Memorandum March 5, 2007

TO: House Judiciary Committee
Attention: Nolan Rappaport

FROM: Robert Keith (7-8659)
Specialist in American National Government
Government and Finance Division

SUBJECT: Approaches to Funding a New Spending Initiative

This memorandum responds to your request for a discussion of various approaches that might be followed in funding a new spending initiative that also involves the imposition of a fee on program applicants. As you requested, the discussion is relatively brief, oriented to fundamental concepts, and addresses procedural considerations, as appropriate. (Although certain budget enforcement mechanisms and procedural restrictions are identified, this memorandum does not address the various means by which they may be circumvented or set aside.) Finally, the memorandum also discusses the adequacy of funding for "start up" purposes.

Extensive expertise on funding mechanisms and user fees, as we discussed, is available at the Congressional Budget Office and the Government Accountability Office;[1] expertise on user fees, in such areas as immigration and law enforcement, also is available at the Congressional Research Service.

The various funding approaches may be categorized on the basis of two key choices. First, should the funding be provided as discretionary spending or direct spending? Second, should income from the fees be linked to spending for the initiative?

Discretionary Spending Versus Direct Spending

All federal spending is classified as either discretionary spending or direct spending (also referred to as mandatory spending). Discretionary spending is provided in, and controlled by, annual appropriations acts under the jurisdiction of the House and Senate

[1] Initial points of contact are: (1) at CBO, Bob Sunshine, Assistant Director, Budget Analysis Division, 6-2800; and (2) at GAO, Sue Irving, Director, Federal Budget Analysis, Strategic Issues, 202-512-9142.

Appropriations Committees. Discretionary spending typically funds the routine operations of the federal government.

Direct spending is provided mainly in substantive legislation under the jurisdiction of the authorizing committees of the House and Senate, but some direct spending (e.g., Medicaid) is funded in annual appropriations acts. Direct spending typically funds entitlement programs, but many other types of activities are funded by direct spending. Whether direct spending is funded by devices in substantive law or by annual appropriations acts, the spending levels are controlled by substantive law.

Different budget enforcement procedures apply to discretionary spending and direct spending legislation, as discussed in more detail below.

Discretionary Spending. Funding a spending initiative as discretionary spending would entail providing an amount of new budget authority (in the form of an appropriation) for that purpose in a regular, supplemental, or continuing appropriations act. Appropriations are provided on the basis of accounts; an appropriation for the new initiative could be provided as a stand-alone account or incorporated into an existing account encompassing other programs, projects, or activities.

Relatively few new spending initiatives are included in annual appropriations acts as new, stand-alone accounts. Instead, they usually are incorporated into the existing accounts to which they relate. Funds associated with the initiative often are subsumed under a "lump sum" amount for the account generally. The initiative may be highlighted in the legislative language as an "earmark" or in some other fashion, or may be separately identified in the accompanying committee report language (or other legislative documentation).[2]

Box 1 shows an example of a relatively simple appropriation. Under the account heading, "Administrative Review and Appeals," a lump sum appropriation of $215.7 million is provided for a group of activities. Detail on the line items subsumed under the lump sum is not provided in the legislative language, but a short reference is made to the purpose of the appropriation — the administration of pardon and clemency petitions and immigration-related activities.

Box 1

Administrative Review and Appeals

For expenses necessary for the administration of pardon and clemency petitions and immigration-related activities, $215,685,000.

—P.L. 109-108, Science, State, Justice, Commerce Appropriations Act for FY2006, 119 Stat. 2291.

[2] Definitions of the term "earmark" vary; in this instance, the term is used in its broadest sense merely to indicate a subdivision of the lump sum amount for a specified purpose.

The House Appropriations Committee provided somewhat more detail on the entities funded under the account in the report accompanying the measure:

> This appropriation supports the Executive Office of Immigration Review (EOIR), which includes the Board of Immigration Appeals, Immigration Judges, and Administrative Law Judges who decide through administrative hearings on the admission or exclusion of aliens seeking to enter the country, and the transportation and adjustment of status of aliens whose status has been challenged; and the Office of the Pardon Attorney, which receives, investigates and considers petitions for all forms of Executive clemency.[3]

In many instances, an amount for a portion of the total appropriation to an account is provided as an earmark or in another manner that separately identifies it, either in the legislative language or the committee report language (or other legislative documentation), often with the intent of assuring that the entire earmarked amount is spent for the intended purpose.

Box 2 provides an example of an appropriation with an earmark in the legislative language (for $1.5 million for "Operation Streetsweeper").

Box 2

Salaries and Expenses, United States Attorneys

For necessary expenses of the Offices of the United States Attorneys, including inter-governmental and cooperative agreements, $1,600,000,000: *Provided,* That of the total amount appropriated, not to exceed $8,000 shall be available for official reception and representation expenses: *Provided further,* That not to exceed $20,000,000 shall remain available until expended: *Provided further,* That of the funds made available under this heading, $1,500,000 shall only be available to continue "Operation Streetsweeper".

—P.L. 109-108, Science, State, Justice, Commerce Appropriations Act for FY2006, 119 Stat. 2292.

For this account, "Salaries and Expenses, United States Attorneys," the House Appropriations Committee provided somewhat more detail on the entities funded thereunder in the committee report, including this excerpt:

> The recommendation includes the following program increases: $2,289,000 for 28 additional positions for counterterrorism investigations and prosecutions; $3,748,000 for 46 additional positions to increase criminal prosecutions along the border; $900,000 and 11 positions for the computer crime, high tech and intellectual property program; and $3,000,000 and 32 additional positions for additional gang prosecutions.[4]

The total level of discretionary spending for a fiscal year, as reflected in the most recent budget resolution, is allocated to the Appropriations Committees pursuant to Section 302(a) of the Congressional Budget Act of 1974. The Appropriations Committees then subdivide their spending allocations to their subcommittees pursuant to Section 302(b) of the act. In

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[3] H.Rept. 109-118 (June 10, 2005), to accompany H.R. 2862, p. 14.

[4] Ibid., p. 17.

this manner, the cost of each of the regular appropriations acts (and related amounts in supplemental appropriations acts or continuing resolutions) can be compared to the relevant Section 302(b) spending subdivisions to determine if the legislation violates budget resolution policies. Under Section 302(f) of the act, any Member may raise a point of order to bar the consideration of legislation (i.e., bill, amendment, or conference report) that would cause the relevant Section 302(b) subdivisions to be exceeded.

One maxim of the legislative process is that any proposal usually has a better chance of being enacted if it is included in the legislation as originated by the committee rather than at a later stage in the process. Under the long-standing practices of the Appropriations Committees, in which the regular appropriations acts are reported at levels that "use up" all of the room for spending under the Section 302(b) subdivisions, the advantage of spending being included in the reported bill is significant. In such instances, Members seeking to add new spending by floor amendment usually must include offsets in the amendment or risk their amendment being defeated by a point of order under Section 302(f). Consequently, significant procedural and political disadvantages may be avoided if the amount of spending necessary for the new initiative is accommodated by the budget resolution, and is agreed to by the Appropriations Committee and included in the pertinent annual appropriations act as it is developed and reported.

The House adopted a new rule on the use of earmarks in legislation (as Clause 9 of House Rule XXI) as part of the rules package (H.Res. 6) adopted on January 4 and 5, 2007. The Senate has proposed earmark rules in S. 1, which it has passed and sent to the House. The final appropriations measure for FY2007, P.L. 110-5 (H.J.Res. 20), signed into law on February 15, 2007, eliminated many existing earmarks for the current budget cycle; the OMB Director issued a memorandum on February 15 informing agencies on how to deal with earmarks in the implementation of FY2007 spending.[5] Congressional leaders have indicated that the use of earmarks may resume for FY2008, within the framework established by new earmark rules. If you intend to include spending for the new initiative in an annual appropriations act in the form of an earmark, it would be important to be cognizant of the applicable rules and practices (which currently are in flux); the definition of the term "earmark," however, may be sufficiently narrow under whatever new rules may apply at the time that the new spending initiative is not affected by them.

Direct Spending. Legislative committees may propose direct spending in legislation under their jurisdiction. While direct spending may be provided in various forms,[6] two common forms are permanent appropriations and multi-year appropriations. Permanent appropriations appropriate funds without any fiscal year limitation. The permanent appropriation for the main Social Security trust fund (42 U.S.C. 401(a)), for example, provides in part:

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[5] The memorandum (M-07-10) is available on the OMB Web site, at: [http://www.whitehouse.gov/omb/memoranda/fy2007/m07-10.pdf].

[6] For more information on this topic, see the report of the General Accounting Office (now the Government Accountability Office), *Budget Issues: Inventory of Accounts With Spending Authority and Permanent Appropriations, 1996*, May 1996, GAO/AIMD-96-79.

> There is hereby appropriated to the Federal Old-Age and Survivors Insurance Trust Fund for the fiscal year ending June 30, 1941, ***and for each fiscal year thereafter***, out of any moneys in the Treasury not otherwise appropriated, amounts equivalent to (emphasis added)....

Multi-year appropriations appropriate funds for two or more specified fiscal years. Section 7218 (116 Stat. 449) of the Farm Security and Rural Investment Act of 2002 (P.L. 107-171), for example, in part amended existing law with the following five-year appropriation:

> "(e) FUNDING—On October 1, 2003, and each October 1 thereafter through October 1, 2007, out of any funds in the Treasury not otherwise appropriated, the Secretary of the Treasury shall transfer $3,000,000 to the Secretary of Agriculture for this section."

The total level of direct spending for a fiscal year, as reflected in the most recent budget resolution, is allocated to the relevant legislative committees pursuant to Section 302(a) of the Congressional Budget Act of 1974. Unlike the Appropriations Committees, the legislative committees are not required to subdivide their spending allocations. Under Section 302(f) of the act, any Member may raise a point of order to bar the consideration of legislation (i.e., bill, amendment, or conference report) that would cause a committee's Section 302(a) allocation to be exceeded. A committee may report legislation with new direct spending, without concern about a point of order under Section 302(f), so long as the amount of such spending is within the committee's Section 302(a) allocation.

Other budget enforcement mechanisms potentially could apply to legislation providing new direct spending. In the House, a PAYGO rule was established by the adoption of H.Res. 6 on January 4 and 5, 2007.[7] The House's PAYGO rule requires that legislation affecting direct spending or revenues must not increase the deficit (or reduce the surplus) over a six-year period, including the current year, the upcoming fiscal year, and the four following fiscal years, as well as an 11-year period (the previously cited period and the ensuing five fiscal years). The Senate, which already has a PAYGO rule (which Senate leaders are proposing to strengthen later this session), also has a long-term spending point of order applicable to any direct spending legislation that would provide more than $5 billion in any of the four 10-year periods covering FY2016-FY2055.[8]

A new direct spending proposal from a legislative committee, even if it is consistent with the committee's Section 302(a) spending allocation, may require offsets to avoid violating these other House and Senate rules.

One complicating factor is the possible use of budget reconciliation procedures as an adjunct to the FY2008 budget resolution. A committee's response to reconciliation directives to reduce outlays within its jurisdiction is judged on a net basis. Committees sometimes include new direct spending provisions ("sweeteners") in their reconciliation responses, so long as the direct spending increases are more than offset by reductions that allow the committee to meet its overall savings targets. The inclusion of direct spending provisions in reconciliation legislation does not, by itself, afford them any exemption from

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[7] The new rule is discussed in CRS Report RL33850, *The House's "Pay-As-You-Go" (PAYGO) Rule in the 110th Congress: A Brief Overview*, by Robert Keith.

[8] The point of order is found in Section 407 of the FY2006 budget resolution, H.Con.Res. 95 (109th Cong.).

other budget enforcement mechanisms, but it might be worth exploring the matter (if the opportunity presents itself) to determine whether any advantage can be gained by this route.

Treatment of Income From User Fees

Income to the federal government that derives from the exercise of its sovereign powers or its ability to compel payment is treated as revenue (also called receipts). Other income to the federal government, which stems mainly from the sale of goods and services or regulatory activities, is offset against spending and is referred to as offsetting receipts or offsetting collections. User fees (also called user charges) straddle both sides of the ledger; while most user fees are counted as offsets to spending (about $245 billion for FY2008, according to OMB), a relatively small portion of them is counted as revenues (about $3 billion for FY2008). In some instances, user fees that otherwise would be counted as revenues are counted as offsets to spending pursuant to a directive in law to do so.

According to OMB, the term "user charges" means:

> ... fees, charges, and assessments levied on individuals or organizations directly benefiting [sic] from, or subject to regulation by, a Government program or activity. In addition, the payers of the charge must be limited to those benefiting [sic] from, or subject to regulation by, the program or activity, and may not include the general public, and generally does not apply to a broad segment of the public (such as those who pay income taxes or customs duties).[9]

The establishment, use, and administration of user fees is subject to various laws.[10] Although user fees may be established in legislation, they also may be established by administrative action. OMB manages executive agency actions in this regard through Circular A-25 (User Charges).

In the House, the Ways and Means Committee exercises jurisdiction over revenue matters generally, but the other committees may report legislation dealing with user fees.[11] Further, user fees may be carried in annual appropriations acts, although they may be subject to a point of order (as legislation in an appropriations act, under House Rule XXI) or counted as discretionary spending instead of direct spending (pursuant to Scorekeeping Rule 3).

User fees, as indicated previously, may be treated in several different ways, with of the most common ways including: (1) the fee income may be regarded as revenue and deposited to a receipt account; (2) the fee income may be deposited into an offsetting receipt account, with any further use determined by legislation; or (3) the fee income may be credited to an appropriation account and made available for spending without any further legislative action. Under the first option, the fee income does not directly offset the spending (although it may

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[9] Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2008, Analytical Perspectives*, February 2007, Chapter 18 (User Charges and Other Collections), p. 272.

[10] For more detailed information on user fees, see: (1) CRS Report RS20439, *User Fees: Applicable Budget Enforcement Procedures*, by Bill Heniff Jr.; (2) *Federal User Fees: Budgetary Treatment, Status, and Emerging Management Issues*, GAO/AIMD-98-11, December 1997; and (3) *INS User Fees: INS Working to Improve Management of User Fee Accounts*, GAO/GGD-94-101, April 1994.

[11] Jurisdiction issues in this regard are discussed in: Congressional Budget Office, *The Growth of Federal User Charges*, August 1993, pp. 23-26.

be said to offset such spending for purposes of calculating the deficit); under the second option, the fee income may offset direct spending or discretionary spending, depending on whether the controlling legislation is an annual appropriations act or substantive law; and under the third option, the fee income offsets discretionary spending.

In some instances, where an account in an annual appropriations act is provided with an appropriation, but fees collected under a law also are authorized to be credited to the account and are made available for spending by the agency, the amount of the appropriation is reduced as the fees are received during the year. If the fees are not sufficient to cover the entire cost of the program for the fiscal year, then a "final" appropriation amount is provided at a capped level. When more fees than are needed are credited to the account, they are allowed to carry over into the next fiscal year. **Box 3** provides an example of such a provision.

Box 3

Transportation Security Administration
Aviation Security

For necessary expenses of the Transportation Security Administration related to providing civil aviation security services pursuant to the Aviation and Transportation Security Act (Public Law 107–71; 115 Stat. 597; 49 U.S.C. 40101 note), $4,607,386,000,...

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Provided further, That security service fees authorized under section 44940 of title 49, United States Code, shall be credited to this appropriation as offsetting collections and shall be available only for aviation security: *Provided further*, That the sum herein appropriated from the General Fund shall be reduced on a dollar-for-dollar basis as such offsetting collections are received during fiscal year 2006, so as to result in a final fiscal year appropriation from the General Fund estimated at not more than $2,617,386,000: *Provided further*, That any security service fees collected in excess of the amount made available under this heading shall become available during fiscal year 2007....

—P.L. 109-90, Homeland Security Appropriations Act
for FY2006, 119 Stat. 2070.

Adequacy of "Start Up" Funding

You also expressed concern about adequate "start up" funds for the new initiative being available at the outset so that the necessary hiring of new personnel and other actions are not impeded. This concern generally does not become an issue under the three-step process that pertains to most federal spending.

In the first step under this process, Congress and the President enact legislation that provides new *budget authority*. New budget authority provides legal authority for agencies to begin spending funds. New budget authority, often expressed as specific dollar amounts for individual accounts, is provided for a period of time, such as the fiscal year. In the second step, agencies spend funds by incurring *obligations* (through such actions as hiring personnel who begin work, entering into contracts, and submitting purchase orders), which create financial commitments of the federal government. In the final step, when the obligations are paid off or liquidated, *outlays* ensue (usually in the form of electronic funds transfers made, or checks issued, by the Treasury Department).

The flow of funds in the three-step spending process is regulated in various ways. Two of the most important means of regulation, which stem from the Antideficiency Act, are: (1) the requirement that obligations cannot be made in the absence of budget authority; and (2) apportionment procedures, under which the Office of Management and Budget (OMB) makes a portion of an agency's budget authority available in phases. (Most commonly, OMB apportions to an agency one quarter of its budget authority for a fiscal year by calendar year quarter.) The amount available for initial apportionment to an agency is based on the amount of new budget authority enacted for the whole fiscal year (or other time period) and could, in theory, be the entire amount enacted.

In general, if an appropriation or another form of budget authority is not provided to an account, then the Antideficiency Act prohibits spending under the account. As summarized by the Government Accountability Office (GAO), the four key prohibitions of the Antideficiency Act (which is codified in Title 31, Money and Finance, of the United States Code) are:

- Making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law. 31 U.S.C. § 1341(a)(1)(A).

- Involving the government in any contract or other obligation for the payment of money for any purpose in advance of appropriations made for such purpose, unless the contract or obligation is authorized by law. 31 U.S.C. § 1341(a)(1)(B).

- Accepting voluntary services for the United States, or employing personal services in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342.

- Making obligations or expenditures in excess of an apportionment or reapportionment, or in excess of the amount permitted by agency regulations. 31 U.S.C. § 1517(a).[12]

Exceptions may be made in law to the prohibitions of the Antideficiency Act. Under the "Feed and Forage Act" (41 U.S.C. 11), for example, the President may authorize certain spending for "clothing, subsistence, forage, fuel" and other purposes for the military (the authority is used, or proposed to be used, in times of armed conflict).[13]

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[12] See GAO, *Principles of Federal Appropriations Law (Red Book)*, Vol. II, Chapter 6, Section C (The Antideficiency Act), available on the GAO Web site at: [http://www.gao.gov/special.pubs/d06382sp.pdf].

[13] A discussion of the Feed and Forage Act is presented under "Budget Quiz" in: Senate Budget Committee, *Informed Budgeteer*, 107th Cong., 1st sess., no. 35, Dec. 11, 2001, available on the committee Web site at: [http://www.senate.gov/~budget/republican/analysis/2001/BB35-01.pdf].

Appropriations are provided to an account to be used only for purposes specified in law. Accordingly, an agency may not shift funds from one account to another (referred to as a "transfer") without statutory authorization granting transfer authority. Annual appropriations acts often provide a general grant of transfer authority that may be used during the fiscal year, although such authority typically covers a relatively small amount (e.g., three to five percent) of the department's or agency's total budget. The Secretary of Homeland Security, for example, was granted this type of transfer authority in Section 503(c) and (d) of the Department of Homeland Security Appropriations Act for FY2006:

> (c) Not to exceed 5 percent of any appropriation made available for the current fiscal year for the Department of Homeland Security by this Act or provided by previous appropriations Acts may be transferred between such appropriations, but no such appropriations, except as otherwise specifically provided, shall be increased by more than 10 percent by such transfers: *Provided,* That any transfer under this section shall be treated as a reprogramming of funds under subsection (b) of this section and shall not be available for obligation unless the Committees on Appropriations of the Senate and the House of Representatives are notified 15 days in advance of such transfer.
>
> (d) Notwithstanding subsections (a), (b), and (c) of this section, no funds shall be reprogrammed within or transferred between appropriations after June 30, except in extraordinary circumstances which imminently threaten the safety of human life or the protection of property.[14]

If the OMB apportionment to an agency account that funds a new initiative is sufficient, the agency may begin incurring a high level of obligations at the start of the fiscal year in order to quickly get the program in place. There may be instances, however, in which the availability of funds for apportionment is dependent upon the flow of user fees into the account, which at times may not be sufficient to allow an agency to engage in a full range of start up activities.

At least two different practices have been developed to cope with such instances. First, an account may be given an initial appropriation which then is reduced to zero or a capped amount as user fees are collected and deposited. **Box 3** provides an example of such a provision applicable to the Aviation Security account of the Transportation Security Administration.

Second, an exemption from the strictures of the Antideficiency Act may be provided to the account. For example, H.R. 278, introduced on January 5, 2007, by Representative Barbara Cubin, would exempt universal service fees from the act:

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[14] P.L. 109-90, Oct. 18, 2005, see 119 Stat. 2082.

To amend section 254 of the Communications Act of 1934 to provide that funds received as universal service contributions and the universal service support programs established pursuant to that section are not subject to certain provisions of title 31, United States Code, commonly known as the Antideficiency Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1. Amendment of Communications Act of 1934.

Section 254 of the Communications Act of 1934 (47 U.S.C. 254) is amended by adding at the end the following:

‘(m) Application of Antideficiency Act — Section 1341 and subchapter II of chapter 15 of title 31, United States Code, do not apply—

‘(1) to any amount collected or received as Federal universal service contributions required by this section, including any interest earned on such contributions; nor

‘(2) to the expenditure or obligation of amounts attributable to such contributions for universal service support programs established pursuant to this section.’.

Please call or email me if you require further assistance in this matter.