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*Attorney-Client Communication*

## MEMORANDUM

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To Ben Hirst

From Seth Waxman  
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cc Thomas Strickland

Re **The FAA's Flexibility In Responding To Sequestration**

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This memorandum addresses the authority of the Federal Aviation Administration (FAA) to implement sequestration of the FAA's budgetary resources so as to limit disruption of the FAA's core mission priorities. Our high-level conclusions are as follows:

- The FAA's discretion to implement sequestration is constrained, but not absent. The FAA must implement sequestration by "the same percentage" across each non-exempt "program[], project[], and activit[y]" within a "budget account." Although the phrase "program[], project[], and activit[y]" is not defined and despite some ambiguity in the phrase, the better view is that there are seven budget activities within the FAA's Operations account<sup>1</sup> for FY2013 funding purposes. This conclusion is consistent with the text of the relevant FAA appropriations act, the accompanying congressional report, the FAA's budget submission, and the President's budget. The FAA accordingly must make the same percentage reduction to each of those seven activities across-the-board. Importantly, however, the FAA retains discretion—at least as a matter of sequestration law—with respect to how to implement cuts within each of these seven activities, so long as the uniform percentage reduction for the overall activity is achieved. The statutory requirement of uniformity, in other words, does not restrict the FAA's choices about how best to reduce spending levels for items within each of the budget activities consistent with its statutory responsibilities.

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<sup>1</sup> As explained further below, we have focused on the Operations account because it is the largest of the FAA's budget accounts and because the account funds employees' salaries. If helpful, we would be happy to address the FAA's other budget accounts as well. As noted below, *see* n.31, the other accounts may pose additional or somewhat different questions.

April 10, 2013

Page 2

- Apart from the flexibility that the FAA has in implementing cuts within a program, project, and activity, the FAA (or the Secretary of Transportation) may, in our view, exercise statutory transfer authority to limit the negative effects of sequestration. In particular, under authority Congress provided in the FAA Modernization and Reform Act of 2012, the Secretary of Transportation may readjust funding levels within the Operations account. That authority, in our view, remains available even in response to sequestration. The FAA also possesses more limited transfer authority under its appropriations act. Each of these authorities should provide a way to help mitigate the negative effects of sequestration.

### **BACKGROUND**

The Budget Control Act of 2011 (BCA) amended the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the Gramm-Rudman-Hollings Act (GRH Act). The BCA “tasked a new Joint Select Committee on Deficit Reduction with producing legislation to reduce deficits by at least \$1.5 trillion over the 2012-2021 period.”<sup>2</sup> The BCA further provides that, “if a joint committee bill reducing the deficit by least \$1.2 trillion [is] not signed into law by [a specified date], certain automatic spending reductions would take effect.”<sup>3</sup> The procedures for enforcing those cuts—through a cancellation of budgetary resources otherwise known as “sequestration”<sup>4</sup>—are also described in the BCA.<sup>5</sup>

As relevant here, the BCA mandates that sequestration “shall be implemented in accordance with [2 U.S.C. § 906(k)].”<sup>6</sup> Section 906(k), which Congress adopted as part of the amended GRH Act, 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

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<sup>2</sup> OMB *Final Sequestration Report to the President and Congress for Fiscal Year 2012*, at 3 (Jan. 18, 2012).

<sup>3</sup> *Id.*

<sup>4</sup> *See* 2 U.S.C. § 900(c)(2).

<sup>5</sup> *See id.* § 901a.

<sup>6</sup> *Id.* § 901a(10).

April 10, 2013

Page 3

included in appropriation Acts, as delineated in the most recently submitted President's budget).<sup>7</sup>

This uniform percentage reduction requirement is consistent with the Congress's judgment that sequestration should not ordinarily present the Executive Branch with the opportunity to reorder spending priorities set by Congress. In testifying in favor of the original GRH Act, for example, James C. Miller III, then-Director of the Office of Management and Budget (OMB), explained that, "in the event of sequestering funds, the President's function is essentially ministerial, that is, imposing uniform percentage spending reductions across the budget, across most of the budget. Thus, Gramm-Rudman-Hollings is entirely different from the [now-defunct] line-item veto where the President indeed have the power to pick and choose among programs."<sup>8</sup> In introducing the legislation, moreover, Senator Gramm stated: "What this bill does is simply make[ ] the President the instrument of the will of Congress in sequestering across the board proportionately so as to preserve the congressional intent in terms of priorities."<sup>9</sup>

Congress's failure to pass legislation implementing the recommendations of the Super Committee has triggered sequestration. On March 1, 2013, OMB, as required by the BCA,<sup>10</sup> issued a sequestration report "provid[ing] OMB's calculations of the percentage and dollar amount of the reduction for each non-exempt budget account."<sup>11</sup> The report stated that sequestration must "be applied equally at the program, project, and activity level within each

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<sup>7</sup> *Id.* § 906(k)(2). Congress adopted Section 906(k)(2)'s current text in 1990, when it rewrote much of the original GRH Act. *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 13101 (1990). We have identified no legislative history shedding light on the provision.

<sup>8</sup> *The Balanced Budget and Emergency Deficit Control Act of 1985: Hearing on H.J. Res. 372 Before the Subcomm. of the H. Comm. On Govt. Operations, 99th Congress 69 (1985).*

<sup>9</sup> Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 Cal. L. Rev. 593, 632 (1988) (quoting Senator Gramm's statement; concluding that "[t]he purpose of 'uniform' reductions is to ensure that sequestration will not alter the relative spending priorities established by Congress" and that "the sequestration formulae prescribed by GRH require the President to spread the pain of spending cuts evenly among those parts of the budget that GRH neither fully nor partially exempts") (internal footnote omitted); *see also* Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act*, 20 Cardozo L. Rev. 871, 895 (1999) ("If the spending cap is exceeded in a fiscal year, OMB must sequester, or uniformly cut, budget authority and outlays in every non-exempt account so that the breach is eliminated. The executive branch does not have a great deal of discretion with regard to these cancellations, which must be uniform across programs, projects, and activities.") (internal footnote omitted).

<sup>10</sup> *See* 2 U.S.C. § 901a(8), (11).

<sup>11</sup> *OMB Report to the Congress on the Joint Committee Sequestration for Fiscal Year 2013*, at 1 (Mar. 1, 2013) ("FY2013 OMB Sequestration Report").

April 10, 2013

Page 4

budget account,”<sup>12</sup> but it offered no guidance on how to identify or define the relevant programs, projects, and activities to be cut. The President issued a sequestration order the same day, directing that “[a]ll sequestrations shall be made in strict accordance with the requirements [of the BCA] and the specifications of [OMB’s] report of March 1, 2013.”<sup>13</sup>

## DISCUSSION

Although the FAA is constrained in many ways in how it implements sequestration, the FAA retains some flexibility that it may use to help limit the negative consequences of sequestration on the FAA’s statutory responsibilities. We first address the FAA’s discretion with respect to the implementation of the President’s sequestration order. We then discuss the ability of the FAA, or the Secretary of Transportation, to exercise separate budget transfer authority to address funding shortfalls caused by sequestration.

### **I. THE FAA’S DISCRETION TO IMPLEMENT SEQUESTRATION**

As noted, under 2 U.S.C. 906(k)(2), the FAA must sequester all non-exempt “programs, projects, and activities within a budget account” by the “same percentage.” This uniform reduction requirement reflects the basic principle that sequestration should not afford the President the opportunity to reorder congressional budget priorities. However, under the statute, the FAA retains discretion regarding how to implement sequestration *within* a program, project, or activity—sometimes referred to as “PPA.” How the phrase “programs, projects and activities” is defined is therefore crucial: the more granular the definition of PPA, the less discretion that the FAA has in implementing the sequester; the higher up in the budget PPA is defined, the more flexibility that the FAA has in making sequester-required cuts.

The key question, then, is what is a PPA? The statute does not say. Unlike the term “account,”<sup>14</sup> the phrase “programs, projects, and activities” is not defined, either by the BCA or the GRH Act, as amended.<sup>15</sup> And the meaning of PPA is far from self-evident. To be sure,

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<sup>12</sup> *Id.* at 7.

<sup>13</sup> Order of March 1, 2013, *Sequestration Order for Fiscal Year 2013*, 78 Fed. Reg. 14633 (Mar. 1, 2013).

<sup>14</sup> See 2 U.S.C. § 900(c)(11) (“The term ‘account’ means an item for which appropriations are made in any appropriation Act and, for items not provided for in appropriation Acts, such term means an item for which there is a designated budget account identification code number in the President’s budget.”).

<sup>15</sup> As first enacted, the GRH Act authorized the House and Senate Committees on Appropriations to define the term “program, project, and activity” for purposes of FY1986. See Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 252(a)(6)(D)(II) (1985). Pursuant to that

April 10, 2013

Page 5

Section 906(k)(2) tells agencies *where* to look for PPAs—namely, in “the appropriation Act or accompanying report for the relevant fiscal year”—but it does not explain *what* to look for in identifying a PPA. The budget glossary of the Government Accountability Office (GAO), although specifying where to look for PPAs in a bit more detail, is also vague:

Program, Project, or Activity (PPA)

An element within a budget account. For annually appropriated accounts, [OMB] and agencies identify PPAs by reference to committee reports and budget justifications; for permanent appropriations, OMB and agencies identify PPAs by the program and financing schedules that the President provides in the ‘Detailed Budget Estimates’ in the budget submission for the relevant fiscal year. Program activity structures are intended to provide a meaningful representation of the operations financed by a specific budget account—usually by project, activity, or organization.<sup>16</sup>

Similarly, the Deputy General Counsel of GAO explained to Congress last year that, under Section 906(k)(2), “each budget account must be analyzed separately to determine its component programs, projects, and activities, as such a determination may require reference to the original appropriations act, to accompanying reports, or to the President’s budget.”<sup>17</sup> This “definition” of PPA is consistent with decisions of the Comptroller General.<sup>18</sup>

Because PPA is not statutorily defined and in view of the ambiguity of the phrase, it is not surprising that federal agencies have encountered difficulty in applying the concept in the past. In 1986, for example, the GAO issued a compliance report with respect to the FY1986 sequester.<sup>19</sup> The report concluded that sequestration occurred properly at “[a]t the [budget]

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provision, Congress issued a report in December 1985 defining PPAs by department. *See* H.R. Rep. No. 99-450, at 338 (1985). Although they varied somewhat by department, the most common definition of PPA used in that report was the “most specific level of budget items identified” in the relevant appropriations act and accompanying committee reports. *See id.* at 338-45.

<sup>16</sup> U.S. Government Accountability Office, *A Glossary of Terms Used in Federal Budget Process*, 80 (Sept. 2005) (“*GAO Budget Glossary*”).

<sup>17</sup> Statement of Susan A. Poling, Deputy General Counsel GAO, *Agency Operations: Agencies Must Continue to Comply with Fiscal Laws Despite the Possibility of Sequestration*, at 8 (Apr. 2012).

<sup>18</sup> *See, e.g.*, Comptroller General, *National Aeronautics and Space Administration-Constellation Program and Appropriations Restrictions, Part II*, B-320091, at \*4 (July 23, 2010) (relying on *GAO Budget Glossary* definition of PPA).

<sup>19</sup> *See* U.S. General Accounting Office, *Compliance Report for FY 1986; Balanced Budget and Emergency Deficit and Control Act of 1985* (Mar. 31, 1986).

April 10, 2013

Page 6

account level.”<sup>20</sup> But the report found “a number of problems in the listing of programs, projects, and activities below the account level.”<sup>21</sup> In particular, GAO reported “widespread confusion among agencies in applying the program, project, and activity definitions”—confusion that “often reflected the ambiguities of the definitions themselves.”<sup>22</sup>

Although the ambiguity surrounding PPAs might, in certain circumstances, allow agencies to exercise some discretion in defining PPAs and thus in implementing sequestration, there appear to be sufficient indications of the relevant PPAs for the FAA, at least for FY2013. Those indications are found in the relevant appropriations act, the act’s accompanying congressional report, the FAA’s budget justification, and the President’s budget submission.

Section 906(k)(2) instructs federal agencies first to look to the text of their appropriations acts to identify PPAs. The relevant appropriations act for the FAA includes four budget accounts: “Operations,” “Facilities and Equipment,” “Research Engineering and Development,” and “Grants-in-Aid for Airports.”<sup>23</sup> The conclusion that these are the relevant “budget accounts” for sequestration purposes under Section 906(k)(2) is supported by the FAA’s FY2013 budget submission<sup>24</sup> and by OMB’s sequestration report.<sup>25</sup>

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<sup>20</sup> *Id.* at 1.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Pub. L. No. 112-55, at 94-97. Public Law No. 112-55 is the last appropriations act Congress enacted for the FAA. Congress extended the appropriations in that act by a partial Continuing Resolution (Pub. L. No. 112-175) through March 27, 2013, and then for all of FY2013 by a full Continuing Resolution (Pub. L. No. 113-6). Each of the continuing resolutions extended the FY2012 appropriations levels subject to the “authority and conditions provided” in “the applicable appropriations Act for fiscal year 2012.” Pub. L. No. 112-175, § 101(a) (2012); Pub. L. No. 113-6, § 1101(a) (2013). We therefore treat Public Law No. 112-55 as the relevant appropriations act for purposes of application of Section 906(k)(2). Similarly, we treat the congressional report accompanying that act as relevant for these purposes as well.

<sup>24</sup> See Federal Aviation Administration, *Budget Estimates: Fiscal Year 2013* (listing “Operations,” “Facilities and Equipment,” “Research, Engineering & Development,” and “Grant-in-Aid for Airports” under the heading of “Overview by Appropriation Account”); see also *id.* Exh. II-1.

<sup>25</sup> See *FY2013 OMB Sequestration Report*, appendix, at 44 (requiring a 5 percent sequestration for “Operations,” “Facilities and Equipment,” “Research, Engineering and Development,” and “Grants-in-aid for Airports”). The OMB report also includes “Aviation Insurance Revolving Fund” and “Trust Fund Share of FAA Activities” headings. Even if those additional categories are considered budget accounts for Section 906(k)(2) purposes, that would not affect our analysis here.

April 10, 2013

Page 7

The Operations account is likely the most relevant for present purposes because it is the largest of the FAA's accounts and because it funds employees' salaries. The account is currently funded at a level of approximately \$9.6 billion, with funds distributed among seven "activities": "air traffic organization activities"; "aviation safety activities"; "commercial space transportation activities"; "finance and management activities"; "human resources program activities"; "NextGen program activities"; and "staff offices."<sup>26</sup> These "activity" designations are the most specific level of dollar amounts provided in the Operations account in the text of the appropriations act. In our view, these seven "activities" are likely the "programs, projects, or activities" to which the FAA must apply uniform sequestration under Section 906(k)(2).

The relevant congressional report—which accompanied the last FAA appropriations act, for FY2012—supports this conclusion.<sup>27</sup> With respect to the Operations account, the report explains that "[f]unds are distributed in the bill by budget activity."<sup>28</sup> And a table in the report lists the seven items under a "Program" heading.<sup>29</sup> Although this usage suggests Congress may use the words "program" and "activity" imprecisely or at least interchangeably, it further supports the conclusion that the seven items are relevant "programs" or "activities." And the report contains no additional breakdown or categories within the Operations account that could be considered PPAs.<sup>30</sup> That omission is telling because for other accounts in the FAA budget (for example, the Facilities and Equipment account) the report does include detailed itemization not contained in the text of the appropriations act itself.<sup>31</sup>

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<sup>26</sup> Pub. L. No. 112-55, at 94.

<sup>27</sup> There is a question whether Congress constitutionally may assign legal significance to designations made in congressional reports that are subject neither to bicameral passage in Congress nor to presentment to the President. *See INS v. Chadha*, 462 U.S. 919 (1983); *but see* Stith, 76 Cal. L. Rev. at 649-650 (arguing that "[t]he better view ... supports the constitutionality" of the use of committee materials because the statute "gives notices that such designations will have the force and effect of law" and "the designations have this effect only upon enactment of accompanying appropriations legislation"). Our analysis here need not resolve this question because, at least for purposes of the Operations account, the appropriations act and the congressional report point to the same conclusion. In any event, we are aware of no indication the FAA is relying on a congressional report for PPA purposes.

<sup>28</sup> H.R. Rep. No. 2112, at 289 (2011) (Conf. Rep.).

<sup>29</sup> *See id.*

<sup>30</sup> The Conference Report accompanying the FY2010 appropriations act did contain a detailed itemization within the Operations account. *See* H.R. Rep. No. 111-366, at 383 (2009) (Conf. Rep.).

<sup>31</sup> H.R. Rep. No. 2112, at 290-293. To the extent that the FAA does treat the congressional report as binding on the definition of PPA for purposes of the Facilities and Equipment account, such reliance would squarely raise the constitutional issue under *Chadha* noted above, *see* n.27. We would be happy to provide a full analysis of that constitutional question if you would find that useful.

April 10, 2013  
Page 8

Our conclusion is further reinforced by the FAA's budget justification for FY2013. In that document, the FAA lists "Air Traffic Organization," "Aviation Safety," "Commercial Space Transportation," "Finance & Management," "NextGen," "Human Resources Management," and "Staff Offices" under the "Operations Account."<sup>32</sup> The President's budget submission for FY2013 similarly lists these seven items as "program activit[ies]."<sup>33</sup>

Based on these sources of information—sources specified by statute and by GAO—we believe that, for the Operations account, the relevant PPAs are the seven budget activities listed above. Although the FAA must administer uniform cuts *across* those seven activities, it retains discretion (at least as a matter of sequestration law) *within* each activity to implement cuts disparately so as to mitigate negative consequences from sequestration on the FAA's statutory responsibilities.

This discretion could be important. For example, the air traffic organization activity is capped at approximately \$7.4 billion in the appropriations act. Although the FAA is required to reduce that activity by the same uniform percentage as the six other activities, the FAA has discretion with respect to cuts within that PPA. The FAA can thus pick and choose how to reduce spending within the air traffic organization activity so as to minimize the adverse effects of sequestration on the FAA's core mission priorities. Indeed, OMB has instructed that federal agencies should "use any available flexibility to reduce operation risks and minimize impacts on the agency's core mission in service of the American people."<sup>34</sup> And the FAA's discretion to impose cuts within PPAs in the Operations account appears to afford just such "flexibility."<sup>35</sup>

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<sup>32</sup> *FY2103 FAA Budget Submission* at Exh. II-2.

<sup>33</sup> *The Appendix, Budget of the United States Government, Fiscal Year 2013*, at 977.

<sup>34</sup> Memorandum for the Heads of Executive Departments and Agencies, from Jeffrey D. Zients, Deputy Director for Management, OMB, *Planning for Uncertainty with Respect to Fiscal Year 2013 Budgetary Resources*, at 2 (Jan. 14, 2013).

<sup>35</sup> Assuming that a political solution is not reached and that sequestration continues in future fiscal years, the FAA and the President would arguably have some ability to maneuver strategically by redefining PPAs in the FAA budget justification, the President's budget submission, or both. If Congress specifies PPAs in future appropriations acts or committee reports, however, Congress's specification would likely trump designations made by the FAA or the President. See 2 U.S.C. § 906(k)(2) (mandating that agencies look to appropriations acts and reports for PPAs with respect to discretionary spending).

April 10, 2013

Page 9

## II. BUDGET TRANSFER AUTHORITY

Apart from the FAA's discretion to apportion cuts within each PPA, the FAA (or, as explained below, the Secretary of Transportation on behalf of the FAA) likely retains flexibility to offset some of the consequences of sequestration through the exercise of budget transfer authority. OMB has urged "agencies with reprogramming or transfer authority ... to examine whether the use of these authorities would allow the agency to minimize the negative impact of sequestration on core mission priorities."<sup>36</sup> We have identified two potential sources of statutory authority that likely would be available to minimize the negative effects of sequestration.

### A. Transfer Authority Under The FAA Modernization And Reform Act

Under 49 U.S.C. § 106(k)—as amended in part by the FAA Modernization and Reform Act of 2012—the Secretary of Transportation has transfer authority with respect to FAA appropriations.<sup>37</sup> Secretary LaHood would have a strong argument that this statutory transfer authority enables him to respond to funding shortfalls by transferring funds both within and among PPAs in the FAA Operations account.

As amended by Congress in 2012, Section 106(k)(1) establishes the budget authority for appropriations for "salaries, operations, and maintenance of the [FAA]"—that is, the Operations account—for FY2012-2015.<sup>38</sup> Section 106(k)(3) then provides that:

Notwithstanding any other provision of law, ... if the Secretary determines that the funds appropriated under [Section 106(k)(1)] are insufficient to meet the salary, operations, and maintenance expenses of the Federal Aviation Administration ... 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).

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<sup>36</sup> Memorandum for the Heads of Executive Departments and Agencies, from Danny Werfel, Controller OMB, *Ongoing Implementation of the Joint Committee Sequestration*, at 4 (Apr. 4, 2013).

<sup>37</sup> The FAA, of course, is a division within the Department of Transportation, and the Administrator of the FAA reports to the Secretary. *See* 49 U.S.C. § 106(a).

<sup>38</sup> The conference report makes clear that this budget authority corresponds to the FAA's Operation account. *See* H.R. Rep. No. 112-381, at 149 (2012) (Conf. Rep.) ("Section 103 authorizes the FAA's Operations account at: \$9.653 billion for FY 2012, \$9.539 billion for FY 2013, \$9.596 billion for FY 2014, and \$9.653 billion for FY 2015."). The authorization of appropriations under the FAA Modernization and Reform Act is distinct from Congress's actual appropriation of funds in an appropriations act; in other words, Congress must still appropriate funds for the relevant fiscal years. *See* GAO *Budget Glossary* at 15 (defining "authorizing legislation").

April 10, 2013

Page 10

This provision permits the Secretary to reduce spending for “nonsafety-related activities” in the event that he determines that appropriated amounts are “insufficient” to pay the Operations expenses of the FAA. Although Section 106(k)(3) does not expressly mention “transfer” authority, that is its effect: the Secretary may spend more on safety-related activities of the FAA by decreasing spending on nonsafety-related activities. Indeed, the relevant conference report describes the provision in those terms: “[t]he Secretary of Transportation is permitted to transfer funds from non-safety related programs if appropriated funds are insufficient to meet salary, operations, and maintenance expenses.”<sup>39</sup> Relying upon this transfer authority, the Secretary could, for example, reduce expenses in connection with nonsafety-related activities (for example, certain human resource expenses) to ensure sufficient funding for safety-related activities (for example, air traffic control). This authority, unlike the separate transfer provision discussed below in Part II.B, is not subject to an express statutory cap.

There are two legal hurdles that the Secretary would face in exercising this authority, but we believe the better view is that neither would restrict the Secretary’s ability to act.

*First*, there is some question whether funding shortfalls occasioned by sequestration can be said to render appropriated amounts “insufficient.” Indeed, one might argue that allowing the Secretary to use Section 106(k)(3) to reshuffle spending priorities in response to sequestration defeats the basic requirement in Section 906(k)(2) that sequestration be accomplished in a uniform manner. Although this question is not free from doubt, there are substantial arguments that Section 906(k)(2) does not limit the authority provided by Section 106(k)(3). Section 106(k)(3) provides that the authority granted is “[n]otwithstanding any other provision of law.” And courts have explained that a “clearer statement” of congressional intent to “supersede all other laws” is “difficult to imagine.”<sup>40</sup> As the Supreme Court has held, “the use of ... a ‘notwithstanding’ clause clearly signals the drafter’s intention that the provisions of the ‘notwithstanding’ section override conflicting provisions” of law.<sup>41</sup>

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<sup>39</sup> H.R. Rep. No. 112-381, at 149. In adding Section 106(k)(3) in the FAA Modernization and Reform Act, Congress used the heading “AUTHORITY TO TRANSFER FUNDS.” Pub. L. No. 112-95, § 103(c).

<sup>40</sup> *E.g., Liberty Maritime Corp. v. United States*, 928 F.2d 413, 416 (D.C. Cir. 1991) (internal quotation marks omitted).

<sup>41</sup> *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993); *see also* Memorandum Opinion for the Chief Counsel, Internal Revenue Service, from Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, *Applicability of Tax Levies Under 26 U.S.C. § 6334 to Thrift Savings Plan Accounts* at 4-5 (May 3, 2010) (a “notwithstanding” clause provides strong evidence that Congress intended the provision to override all other conflicting statutes, regardless of when enacted).

April 10, 2013

Page 11

Apart from the notwithstanding clause, in cases of potential conflict between provisions of law, the more specific statutory provision often trumps the general<sup>42</sup> and the later-enacted provision often trumps the earlier-enacted provision.<sup>43</sup> Those canons would also weigh against reading Section 906(k)(2) to limit the authority conferred by Section 106(k)(3): the latter is arguably more specific (because it provides transfer authority to the Secretary in the event of insufficient FAA appropriations, while Section 906(k)(2) applies across all federal agencies), and it was also enacted after Section 906(k)(2).<sup>44</sup> A final textual clue informing how to reconcile the provisions is found in Section 906(k)(2). That provision states that the uniform percentage reduction requirement applies “[e]xcept as otherwise provided,” and courts have interpreted similar provisions as evidencing Congress’s intent that a statute containing such provisions should yield way to other conflicting provisions of law.<sup>45</sup> For these reasons, the Secretary would be on solid legal ground concluding that he retains authority under Section 106(k)(3) to respond to funding shortfalls within the Operations account caused by sequestration.

*Second*, a related argument might be made that Section 106(k)(3) is limited by the transfer authority provided in the FAA appropriations act. That provision, as explained below in Part II.B, grants the FAA transfer authority for the Operations account but imposes a 2 percent cap on transfers between activities. One might argue that the 2 percent cap was readopted by Congress in March 2013 when it enacted a continuing resolution extending FY2012 appropriations levels, and that the later-enacted cap limits any independent transfer authority provided by the earlier-enacted Section 106(k)(3). The short and, in our view, persuasive answer to this is that there is no conflict between Section 106(k)(3) and the 2 percent cap: each provision grants authority, and imposes limits, on separate actors. Section 106(k)(3) equips the Secretary of the Transportation with transfer authority, while the appropriation act gives transfer authority to the FAA. The two provisions can therefore be read harmoniously. When the Secretary transfers funds within the FAA Operations account, he proceeds pursuant to the

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<sup>42</sup> See *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974) (“Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.”).

<sup>43</sup> See *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 878 (D.C. Cir. 2006) (“[A] later-enacted statute trumps an earlier-enacted treaty to the extent the two conflict.”).

<sup>44</sup> Even if the relevant time of enactment for purposes of Section 906(k)(2) is the date on which the BCA was passed, the FAA Modernization and Reform Act is still a later-enacted statute. See Budget Control Act of 2011, Pub. L. No. 112-25 (passed by Congress August 1, 2011); FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95 (passed by Congress February 14, 2012).

<sup>45</sup> See *New Jersey Air Nat’l Guard v. FLRA*, 677 F.2d 276, 283 (3d Cir. 1982) (a statute that “explicitly defers to existing laws where they conflict” indicates the intent of Congress that the statute give way to “other, overlapping statutes”).