

ed by law on the effective date of this Act,<sup>642</sup> including any increase in or addition to spending authority provided by law on such date.

§ 401(c)(2)

(2) For purposes of paragraph (1), the term "spending authority"<sup>643</sup> means authority (whether temporary or permanent) —

§ 401(c)(2)(A)

(A) to enter into contracts under which the United States is obligated to make outlays,<sup>644</sup> the budget authority<sup>645</sup> for which is not provided in advance by appropriation Acts;<sup>646</sup>

§ 401(c)(2)(B)

(B) to incur indebtedness (other than indebtedness incurred under chapter 31<sup>647</sup> of title 31 of the United States Code) for the repayment of which

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<sup>642</sup> Section 211 of Gramm-Rudman-Hollings changed this word from "section" to "Act." See *infra* p. 415. As originally written, the reference was clear: section 905(c) indicates that the effective date for section 401 was January 19, 1976. See *infra* p. 369 & note 984. As amended, however, the intent is ambiguous. Section 905(a) provides that the effective date of the Act was the date of enactment, July 12, 1974, except as provided in section 905, which has the specific reference to (among other sections) section 401. See *infra* p. 369. Note that the drafters of Gramm-Rudman-Hollings made clear when they meant the date of enactment of Gramm-Rudman-Hollings instead of the date of enactment of the Congressional Budget Act. See section 401(d)(3)(A)(ii) *infra* p. 257.

<sup>643</sup> Note that section 406(a), regarding off-budget agencies, programs, and activities (see *infra* p. 270), requires that certain items be included in spending authority.

<sup>644</sup> Section 3(1) defines "outlays." See *supra* p. 11.

<sup>645</sup> Section 3(2) defines "budget authority." See *supra* pp. 11-13.

<sup>646</sup> For a discussion of whether something is "provided in advance by appropriation Acts," see generally *infra* note 652.

Section 3(5) defines "appropriation Act" by reference to 1 U.S.C. § 105. See *supra* p. 16. For the text of 1 U.S.C. § 105 (1988), see *supra* note 36.

<sup>647</sup> Chapter 31 comprises 31 U.S.C. §§ 3101-3129 (1988 & Supp. III 1991).

**the United States is liable, the budget authority<sup>648</sup> for which is not provided in advance by appropriation Acts;<sup>649</sup>**

§ 401(c)(2)(C)

**(C)<sup>650</sup> to make payments (including loans and grants), the budget authority<sup>651</sup> for which is not provided for in advance by appropriations Acts,<sup>652</sup>**

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<sup>648</sup> Section 3(2) defines "budget authority." *See supra* pp. 11-13.

<sup>649</sup> For a discussion of whether something is "provided in advance by appropriation Acts," see generally *infra* note 652.

Section 3(5) defines "appropriation Act" by reference to 1 U.S.C. § 105. *See supra* p. 16. For the text of 1 U.S.C. § 105 (1988), see *supra* note 36.

<sup>650</sup> Section 3(9) refers to this subparagraph to define the term "entitlement authority." *See supra* p. 18. Note that section 250(c)(18) of Gramm-Rudman-Hollings defines certain mandatory appropriated accounts as entitlements for purposes of Gramm-Rudman-Hollings. *See infra* p. 447.

<sup>651</sup> Section 3(2) defines "budget authority." *See supra* pp. 11-13.

<sup>652</sup> In determining whether "budget authority . . . is . . . provided for in advance by appropriations Acts," the Parliamentarian's office will examine the likely real world consequences of legislation on a case-by-case basis, and will not rely exclusively on the form of language in the legislation.

In one case, the Presiding Officer advised that even if an amendment creates benefits for qualifying individuals, it will not create entitlement authority within the meaning of section 401(c)(2)(C) if it also provides that "no payments shall be made except subject to appropriations." 130 CONG. REC. S7070-71, S7108, S7110 (1984) (parliamentary inquiry of Sen. Cohen); Senate Precedent PRL19840613-002 (June 13, 1984) (LEGIS, Rules database). This is so even if the language creating the benefits says "an individual shall be entitled." *Id.*

The Parliamentarian's office has advised that the following language would ensure that a program would be subject to appropriations, and therefore not an entitlement under section 401(c)(2)(C):

In any fiscal year the administrator of this program shall limit the value of any benefits conferred by this program to an amount not in excess of the appropriation for such fiscal year and if the requirements of this program exceed the limitations set herein the benefits shall be reduced to the extent necessary to comply with the provisions of this subsection.

(continued...)

to any person or government if, under the provisions of the law containing such authority, the United States is obligated to make such payments to persons or governments who meet the requirements established by such law;

§ 401(e)(2)(D)

(D) to forgo the collection by the United States of proprietary offsetting receipts, the budget authority<sup>653</sup> for which is not provided in advance by appropriation Acts<sup>654</sup> to offset such forgone receipts;

<sup>653</sup>(...continued)

Senate Precedent PRL19840613-002 (June 13, 1984) (LEGIS, Rules database). For an example of an application of language similar to this, see, e.g., National and Community Service Act of 1989, § 250(a), S. 1430, 101st Cong. 2d Sess., 136 CONG. REC. S1672, S1684 (daily ed. Feb. 27, 1990) (§ 432A(c) of the material proposed to be inserted).

To avoid a point of order caused by the creation of new entitlement authority, however, it is not necessarily sufficient to include language that the payments must come out of an appropriated account; the language must make the payments themselves subject to appropriations. See 130 CONG. REC. S7107, S7109-10 (daily ed. June 13, 1984) (parliamentary inquiry and statement of Sen. Domenici, ruling of the Vice President). Some thus refer to "appropriated entitlements" that fall within the meaning of section 401(c)(2)(C). (See, e.g., *infra* note 1245 (listing "APPROPRIATED ENTITLEMENTS AND MANDATORIES".)) Even though the Government pays such appropriated entitlements out of appropriated funds, annual appropriations do not truly control them. That the entitlement is paid from appropriated funds cannot, without more, remove the entitlement from the definition of section 401(c)(2)(C), for, as the Constitution requires, "No Money shall be drawn from the Treasury, but in consequence of Appropriations made by Law." U.S. CONST. art. I, § 9, cl. 7. Thus, all entitlements provide for appropriations, either implicitly or explicitly.

Section 3(5) defines "appropriation Act" by reference to 1 U.S.C. § 105. See *supra* p. 16. The text of 1 U.S.C. § 105 (1988) (see *supra* note 36) deals with regular appropriations bills. Section 401(c)(2)(C) thus refers to authority that regular appropriations acts do not control.

<sup>653</sup> Section 3(2) defines "budget authority." See *supra* pp. 11-13.

<sup>654</sup> For a discussion of whether something is "provided in advance by appropriation Acts," see generally *supra* note 652.

Section 3(5) defines "appropriation Act" by reference to 1 U.S.C. § 105. See *supra* p. 16. For the text of 1 U.S.C. § 105 (1988), see *supra* note 36.

and

§ 401(e)(2)(E)

(E) to make payments by the United States (including loans, grants, and payments from revolving funds) other than those covered by subparagraph (A),<sup>655</sup> (B),<sup>656</sup> (C),<sup>657</sup> or (D),<sup>658</sup> the budget authority<sup>659</sup> for which is not provided in advance by appropriation Acts.<sup>660</sup>

Such term does not include authority to insure or guarantee the repayment of indebtedness incurred by another person or government.

§ 401(d)

(d) EXCEPTIONS. —

§ 401(d)(1)

(1) Subsections (a)<sup>661</sup> and (b)<sup>662</sup> shall not apply to new spending authority<sup>663</sup> if the budget authority<sup>664</sup> for

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<sup>655</sup> See *supra* p. 251.

<sup>656</sup> See *supra* p. 251.

<sup>657</sup> See *supra* p. 252-253.

<sup>658</sup> See *supra* p. 253.

<sup>659</sup> Section 3(2) defines "budget authority." See *supra* pp. 11-13.

<sup>660</sup> For a discussion of whether something is "provided in advance by appropriation Acts," see generally *supra* note 652.

Section 3(5) defines "appropriation Act" by reference to 1 U.S.C. § 105. See *supra* p. 16. For the text of 1 U.S.C. § 105 (1988), see *supra* note 36.

<sup>661</sup> See *supra* pp. 247-248.

<sup>662</sup> See *supra* pp. 248-250.

<sup>663</sup> Section 401(c) defines "new spending authority." See *supra* pp. 250-254.

<sup>664</sup> Section 3(2) defines "budget authority." See *supra* pp. 11-13.