees to the Appropriations Committees. And the complaints of the second group are valid to some degree – states, MPOs and transit agencies do need some kind of multi-year funding certainty for the largest and most complicated projects (though not for the sizeable chunk of their budget that goes for routine maintenance).

However, Trust Fund advocates often falsely imply that contract authority is the only method of providing guaranteed advance funding. This is not the case. Nothing in the Constitution prohibits the Appropriations Committees from funding infrastructure projects years in advance (the only such restriction in the Constitution is a ban on appropriations "to raise and support Armies" lasting longer than two years.)

Indeed, of the $492 billion in non-defense discretionary appropriations enacted in FY 2014, 17 percent ($85 billion) was actually in the form of "advance appropriations" that won't become available until future fiscal years.

Discretionary Advance Appropriations Carried in FY 2014 Appropriations Acts
(Millions of dollars)

Dept. of Education	FY 2015	FY 2016	Total
Education for the Disadvantaged	10,841	0	10,841
Special Education	9,283	0	9,283
Career, Technical and Adult Education	791	0	791
School Improvement Programs	1,681	0	1,681
Subtotal, DOE	*22,596*	*0*	*22,596*
Dept. of Housing and Urban Development			
Tenant-Based Rental Assistance	4,000	0	4,000
Project-Based Rental Assistance	400	0	400
Subtotal, HUD	*4,400*	*0*	*4,400*
Dept. of Labor			
Training and Employment Services	1,772	0	1,772
Dept. of Veterans Affairs			
Medical Services	45,016	0	45,016
Medical Support and Compliance	4,739	0	4,739
Medical Facilities	5,880	0	5,880
Subtotal, VA	*55,635*	*0*	*55,635*
Payment to Postal Service Fund	71	0	71
Corporation for Public Broadcasting	0	445	445
Total, Discretionary Advance Appropriations	**84,474**	**445**	**84,919**

Over the years, advocates of veterans health, education, job training, and public housing programs have been able to convince Congress that their need for certainty in future funding is such that they should get their appropriations one fiscal year in advance. And, inexplicably, the Corporation for Public Broadcasting was able to convince Congress in the mid-1970s that they were so important that they, alone amongst discretionary appropriated programs, should be able to get their budget appropriated two years in advance.

(*Ed. Note:* In this scenario, the construction lobby's motto could be: if it's good enough for Big Bird, it's good enough for transportation.)

There is nothing (save the general reluctance of the Appropriations and Budget Committees) preventing the appropriators from making some surface transportation appropriations available out of the discretionary budget even farther in advance. So the whole argument about contract authority being the "only" solution to the need for long-term funding security is invalid.

But abolishing the Trust Fund would be a radical step. There are other ways to solve the problem.

Option #2. Increase user taxes. Another honest way to fix the long-term problem would be to increase taxes on highway and mass transit system users in amounts sufficient to raise at least the needed $12 billion per year (to align the current law $39 billion per year in tax receipts with the current law $51 billion per year in new spending commitments) and, preferably, by a greater amount in order to allow funding from the Trust Fund to grow beyond the $51 billion per year baseline.

However, the politics of a straight-up user tax increase appear to be impossible at this point. Even before the Tea Party-inspired Republicans took back the House, the Obama Administration categorically ruled out an eventual transition to a mileage-based user tax system and refused to talk about a gas tax increase (and this was in 2009-2010 when they had huge Democratic majorities in each chamber). GOP control of the House has made this political problem even more difficult. And the usual election-year timing issues mean that any such increase in user taxes can't even be mentioned by anyone in a position of responsibility until after the November elections. (And, of course, if the GOP happens to take back the Senate in those elections, then prospects for anything happening in a lame-duck session shrivel up.)

If abolishing the Trust Fund is too drastic, and raising gas and diesel taxes (or levying a VMT fee) is too politically poisonous, then what other ways are there to pay for a surface transportation in an honest and straightforward way?

Option #3. Limit Trust Fund spending to user tax levels and supplement it with general fund appropriations subject to a discretionary cap. Under this scenario, if Highway Trust Fund tax receipts from highway users under current law (plus interest on balances) is only going to total $39 billion per year indefinitely, and Congress and the President lack the political will to increase these user taxes in an honest manner, then spending out of the Trust Fund should be reduced to about $39 billion per year. The difference between that $39 billion per year in Trust Fund spending and the higher spending level needed to get to whatever policy you want would come from general fund discretionary appropriations.

In order to do this without shutting down the highway program completely in 2015 for one year (since the need to pay off bills incurred in prior years will almost be total to new Highway Account tax receipts in 2015), a large one-time bridge bailout of the Trust Fund would be needed to allow a smooth transition down to the lower spending levels.

As shown in the following table, under the latest Congressional Budget Office / Joint Committee on Taxation estimates, current law Highway Account tax receipts will be between $33.5 and $34.5 billion per year for the next ten years. If you fund FMCSA and NHTSA programs at baseline levels off the top and subtract the current law $739 million per year in truly mandatory highway spending exempt from limitation, then this would leave about $32 billion per year in highway contract authority subject to limitation each year (before the "flex" transfer of about $1 billion per year from highways to mass transit). (The comparable FY 2014 level was $40.3 billion pre-flex.)

The reduction would be worse in the Mass Transit Account because current law spending levels from that account are even farther away from tax revenues. Under this scenario, the Trust Fund contract authority for the FTA Formula Grants account would have to be decreased from the current law $8.6 billion per year down to about $4.8 billion per year (again, this is before the flex transfer from highways).

What Would A Self-Sufficient Highway Trust Fund at Current Tax Levels Look Like?

Assumption 1: Use CBO 2014 WIDI baseline funding levels for FMCSA and NHTSA programs.

Assumption 2: Maintain $739 million per year in exempt highway obligations and $1 billion annual flex of cash from FHWA to FTA, as under current law.

Assumption 3: A sizeable one-time general fund transfer (not shown here) would be necessary to pay off the legally binding commitments made at higher spending levels prior to 2015 to allow a transition down to the lower spending levels that could be sustained by current-law user taxes.

(CBO/JCT spring 2014 baseline used. Billions of dollars.)

Highway Account	FY15	FY16	FY17	FY18	FY19	FY20	FY21	FY22	FY23	FY24
HTF-HA Receipts & Interest	33.5	34.0	34.3	34.5	34.4	34.4	34.4	34.5	34.5	34.5
Minus Flex to FTA	-1.0	-1.0	-1.0	-1.0	-1.0	-1.0	-1.0	-1.0	-1.0	-1.0
Minus FAHP Exempt Outlays	-0.7	-0.7	-0.7	-0.7	-0.7	-0.7	-0.7	-0.7	-0.7	-0.7
Minus Safety Outlays	-1.2	-1.3	-1.3	-1.3	-1.3	-1.4	-1.4	-1.4	-1.5	-1.5
Leaves FAHP Oblim Outlays	30.5	31.0	31.3	31.4	31.3	31.3	31.3	31.3	31.3	31.2
Mass Transit Account										
HTF-MTA Receipts & Interest	4.8	4.8	4.8	4.8	4.7	4.7	4.6	4.6	4.6	4.5
Plus Flex From FHWA	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0	1.0
Equals FTA Formula Outlays	5.8	5.8	5.8	5.8	5.7	5.7	5.6	5.6	5.6	5.5
Total HTF Receipts/ Outlays	38.3	38.8	39.1	39.3	39.1	39.1	39.0	39.1	39.1	39.0

Under this scenario, any funding in excess of the $34.5-ish billion per year in Highway Account receipts and interest and the $4.7-ish billion per year in Mass Transit Account receipts would have to come from the general fund via legitimate appropriations, budgeted honestly, and subject to a statutory cap on discretionary spending. As in option #1, Congress could use the proceeds of pro-business tax reform to offset an increase the non-defense discretionary cap by $10-20 billion per year to accommodate these appropriations, or they could establish a separate discretionary cap on surface transportation spending. And the general fund appropriations could be one-year-advance (or preferably, two-year-advance appropriations).

This approach would allow the authorizing committees to maintain control over most of the highway and transit programs while also allowing the appropriators some power-sharing. And the idea of appropriating discretionary general fund money directly into the highway and transit formula programs that are run on contract authority has already been tried – the 2009 ARRA stimulus law did it, and (programmatically at least) it worked rather well.

This approach also has the potential to satisfy the states, localities and stakeholders who want long-term funding. The contract authority from the Trust Fund would be provided five or six years in advance and most of that would be restricted to the largest, most expensive, most complicated projects that require the longest planning lead times. Then the one-year or two-year advance appropriations would come from the Appropriations Committees and supplement that long-term contract authority with funding primarily directed at projects with shorter lead times.

Those who are skeptical of splitting up program funding into long-term and short-term funding tracks should remember that this is exactly the way the highway program worked back in its glory days from 1956-1978. At any point during that time period, Congress had already provided full funding for Interstate construction contract authority somewhere between four and twelve years in advance, and each state DOT had a pretty good idea of how much of that money they would be apportioned each year. But, depending on the authorization cycle, they did not have any contract authority for other programs guaranteed in advance beyond the next year or two, since all of the non-Interstate money was on a two-year reauthorization cycle. And yet this system worked reasonably well.

As mentioned above, this proposal would require a "bridge" bailout to pay down the outlays drawn from the $51 billion per year Trust Fund spending levels of the past until they drop down to the $39 billion per year self-sufficiency level that will eventually occur if new spending commitments are reduced to the $39 billion per year level starting in 2015. But unlike the proposal in the President's budget, where the general fund bailout was billed as "transition revenue" even though the underlying proposal did not provide any such transition to a sustainable system, this bridge bailout could be part of the same legislation that cuts contract authority levels from the Trust Fund from the $51 billion per year level down to the $39 billion per year level, so legislators could be assured that the "bridge" bailout would be the last bailout.

To sum up, this third option would require the following to be enacted this fall:

- A one-time "bridge" bailout of the Trust Fund by the general fund to pay for the excessive outlays coming due in the FY 2015-2020 time period from legally binding spending commitments made by the federal government in FY 2014 and prior years (possibly offset).
- A multi-year surface transportation reauthorization bill that cuts new contract authority from the Highway Trust Fund down from the current $42.2 billion per year in Highway Account contract authority and the current $8.6 billion per year in Mass Transit Account contract authority down to a sustainable level of $33.5 billion for the Highway Account and $4.8 billion for the Mass Transit Account in 2015, rising slightly in future years.

- Adjustments to the statutory discretionary spending caps to allow increased general fund appropriations for highway and mass transit programs. (Offset with receipts from tax reform or other savings.)
- Appropriations bills in FY 2015 and future years providing discretionary budget authority for highway programs, and for mass transit formula grants, equal at least to the amount of the cuts in new Trust Fund contract authority ($8.7 billion for highways and $3.8 billion in 2015) and containing advance appropriations for at least one year in advance, as allowable under the revised discretionary spending cap and any limit on total advance appropriations in a future budget resolution.

Conclusion. These options all require leadership from the House and Senate Budget Committees to some degree, since those chairmen control changes in the spending caps and the other rules that govern the budget process. Consensus on these issues has been elusive in the past (most budget pros agree that the fact that the HTF and the AIP program are the only ones in the entire on-budget federal government exempt from both PAYGO and the discretionary caps is ridiculous and needs to change, but they have been unable to overcome inertia and political difficulties to get anything done about it.) Whatever finally happens also needs to be accepted by both the authorizing committees and the appropriators, which is also difficult.

It is likely that instead of choosing any of the honesty-in-budgeting alternatives listed above, that Congress will instead take the path of least resistance and continue to launder unrelated general fund revenues through the Trust Fund, maintaining the status quo and kicking the can further down the road for a few more years. But the debate needs to stop focusing on how important infrastructure is, because nearly everyone agrees with that. The settled debate over the importance of infrastructure obscures the much-needed debate about whether the user tax/trust fund concept has run its course.

And, if Congress does indeed commit itself to more business as usual, the proponents of continued Trust Fund spending should at least provide honest answers to the basic questions:

- What is the justification for continuing with a Trust Fund that requires at least one-fourth of its revenues to come from unrelated general fund taxes?
- Isn't laundering general fund money through a trust fund just a way of creating general fund contract authority in violation of the Budget Act's ban on new "backdoor" spending?
- Given the need for a $100+ billion Trust Fund bailout, what possible justification is there for continuing to exempt Highway Trust Fund spending from all of the statutory budget restraint rules that limit the growth of all other on-budget federal programs?
- Are taxes on overseas corporate profits having nothing to do with U.S. surface transportation infrastructure really the best way to fund future infrastructure investment?

- Jeff Davis