PAYGO Rules and Sequestration Procedures
PART I: FACTUAL BACKGROUND:

ROLE IN FEDERAL BUDGET POLICY:

Pay-as-you-go ("PAYGO") rules require that new direct spending and revenue legislation be deficit neutral. Under these procedures, any increase in direct spending (associated with a change in legislation) must be offset by an equivalent increase in revenue or a decrease in another area of direct spending. These rules, which constitute a shift from deficit reduction (under the Gramm-Rudman-Hollings Act ("GRH") to spending control, are enforced via the sequestration mechanisms and Senate points of order. Sequestration requires an automatic reduction in non-exempt direct spending upon the violation of PAYGO rules. Senate Points of Order, which constitute self-enforcing mechanisms, permit (but do not require) a Senator 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 largely ineffective as PAYGO scorecard balances are automatically reset to zero through the end of FY 2005. The Senate Points of Order, however, can still be used to enforce PAYGO rules.

---

2 Sequestration as it applies to discretionary spending and discretionary spending caps expired on September 30, 2002. 2 USCS §901 (2005).
3 Their effectiveness, however, is mitigated due to their permissive nature and the fact that they can be waived by a 3/5 vote of the Senate.
LEGAL BASIS AND PARTICIPATING ENTITIES:

The Budget Enforcement Act of 1990 ("BEA") created the PAYGO rules, which involve direct spending and revenue legislation, and established limits on discretionary spending. 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)."

"Sequestration" involves "the cancellation of budgetary resources provided by discretionary appropriations or direct spending law." The net deficit increase includes estimates of direct 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". 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-

---

5 2 USCS §902(b) (2005)
6 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).
7 2 USCS §902(d)(4) (2005).
exempt direct spending accounts by a uniform percentage. But these procedures are suspended during times of war and periods of “low-growth”, as defined by the statute.

The Sequestration procedures, which enforce the PAYGO rules, no longer constitute significant deterrents against the formation of increased deficits associated with direct spending. Although they are still in effect through September 30, 2006, they only address effects of legislation enacted prior to October 2, 2002. Therefore, any legislation enacted after the October 1, 2002 cut-off date is not subject to PAYGO restrictions via the Sequestration process. Additionally the threat of Sequestration no longer applies to legislation enacted before the cut-off date, even if it creates net deficits.

PAYGO rules can also be enforced through voluntary Senate points of order. 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.” Based on this authority, the Senate created its PAYGO rule within its FY 1994 budget.

---

8 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).

9 “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).

10 2 USCS §902(b) (2005).

11 See Pub L No 107-312, 116 Stat. 2456 (2002) (requiring the Director of OMB to set all scorecards to zero in each fiscal year subject to this section).

12 2 USC §632 (b)(4) (2005),

4 of 26
resolution for the purpose of “preventing the deficit reduction expected to be achieved in a subsequent reconciliation bill from being used to offset the costs of any new direct spending or revenue legislation.” The Senate subsequently modified and extended its rule on four separate occasions. The current rule 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 any one of three named time periods. These time periods include the first year covered by the most recently adopted concurrent resolution, the first five fiscal years covered by the most recently adopted concurrent resolution and the 5 fiscal years following the first 5 fiscal years covered in the most recently adopted concurrent resolution. As a point of order can be raised against legislation that violates any of the three time periods, this rule subjects legislation to a ten-year period of review. Senate points of order are, however, entirely voluntary in nature. There is no requirement that a Senator object to legislation which will increase on-budget deficits via this provision. Additionally a point of order can be waived by the 3/5ths vote of the Senate under §505(b). The rule is currently scheduled to expire on September 30, 2008.

---

14 Id.
15 H. Cong. Res. 95 §505(a)(1) (2003). Authorization for use of this point of order is contained within the House Conference Report for 2003. “The Senate pay-as-you-go point of order included in the Conference Agreement reflects the language in the Senate-reported resolution and will apply on a post-budget resolution policy basis; that is, it will not apply to direct spending or revenue changes assumed in this resolution. To accomplish this, a scorecard will be maintained by the Chairman of the Committee on the Budget that will set out the total level of change to the deficit assumed by this budget resolution Conference Agreement. Subsequent legislation will be measured against these balances.” H. Conf. Rep. 108-71, §505 (2003).
The Byrd Rule, another Senate point of order, can be used to halt reconciliation legislation that will increase net deficits beyond the ten-year horizon period associated with the PAYGO point of order. This 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”. This rule, therefore, can be used to object to legislation that will create net deficits beyond the ten-year PAYGO window. But the Byrd Rule, like the PAYGO 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.

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 PAYGO rules and discretionary spending caps since that is precisely what they were designed to prevent. Clearly, however, budgets between FY 1991 and FY 2002, when PAYGO rules 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 PAYGO rules. Much of this deviation was a result of what Schick calls “offset games” being played in both the House and the Senate.\textsuperscript{18}

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 just right 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 following year.\textsuperscript{19} These systematic methods of gaming the system typically occur in one of four ways: reporting a delayed loss of revenue, reporting accelerated revenue gains, through the use of ‘sunset’ provisions, or using emergency spending provisions. Another way, however, that Congress can easily circumvent PAYGO rules is by issuing a simple decree that erases any PAYGO balance.

**Erasing PAYGO Balances by Decree**

Since Congress can change the rules of the game, circumventing PAYGO 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.\textsuperscript{20} Statutorily, PAYGO, as established by the BEA, requires that legislation proposing new direct spending or

\textsuperscript{19} Id at 148.
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 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.21

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 PAYGO rule was sustained with only small excesses. Nevertheless, according to Penner, it was exceeded by $10.5 billion in FY 2000 and FY 2001.22 Congress acted several times after 1999 to evade sequester by decreeing that OMB ignore excess balances on the scorecard. Furthermore, according to Riedl, no meaningful sequestration ever took place during the 12 years governed by PAYGO rules.23

In 2002 PAYGO rules had little disciplining effect on Congress’ level of spending. Congress had already eliminated the FY 2002 PAYGO balance by declaration, and in January 2002 the OMB projected a PAYGO balance for FY 2003 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 (FY 2002), raised the projected balance for FY 2003 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 direct spending was exempt from sequestration, only $31.1 billion could be cut under a PAYGO sequester for FY 2003. 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 under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 to zero.\textsuperscript{24}

This law erased the five-year PAYGO balance of over $559 billion for FY 2002-FY 2006 (see the table below), the last five-year budget window for which PAYGO requirements mattered.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|c|}
\hline
\hline
Balances for legislation enacted through September 30, 2002: & & & & & \\
2.320 & 125.066 & 146.940 & 141.628 & 143.739 & 559.694 \\
\hline
Balances after adjustments required by P.L. 107-312: & & & & & \\
0.0 & 0.0 & 0.0 & 0.0 & 0.0 & 0.0 \\
\hline
\end{tabular}
\caption{OMB Estimate of PAYGO Balances (amounts in $ billions)}
\end{table}

\textsuperscript{24} Robert Keith, Termination of the PAYGO Requirement for FY 2003 and Later Years, CRS Report for Congress, Dec 31, 2002, p.4-5.
Delaying Loss of Revenue

A less blatant way of circumventing 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. 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. 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.

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 rules. 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. Id.

Shifting Revenue Gains

Another mechanism used to “game” PAYGO 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 offs
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 offset the tax cut, which was the primary purpose of the maneuver.  

Sunsetting 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 budget 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 PAYGO. 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. 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. 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. President Bush in his 2002 State of the Union Address called for making the tax cuts permanent, and Treasury Secretary John O’Neill said that “All these things are going to become permanent.” 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. 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.

**Emergency Spending Provisions**

Congress can also invoke emergency spending provisions to avoid PAYGO restrictions. In statute, PAYGO exempts ‘emergency spending,’ but does not specifically define what constitutes an emergency. This leaves room for abuse, giving Congress the ability to circumvent 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 FY 2002, $36.878 billion for FY 2003, and

---

29 Id.
33 Id at 195.
$88.723 billion over the five-year period covering FY 2002-2006. Nevertheless, section 502 of the act designates these amounts as emergency requirements, effectively removing them from the PAYGO scorecard.34

PART II: Existing Critiques:
Assessments of PAYGO:
Failure to Curtail Entitlement Spending:

PAYGO rules fail to impose any sort of ceiling on entitlement spending, although discretionary spending has been subject to caps enforced via sequestration. Although they deter the formation of new direct spending programs by requiring the identification of offsetting legislation, they do little to chill spending under existing programs35. The failure of the budgetary rules to limit direct 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.”36

The quasi-property like nature of these programs, however, may help to explain the lack of direct spending caps, especially when dealing with entitlements that provide for basic

34 Id at 5.
35 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.”
necessities. Although most recipients do not have a legal claim to their entitlements, it would be politically challenging to reduce their payments from existing programs.\(^{37}\)

**Maintenance of Status Quo:**

PAYGO rules arguably favor existing programs and stifle the formation of new, direct 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.\(^{38}\) This discrepancy in treatment may result in undesirable outcomes if the existing programs would have been eliminated had they been subjected to PAYGO review. In this context, PAYGO rules constitute an “effective poison pill”, one that can be used to kill new programs.\(^{39}\)

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

---

37 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 clienteles 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.”)

38 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”)

39 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”).

15 of 26
the predators. Predators, which are free to look across all categories of direct spending and tax expenditures, select potential offsets based on the resistance which they expect to encounter from the proponents of the targeted program. 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. 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. Therefore, the market for offsets creates a mechanism to review existing direct 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

---

40 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.”).
41 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.
42 Id at 557.
43 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.

The ten-year time horizon contained in the Senate point of order rules 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. But this “backloading” also reduces the net present value of the associated benefits and reduces the incentives of lobbyists to pursue direct spending dollars, thereby decreasing the associated payouts and any net deficit increase.

Additionally, this rule and its ten-year horizon may represent an improvement over its statutory PAYGO counterpart, which only looks to the end of FY2006 when assessing the impact of legislation enacted before the end of FY2002. Because of the longer horizon associated with the Senate rule, a larger share of the costs will arguably be contained within the specified window, thereby requiring a larger offset and reducing any

---

44 See Philip J. Joyce, Congressional Budget Reform: The Unanticipated Implications of Federal Policy Making, Public Administration Review, p. 322 (July/August 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 Rudolph G. Penner, Repairing the Congressional Budget Process, The Urban Institute, p. 9 (May 2002) (“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”).

45 Congressional Budget Reform: Impact on the Appropriations Committees, Public Budget & Finance, p. 70 (Fall 1997) (citing Congress’ preference of for slow spending programs over fast spending ones).

46 Id at 529-530. See also Elizabeth Garrett, Accounting for the Federal Budget and its Reform, 41 Harv. J. on Legis. 187, 190 (Winter 2004) (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.”)

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 likely has less information about later years (those not contained in the statutory PAYGO analysis), the estimates associated with the Senate rule 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 direct spending or receipts legislation as an “emergency requirement” and that Congress make the same designation in a statute. 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 scare 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 McCaffrey cite a potential “policy ambiguity” (rather than blatant opportunism) in the designation of unemployment insurance benefits as emergency legislation. 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 the PAYGO rule to maintain sufficient flexibility as a formal rule cannot anticipate all future “emergency” situations.

48 2 U S C S §902(e) (2005).
The complex PAYGO rules which permit sophisticated actors to game the system (as discussed above) may also decrease the transparency of the legislative process 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.” 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 direct 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.” But the trade-offs may not be well publicized or made clearly explicit. If so, the increased complexity associated with PAYGO may undermine public confidence and result in “widespread disillusionment” in the budgetary process and in the government.

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

50 Louis Fisher and Philip Royce, Introduction: Reflection on Two Decades of Congressional Budgeting, Public Budgeting & Finance, p. 6 – 7 (Fall 1997).
51 James A. Thurber, Congressional Budget Reform: Impact on the Appropriations Committees, Public Budgeting & Finance, p. 69 (Fall 1997).
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 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.\footnote{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, \textit{Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process}, 65 U. Chi. L. Rev. 501, 519 (Spring 1998).}

\textbf{Walls between Discretionary and Mandatory Spending are Arbitrary:}

PAYGO rules do not permit offsets to occur between discretionary and mandatory spending programs. Additionally changes in revenue legislation, which are subject to PAYGO rules, 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.\footnote{Philip G. Joyce, \textit{Congressional Budget Reform: The Unanticipated Implications for Federal Policy Making}, Public Administration Review, p. 323 (July/August 1996).} 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 direct spending counterpart, it may be inappropriate to fund increased direct spending (which will likely

\footnote{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, \textit{Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process}, 65 U. Chi. L. Rev. 501, 519 (Spring 1998).}

\footnote{Philip G. Joyce, \textit{Congressional Budget Reform: The Unanticipated Implications for Federal Policy Making}, Public Administration Review, p. 323 (July/August 1996).}
result in a stream of future payments) with decreases in discretionary spending and may invite increased gaming of the system. But in eras of high deficits, it seems less problematic to fund discretionary spending with funds from direct spending or revenue accounts as such a transfer will likely reduce future entitlement obligations.

**PROPOSALS FOR REFORM**

From FY 1991 through FY 2002, federal budgets were constrained by both the PAYGO provision 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. Many scholars agree that PAYGO provisions contributed, at least partially, to the fiscal discipline of the 1990s and the achievement of the first unified budget surplus in 30 years in FY 1998 (Schick, Garrett, 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 PAYGO and what, if any, changes might make it more effective.

**Bush Administration Proposal**

In his FY 2006 budget, President Bush has proposed reestablishing the PAYGO requirement, but in a form that would apply only to direct 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,

---

55 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 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.”)

PAYGO would not apply to tax legislation and would not allow increases in direct spending to be offset by higher tax rates. Similar legislation was considered in Congress last year. On March 19, 2004 the House Budget Committee reported a measure that would have reestablished a PAYGO requirement, which would have been applied only to direct spending, for FY 2005-FY 2009. The bill was defeated by a vote of 146-268 on June 24th.\(^\text{57}\)

Nevertheless, the administration believes their proposed rules would better resemble the budget restraint practices that operate within many state governments.\(^\text{58}\) However, when analyzed according the weaknesses of the previous PAYGO requirements, it seems that the newly proposed PAYGO 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 PAYGO to the spending side of the budget could hamper overall efforts to reduce the deficit.

**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. Penner calls this “policy making... more mechanical than wise.”

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.  

Brian Riedl at The Heritage Foundation proposes adding caps to all entitlement spending, instead of just new direct spending measures as enforced under the old PAYGO rules. Due to the increasing costs of Social Security and Medicare, entitlement spending actually increased faster during the 12 years under PAYGO than during the 12 previous years. Therefore, 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.\textsuperscript{61}

\section*{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.

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 be artificial. Penner and Steuerle write, “There has to be some agreed-upon set of goals that the rules are meant to enforce.”\textsuperscript{62} In short, perhaps foremost on the minds of policymakers should be reaching strong political consensus, not devising perfectly effective budget constraint rules.

\textsuperscript{62} Id at 552
Bibliography


Richard Doyle, Congress, the Deficit Budget and Reconciliation, Public Budgeting & Finance, p. 59 (Winter 1996)


Louis Fisher and Philip Royce, Introduction: Reflection on Two Decades of Congressional Budgeting, Public Budgeting & Finance, p.3 (Fall 1997).


Philip Joyce, Congressional Budget Reform: the Unanticipated Implications of Federal Policy Making, Public Administration Review (July/August 1996)


James A. Thurber, Congressional Budget Reform: Impact on Appropriations Committees, Public Budgeting & Finance, (Fall 1997)