Congressional Research Service

Memorandum

June 1, 2007

TO: Honorable Carolyn Maloney
Attention: Anna Cielinski

FROM: Bill Heniff Jr. (7-8646)
Analyst in American National Government
Government and Finance Division

SUBJECT: Procedural Issues Relevant to the Consideration of Legislation Proposing to Extend and Expand the September 11th Victim Compensation Fund

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This memorandum responds to your request for a discussion of procedural issues relevant to the consideration of legislation (H.R. 1638) proposing to extend and expand the September 11th Victim Compensation Fund. More specifically, you were interested in knowing how the legislation originally establishing the fund avoided any budget enforcement procedures, what budget-related procedural obstacles the proposed legislation might face, and what options are available to avoid such obstacles.

Summary

The September 11th Victim Compensation Fund of 2001 provided a permanent and indefinite appropriation to make payments to eligible individuals. The legislation was projected to increase mandatory spending, likely in violation of the amounts associated with the budget resolution, but it was not subject to the existing budget enforcement procedures because all points of order were waived under a special rule in the House and because no Senator raised any points of order during consideration in the Senate.

Proposed legislation that would extend and expand the September 11th Victim Compensation Fund (H.R. 1638, 110th Congress), presuming that it would increase mandatory 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. These budget enforcement rules could be avoided in one of four ways: (1) if no Representative or Senator raises a point of order against the consideration of such legislation; (2) if the projected spending increase is offset with an equivalent spending reduction or revenue increase; (3) if the rules are waived or set aside; or (4) if the increased spending is designated as an "emergency requirement" (although, in the House, this exemption does not apply to its PAYGO rule).

September 11th Victim Compensation Fund

Legislative History. The September 11th Victim Compensation Fund of 2001 was enacted as Title IV of P.L. 107-42, 115 Stat. 230-242, the Air Transportation Safety and System Stabilization Act (H.R. 2926/S. 1450, 107th Congress).[1] The legislation became law in a relatively quick manner, considered and adopted in both chambers in one day and signed into law the following day.

On September 21, 2001, the House considered H.R. 2926 under a special rule (H.Res. 244) reported by the House Rules Committee.[2] The special rule prohibited any floor amendments, providing for only one hour of general debate and the required motion to recommit. The special rule also waived all points of order against consideration of the legislation. After rejecting the motion to recommit with instructions made by Representative Peter DeFazio by a 174-239 vote, the House passed H.R. 2926 by a 356-54 vote.[3]

On the same day, the Senate considered a companion bill (S. 1450) under an unanimous consent agreement. The agreement prohibited any amendments or motions and limited debate to one hour and 45 minutes. In addition, the unanimous consent agreement, unlike the special rule in the House, did not waive or set aside any points of order. No Senator, however, raised a point of order against the consideration of the measure. After debate concluded, the Senate passed S. 1450 by a 96-1 vote.[4] The unanimous consent agreement also provided that when the Senate received the House companion bill, provided that it was identical to the Senate-passed bill, the Senate agree to the House-passed measure, thereby clearing it for the President. On September 22, President George W. Bush signed H.R. 2926 into law (P.L. 107-42).

Funding and Budget Controls. The September 11th Victim Compensation Fund of 2001 provided a *permanent and indefinite appropriation* for making payments on approved claims (Section 406 of Title IV, P.L. 107-42). That is, the Special Master, established to administer the compensation program, was authorized to make payments to eligible claimants without further legislative action (i.e., without separate enactment of budget authority in a subsequent appropriations act). Moreover, the total amount of

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[1] For an overview of the Fund, see CRS Report RL31179, *The September 11th Victim Compensation Fund of 2001*, by Henry Cohen.

[2] The House agreed to H.Res. 244 by a 285-130 vote, after agreeing to another special rule (H.Res. 242), which provided for the same-day consideration of H.R. 244, by a 303-107 vote. See *Congressional Record*, vol. 147 (Sept. 21, 2001), pp. 17606-17624.

[3] For the consideration and adoption of H.R. 2926, see *Congressional Record*, vol. 147 (Sept. 21, 2001), pp. 17625-17650.

[4] For the consideration and adoption of S. 1450, see *Congressional Record*, vol. 147 (Sept. 21, 2001), pp. 17505-17525.

payments under the program was not limited to a specific dollar amount.[5] Such an appropriation is referred to as mandatory, or direct, spending.

During the legislative process, as explained in more detail below, Congress controls mandatory 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 and the raising of points of order against the consideration of legislation in violation of such amounts. This budgetary control mechanism, however, was not utilized during the consideration of the legislation establishing the compensation program.[6] As mentioned above, in the House, the special rule (H.Res. 244) providing for the consideration of the legislation establishing the compensation program (H.R. 2926) waived all points order against its consideration. In the Senate, no Senator raised a point of order against consideration of the companion bill (S. 1450).

At the time the fund was enacted, Congress and the President also controlled mandatory spending, as well as revenue, legislation through a statutory pay-as-you-go (PAYGO) requirement.[7] Generally, under this requirement the net effect of the projected cost of all mandatory spending and revenue legislation enacted during a session of Congress must not cause a deficit or increase the deficit. If, after the end of a session of Congress, the director of the Office of Management and Budget determined that such net effect did cause a deficit or increase the deficit, then the President would be required to order a sequestration, or largely across-the-board spending cuts, in non-exempt mandatory spending programs in the amount of the projected deficit or deficit increase.

OMB projected that the September 11th Victim Compensation Fund of 2001 would increase the deficit by $6 billion over the period covering FY2002-FY2004, including $1.2 billion in FY2002 alone.[8] At the end of the first session of the 107th Congress, as required by law, the OMB director included the projected cost of the September 11th Victim Compensation Fund of 2001 in calculating the net effect of enacted mandatory spending and

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[5] The law, however, did prohibit the filing of claims "after the date that is 2 years after the date on which regulations are promulgated ..." (Section 405(a)(3) of Title IV, P.L. 107-42). Accordingly, the deadline for submission of claims was December 22, 2003. A CRS calculation, based on information contained in the *Appendix* volumes of the annual budget documents submitted to Congress by the President for fiscal years (FY) 2003-2008, indicates that the total amount disbursed (i.e., total outlays) under the program was $7.051 billion over the period covering FY2002-FY2006.

[6] While the budget committees in each chamber, and ultimately the each chamber in plenary session, have the authority to determine whether or not legislation would violate the amounts associated with the budget resolution, based on the cost estimate by the Congressional Budget Office (CBO) and the unanticipated nature of the new spending, it is likely that the legislation would have been subject to enforcement based on 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. 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 November 30, 2001.

[7] The statutory PAYGO requirement expired at the end of FY2002. For further information, see CRS Report RL31137, *Sequestration Procedures Under the 1985 Balanced Budget Act*, by Robert Keith.

[8] See OMB, *Cost Estimate for Pay-As-You-Go Calculations, P.L. 107-42 (H.R. 2926), Air Transportation Safety and System Stabilization Act*, Report No. 563, dated January 8, 2002.

revenue legislation for PAYGO purposes.[9] The projected $1.2 billion increase in the deficit for FY2002 attributable to the Fund, as well as a significant amount attributable to other legislation ($128.8 billion for FY2001-FY2002), was eliminated from the PAYGO balances for FY2001 and FY2002 by the Department of Defense and Emergency Supplemental Appropriations Act for 2002 (specifically, Section 102 of Div. C, P.L. 107-117).[10] Therefore, no sequester was required in 2002.[11]

Proposed Legislation to Extend and Expand the Fund

Title III of H.R. 1638, 110th Congress, the James Zadroga 9/11 Health and Compensation Act, as introduced on March 22, 2007, proposes to extend and expand the September 11th Victim Compensation Fund of 2001. Among other things, it would extend for five years after the date of enactment the deadline for filing a claim that met specified criteria.[12] In addition, the legislation would expand the eligibility for compensation to individuals, or the personal representatives of individuals, determined to have suffered "psychological harm" as a result of the September 11th terrorist attacks.[13]

If H.R. 1638 is enacted, the permanent and indefinite appropriation provided in the original act would be available to make payments to newly eligible claimants without further legislative action because it amends the original act establishing the fund. Even though this spending authority is provided in existing law, the projected spending resulting from the proposed legislation (i.e., the proposed extension and expansion of the eligibility criteria) would be treated as new mandatory spending for budget enforcement purposes.[14] Given this treatment, you requested a discussion of possible budget-related procedural obstacles the legislation might face, as well as options to avoid such obstacles.

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[9] If the projected new spending were designated as an "emergency requirement" by the President and Congress in statute, the projected increase in the deficit would not have been counted for PAYGO purposes. In fact, the projected new spending resulting from the grants and loan guarantee subsidies to airlines included in the Air Transportation Safety and System Stabilization Act was so designated (see Section 101(b) of the P.L. 107-43) and therefore was not counted for PAYGO purposes.

[10] See OMB, *Final Sequestration Report to the President and Congress for Fiscal Year 2002*, dated January 31, 2002, pp. 15-20.

[11] The projected spending resulting from the Fund for FY2003-FY2004 was also added to the PAYGO balances for those years. Subsequent legislation, however, removed these balances as well, thereby preventing any future sequester under the statutory PAYGO process. See CRS Report RS21378, *Termination of the "Pay-As-You-Go" (PAYGO) Requirement for FY2003 and Later Years*, by Robert Keith.

[12] As noted above, the original deadline was December 22, 2003.

[13] Under the original program, an individual, or a personal representative of an individual, that suffered "physical harm or death" as a result of the terrorist attacks, among other criteria, was eligible for compensation.

[14] 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. 1638 is not available.

Budget-related Procedural Obstacles. Legislation proposing to extend and expand the September 11th Victim Compensation Fund, such as H.R. 1638, 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).[15]

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.[16] In particular, mandatory spending legislation primarily is constrained by each committee's spending allocations (commonly referred to as 302(a) allocations), and discretionary spending (i.e., funds provided in appropriations acts) is constrained by each appropriations subcommittee's subdivision amounts (commonly referred to as 302(b) suballocations).[17]

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.[18] 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 mandatory spending for an extension and expansion of the Fund is accommodated in the budget resolution. Moreover, the spending allocations for the House Committee on the Judiciary, which has jurisdiction over the spending resulting from the Fund, reflect spending levels under existing law.[19] That is, any legislation projected to increase mandatory spending under the committee's jurisdiction

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[15] 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, any points of order relating to budgetary amounts, however, 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 the Congressional Budget Office (CBO), but the budget committees have the authority to make their own estimates, which may vary from the CBO estimates.

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

[17] Direct spending is provided in substantive law, and funds such mandatory items as Medicare, unemployment compensation, and retirement programs. It is distinguished from discretionary spending, which is controlled through the annual appropriations process.

[18] 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.

[19] The spending allocations for the committee 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, p. 131).

without any offsetting spending reduction, such as H.R. 1638 as introduced, presumably would be subject to a point of order (under Section 302(f) of the Budget Act) for violating the committee's spending allocations (i.e., its 302(a) allocations).[20]

PAYGO Rules. In addition to the committee spending allocations, mandatory 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 mandatory spending legislation that would have the net effect of increasing the deficit (or reducing the surplus, in the House) over either a six-year period (FY2007-FY2012) or an 11-year period (FY2007-FY2017).[21]

Any legislation that is projected to increase mandatory spending without any offsetting spending reduction or revenue increase, such as H.R. 1638 as introduced, would increase the deficit in at least one of the two time periods. Such legislation, therefore, presumably would be subject to a point of order under the PAYGO rule in both chambers.

Options to Avoid Budget-related Procedural Obstacles. The budget enforcement rules mentioned above apply to legislation as it is considered in the House and Senate. Legislation enacted despite violating these procedural rules has the full force and effect of any other law. Avoiding the constraints imposed by these rules during the consideration of the proposed legislation might therefore be necessary to secure its successful enactment. The budget enforcement rules mentioned above could be avoided in one of four ways: (1) if no Representative or Senator raises a point of order against the consideration of such legislation; (2) if the projected spending increase is offset with an equivalent spending reduction or revenue increase; (3) if the rules are waived or set aside; or (4) if the increased spending is designated as an "emergency requirement" (although, in the House, this exemption does not apply to its PAYGO rule).

First, the rules are not self-enforcing. If no Member or Senator raises a point of order, 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. 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.

Second, a point of order under these rules may be avoided by basically complying with them. That is, any increase in mandatory spending could be offset by an equivalent spending reduction, revenue increase, or a combination of the two.[22] In order to avoid being subject

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[20] 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.

[21] For more detailed information on the PAYGO requirements, see CRS Report RL32835, *PAYGO Rules for Budget Enforcement in the House and Senate*, by Robert Keith and Bill Heniff Jr.

[22] The spending increase would need to be offset in the time periods enforced by the applicable rule. In the case of the committee spending allocations, the spending increase would need to be offset in the first fiscal year and the total of fiscal years covered by the most recently adopted budget (continued...)

to a point of order under Section 302(f) of the Budget Act for violating the committee spending allocations, however, the offset would need to be under the jurisdiction of the same committee. Any offset under the jurisdiction of another committee would be credited to that committee and not to the committee proposing the increase in spending. In such a case, therefore, the increase in mandatory spending would still cause the committee's spending allocations to be exceeded. For example, given that the spending resulting from the Fund is under the jurisdiction of the House Judiciary Committee, which does not have jurisdiction over revenues,[23] this requirement presumably would preclude the committee from using a revenue increase to offset an increase in mandatory spending, unless this requirement was waived or set aside, as described below.

In contrast, the House and Senate PAYGO rules do not place such restrictions on offsetting provisions. As long as legislation is deficit-neutral in the two time periods covered by the rule, it would comply with the PAYGO rules regardless of whether or not the new spending and the offsetting provisions are under the jurisdiction of the same committee. In this case, therefore, a revenue increase could be used to offset a mandatory spending increase in order to avoid a point of order under the PAYGO rules. Consequently, legislation that complies with the PAYGO rules would not necessarily comply with the rules enforcing the committee spending allocations.[24]

Third, 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 only, 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 only, 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).

Lastly, under Section 204 of S.Con.Res. 21, spending designated as an "emergency requirement" is exempt from the budget constraints associated with the budget resolution and the Senate PAYGO rule. Spending is so designated by including a provision in the legislation specifying that it is an "emergency requirement." For example, Congress exempted the 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.

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[22] (...continued)
resolution. In the case of the PAYGO rules, the spending increase would need to be offset in the six-year period and 11-year period.

[23] The House Committee on Ways and Means and the Senate Committee on Finance have exclusive jurisdiction over revenues generally.

[24] It is worth noting that the reverse is true if legislation complies with a committee's spending allocations. Legislation that complies with a committee's spending allocations likely would comply with the PAYGO rules.

The House PAYGO rule, however, does not have such an exemption for emergency spending. An emergency designation, therefore, would not prevent a point of order under the House PAYGO rule against the consideration of legislation proposing an increase in mandatory spending.

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