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**PAYGO Rules and
Sequestration Procedures**

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PART I: FACTUAL BACKGROUND:

ROLE IN FEDERAL BUDGET POLICY:

The federal government has essentially two distinct budget processes.¹ The first process involves discretionary spending, which is allocated through the annual appropriations cycle. The second process involves mandatory spending (also called direct or entitlement spending) that is generally allocated according to “legislation that establishes eligibility criteria and payment formulas, or otherwise obligates the government.”² Additionally, federal tax receipts are determined according to existing revenue legislation. In years that Congress decides to change existing mandatory spending and revenue laws, it enacts these adjustments most commonly through the congressional budget process known as “reconciliation.”³ Pay-as-you-go (“PAYGO”) procedures apply only to changes in mandatory spending and revenue legislation and are “not a comprehensive means of budget enforcement” because these procedures do not apply to discretionary spending.⁴

PAYGO refers to either statutory or congressional rules-based budget procedures that require new mandatory spending and revenue legislation to be deficit neutral. Under both statutory and rules-based procedures, any increase in mandatory spending (associated with a change in legislation) must be offset by an equivalent increase in revenue or a decrease in another area of mandatory spending. These procedures, which

¹ Allen Schick, *The Federal Budget*, 3rd Ed., Brookings Institution Press: Washington, D.C., p. 55 (2007).

² Id. See generally, William C. Fay & Michelle D. Rodgers, *Appropriations for Mandatory Expenditures* (Harvard Law School Federal Budget Policy Seminar, Briefing Paper No. 17, 2008) (available at: http://www.law.harvard.edu/faculty/hjackson/MandatoryExpenditures_17.pdf).

³ Schick, *Supra* note 1, at 61.

⁴ Robert Keith, *Pay-As-You-Go Procedures for Budget Enforcement*, CRS Report for Congress, December 31, 2007, Summary Page.

constitute a shift from deficit reduction (under the Gramm-Rudman-Hollings Act (“GRH”)⁵) to spending control, are enforced statutorily via sequestration mechanisms or through the rules-based process via congressional points of order. Sequestration requires an automatic reduction in non-exempt mandatory spending upon the violation of statutory PAYGO procedures.⁶ Congressional points of order, which are not self-enforcing mechanisms, permit (but do not require) members of Congress to object to legislation when it does not provide for an equivalent offset and will contribute to a deficit increase or surplus reduction. Although sequestration may have represented a strong enforcement mechanism at one time, it is currently inoperable, as statutory PAYGO procedures expired at the end of FY2006.⁷ Statutory PAYGO procedures, however, were “effectively terminated” in December 2002, when PAYGO scorecard balances are automatically reset to zero.⁸ Congressional points of order, however, can still be used to enforce rules-based PAYGO procedures.⁹

LEGAL BASIS AND PARTICIPATING ENTITIES:

The Budget Enforcement Act of 1990 (“BEA”) created statutory PAYGO procedures, which involve mandatory spending and revenue legislation, and established

⁵ Balance Budget and Emergency Deficit Control Act of 1985, Pub L No 99-177, 99 Stat. 1038. Congress amended GRH in 1987, 1990, 1993 and 1997. See Pub L No. 100-119, 101 Stat 754 (for 1987 amendments); Pub L No. 101-508, 104 Stat 1388 (for 1990 amendments); Pub L No 103-66, 107 Stat 312 (for 1993 amendments) and Pub L No 105-33, 111 Stat 251 (for 1997 amendments).

⁶ Sequestration as it applies to discretionary spending and discretionary spending caps expired on September 30, 2002. 2 USCS §901 (2005).

⁷ Pub L No 105-33, 111 Stat 251 (1997).

⁸ Keith, Supra note 4, at 2.

⁹ Their effectiveness, however, is mitigated due to their permissive nature and the fact that they can be waived in both the House and the Senate.

limits on discretionary spending.¹⁰ The Omnibus Reconciliation Act of 1993 (Pub L No 103-66) and the Budget Enforcement Act of 1997 (Title X of Pub L No 105-33) renewed these procedural devices. Sequestration procedures exist to enforce these rules. As amended, the BEA requires that;

“Not later than 15 calendar days after the date Congress adjourns to end a session on the same day as a sequestration (if any) under §251 (discretionary spending limits) or §253 (enforcing deficit targets), there shall be a sequestration to offset the amount of any net deficit increase caused by all direct spending and receipts legislation enacted before October 1, 2002, as calculated under paragraph (2).”¹¹

“Sequestration” involves “the cancellation of budgetary resources provided by discretionary appropriations or direct spending law”.¹² The net deficit increase includes estimates of *mandatory spending* and *receipts* legislation under §902(d) and any estimated savings resulting from the prior year’s sequestration. But such an increase does not include the full funding of the deposit insurance guarantee commitment or any “emergency provisions”.¹³ The net deficit increase, calculated on a rolling basis and identified on the final sequestration report or PAYGO scorecard of the Office of Management and Budget (“OMB”) under §904(f), is eliminated by reducing all non-exempt mandatory spending accounts by a uniform percentage.¹⁴ But these procedures

¹⁰ Pub L No 101-508, 104 Stat. 1388 (1990).

¹¹ 2 USCS §902(b) (2005)

¹² 2 USCS §900(c)(2) (2005) . “Discretionary appropriations” are “budgetary resources (except to fund direct-spending programs) provided in appropriation Acts”. “Direct spending” includes “(a) budget authority provided by law other than appropriation Acts; (b) entitlement authority and (c) the food stamp program”. 2 USCS §§900(c)(7), (8).

¹³ 2 USCS §902(d)(4) (2005).

¹⁴ 2 USCS §902(c) (2005). But not all programs are subject to the same uniform reductions. Medicare reductions are capped at 4%, which may require a uniform increase of the amount deducted from the other non-exempt programs. 2 USCS §902(c)(1)(C)(i) (2005).

are suspended during times of war and periods of “low-growth”, as defined by the statute.¹⁵

The sequestration process, which enforced statutory PAYGO procedures, no longer constitutes a deterrent against the formation of increased deficits associated with mandatory spending and revenue legislation. Statutory PAYGO procedures expired at the end of FY2006, eliminating the use of sequestration as a budget enforcement tool.¹⁶ Congress, however, chose to eliminate the threat of sequestration before the expiration of statutory PAYGO procedures by requiring the Director of the OMB to set all PAYGO scorecards to zero.¹⁷ In fact, sequestration of funds for mandatory programs was never implemented throughout the entire time the mechanism was statutorily available.¹⁸ While this might lead some to conclude that the procedure was unnecessary, it is quite likely that the mere threat of sequestration was enough to keep lots of would-be PAYGO violations from being proposed in the first place.¹⁹ The odds of Congress reenacting a statutory sequestration provision, however, are perhaps marginally decreased by the fact that such a course would require the House to change its current PAYGO rule.

¹⁵ “Upon the enactment of a declaration of war or a joint resolution (issued in the event of a low-growth report)... (1) the subsequent issuance of any sequestration report or any sequestration order is precluded.” 2 USCS §907(b) (2005). A “low-growth” report is a report issued by the CBO to Congress indicating that “(1) during the period consisting of the quarter during which such notification is given, the quarter preceding such notification, and the 4 quarters following such notification, CBO or OMB as determined the real economic growth is projected or estimated to be less than zero with respect to each of any 2 consecutive quarters within such period; or (2) the most recent of the Department of Commerce’s advance preliminary or final reports of actual real economic growth indicate that the rate of real economic growth for each of the most recently reported quarter *and* the immediately preceding quarter is less than one percent.” 2 USCS §904(i) (2005). When issuing any reports associated with this section, the OMB shall use the same economic and technical assumptions used in the most recent budget submitted by the President. 2 USCS §904(j) (2005).

¹⁶ Pub L No 105-33, 111 Stat 251 (1997).

¹⁷ See Pub L No 107-312, 116 Stat. 2456 (2002).

¹⁸ Statement of Peter R. Orszag, CBO Testimony: Issues in Reinstating a Statutory Pay-As-You-Go Requirement, July 25, 2007, 6.

¹⁹ *Id.*

Sequestration would be impractical as an enforcement mechanism in a regime where each piece of proposed legislation was subjected to PAYGO restrictions individually.²⁰

Rules-based PAYGO procedures are enforced through voluntary congressional points of order. Rules-based PAYGO enforcement in the House applies to each new piece of legislation that violates PAYGO rules. This differs from statutory PAYGO enforcement and the rule-based enforcement in the Senate, which only applies once annual PAYGO limits have been reached. The Elastic Clause of the Congressional Budget Act permits Congress, in the context of a budget resolution, to "set forth such other matters, and require such other procedures, relating to the budget, as may be appropriate to carry out the purposes of this Act."²¹ Based on this authority, the Senate created its original rules-based PAYGO procedure within the FY1994 budget resolution.²² The Senate has subsequently modified and extended its rule on several occasions. Modifications included permitting tax cuts or mandatory spending increases that did not exceed the budget surplus and exempting any tax cut or mandatory spending increase assumed in the congressional budget resolution.²³ These exceptions to the PAYGO rule have allowed for very sizable deficit increases to pass under the radar. For instance, the Economic Growth and Tax Relief Reconciliation Act of 2001 was passed without violating PAYGO notwithstanding the estimated \$1.26 trillion dollar loss of revenue attributed to it over the eleven-year period of FY2001-FY2011.²⁴ The Medicare Prescription Drug, Improvement, and Modernization Act of 2003, was similarly passed

²⁰ Id., at 12.

²¹ 2 USC §632 (b)(4) (2005),

²² Bill Heniff, Budget Enforcement Procedures: Senate's Pay-As-You-Go (PAYGO) Rule, CRS Report for Congress, June 2, 2003, p. 3.

²³ Schick, Supra note 1, at 171.

²⁴ Bill Henniff Jr., Budget Enforcement Procedures: Senate Pay-As-You-Go (PAYGO) Rule, CRS Report for Congress, December 6, 2007, 13.

without a violation in spite of estimates that it would increase direct spending by \$395 billion over the succeeding ten-year period of FY2004-FY2013.²⁵

Most recently, the Senate modified its rules-based PAYGO procedures and extended rules-based PAYGO in the Senate until September 30, 2017.²⁶ The current Senate procedure applies to “direct spending” and “revenue” legislation and permits any Senator to raise a point of order when legislation would “increase the on-budget deficit or cause an on-budget deficit” for either of two named time periods.²⁷ These two time periods include: the current fiscal year plus the next five fiscal years and the current fiscal year plus the next ten fiscal years.²⁸ As a point of order can be raised against legislation that violates either of these two time periods, this procedure subjects legislation to a ten-year period of review. Three types of legislation are exempted from Senate rule-based PAYGO procedures: 1) budget resolutions, 2) any legislative provision that affects the full funding and continuation of the 1990 deposit insurance guarantee commitment, and 3) non-reconciliation legislation that is covered by a “prior surplus” achieved during the calendar year.²⁹

The Senate also created a new PAYGO point of order in 2007.³⁰ This point of order attempts to address legislation increasing long-term deficits and can be raised against “any bill, joint resolution, amendment, motion, or conference report that would cause a net increase in deficits in excess of \$5,000,000,000 in any of the 4 10-year periods beginning in 2018 through 2057.”³¹ Another long-term budget point of order is

²⁵ Id.

²⁶ S. Cong. Res. 21 §§ 201-05, 110th Cong., 1st Sess. (2007).

²⁷ Id. at § 201.

²⁸ Id.

²⁹ Id.

³⁰ Id. at § 203.

³¹ Id.

the Byrd Rule, which applies specifically to reconciliation legislation that would increase net deficits beyond the traditional ten-year PAYGO horizon period.³² The Byrd Rule permits Senators to object to “extraneous matter” which include provisions which “increase net outlays or decrease revenue during a fiscal year after the years covered by the reconciliation bill unless the provision's title, as a whole, remains budget neutral”. The Byrd Rule is entirely voluntary in nature and can be overturned by a 3/5th vote of the Senate. Additionally, the Byrd Rule does not apply if “the provision will likely reduce outlays or increase revenues based on actions that are not currently projected by CBO for scorekeeping purposes” or if “such provision will likely produce significant reduction in outlays or increase in revenues, but due to insufficient data such reduction or increase cannot be reliably estimated”. These exceptions seem to promote gaming and encourage crafty legislators to argue that the CBO has not adequately incorporated relevant information into the baseline or that there is insufficient information available. As these exceptions seem to rest on contradictory grounds, one would hope that a legislator would not simultaneously argue for both exceptions, although the statute does not prohibit such an approach.

Rules-based PAYGO enforcement in the Senate through points of order is, however, entirely voluntary in nature. There is no requirement that a Senator object to legislation which will increase on-budget deficits via this provision. The first real test of the Senate’s new rules-based PAYGO procedures demonstrates this fact. In late 2007, Congress passed revenue legislation to ameliorate the effects of the Alternative Minimum Tax on as many as 23 million taxpayers – a measure which was estimated to contribute

³² See Generally, William Dauster, The Congressional Budget Process, Fiscal Challenges: an Interdisciplinary Approach to Budget Policy, Cambridge University Press (2008).

more than \$50 billion to the federal deficit. The House of Representatives fully offset the costs of Alternative Minimum Tax legislation through a variety of means, including increased taxes. The Senate, however, voted 88-5 to strip all offsets from this bill, a move that subjected the bill to a PAYGO point of order.³³ No PAYGO point of order was raised in the Senate, however. Another element of Senate procedure further weakens the effectiveness of PAYGO points of order – any PAYGO point of order can be waived by the 3/5ths vote of the Senate.³⁴ Despite the example of the current Senate’s failure to enforce PAYGO by raising points of order, to say that the current membership is not serious about the new rule is perhaps belied by the fact that nearly half of all the points of order that have been raised in the Senate since the adoption of PAYGO in 1993 were raised in 2007.³⁵ Although motions to waive the points of order were raised in all but one of the instances, these motions invariably failed to pass.³⁶

In 2007, the Senate also changed its rule concerning the exemption from PAYGO requirements of legislation assumed in the most recent budget resolution. By way of background, as a general rule, the Senate uses the baseline provided by CBO.³⁷ This baseline is determined by projecting “revenues, spending, and deficit or surplus levels under existing law.”³⁸ Notably, the CBO baseline does not assume any legislative

³³ Klaus Marre, Senate Passes AMT Patch, TheHill.com, Dec 6, 2007 (available at: <http://thehill.com/leading-the-news/senate-passes-amt-patch-2007-12-06.html>).

³⁴ S. Con. Res. 21 § 201(b), 110th Cong., 1st Sess. (2007).

³⁵ Of the 27 total points of order raised since the adoption of PAYGO in 1993, 13 were raised in 2007. See Heniff, supra note 26, at 13.

³⁶ With one exception, motions to waive have followed these points of order. On only three occasions, however, did the Senate vote to approve these waiver motions. Two of these decisions to waive came in response to a point of order directed at an entire bill. On another occasion, the Senate voted to waive a point of order against a motion to concur with a House bill. Points of order against amendments, on the other hand, have succeeded on every occasion they were raised. See id.

³⁷ Id. at 3.

³⁸ Id. at 4.

changes going forward.³⁹ Starting with the 108th Congress, the Senate began to alter this baseline before it used it for PAYGO enforcement.⁴⁰ By adjusting the baseline produced by the CBO to include assumed legislation found in the most recent budget resolution (including any deficit increases or revenue losses it was thought to produce), the Senate affectively exempted such legislation from PAYGO requirements. Several attempts were made to get rid of this exemption, but none was successful.⁴¹ With the advent of the 110th Congress, the newly empowered Democrats having promised to “restore” PAYGO to the more robust status it had enjoyed before 2003, the Senate voted 52-47 to subject assumed legislation to PAYGO requirements.⁴² In May the Senate voted 52-40 in favor of the conference report to accompany the budget resolution, and the new rule was enacted.⁴³ Since that date the Senate has stopped adjusting its baseline for assumed legislation.⁴⁴ As a side note, the Senate rejected a proposed amendment to the budget resolution that would have exempted legislation providing for the extension of the Bush tax cuts.⁴⁵

The House of Representatives instituted its first version of rules-based PAYGO procedures on January 4, 2007.⁴⁶ These rules-based PAYGO procedures form part of the House rules of procedure, which are adopted at the start of each new Congress, meaning this rule must be renewed at the beginning of the next Congress to remain in effect.

³⁹ Id.

⁴⁰ Id. at 9.

⁴¹ Senator Russell Feingold proposed an amendment to the budget resolution to this effect in 2004. While the Senate voted in favor of the amendment, it was not enacted because the Senate failed to consider the subsequent conference report. Again in 2005 Senator Feingold proposed his amendment. This time it was defeated in the Senate by a 50-50 vote. In 2006, the Senate rejected a similar amendment proposed by Senator Kent Conrad by the same 50-50 vote. See Heniff, Supra note 26, at 10-12.

⁴² Id. at 11-12

⁴³ Id. at 12.

⁴⁴ Orszag, Supra note 19, at 12, citing section 201(a)(5) of S. Con. Res. 21.

⁴⁵ Heniff, Supra note 26, at 12.

⁴⁶ H. Res. 6 Title I, 110th Cong., 1st Sess. (2007).

House PAYGO procedures create a point of order for any mandatory spending or revenue legislation that has the “net effect of increasing the deficit or reducing the surplus” for the current fiscal year and the next five fiscal years and the current fiscal year and the next ten fiscal years.⁴⁷ Unlike the Senate rules-based PAYGO procedures, House procedures do not explicitly exempt any legislation from PAYGO points of order. House procedures also do not include the \$5 billion long-term deficit point of order found in the Senate. Yet another difference between the House and Senate rules is that in the House proposed legislation is submitted to PAYGO restrictions one proposal at a time. No net savings created by one bill can be used to offset a deficit increase caused by another bill. In the Senate, on the other hand, where the costs and savings generated by bills are recorded on a scorecard, PAYGO restrictions only kick in when a piece of legislation causes an increase in the deficit both individually and when aggregated with the other pieces of legislation enacted since the start of the year. In sum, Senate rules allow for savings to be “banked,” while House rules prohibit this practice.⁴⁸

As in the Senate, House PAYGO points of order are not self enforcing. A point of order must be raised before consideration of offending legislation has begun or during the pendency of an offending amendment.⁴⁹ Waiver of rules-based PAYGO limitations in the House can be accomplished through a special rule, which requires only a simple majority vote. Waiver can also be secured through House suspension procedure, though this requires a 2/3rds vote. As stated above, the first major challenge to the new rules-based PAYGO procedures of both the Senate and the House was the Alternative Minimum Tax revenue legislation enacted in late 2007. Though the House preferred a

⁴⁷ Id.

⁴⁸ See Orszag, Supra note 19.

⁴⁹ House Rule XXI, 110th Cong., 1st Sess. (2007).

deficit neutral version of this legislation, the House ultimately approved the Senate version of this bill, which added over \$50 billion to the federal deficit. This measure easily passed in the House after it approved a waiver of PAYGO enforcement by a vote of 352–64.

WHERE PRACTICE DEVIATES FROM FORMAL REQUIREMENTS

It is somewhat of a conundrum that increases in the deficit (or surplus reductions) occurred at all in a world governed by statutory and rules-based PAYGO procedures and discretionary spending caps since that is precisely what they were designed to prevent. Clearly, however, budgets between FY1991 and FY2002, when statutory and Senate rules-based PAYGO procedures were in full effect, were not void of deficit increases. This indicates that there was at least some deviation between theory and practice in the enforcement of both statutory and rules-based PAYGO procedures. Much of this deviation was a result of what Schick calls “offset games” being played in both the House and the Senate.⁵⁰

The mechanics of PAYGO scoring instruments may lead to budget gimmicks, which weaken the effectiveness of these fiscal constraint rules. Spending and revenue provisions are scored within a limited period of time, in recent years typically a ten-year budget window. Therefore, Congress can game the system by timing revenue-raising provisions in order to make room for tax reductions. Or, Congress could habitually extend an expiring tax, scoring it as additional revenue each time it was renewed. For instance, when the federal tax on airline tickets was scheduled to expire in 1996, Congress renewed it for another year and then extended it again in a different form the

⁵⁰ Schick, *Supra* note 1, at 170.

following year.⁵¹ These systematic methods of gaming the system can occur in several ways. Statutory PAYGO procedures can be circumvented by issuing a simple decree that erases any PAYGO balance. At the same time, both statutory and rules-based PAYGO procedures can be gamed in four ways: reporting a delayed loss of revenue, reporting accelerated revenue gains, using ‘sunset’ provisions, or using emergency spending provisions.

Erasing PAYGO Balances by Decree

Since Congress can change the rules of the game, circumventing statutory PAYGO procedures is not all that difficult. For instance, as it did several times, Congress avoided sequester by simply decreeing that OMB ignore any excess PAYGO balance.⁵² Statutorily, PAYGO, as established by the BEA, requires that legislation proposing new mandatory spending or decreasing revenues for a fiscal year must not result in a net cost for that year. PAYGO balances, however, are maintained on a rolling ‘scorecard’ that accumulates the budgetary effects of laws passed during the current session and previous sessions. Therefore, the threshold test used by OMB to determine the necessity of a statutory PAYGO sequester considers only the net cost of legislation on the PAYGO scorecard, not how a particular piece of legislation changed the surplus or deficit for that fiscal year in the federal budget.⁵³

Yet Congress can prevent a budget sequester by simply mandating that OMB ignore any remaining PAYGO balance on the scorecard. Through fiscal year 1999, the statutory PAYGO procedures were sustained with only small excesses. Nevertheless,

⁵¹ *Id.* at 171.

⁵² Victoria Allred, *PAYGO Goes by Wayside*, CQ Weekly, Jan 13, 2001, p. 96.

⁵³ Robert Keith, *Termination of the PAYGO Requirement for FY2003 and Later Years*, CRS Report for Congress, Dec 31, 2002, p. 4.

according to Rudolph Penner, it was exceeded by \$10.5 billion in FY2000 and FY2001.⁵⁴ Congress acted several times after 1999 to evade sequester by decreeing that OMB ignore excess balances on the scorecard. Furthermore, according to Brian Riedl, no meaningful sequestration ever took place during the 12 years governed by statutory PAYGO procedres.⁵⁵

In 2002 statutory PAYGO procedures had little disciplining effect on Congress' level of spending. Congress had already eliminated the FY2002 PAYGO balance by declaration, and in January 2002 the OMB projected a PAYGO balance for FY2003 of \$110.694 billion. As the year progressed Congress and the President enacted legislation that added \$2.3 billion to the previous year's PAYGO balance (FY2002), raised the projected balance for FY2003 to \$125 billion, and accumulated \$559.6 billion to the 5-year anticipated PAYGO balance. Much of this increase was attributed to the Job Creation and Worker Assistance Act of 2002. Moreover, the OMB estimated that since some mandatory spending was exempt from sequestration, only \$31.1 billion could be cut under a PAYGO sequester for FY2003. Therefore, even if a full sequester were to have occurred, a violation of more than \$90 billion would have remained.

Nonetheless, Congress avoided a sequester by passing HR 5708, which became Public Law 107-312 after it was signed by President Bush. The text of PL 107-312, in its entirety, reads:

Upon the enactment of this Act, the Director of the Office of Management and Budget shall reduce any balances of direct spending and receipts legislation for all fiscal years

⁵⁴ Rudolph Penner, Repairing the Congressional Budget Process, Washington, Urban Institute, p. 12 (2002).

⁵⁵ Brian Riedl, Better Budget Reform, The Heritage Foundation, Backgrounder No 1758, May 14, 2004, p. 3 (available at: www.heritage.org/Research/Budget/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=63391).

under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 to zero.⁵⁶

This law erased the five-year PAYGO balance of over \$559 billion for FY2002-FY2006 (see the table below), the last five-year budget window for which statutory PAYGO requirements mattered.

Table 1. OMB Estimate of PAYGO Balances
(amounts in \$ billions)

FY2002	FY2003	FY2004	FY2005	FY2006	FY2002-2006
<i>Balances for legislation enacted through September 30, 2002:</i>					
2.320	125.066	146.940	141.628	143.739	559.694
<i>Balances after adjustments required by P.L. 107-312:</i>					
0.0	0.0	0.0	0.0	0.0	0.0

Source: OMB Final Sequestration Report to the President and Congress for Fiscal Year 2003, December 6, 2002, Table 2, page 7.

Delaying Loss of Revenue

A less blatant way of circumventing both statutory and rules-based PAYGO requirements involves delaying a revenue loss. Certain measures, such as changes in the tax code, can be written such that a substantial portion of their loss of revenue occurs outside of the scored budget window. Elizabeth Garrett points out that this phenomenon, also known as ‘back-loaded revenue loss,’ might make tax reductions less desirable to interest groups since they have to wait several years to enjoy the benefits.⁵⁷ Nevertheless the demand for tax cuts has certainly not diminished, even after the Senate began using a ten-year budget window instead of the five-year window.

⁵⁶ Keith, *Supra* not 57, at 4-5.

⁵⁷ Elizabeth Garrett, *Accounting for the Federal Budget and Its Reform*, 41 Harv. J. on Legis. 187 (Winter 2004).

The establishment of the Roth IRA program illustrates this occurrence well. Money from Roth IRAs, unlike traditional IRAs, is not taxed when it is withdrawn but it is not deductible when it is initially contributed. By postponing revenue losses far into the future Roth IRAs looked cheaper according to PAYGO scoring than traditional IRAs, and Congress was able to pass the measure without breaching PAYGO procedures. In fact, when the Roth IRA provision was enacted in 1997, only \$1.8 billion in revenue losses were scored within the five-year budget window, but the provision was estimated to produce more than \$20 billion in losses over the first ten years.⁵⁸

Shifting Revenue Gains

Another mechanism used to “game” statutory and rules-based PAYGO procedures is speeding-up revenue gains. Just as certain legislation can clear PAYGO requirements by postponing revenue losses outside of the measured budget window, Congress also uses techniques to accelerate revenue gains in order to offset spending or revenue losses. Most of the time, these accelerated revenue gains do not represent new income, but simply provisions written in order to speed-up the receipt of revenue.

For example, revenue acceleration techniques are rather common in state governments with balanced budget requirements. In recent years, for instance, many states have dealt with projections of budget deficits by speeding-up the receipt of revenue expected from the tobacco settlement. This is often done simply by selling Tobacco Securitization Bonds.⁵⁹

At the federal level, the pension reform plan proposed by the Bush administration in 2003 would have increased revenue by \$15 billion in the first few years. The proposal

⁵⁸ Id.

⁵⁹ Id. at 193-194.

would have encouraged people to switch from traditional retirement savings accounts that allow for immediate tax deductions to Roth accounts that allow for future deductions. This meant short-term revenue gains as individuals opted against retirement accounts with immediate tax deductions, however, in the long-term, of course, government would suffer revenue losses since withdrawals from Roth accounts would not be taxed. In other words, Congress scored a revenue gain in the short-term budget window to offset other measures, even though the legislation caused a long-term loss of revenue. If this same piece of legislation were scored under an accrual accounting measure that considered its long-term, real net effects on revenue and spending, it would probably not have been scored as a revenue gain for PAYGO.⁶⁰

Revenue shifting techniques were also used to help pass the first phase of the Bush tax cuts, the Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”). At the time EGTRRA was being debated, the ten-year budget window covered 2002 through 2011. The federal government was scheduled to receive \$33 billion in corporate tax receipts late in fiscal year 2001. By delaying the receipt of that revenue two weeks, legislators were able to score that \$33 billion inside fiscal year 2002, which was covered within the EGTRRA budget window. Although shifting that revenue did not improve the government’s financial position, it increased the funds available to off-set the tax cut, which was the primary purpose of the maneuver.⁶¹

⁶⁰ Id. at 193.

⁶¹ Alan Auerbach, William Gale, and Peter Orzsag, The Budget Outlook and Options for Fiscal Policy, Tax Notes, June 10, 2002, p. 1645.

Sunseting Provisions

The Senate's Byrd Rule is designed to prevent the passage of legislation that would cause a long-term increase in deficits. The Byrd Rule allows Senators to raise a point of order objecting to reconciliation legislation that would increase the deficit beyond the period of time covered in the measured window. Once a point of order from the Byrd Rule has been raised, a supermajority is required to approve the violation so that the legislation can proceed.

Nevertheless, Congress can avoid the Byrd Rule by adopting sunset provisions. For instance, tax reductions can be set to expire at the end of a budget window so that they do not have negative effects on the deficit outside of the period considered by statutory and rules-based PAYGO procedures. This was precisely what Congress did with the first Bush tax cut passed in 2001. As mentioned previously, when EGTRRA was debated and passed the ten-year budget window was 2002 through 2011. Tax cuts are expected to have spillover effects on revenue in subsequent years. Therefore, most of the tax provisions in EGTRRA were set to expire at the end of calendar year 2010 to avoid additional revenue loss beyond fiscal year 2011.⁶² This enabled EGTRRA to pass without a 60 vote supermajority as required by the Byrd Rule.

Congress, however, has rarely adopted temporary tax measures, customarily extending them rather than letting them expire.⁶³ The rhetoric from lawmakers today indicates that EGTRRA sunsets represent budget gimmicks and not a genuine desire to have the tax cuts phased out in 2010. In fact, President Bush's FY2009 budget proposes

⁶² *Id.*

⁶³ Garrett, *Supra* note 61, at 194.

making these tax cuts permanent.⁶⁴ Moreover, Garrett points out that provisions often are set to expire in election years when members of Congress do not want to be on record raising taxes.⁶⁵ If the sunset provision on EGTRRA were removed, extending the tax cut indefinitely into the future, William Gale estimates that it would permanently reduce revenue by 2.4% of GDP.⁶⁶

Emergency Spending Provisions

Congress can also invoke emergency spending provisions to avoid statutory and rules-based PAYGO restrictions. PAYGO procedures exempt ‘emergency spending,’ but do not specifically define what constitutes an emergency. This leaves room for abuse, giving Congress the ability to circumvent statutory and rules-based PAYGO restrictions by designating certain measures ‘emergency spending.’ The net cost of the Job Creation and Worker Assistance Act of 2002, for instance, was estimated at \$46.538 billion for FY2002, \$36.878 billion for FY2003, and \$88.723 billion over the five-year period covering FY2002-2006. Nevertheless, section 502 of the act designates these amounts as emergency requirements, effectively removing them from the PAYGO scorecard. In early 2008, Congress passed an economic stimulus package that operated largely through tax rebates, reducing federal revenues by more than \$150 billion.⁶⁷ Despite support for offsets in the House to make this legislation PAYGO compliant, Congress ultimately deemed this proposal “emergency” legislation and avoided any rules-based PAYGO enforcement.

⁶⁴ Budget of the United States Government: Fiscal Year 2009, Office of Management and Budget, Feb 4, 2008. Available at: <http://www.whitehouse.gov/omb/budget/fy2009/budget.html>

⁶⁵ Garrett, *Supra* note 61, at 194.

⁶⁶ *Id.* at 195.

⁶⁷ Pub L No 110-185 (2008)

PART II: Existing Critiques:

Assessments of PAYGO:

Failure to Curtail Mandatory Spending:

PAYGO rules fail to impose any sort of ceiling on mandatory spending, although discretionary spending has been subject to caps enforced via sequestration. Although they deter the formation of new mandatory spending programs by requiring the identification of offsetting legislation, they do little to chill spending under existing programs.⁶⁸ The failure of the budgetary rules to limit mandatory spending may help explain the rapid growth in this area, especially in light of existing demographic and economic trends which encompass an aging population, increased health care costs and a softer economy.

“It has become an established fact of federal budgeting that old programs never die.... Furthermore, while the pay-as-you-go discipline limits the impact of new or existing entitlements on the deficit, it makes no effort to curtail the built in growth of existing entitlements, which is the major force driving spending skyward.”⁶⁹

The quasi-property like nature of these programs, however, may help to explain the lack of mandatory spending caps, especially when dealing with entitlements that provide for basic necessities. Although most recipients do not have a legal claim to their

⁶⁸ Richard Doyle and Jerry McCaffrey, The Budget Enforcement Act of 1990: The Path to No Fault Budgeting, Public Budgeting & Finance, p. 37-38 (Spring 1991) (“The committees with jurisdiction over revenues and direct spending (e.g. entitlements) will not be required to operate within the parameters of a pay-as-you-go system, although spending growth caused by caseload growth in benefit programs is outside these parameters.”)

⁶⁹ Philip G. Joyce and Robert D. Reischauer, Deficit Budgeting: The Federal Budget Process and Budget Reform, 29 Harv. J. on Legis., 429, 442 (1992).

entitlements, it would be politically challenging to reduce their payments from existing programs.⁷⁰

Maintenance of Status Quo:

PAYGO rules arguably favor existing programs and stifle the formation of new, mandatory spending initiatives. As only the effects of new legislation or the expansion of existing programs are subject to review, existing programs may escape review and become entrenched within Presidential and Congressional budgets. Richard Doyle characterizes this phenomenon as the “inertia problem”, one which favors existing programs, presumably to the detriment of new ones.⁷¹ This discrepancy in treatment may result in undesirable outcomes if the existing programs would have been eliminated had they be subjected to PAYGO review. In this context, PAYGO rules constitute an “effective poison pill”, one that can be used to kill new programs.⁷²

PAYGO rules, however, can be seen as providing for an implicit review of existing programs. Supporters of a proposed mandatory spending program (or predators) can increase the likelihood of securing funding by identifying an offset, either in an existing mandatory spending program or tax expenditure. These offsets constitute

⁷⁰ See Eric M. Patashnik, Ideas, Inheritances, and the Dynamics of Budgetary Change, *Governance: An International Journal of Policy and Administration*, Vol. 12, No. 2, April 1999, p. 161 (finding “entitlements are based on the idea that clientele have a right to their benefits, and that the ethical obligation of government is to give people what they are due. Although entitlement rights are by no means inviolable, they are a major reason why contemporary budget outcomes are so sticky.”)

⁷¹ Richard Doyle, Congress, the Deficit and Budget Reconciliation, *Public Budgeting & Finance*, p. 71 (Winter 1996) (finding “the inertia problem arises from the fact that the budgetary status quo both shelters entitlements from spending cuts and favors increased spending for them”).

⁷² See James A. Thurber, Congressional Budget Reform: Impact on Appropriations Committees, *Public Budgeting & Finance*, p. 68 (Fall 1997) (citing CBO Director Robert D. Reischauer: “To date, this pay-as-you-go requirement has proved to be an effective poison pill that has killed a number of legislative efforts to cut taxes and expand entitlements”).

potential prey for the predators.⁷³ Predators, which are free to look across all categories of mandatory spending and tax expenditures, select potential offsets based on the resistance which they expect to encounter from the proponents of the targeted program.⁷⁴ Beneficiaries of existing programs can increase the cost associated with securing their program as an offset by providing key legislators with information about the effectiveness of their program. Although these beneficiaries are inclined to portray their program and existing spending levels in a favorable light, potential predators are likely to present contradictory information, thereby presenting legislators with more information upon which to make informed judgments when considering proposed programs and potential offsets.⁷⁵ The repeat nature of this game also helps to increase the quality of the data subject to review as lobbyists do not want to develop a reputation for providing inaccurate information to legislators.⁷⁶ Therefore, the market for offsets creates a mechanism to review existing mandatory spending programs.

Gaming the System – Potential for Abuse and Lack of Transparency:

PAYGO rules - which depend on scorekeeping mechanisms, utilize finite time horizons, and create exceptions for “emergency requirements” - allow for the creation of programs which satisfy the letter of PAYGO requirements while resulting in sub-optimal

⁷³ See Elizabeth Garrett, Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process, 65 U. Chi. L. Rev. 501, 517 (1998) (finding “because of the political taboo associated with tax increases, the tax legislative process is presently dominated by the quest to find a different sort of offset.”).

⁷⁴ These predators can prevent the formation of opposition by arguing that the offset, to fund the new, proposed benefit, imposes a cost upon the requesting group (the predators). Elizabeth Garrett cited the 1993 repeal of the luxury tax on boats as an example of this approach. To offset the elimination of the tax, luxury boat owners proposed to increase the tax on diesel fuel for non-commercial boats. They argued that luxury boat owners (the predators) would pay for their new tax benefit through higher gas prices on the docks. But as Garrett indicated, “the group benefiting from the luxury tax repeal (purchasers and manufacturers of expensive boats) is not necessarily congruent with the group paying for the new expenditure (all owners of noncommercial boats who must pay higher fuel prices).” Id. at 524.

⁷⁵ Id. at 557.

⁷⁶ Id. at 560

policy outcomes. Additionally their complexity may contribute to a lack of transparency which frustrates or disillusions the public. Scoring mechanisms, which are used to determine the costs associated with legislation, may change legislation in ways which do not reflect the preferences of the policy makers.⁷⁷

The ten-year time horizon contained in the Rules-based PAYGO procedures creates incentives for policy makers to backload payments so as to minimize the amount of the required offset. This trend constitutes “pain-deferral budgeting”, as characterized by James A. Thurber.⁷⁸ But this “backloading” also reduces the net present value of the associated benefits and reduces the incentives of lobbyists to pursue mandatory spending dollars, thereby decreasing the associated payouts and any net deficit increase.⁷⁹ Additionally, this rule and its ten-year horizon may represent an improvement over its statutory PAYGO counterpart, which only looked to the end of FY2006 when assessing the impact of legislation enacted before the end of FY2002.⁸⁰ Because of the longer horizon associated with Congressional rules-based PAYGO procedures, a larger share of the costs will arguably be contained within the specified window, thereby requiring a larger offset and reducing any deficit increase that will occur outside the specified time horizon, especially in light of the potential application of the Byrd rule. But as the CBO

⁷⁷ See Philip J. Joyce, Congressional Budget Reform: The Unanticipated Implications of Federal Policy Making, Public Administration Review, p. 322 (July/Aug. 1996) (stating that insurance premium caps were allegedly included in President Clinton’s health reform plan so the Congressional Budget Office would score them as reducing spending rather than as a reflection of President Clinton’s approval of the caps). See Also Penner, Supra note 58, at 9 (“The (PAYGO) rules incurred some cost, however, in that they sometimes forced policymaking to be more mechanical than wise. For example, the tax increases chosen to pay for certain small tax deductions were sometimes chosen only because they happened to provide the right amount of money rather than they represented good policy”).

⁷⁸ Thurber, Supra note 78, at 70 (citing Congress’ preference of for slow spending programs over fast spending ones).

⁷⁹ Id., at 529-530. See also Garrett, Supra note 61, at 190 (finding “even the ten-year budget window did not eliminate the ability of lawmakers to back-load revenue loss, although it could make tax benefits less desirable for interest groups that would have to wait several years to enjoy their tax expenditures and who would therefore worry that Congress might repeal or reduce them before they were fully effective.”)

⁸⁰ Heniff, Supra note 23, at Summary Page.

likely has less information about later years (those not contained in the statutory PAYGO analysis), the estimates associated with rules-based procedures are likely more speculative and may result in larger deficit increases.

The exclusion of “emergency” spending in the calculation of net deficits, as mentioned previously, may permit increased gaming of the system. The definition of “emergency legislation” requires only that the President designate the mandatory spending or receipts legislation as an “emergency requirement” and that Congress make the same designation in a statute.⁸¹ This definition confers significant discretion upon the President and Congress to determine what constitutes an emergency. Such discretion may be misused in times when offsets are in scarce supply, perhaps when tax revenues are relatively low and there is increased pressure to maintain current spending levels – in response to a distressed economy. Richard Doyle and Jerry McCaffery cite a potential “policy ambiguity” (rather than blatant opportunism) in the designation of unemployment insurance benefits as emergency legislation.⁸² The requirement that both the President and Congress agree to designate a particular piece of legislation as “emergency legislation” may provide a sufficient institutional safeguard, especially when different political parties are in charge of the Executive and Legislative branches. This check-and-balance element of the “emergency” exception also enables PAYGO procedures to maintain sufficient flexibility as a formal rule cannot anticipate all future “emergency” situations.

Complex PAYGO procedures which permit sophisticated actors to game the system (as discussed above) may also decrease the transparency of the legislative process

⁸¹ 2 USCS §902(e) (2005).

⁸² Richard Doyle and Jerry McCaffery, The Budget Enforcement Act in 1992: Necessary but Not Sufficient, Public Budgeting & Finance, p. 33 (Summer 1993).

and alienate the public. According to Fisher and Royce, “The congressional budget process now has a great many more rules and procedures than it did in 1974... Without judging the reasonableness of these developments, they have unquestionably made the process less able to understand, both by participants and by the general public.”⁸³ However, by requiring the naming of offsets, Congress makes explicit those tradeoffs inherent in the legislative process. This explicit disclosure may increase, rather than decrease, the transparency of the budgetary system. When speaking of the sequestration rules to which mandatory and discretionary spending were at one time subject, “the congressional budget process has made decision making by the Appropriations Committees more open, accessible, and accountable to the public, interest groups, and the administration by publicly revealing the tradeoffs that must be made in discretionary and entitlement program spending.”⁸⁴ But the trade-offs may not be well publicized or made clearly explicit. If so, the increased complexity associated with PAYGO procedures may undermine public confidence and result in “widespread disillusionment” in the budgetary process and in the government.⁸⁵

The competitive market for offsets, as characterized by Elizabeth Garrett, indicates a significant level of public involvement in the budgetary process, despite the existence of complex budgetary rules. In fact, she might argue that the competitive market and the associated public involvement exist precisely because of the complexity associated with the rules. However, the market is largely dominated by lobbyists, who may not represent a valid proxy for public participation in the budgetary process. But if

⁸³ Louis Fisher and Philip Royce, Introduction: Reflection on Two Decades of Congressional Budgeting, *Public Budgeting & Finance*, p. 6 – 7 (Fall 1997).

⁸⁴ Thurber, *Supra* note 78, at 69.

⁸⁵ Joyce, Supra note 83, at 319.

the principal-agent costs between lobbyists and policy entrepreneurs (as agents) and public beneficiaries (as principals) are minimized, agent involvement may represent a sufficient level of public involvement in the budgetary process.⁸⁶

Walls between Discretionary and Mandatory Spending are Arbitrary:

Statutory and rules-based PAYGO procedures do not permit offsets to occur between discretionary and mandatory spending programs. Additionally changes in revenue legislation, which are subject to PAYGO procedures, can not be used to fund additional discretionary spending. The prohibition on transferring funds between categories may prevent the funding of socially beneficial programs. These efficient transfers, however, may be achieved by use of an omnibus reconciliation bill that includes changes in tax revenue with modifications to discretionary spending.⁸⁷ But use of the reconciliation bill constitutes another procedural hurdle, one that increases the complexity of the system and reduces the likelihood that the desired transfer will take place. These restrictions may, however, be justified in light of the different time frames associated with each of the spending categories. As discretionary spending is typically up for renewal each year, unlike its mandatory spending counterpart, it may be inappropriate to fund increased mandatory spending (which will likely result in a stream of future payments) with decreases in discretionary spending and may invite increased gaming of the system.⁸⁸ But in eras of high deficits, it seems less problematic to fund

⁸⁶ Garrett cites Kay Lehman Scholzman and John T. Tierney's definition of a "policy entrepreneur" as one "who, through adroit use of the media, can mobilize public support by appealing to widely shared values such as concern about health, safety, or environmental preservation and by making opponents seem self-serving and careless of the public interest". Elizabeth Garrett, Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process, 65 U. Chi. L. Rev. 501, 519 (Spring 1998).

⁸⁷ Joyce, *Supra* note 83, at 323.

⁸⁸ See Elizabeth Garrett, Rethinking the Structure of Decision Making in the Federal Budget Process, 35 Harv. J. on Legis. 387, 403 (Summer 1998) (justifying the current separation of discretionary and direct

discretionary spending with funds from mandatory spending or revenue accounts as such a transfer will likely reduce future entitlement obligations.

Some critics are opposed to the current distinction between mandatory and discretionary spending for a different reason. Tim Westmoreland, a visiting professor of law at the Georgetown Law Center, for one, suggests that the congressional designation in the first instance, or as it initially categorized a bill passed before the statutory distinction between mandatory and discretionary spending was enacted, should give adequate regard to the language of promise found in the bill.⁸⁹ He takes issue with the practice of designating as discretionary spending bills that promise future benefits.⁹⁰ It would seem that for Westmoreland transferring funds from mandatory spending programs to discretionary ones (even ones that he would argue should have been designated mandatory) is effectively robbing Peter to pay Paul.

PROPOSALS FOR REFORM

From FY1991 through FY2002, federal budgets were constrained by both statutory PAYGO procedures and statutory limits on discretionary spending. These constraints, originally established by the BEA in 1990, were extended in 1993 and 1997 but expired at the end fiscal year of 2002.⁹¹ Many scholars agree that PAYGO procedures contributed, at least partially, to the fiscal discipline of the 1990s and the achievement of the first unified budget surplus in 30 years in FY1998 (Schick, Garrett,

spending programs by stating “the temporal distinction between periodically appropriated discretionary programs and permanently enacted tax subsidies or entitlement programs invites funding predators to use timing gimmicks in order to evade the discipline of the offset.”)

⁸⁹ Tim Westmoreland, *Standard Errors: How Budget Rules Distort Lawmaking*, 95 Geo.L.J 1555, 1583 (June 2007).

⁹⁰ He cites several examples of such programs, including the enabling act of the Indian Health Service and statutory provisions that promise health care benefits to federal prisoners. *Id.*, at 1583-84.

⁹¹ Garrett, *Supra* note 61.

Heniff & Keith). Others attribute the surplus largely to the growing economy. Still, the return of large deficits has triggered new discussions on the viability of restoring statutory PAYGO and what, if any, changes might make it more effective. As noted above, both the House and Senate have enacted new rules-based PAYGO procedures in 2007.

Bush Administration Proposal

In 2004, President Bush submitted draft legislation to Congress reestablishing statutory PAYGO procedures, but in a form that would apply only to mandatory spending legislation and not to revenue legislation. In other words, legislation that increases mandatory spending would be offset by reductions in other mandatory spending programs. Under these rules, statutory PAYGO procedures would not apply to tax legislation and would not allow increases in mandatory spending to be offset by higher tax rates. Similar legislation was considered in Congress that year. On March 19, 2004 the House Budget Committee reported a measure that would have reestablished a statutory PAYGO procedures, which would have been applied only to mandatory spending, for FY2005-FY2009. The bill was defeated by a vote of 146-268 on June 24th.⁹²

Nevertheless, the administration believes their proposed rules would better resemble the budget restraint practices that operate within many state governments.⁹³

However, when analyzed according the weaknesses of the previous statutory PAYGO

⁹² Bill Heniff and Robert Keith, Federal Budget Process Reform: A Brief Overview, CRS Report for Congress, Feb. 8, 2005.

⁹³ Major Savings and Reforms in the President's 2006 Budget, Publication of the Office of Management and Budget, Feb. 11, 2005, p. 229 (available at: <http://www.whitehouse.gov/omb/budget/fy2006/pdf/savings.pdf>).

requirements, it seems that the newly proposed statutory PAYGO procedure would not mitigate many of the gimmicks that Congress used to bypass PAYGO restraints. By taking tax legislation out of the picture, this new proposal might prevent lawmakers from renewing an expiring tax and scoring that as a revenue gain. Critics, of course, contend that restricting statutory PAYGO to the spending side of the budget could hamper overall efforts to reduce the deficit. Such a one-sided rule, it is argued, would not only reduce revenues by make tax cuts easier to pass, it would further contribute to an increased deficit by encouraging tax lawyers and lobbyists to simply transform entitlement programs into tax exemptions.⁹⁴ This practice, it is further argued, does not take into account the fact that a traditional entitlement program may be more efficient and effective than a tax-based approach to the same problem.⁹⁵

Congressional Reform

Some members of Congress are also interested in restoring statutory PAYGO procedures. The FY2008 budget resolution contained a sense of Congress stating: “that in order to reduce the deficit Congress should extend [statutory] PAYGO consistent with provisions of the Budget Enforcement Act of 1990.”⁹⁶ According to the Congressional Research Service, “no action has been taken so far in the 110th Congress on legislation to carry out this sense-of-Congress statement.”⁹⁷

The House, in both 2004 and in 2006, considered proposals, similar to the draft legislation presented by President Bush mentioned above, that would also have limited

⁹⁴ Joel Friedman et al., Ctr. On Budget and Policy Priorities, [A Pay-As-You-Go Rule That Would Exempt All Tax Cuts Would Make A Mockery of Efforts to Restore Fiscal Discipline](http://www.cbpp.org/3-20-06bud.pdf), 4 (available at: <http://www.cbpp.org/3-20-06bud.pdf>).

⁹⁵ Id.

⁹⁶ S. Con. Res. 21, 110th Cong., 1st Sess. (2007).

⁹⁷ Keith, Supra note 4, at 4.

the applicability of PAYGO rules to entitlement spending, exempting tax cuts.⁹⁸ In 2004 the proposal was even passed by the House Budget Committee, but defeated on the floor.⁹⁹ These House proposals, in turn, were subject to the same criticism leveled against President Bush's earlier proposal.¹⁰⁰

Theoretical & Academic Approaches to Reform

Many researchers and policy analysts criticized PAYGO for the gaming and counterproductive budget policies that it allows. Most scholars admit, however, that devising a process void of at least some gaming or gimmicks would be nearly impossible. Moreover, complex rules aimed to limit gaming may prove to be futile. The Byrd Rule, for instance, instead of preventing the passage of the 2001 tax cut, simply prompted sophisticated writing techniques so that most measures within the legislation would expire at the end of the scored budget window. Rudolph Penner calls this “policy making... more mechanical than wise.”¹⁰¹

Nevertheless, although there is certainly no consensus on what changes, if any, should be made to PAYGO, some academics have proposed new approaches hoping to limit its weaknesses and increase its effectiveness. Penner, for instance, proposes creating a mechanism that sets realistic goals for the budget balance each year and then invoking a simplified PAYGO rule for any legislation that exceeds the target. This, he suggests, would give Congress an incentive to consider the most controversial legislation first before the PAYGO rule would apply.¹⁰²

⁹⁸ Friedman, *Supra* note 100, at 1.

⁹⁹ Westmoreland, *Supra* note 95, at 1579.

¹⁰⁰ See generally, Friedman, *Supra* note 100.

¹⁰¹ Penner, *Supra* note 58.

¹⁰² *Id.*

Brian Riedl at The Heritage Foundation proposes adding caps to all mandatory spending, instead of just new mandatory spending measures as enforced under the old PAYGO rules. Due to the increasing costs of Social Security and Medicare, mandatory spending actually increased faster during the 12 years under PAYGO than during the 12 previous years.¹⁰³ Therefore, Brian Riedl suggests that substantially reducing the deficit will require strict caps on all mandatory spending.

Penner and Steuerle agree that restraining entitlement growth is a required ingredient towards substantially reducing the current budget deficit. They suggest automatic adjustments to prevent entitlement programs from growing faster than the economy. For example, the rate of payment of Medicare services could be periodically adjusted to keep Medicare payments within a total budget designated by Congress. Or, the formula determining Social Security benefits (or maybe even the retirement age itself) could be automatically re-indexed whenever the Social Security trust fund shows a long-term deficit.¹⁰⁴

In a completely different vein, indeed flying in the face of the arguments in support of the previously mentioned proposals for change, Tim Westmoreland advocates a paradigm shift in the focus of the budget process from a monetary, solipsistic approach to one that measures nonmonetary values. Westmoreland criticizes PAYGO, among other money-centered procedures. He points out that these rules ignore completely non-economic benefits such as increased quality of life that occur as a result of increased health care entitlements,¹⁰⁵ Accordingly, the current regime, he argues, promotes

¹⁰³ Riedl, *Supra* note 59, at 3.

¹⁰⁴ Rudolph Penner and Eugene Steuerle, Budget Rules, *The National Tax Journal*, p. 554 (Sept. 2004).

¹⁰⁵ Westmoreland, Supra note 95, at 1604.

ethanasia.¹⁰⁶ Proposed legislation providing for immunization, flouridization, and lead abatement, for example, fail to pass muster under current PAYGO rules. Some proposals fail because the preventative care will increase the longevity of the lives of entitlement beneficiaries and thus increase future costs. Others fail because any long-term cost savings created by the legislation would accrue to private individuals or states and are thus not calculated for federal budget purposes.¹⁰⁷

As part of this systemic shift, Westmoreland has proposed enacting a PAYGO rule that shuts the door on consideration of legislation that increases morbidity, mortality or that reduces Quality-Adjusted Life Years (QALYs). Such values are measurable, he contends, and could be used to establish a different kind of baseline calculation to which the new PAYGO rules would require adherence. Such a device, he argues, would encourage unlikely interest group partnerships, requiring currently influential interest groups to join political forces with previously powerless groups to get legislative packages passed.¹⁰⁸ Ultimately, the new PAYGO rules would enable Congress to pass health-saving laws that would be blocked by the current fiscally-centered rules and would encourage the passage of such laws by requiring the aggregate of all enactments to be health-neutral.¹⁰⁹

¹⁰⁶ *Id.* at 1595.

¹⁰⁷ *Id.* at 1595-1602. To illustrate his point, Westmoreland, cites an estimate made by the American Dental Association that the life-time cost of fluoridating water for one person is less than the cost of filing a single cavity. Current PAYGO rules, however, would take no account of cost savings that accrue to a private individual.

¹⁰⁸ Westmoreland suggests that such a rule would encourage unlikely political unions like the following: an auto industry group seeking lower tailpipe emission standards joining with those desiring better prenatal care. Coal-fired plant owners combining with those seeking diabetes prevention (which would disproportionately favor low-income blacks).

¹⁰⁹ *Id.* at 1606-07.

III. Conclusion

Other less drastic and more politically viable changes might help increase the effectiveness of PAYGO restrictions. For example, statutorily defining what constitutes ‘emergency spending’ could prevent Congress from abusing the emergency spending provision. The net effect on the total deficit from, say limiting the time period for emergency spending exemptions, might be minimal, but would at least be a step in the right direction.

On a different note, some argue that the nation may benefit from a shift in focus from monetary costs and savings to a more holistic approach that measures the net costs and benefits in increased life quality and expectancy flowing from legislation.¹¹⁰ But this proposal completely ignores and exacerbates the issue that for many is the most vexing budgetary problem of all—the rising cost of health care spending.¹¹¹ Some suggest that increased federal spending on entitlements, especially health care entitlements, is the anecdote to all society’s ills. But others maintain that to untether entitlement spending and raise taxes to keep up is a recipe for disaster.¹¹²

In the end, since Congress can change the rules of the game whenever it pleases, procedural rules and even statutory restrictions are no substitute for political consensus. Perhaps the primary driver behind BEA’s success was simply that it enforced a previously-made agreement supported at the time by a broad political consensus. Moreover, its erosion may signify a break-down in the consensus on deficit reduction. Without a strong, bi-partisan commitment to reduce the deficit, any rules or statute could

¹¹⁰ See *Id.*

¹¹¹ See e.g. Orszag, *Supra* note 19, at 7.

¹¹² See Michael J. Boskin, *Economic Perspectives on Federal Deficits and Debt*, Fiscal Challenges: an Interdisciplinary Approach to Budget Policy, Cambridge University Press (2008), p. 179.

be artificial. Penner and Steuerle write, “There has to be some agreed-upon set of goals that the rules are meant to enforce.”¹¹³ In short, perhaps foremost on the minds of policymakers should be reaching strong political consensus, not devising perfectly effective budget constraint rules.

¹¹³ Penner and Steuerle, Supra note 110, at 552.

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