

Special Issue:

**SHIFTS
FROM ONE YEAR
TO ANOTHER**

Section 202 of the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987 prohibits counting as savings shifts from one year to another. Section 202 provides:

SEC. 202. PROHIBITION OF COUNTING AS SAVINGS THE TRANSFER OF GOVERNMENT ACTIONS FROM ONE YEAR TO ANOTHER

(a) **IN GENERAL.** -- Except as otherwise provided in this section,⁹²⁵ any law or regulation that has the effect of transferring an outlay,⁹²⁶ receipt, or revenue of the United States from one fiscal year to an adjacent fiscal year shall not be treated as altering the deficit⁹²⁷ or producing net deficit reduction in any fiscal year for purposes of the Congressional Budget Act of 1974 and the Balanced Budget and Emergency Deficit Control Act of 1985.

⁹²⁵ See subsection (b) *infra* p. 570.

⁹²⁶ Section 3(1) of the Congressional Budget Act defines "outlays." See *supra* p. 10.

⁹²⁷ Section 3(6) of the Congressional Budget Act defines "deficit" (see *supra* pp. 13-20) and section 257(4) of Gramm-Rudman-Hollings (see *supra* p. 520) adopts the definition of section 3(6).

(b) EXCEPTIONS. -- Subsection (a) shall not apply if the law making the transfer stipulates⁹²⁸ that such transfer --

(1) is a necessary (but secondary) result of a significant policy change;⁹²⁹

⁹²⁸ In something less than full compliance with this provision, one stipulation simply specified that "amendments made by this title shall be considered an exemption under section (b)." Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203, § 6004, 101 Stat. 1330, 1330-278 (Dec. 22, 1987) (Civil Service and Postal Service Programs).

⁹²⁹ See, e.g., Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 11001 (Dec. 19, 1989); H.R. CONF. REP. No. 101-386, 101st Cong., 1st Sess. 405-06 (1989); 125 CONG. REC. H9,446 (Nov. 21, 1989) ("any provision of this Act"); Act making supplemental appropriations for the Department of Veterans Affairs for the fiscal year ending September 30, 1989, and for other purposes, Pub. L. No. 101-45, 103 Stat. 97, 108 (June 30, 1989) (Advance Deficiency Payments); Stuart B. McKinney Homeless Assistance Amendments Act of 1988, Pub. L. No. 100-628, § 1004(b), 102 Stat. 3224, 3264 (Nov. 7, 1988) (Prohibition of Reduction of Section 8 Contract Rents); Rural Development--Agriculture Appropriations Act, 1989, Pub. L. No. 100-460, 102 Stat. 2229, 2253 (Oct. 1, 1988) (Conservation Reserve Program); Department of Housing and Urban Development--Independent Agencies Appropriations Act, 1989, Pub. L. No. 100-404, 102 Stat. 1014, 1026 (Aug. 19, 1988) (NASA Research and Development); Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203, § 4031(c), 101 Stat. 1330, 1330-76 (Dec. 22, 1987) (Payment Cycle Standards for medicare); Joint Resolution making continuing appropriations for the fiscal year 1988, and for other purposes, Pub. L. No. 100-202, 101 Stat. 1329, 1329-202 (Dec. 22, 1987) (NASA Research and Development).

(2) provides for contingencies; or

(3) achieves savings made possible by changes in program requirements⁹³⁰ or by greater efficiency of operations.⁹³¹

An editorial in the *Washington Post* (written after the adoption of section 202) described the evil that section 202 was originally intended to address:

Floating Paydays

OUR LEADERS keep trying to do us the ultimate favor of cutting the budget deficit without cutting the budget, and we suppose it's churlish not to be grateful. Their latest effort involves the floating payday.

Federal employees tend to be paid two weeks at a time. For a lot of them this year, that will mean a payday the first week of October. That turns out to represent both a problem and an opportunity. The problem is that the fiscal year begins Oct. 1; the early October paychecks would thus normally be charged to fiscal 1990, and be part of the 1990 deficit. The

⁹³⁰ See, e.g., Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203, § 7004(a), 101 Stat. 1330, 1330-280 (Dec. 22, 1987) (Cash Sales of Properties Acquired Through Foreclosures).

⁹³¹ Section 202 of the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, § 202, 101 Stat. 754, 784 (Sept. 29, 1987) (codified at 2 U.S.C. § 909).

opportunity is to pay these employees early, on Friday, Sept. 29. That would doubtless make the employees happier and move the expenditure into fiscal 1989, all in the same deft stroke. Since no one is paying that much attention to the 1989 deficit any more, as a political proposition the cost would simply disappear.

Of course grown-ups would not resort to games like these, you say. Wrong. The Department of Defense is already doing it. Secretary Dick Cheney ordered the forward creep himself, under authority Congress gave the department a couple of years ago when the virtues of the step first dawned on the armed services committees.

....

It's an understandable point of view. Our own suggestion is that they simply give all federal employees their full year's pay for fiscal 1990 on Sept. 30 (with a suitable discount for the advance, of course). The fiscal 1990 deficit would positively melt away, and we would all live happily ever after.⁹³²

What became section 202 of the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987 first appeared in the Senate leadership compromise version of the revision of Gramm-Rudman-Hollings. The Senate adopted the amendment (to H.J. Res. 324) containing the provision on July 31, 1987, by a vote of 71 to 21. The original Senate-passed version read as follows:

**PROHIBITION OF COUNTING AS SAVINGS
THE TRANSFER OF GOVERNMENT ACTIONS
FROM ONE YEAR TO ANOTHER**

⁹³² *Floating Paydays*, Wash. Post, June 26, 1989, at A10, col. 1. (c) The Washington Post. Reprinted with permission.

Sec. 225. (a) For purposes of titles III⁹³³ and IV⁹³⁴ of the Congressional Budget and Impoundment Control Act of 1974 and the Balanced Budget and Emergency Deficit Control Act of 1985, any action of the United States Government that is transferred from one fiscal year to an adjacent fiscal year, including a payment, expenditure, receipt of funds from the sale of an asset, and the collection of revenues and other receipts, shall not be treated as causing a reduction in the deficit⁹³⁵ for the fiscal year from which the transfer was made except to the extent that such transfer reduces the sum of the deficits for the two fiscal years by at least \$100,000,000. For purposes of this section, an action shall be considered to have been transferred when the action is taken in a different fiscal year and such change in the year is not --

(1) a necessary but secondary result of a significant policy change;

(2) to provide for contingencies; or

(3) to achieve savings made possible by or through changes in requirements or greater efficiency of operations.

(b) For purposes of the application of this section to the Congressional Budget and Impoundment

⁹³³ See *supra* pp. 53-210.

⁹³⁴ See *infra* pp. 211-245.

⁹³⁵ Section 3(6) of the Congressional Budget Act defines "deficit" (see *supra* pp. 13-20) and section 257(4) of Gramm-Rudman-Hollings (see *supra* p. 520) adopts the definition of section 3(6).

Control Act of 1974, the level of outlays⁹³⁶ and the deficit⁹³⁷ for a fiscal year shall be determined on the basis of estimates made by the Committee on the Budget⁹³⁸ of the House of Representatives or the Senate, as the case may be.⁹³⁹

The conference report describes the section:

7. Prohibition Against Counting Certain Actions
as Savings

Current Law

Under current practice, the deficit for a fiscal year can be reduced by transferring certain actions by the Federal Government between that fiscal year and another fiscal year, even if the deficit for the other fiscal year is increased as a result.

⁹³⁶ Section 3(1) of the Congressional Budget Act defines "outlays." See *supra* p. 10.

⁹³⁷ Section 3(6) of the Congressional Budget Act defines "deficit" (see *supra* pp. 13-20) and section 257(4) of Gramm-Rudman-Hollings (see *supra* p. 520) adopts the definition of section 3(6).

⁹³⁸ This section reflects the normal scorekeeping convention that Congress turns to its Budget Committees to assess the costs of legislation. See also section 301(i)(2)(C), *supra* p. 92; section 302(g), *supra* p. 105; section 310(d)(4), *supra* p. 190; section 311(c), *supra* p. 210; and section 273 of Gramm-Rudman-Hollings, *supra* p. 556.

⁹³⁹ H.J. Res. 324, 100th Cong., 1st Sess. (July 31, 1987) (as received in the House with Senate amendments).

Senate Amendment

The Senate amendment (Section 225) provides that a transfer of any action by the Federal Government -- including payments, expenditures, asset sales, and the collection of revenues and receipts -- from one fiscal year to an adjacent fiscal year shall not be treated as reducing the deficit for the fiscal year from which the transfer is made unless, as a result of the transfer, the deficit for the period covered by both fiscal years is reduced by at least \$100 million.

The Senate amendment specifies the conditions for determining (for purposes of this requirement) whether an action by the Federal Government constitutes a transfer and further specifies that its provisions shall be enforced on the basis of estimates made by the House and Senate Budget Committees.

Conference Agreement

The conference agreement prohibits the savings resulting from the transfer of outlays, receipts, or revenues from one year to another to be counted as changing the deficit, except for certain types of transfers identified in law. The conferees recognize that the determinations required under this provision for the 1974 Budget Act will be based on estimates made by the House and Senate Budget Committees.⁹⁴⁰

In conference, House conferees insisted on the substitution of a new mechanism for applying the exceptions by which the law in question could direct its own scorekeeping. This led to the two problems that the current law creates.

⁹⁴⁰ H.R. Conf. Rep. No. 100-313, 100th Cong., 1st Sess. 65-66 (1987), *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS 739, 765-66.

By providing this mechanism for applying the exception, the current law impliedly prohibits all transfers that do not contain the magic words applying the exception. Even if the transfer is a necessary (but secondary) result of a significant policy change, does provide for contingencies, or does achieve savings made possible by changes in program requirements or by greater efficiency of operations, the section by its terms would apply to prohibit scorekeepers from counting the savings.

The present language thus creates a trap for the unwary Senator. Unless the Senator knows about the section and thinks about the issue while drafting the legislation in question, the section stands as a snare waiting to catch the legislation. This result leads to increased disrespect for the budget process.

The second problem that the language of the current law creates is to invite overuse of the exception. As the exception requires simply that the subject legislation specify that it is for one of the good purposes listed in order to avoid the sanction of the prohibition, the exception has been applied to a number of shifts between years that clearly do not fall within the exception as intended. It has become an easily-avoided prohibition on budget gimmickry. Senator Sanford's bill S. 101⁹⁴¹ would repeal the exception.

Section 202(a) cannot be used to free up additional spending money, but applies only to prohibit the creation of spending room by artificial transfers. Congress made this intent evident in the title of the section and the description of the conference agreement for section 202 above, both of which use the word "savings." The drafters of the section never intended the section to be available as a shield against the counting of actions that increase the deficit.

⁹⁴¹ S. 101, 101st Cong., 1st Sess., 135 CONG. REC. S170, S425-29 (Jan. 25, 1989).

Section 202 covers (among other things) the classic example of a shift: moving a payday from one year into another.⁹⁴² Section 202 also covers, however, novel proposals to shift spending from one year to another such as "outlay management" schemes that empower an executive department official to shift the payment of bills from one year to another so as to keep outlay rates artificially lower than those that would naturally flow from a given amount of budget authority.

The evil Congress sought to remedy had to do with transfers from one year to the immediately adjacent fiscal year. Congress did not intend for this section to address the general issue of asset sales and prepayments (actions which collapse receipts from a long series of years into one year). (Note, however, that section 202 could apply to asset sales or prepayments that are shifted from one year into an adjacent fiscal year.) Section 251(a)(6)(I) of Gramm-Rudman-Hollings addresses asset sales and prepayments generally in defining the baseline for Gramm-Rudman-Hollings purposes.⁹⁴³ Congress has addressed the issue of scoring assets sales annually in budget resolutions.⁹⁴⁴

⁹⁴² See, e.g., *Foley Opposes Payday Switch For Agencies*, Wash. Post, July 19, 1989, at A8, col. 1; Morgan, *Budget Plan for Agencies Includes Payday Shift*, Wash. Post, July 18, 1989, at A6, col. 5; *Floating Paydays*, Wash. Post, June 26, 1989, at A10, col. 1.

⁹⁴³ See *supra* p. 399.

⁹⁴⁴ See section 6 of the Concurrent Resolution on the Budget -- Fiscal Year 1990 (H. Con. Res. 106), H.R. Conf. Rep. No. 101-50, 101st Cong., 1st Sess. (1989); section 4 of the Concurrent Resolution on the Budget -- Fiscal Year 1989 (H. Con. Res. 268), H.R. Conf. Rep. 100-658, 100th Cong., 2d Sess. (1988); and sections 7 and 8 of the Concurrent Resolution on the Budget -- Fiscal Year 1988 (H. Con. Res. 93), S. Conf. Rep. 100-76, 100th Cong., 1st Sess. (1987).

