



Memorandum

November 8, 2007

TO: Honorable Carolyn Maloney
Attention: Anna Cielinski

FROM: Bill Heniff Jr. (7-8646)
Analyst on the Congress and Legislative Process
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SUBJECT: Budget-related Procedural Issues Relevant to the Consideration of H.R. 3543, the James Zadroga 9/11 Health and Compensation Act of 2007

This memorandum responds to your request for a discussion of procedural issues relevant to the consideration of legislation (H.R. 3543, 110th Congress) proposing to establish a World Trade Center health program and to extend and expand the September 11th Victim Compensation Fund. More specifically, you were interested in knowing what options are available to avoid budget-related procedural obstacles if the projected new spending resulting from the proposed legislation is not offset.

Summary

H.R. 3543, the James Zadroga 9/11 Health and Compensation Act of 2007, as introduced by Representative Maloney, presuming that it would increase direct spending, might face primarily two budget-related procedural constraints: the committee spending allocations associated with the FY2008 budget resolution (S.Con.Res. 21) and the House and Senate pay-as-you-go (PAYGO) rules. Assuming that the projected spending resulting from the proposed legislation is not offset, as you requested, these budget enforcement rules may be avoided in one of three ways: (1) if no Representative or Senator raises a point of order against the consideration of such legislation; (2) if the rules are waived or set aside; or (3) if the new spending authority was discretionary spending rather than direct spending and designated as an “emergency requirement” and “necessary to meet emergency needs,” as provided under Section 204 of S.Con.Res. 21.

Funding Provided in H.R. 3543

H.R. 3543, as introduced on September 17, 2007, by Representative Maloney, appears to provide new spending authority for most of the programs authorized in the legislation. Specifically, Section 3008 of H.R. 3543 provides that the entitlements created by Subtitle B, Program of Monitoring and Treatment, and Section 3006, Centers of Excellence, constitute “budget authority in advance of appropriations Acts” and represent “the obligation of the

Federal Government to provide for the payment of costs” of the programs. In addition, Title II of H.R. 3543 would extend and expand the September 11th Victim Compensation Fund of 2001 (Title IV, P.L. 107-42, 115 Stat. 237-241). In each case, the proposed legislation would provide a *permanent and indefinite appropriation* for making certain authorized payments. That is, the legislation would authorize the payment of funds without further legislative action (i.e., without separate enactment of budget authority in a subsequent appropriations act). Moreover, the total amount of payments is not limited to a specific dollar amount. Such an appropriation is referred to as direct spending, or mandatory spending.

During the legislative process, as explained in more detail below, Congress controls direct spending legislation by establishing and enforcing limits on the total amounts of spending and committee spending allocations through the annual adoption of a concurrent resolution on the budget, by enforcing a pay-as-you-go (or PAYGO) rule, and by raising points of order against the consideration of legislation in violation of these rules. The projected spending resulting from the proposed legislation presumably would be treated as new direct spending for budget enforcement purposes.¹ Given this treatment, under current budget enforcement procedures, H.R. 3543 as introduced might face certain budget-related procedural obstacles, as outlined in a previous memorandum dated June 1, 2007. As you requested, this memorandum discusses certain options to avoid those obstacles if the projected new direct spending resulting from the proposed legislation is not offset by direct spending reductions, revenue increases, or a combination of the two.

Budget Enforcement Procedures

Legislation proposing to increase direct spending, such as H.R. 3543 as introduced, might face primarily two budget-related procedural obstacles: (1) the budget controls associated with the 1974 Congressional Budget Act (Titles I-IX of P.L. 93-344, 88 Stat. 297-332); and (2) the House and Senate PAYGO rules (Rule XXI, clause 10, and Section 201 of S.Con.Res. 21, respectively).²

Budget Act Controls. Current budget procedures associated with the Budget Act allow Congress to enforce the budget levels associated with the annual budget resolution during the consideration of budgetary legislation.³ In particular, direct spending legislation primarily is constrained by each committee’s spending allocations (commonly referred to as

¹ The Congressional Budget Office (CBO) is responsible for preparing cost estimates of proposed spending legislation. A Member may request CBO estimate the cost of proposed legislation at any time, although the ability of CBO to provide such a cost estimate will depend on available resources. CBO, however, is required to prepare a cost estimate for any legislation reported by a committee (Section 402 of the Budget Act). At this time, a CBO cost estimate of H.R. 3543 is not available.

² Whether or not legislation violates these rules would depend on a ruling of the respective presiding officer, with the advice of the parliamentarians in each chamber, and ultimately the full chambers on whether or not to sustain the ruling of the presiding officer, if appealed. Under Section 312 of the Budget Act and the House and Senate PAYGO rules, however, any points of order relating to budgetary amounts must be determined on the basis of estimates made by the budget committees. Generally, the estimates used by the budget committees are based on the cost estimates prepared by CBO, but the budget committees have the authority to make their own estimates, which may vary from the CBO estimates.

³ For a more detailed discussion of congressional budget enforcement procedures, see CRS Report 98-721, *Introduction to the Federal Budget Process*, by Robert Keith.

302(a) allocations), and discretionary spending (i.e., funds provided in appropriations acts) is additionally constrained by each appropriations subcommittee's subdivision amounts (commonly referred to as 302(b) suballocations).⁴

Congress may enforce the budget levels associated with the annual budget resolution, including the 302(a) and 302(b) allocations, through the use of points of order.⁵ Generally, these points of order prohibit the consideration of any legislation, or amendment, that would cause a violation of the overall levels, the committee allocations, or the appropriations committees' subdivisions. For example, if the projected cost of legislation, or an amendment, would cause a committee's allocations for the first fiscal year, or the total of fiscal years covered by the most recently adopted budget resolution, to be exceeded, a Member may raise a point of order against its consideration. Thus, spending not assumed in the budget resolution generally would be subject to a point of order.

There is no indication in the conference report to the FY2008 budget resolution (S.Con.Res. 21, H.Rept. 110-153) that new direct spending is accommodated in the budget resolution. Moreover, the spending allocations for the House Committees on Energy and Commerce and on the Judiciary, to which H.R. 3543 has been referred, reflect spending levels under existing law.⁶ That is, any legislation projected to increase direct spending under either committees' jurisdiction without any offsetting spending reduction, such as H.R. 3543 as introduced, presumably would be subject to a point of order (under Section 302(f) of the Budget Act) for violating the committees' spending allocations (i.e., each committees' 302(a) allocations).⁷

PAYGO Rules. In addition to the committee spending allocations, direct spending legislation is limited by PAYGO rules in the House and Senate. The House and Senate PAYGO rules (Rule XXI, clause 10, and Section 201 of S.Con.Res. 21, respectively) prohibit the consideration of direct spending legislation that would have the net effect of increasing the deficit (or reducing the surplus, in the House) over either the five-year period covering FY2008-FY2012 or the 10-year period covering FY2008-FY2017.

Any legislation that is projected to increase direct spending without any offsetting spending reduction or revenue increase, such as H.R. 3543 as introduced, would increase the deficit in one or both time periods. Such legislation, therefore, presumably would be subject to a point of order under the PAYGO rule in both chambers.

⁴ Discretionary spending is provided in appropriations acts and is controlled through the annual appropriations process. In contrast, direct spending generally is provided in acts other than appropriations acts and is determined by such substantive law.

⁵ For more detailed information on these points of order and their application, see CRS Report 97-865, *Points of Order in the Congressional Budget Process*, by James V. Saturno.

⁶ The spending allocations for the committees are set forth in the joint explanatory statement of the committee of conference accompanying the conference report to S.Con.Res. 21 (see H.Rept. 110-153, pp. 130-131).

⁷ Such a violation presumably would also violate the total spending amounts in the budget resolution, and therefore would be subject to a point of order under Section 311(a) of the Budget Act as well.

Options to Avoid Budget-related Procedural Obstacles

The budget enforcement rules mentioned above apply to the consideration of legislation in the House and Senate. Legislation enacted despite violating these procedural rules would still have the full force and effect of any other law. Assuming that the projected spending resulting from the proposed legislation is not offset, as you requested, the budget enforcement rules mentioned above may be avoided in one of three ways: (1) if no Representative or Senator raises a point of order against the consideration of such legislation; (2) if the rules are waived or set aside; or (3) if the new spending authority provided in the proposed legislation was discretionary spending rather than direct spending and designated as an “emergency requirement” and “necessary to meet emergency needs.”

First, legislation could be considered regardless of whether it is projected to exceed the spending levels associated with the budget resolution or to increase the deficit in the two specified time periods under the PAYGO rules if no Representative or Senator raises a point of order. The budget enforcement rules mentioned above are not self-enforcing. It is worth noting that a point of order may be raised each time the legislation is considered on the floor. For instance, a point of order may be raised when the House initially considers the legislation and again when the House considers the conference report to accompany the legislation, after legislative differences have been resolved in a conference committee.

For example, in 2001, when the legislation establishing the September 11th Victims Compensation Fund, which the proposed legislation among other things would extend and expand, was originally considered, no Senator raised a point of order against consideration of the companion bill (S. 1450, 107th Congress) and the Senate subsequently passed the House bill (H.R. 2926, 107th Congress) by unanimous consent. Based on the cost estimate by CBO and the unanticipated nature of the new spending, it is likely that the legislation would have been subject to points of order related to the enforcement of the limits associated with the FY2002 budget resolution (H.Con.Res. 83, 107th Congress). CBO estimated that the compensation program would pay claimants about \$6 billion over the period covering FY2002-FY2005.⁸

Second, the budget enforcement rules may be waived or set aside. In both chambers, the rules may be waived or set aside by unanimous consent. In the House, points of order under the Budget Act and under the House PAYGO rule may be waived by a special rule, reported by the House Committee on Rules, providing for the consideration of the legislation. The special rule, of course, would need to be agreed to by the House by a simple majority. In the Senate, such points of order may be waived by motion. A motion to waive the applicable points of order, or to sustain an appeal of the ruling of the presiding officer on the points of order, requires an affirmative vote of three-fifths of the membership, duly chosen and sworn (i.e., 60 Senators if no seats are vacant).

Once again, the consideration of the legislation establishing the September 11th Victims Compensation Fund provides an example. In the House, the legislation (H.R. 2926, 107th

⁸ See CBO, Pay-As-You-Go Estimate, *H.R. 2926, Air Transportation Safety and System Stabilization Act*, as cleared by the Congress on September 21, 2001, dated Nov. 30, 2001. It is important to note, however, that the budget committees in each chamber, and ultimately each chamber in plenary session, have the authority to determine whether or not legislation would violate the amounts associated with the budget resolution.

Congress) was considered under a special rule (H.Res. 244) that waived all points order against its consideration. As mentioned above, it is likely that the legislation would have been subject to budget-related points of order.

Lastly, the budget enforcement rules may be avoided by designating the projected new spending as an emergency, but only if the new spending authority provided in the legislation is discretionary spending. Under Section 204 of S.Con.Res. 21 (110th Congress), certain spending designated as an “emergency requirement” and “necessary to meet emergency needs” is exempt from budget constraints.⁹ In the Senate, any spending so designated, whether direct or discretionary, is exempt from budget constraints associated with the budget resolution and the Senate PAYGO rule. In the House, however, this “emergency needs” exemption may be used for “discretionary amounts” only, pursuant to Section 204(b) of S.Con.Res. 21. In addition, the House PAYGO rule (which applies to direct spending and revenue legislation only) does not have such an exemption for emergency spending. An emergency designation, therefore, would not prevent a point of order in the House under the budget-related rules mentioned above against the consideration of legislation, such as H.R. 3543, that proposes an increase in direct spending.

Previous versions of the emergency designation exemption, related to the enforcement of statutory budget constraints, applied to both discretionary spending and direct spending (as well as revenues). The Budget Enforcement Act of 1990 (Title XIII of P.L. 101-508, 104 Stat. 1388-573-1388-630), which established statutory discretionary spending caps and a PAYGO requirement for direct spending and revenue legislation, as well as its extensions in 1993 (Title XIV of P.L. 103-66, 107 Stat. 683-685) and 1997 (Title X of P.L. 105-33, 111 Stat. 677-712), provided for an effective exemption for any projected new discretionary and direct spending (as well as any revenue reductions) designated as an emergency requirement.¹⁰

In addition, previous budget resolutions agreed to by Congress provided for an exemption from budget enforcement rules in the House and Senate for “any new budget authority, new entitlement authority, outlays and receipts” if designated as an emergency requirement.¹¹

⁹ Spending is so designated by including a provision in the legislation specifying that it is an “emergency requirement” and “necessary to meet emergency needs.” For example, Congress exempted certain spending in the recently-enacted supplemental appropriations act (P.L. 110-28) from the budget enforcement rules by including the following provision:

SEC. 10002. Amounts in this Act (other than in titles VI and VIII) are designated as emergency requirements and necessary to meet emergency needs pursuant to subsections (a) and (b) of section 204 of S. Con. Res. 21 (110th Congress), the concurrent resolution on the budget for fiscal year 2008.

¹⁰ During the period covered by these statutory budget constraints (FY1990-FY2002), the emergency designation was used three times to exempt projected new direct spending from the statutory PAYGO requirement: (1) the Emergency Unemployment Compensation Amendments of 1993 (P.L. 103-6); (2) the Air Transportation Safety and System Stabilization Act (P.L. 107-42); and (3) the Job Creation and Worker Assistance Act of 2002 (P.L. 107-147).

¹¹ See Section 402(a) of H.Con.Res. 95 (109th Congress), the FY2006 budget resolution, and Section 502(b) of H.Con.Res. 95 (108th Congress), the FY2004 budget resolution.

In the absence of any modifications to the current budget enforcement rules in the House to exempt emergency-designated direct spending from these rules, as provided for in the past and in the Senate rule, the emergency designation exemption may be used for discretionary spending only. The current budget enforcement rules, therefore, may be avoided if the new spending authority provided in H.R. 3543, as introduced, were discretionary spending rather than direct spending. Such a conversion could be achieved by modifying the language of the bill to authorize appropriations, instead of providing entitlement authority (as in Section 3008 of H.R. 3543 as introduced), for the purposes of carrying out the provisions of the legislation. The discretionary appropriations would need to be provided in subsequent appropriations acts and could be designated as “emergency requirements and necessary to meet emergency needs,” thereby exempting the funding from the budget enforcement constraints mentioned above.

In the past several years, discretionary spending provided in supplemental appropriations acts, primarily for activities related to the recovery from and response to the terrorist attacks on September 11, 2001, the wars in Afghanistan and Iraq, and natural disasters, has been designated as an emergency requirement to avoid the applicable budget constraints associated with the annual budget resolution. These supplemental appropriations acts include, but are not limited to, the following:

- P.L. 110-28, U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007;
- P.L. 109-234, Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006;
- P.L. 109-61, Emergency Supplemental Appropriations Act to Meet Immediate Needs Arising From the Consequences of Hurricane Katrina, 2005;
- P.L. 109-13, Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005;
- P.L. 108-303, Emergency Supplemental Appropriations for Disaster Relief Act, 2004;
- P.L. 108-106, Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004;
- P.L. 108-69, Emergency Supplemental Appropriations for Disaster Relief Act, 2003
- P.L. 108-11, Emergency Wartime Supplemental Appropriations Act, 2003;
- P.L. 107-206, 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States; and
- P.L. 107-38, 2001 Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States.

Please call me if I may be of further assistance in this matter.