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How Trump Will Finance Federal Real Property Projects

By **Peter Terenzio, Justin Ganderson and Sandy Hoe** (June 26, 2018, 1:07 PM EDT)

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Earlier this year, President Donald Trump revealed his plan to facilitate new (and much-needed) federal real property projects in part through a $10 billion "mandatory revolving fund," commonly known as the Federal Capital Financing Fund or the Federal Capital Revolving Fund (FCRF).[1] In this article, we take a close look at the revolving fund, and discuss the interaction between the revolving fund and the Office of Management and Budget budgetary scoring rules. As described below, the Revolving Fund is structured to allow federal agencies to meet the large, upfront dollar obligations often required by OMB's budgetary scoring rules. But despite this welcome and significant development, questions still remain about the scope and operation of the Revolving Fund.

Primer on OMB Budgetary Scoring

OMB's budgetary scoring rules, as provided in OMB Circular A-11, Appendices A and B, typically require an agency to have sufficient discretionary budget authority to fund the entire amount of a long-term capital project in year one — regardless of how the project would be financed (e.g., with private capital) and when the agency would be required by contract to pay for the project (e.g., a lease-purchase arrangement with lease payments over several years).[2] Given the ongoing critical needs that arise every fiscal year, which cannot be sacrificed, agencies often do not have the discretionary budget authority to undertake long-term capital projects, and must push these much-needed projects to later years often at much greater cost.

There are, however, certain limited exceptions to the OMB scoring rules. One exception is for projects that are funded through the General Services Administration's Federal Buildings Fund that are also qualified as "operating leases" under OMB A-11.[3] Classifying a project as an "operating lease" results in the agency's annual lease payments being scored in each successive year during the lease term, making the project's score much more palatable in year one.[4] Before such a transaction can qualify as an "operating lease," however, several criteria identified in OMB A-11 must be met.[5] And, unfortunately, satisfying all these criteria often limits the potential of certain deals and even can contribute to the entire collapse of a project.

A Look Inside the Revolving Fund

In February 2018, the White House formally introduced its vision for a $10 billion revolving fund "to finance purchases, construction, or renovation of federally owned civilian real property" through the president's fiscal year 2019 budget (and through the president's infrastructure plan).[6] The heart of the revolving fund lies in the "Analytical Perspectives" volume of the FY 2019 budget.[7]

In this volume, OMB noted that "[t]he structure of the Federal budget and budget enforcement requirements can create hurdles to funding" large-scale real property projects.[8] In fact, "[l]arge-dollar Federal capital investments can be squeezed out ... forcing agency managers to turn to operating leases to meet long-term Federal requirements," which are often "more expensive over the long-term" than capital purchases.[9] In other words, OMB is acknowledging, in part, the consequences of its own scoring rules.

The revolving fund would allow agencies to avoid the "drawbacks of the current Federal approach" by separating certain capital investments from an agency's operating expenses — similar to what state and local governments do.[10] The revolving fund would be capitalized initially by a $10 billion mandatory appropriation, and "[b]alances in the FCRF would be available for transfer to purchasing agencies to fund large-dollar capital acquisitions to the extent projects are designated in advance in appropriations Acts and the agency receives a discretionary appropriation for the first of a maximum of 15 required annual repayments."[11] Essentially, agencies would borrow from the revolving fund to cover the full cost of acquiring a capital asset, and then repay the revolving fund through (interest-free) annual payments taken from the agency's discretionary budget.

Importantly, this arrangement would not result in the entire cost of the project being scored against the agency's discretionary budget in the first year. Instead, the transfer from the revolving fund to the agency would be scored in the budget as mandatory spending. The incremental annual cost to repay the revolving fund would be scored against the agency's annual discretionary budget. Because "future discretionary appropriations will have to be used to repay the FCRF" rather than all from the agency's discretionary budget in the first year, OMB believes that this structure will "provide an incentive for agencies, OMB, and the Congress to select projects with the highest mission criticality and return."[12]

Remaining Questions

Although the proposed revolving fund would provide a viable mechanism for agencies to fund long-term certain infrastructure projects, there still are aspects of the revolving fund that remain unknown and should be considered.

What criteria would have to be met for a project to be funded through the revolving fund?

As proposed, the revolving fund could not be tapped unless (1) the proposed capital project is designated in advance in an appropriations act, and (2) the agency receives a discretionary appropriation for the first annual repayment. In the "Analytical Perspectives" volume of the FY 2019 president's budget, however, OMB is tasked with "review[ing] ... proposed projects" before they can be included in the President's Budget.[13]

Although OMB appears to have positioned itself as a gatekeeper to the revolving fund, it has not identified the criteria that would be used to "review" an agency's potential project. These criteria need to be carefully crafted to ensure that good projects are selected. For example, if the criteria are too restrictive then otherwise meritorious projects could go unfunded.

Is the revolving fund large enough?

As proposed, the revolving fund is to be "capitalized initially by a $10 billion mandatory appropriation, and scored with anticipated outlays over the 10-year window for the purposes of pay-as-you-go budget enforcement rules."[14] However, "[t]otal annual capital purchases would be limited to the lower of $2 billion or the balance in the Revolving Fund."[15] In other words, no more than $2 billion in outlays from the revolving fund could be made in any one year. These numbers, although high, are a drop in the bucket compared to the federal government's real property infrastructure needs.

For example, a proposed use of the revolving fund is to address the FBI's need for a new headquarters building — a project that is no stranger to the unintended consequences of the current OMB scoring rules.[16] On April 17, the head of the GSA testified that GSA's 2019 budget request included the appropriation needed for the first repayment to the revolving fund.[17] However, the GSA has previously estimated that a new FBI headquarters facility could cost between $3.3 and $3.8 billion — or an amount significantly larger than the current proposed $2 billion annual cap on purchases.[18]

On the one hand, it is possible that an agency may take a closer look at its needs and better prioritize what is and is not critical for the purposes of fitting within the bounds of the revolving fund's proposed annual cap. On the other hand, it is also possible that an agency may undersize a project and be left with a facility that may not meet all of its critical needs, either now or in the immediate future.

In any event, the proposed annual cap (combined with the proposed initial capitalization) certainly will limit the number of large capital projects that would be able to utilize the revolving fund.

Is a hybrid approach possible?

The existence of a $2 billion annual cap on outlays from the revolving fund leads to an additional question: Could the revolving fund be supplemented? For example, could an agency that wants a new $2.5 billion building obtain a $2 billion outlay from the revolving fund and a $500 million discretionary appropriation in year one? This presumably would result in an agency score against its discretionary budget in year one of, say, $133 million for the first of 15 annual equal payments to the revolving fund and $500 million for the discretionary appropriation — or a total of $633 million. In contrast, a $2.5 billion new building structured as a capital lease under current scoring rules would garner a $2.5 billion score in the first year, which might be prohibitive for the agency. Allowing a "hybrid" approach could provide agencies with more flexibility to meet long-term real estate needs and could help facilitate larger projects.

Should private capital be considered?

The planned revolving fund contains no mention of whether private financiers could participate in the funding of federal capital projects. Because private participation would increase the size of the revolving fund, it may be worthwhile to consider whether there could be a role for private financing. Public-private partnerships are increasingly being considered by state and local governments, and even the federal government, to expand the fiscal base on which these governmental entities provide services to their constituents. Might this means of providing public services find a home in the revolving fund where the private sector could supplement the amounts available in the fund for investment?

And even with these and other questions remaining open, perhaps the biggest (and more important) question is whether Congress actually will implement the revolving fund. If the revolving fund is not implemented, then agencies will be forced to continue to address their real property infrastructure needs under the constraints that flow from the current OMB scoring rules.

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[1] The White House, Legislative Outline for Rebuilding Infrastructure in America (Feb. 12, 2018), available at https://www.whitehouse.gov/wp-content/uploads/2018/02/INFRASTRUCTURE-211.pdf.

[2] OMB A-11, Appendices A, B, available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/a11_current_year/a11_2017.pdf.

[3] OMB A-11, Appendix B at 2.

[4] Id.

[5] Id. at 6.

[6] OMB, Budget of the U.S. Government (Feb. 2018), available at https://www.whitehouse.gov/wp-content/uploads/2018/02/budget-fy2019.pdf; see also The White House, Legislative Outline for Rebuilding Infrastructure in America (Feb. 12, 2018), available at https://www.whitehouse.gov/wp-content/uploads/2018/02/INFRASTRUCTURE-211.pdf.

[7] OMB, Analytical Perspectives, Budget of the U.S. Government (Feb. 2018), available at https://www.whitehouse.gov/wp-content/uploads/2018/02/spec-fy2019.pdf.

[8] Id. at 119.

[9] Id.

[10] Id.

[11] Id.

[12] Id. at 120.

[13] Id.

[14] Id. at 119.

[15] Id.

[16] See, e.g., Dorothy Robyn, “To keep the FBI headquarters project on track, make an exception to the scoring rules,” Brookings, (July 20, 2017), https://www.brookings.edu/blog/fixgov/2017/07/20/fbi-headquarters-project-and-scoring-rules/.

[17] Statement of Emily W. Murphy, Administrator for General Services Administration, Before the Subcommittee on Financial Services and General Government Committee on Appropriations, United States House of Representatives (Apr. 17, 2018), available at https://docs.house.gov/meetings/AP/AP23/20180417/108141/HHRG-115-AP23-Wstate-MurphyE-20180417.pdf.

[18] Statement of Daniel Mathews, Commissioner Public Buildings Service for General Services Administration, Before the Senate Committee on Environment and Public Works (Feb. 28, 2018), available at https://www.gsa.gov/about-us/newsroom/congressional-testimony/oversight-fbi-headquarters-consolidation-project.