

## NEW BUDGET AUTHORITY, NEW SPENDING AUTHORITY, AND REVENUE LEGISLATION MUST BE WITHIN APPROPRIATE LEVELS

§ 311(a)(1) **SEC. 311.<sup>502</sup> (a)(1)<sup>503</sup> LEGISLATION SUBJECT TO POINT OF ORDER.<sup>504</sup> — Except as provided by subsection (b),<sup>505</sup> after the Congress has completed action on a concurrent resolution on the budget for a fiscal year, it shall not be in order<sup>506</sup> in either the House of Representatives or the Senate to**



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<sup>502</sup> Section 311 is codified as amended at 2 U.S.C. 642 (1988 & Supp. IV 1992).

<sup>503</sup> Section 13303(d)(1) of the Budget Enforcement Act redesignated what used to be section 311(a) as section 311(a)(1). *See infra* p. 758.

<sup>504</sup> Section 904(c) of the Congressional Budget Act (*see infra* pp. 361-363) and section 271(b) of Gramm-Rudman-Hollings (*see infra* p. 671) provide that the Senate may waive or suspend section 311(a) only by the affirmative vote of three-fifths of the Members, duly chosen and sworn — that is, 60 Senators. Section 275(b) of Gramm-Rudman-Hollings provides that this supermajority requirement expires on September 30, 1995. *See infra* p. 690.

Note also the provisions for the suspension of section 311(a) under certain circumstances after the declaration of war or a recession pursuant to section 258 of Gramm-Rudman-Hollings. *See infra* pp. 619-630.

<sup>505</sup> Section 311(b) applies what is known as the "Fazio exception," which applies only in the House. *See infra* p. 192.

<sup>506</sup> Congressional Budget Act prohibitions are not self-enforcing, and require points of order from the floor for their enforcement. *Cf. supra* note 293 (regarding section 303(a)).

consider any bill, joint resolution, amendment,<sup>507</sup> motion,<sup>508</sup> or conference report<sup>509</sup> providing new budget authority<sup>510</sup> for such fiscal year, providing new entitlement authority<sup>511</sup> effective during such fiscal year, or reducing revenues for such fiscal year,<sup>512</sup> if —

§ 311(a)(1)(A) (A)<sup>513</sup> the enactment of such bill or resolution as reported,<sup>514</sup>

<sup>507</sup> An amendment is subject to points of order under the Congressional Budget Act even if the Senate has specified by unanimous consent that the amendment is one of the amendments in order and the yeas and nays have been ordered. *Cf. supra* note 295 (regarding section 303).

The Senate Budget Committee estimates the costs of an amendment based on the assumption that Congress has already enacted the pending bill (to which the amendment has been offered) into law. Thus, when the current level exceeds the outlay ceiling, and a bill is pending that would reduce outlays by less than the amount by which the current level exceeds the outlay ceiling, an amendment that would increase outlays at all (net of outlay reductions in the amendment) will cause outlays to exceed the outlay ceiling.

<sup>508</sup> Section 13207(a) of the Budget Enforcement Act added the word "motion" here. *See infra* p. 723. For a discussion of the motivation for the addition, see *supra* note 235.

<sup>509</sup> Section 13207(a)(1)(E)(i) of the Budget Enforcement Act struck the words "bill, resolution, or amendment" here and inserted "bill, joint resolution, amendment, motion, or conference report." *See infra* p. 723.

<sup>510</sup> Section 3(2) defines "budget authority." *See supra* pp. 11-13.

<sup>511</sup> Section 3(9) (*see supra* p. 18) defines "entitlement authority" to mean that authority described in section 401(e)(2)(C) (*see infra* p. 252). For a discussion of language that ensures that authority will not constitute entitlement authority, *see infra* note 652.

<sup>512</sup> Section 13207(a)(1)(E)(ii) of the Budget Enforcement Act struck the words "or any conference report on any such bill or resolution" here, but did not strike the comma at the end of that parenthetical. *See infra* p. 723.

<sup>513</sup> Section 13303(d)(1) of the Budget Enforcement Act redesignated what used to be section 311(a)(1) as section 311(a)(1)(A). *See infra* p. 758.

<sup>514</sup> By virtue of the words "as reported," a point of order will not lie under section 311(a)(1) against a deficit-neutral bill that has been amended by an amendment that reduces revenues below the revenue floor. 131 CONG. REC. S8806 (1985); Senate Precedent PRL19850626-001 (June 26, 1985) (LEGIS, Rules database) (inquiry of Sen. Chafee). In other words, no point of order will lie under section 311(a)(1) even though the bill as  
(continued...)

<sup>514</sup>(...continued)

amended would cause revenues to fall below the revenue floor, if the bill as reported would not have done so. *See id.* This precedent creates a limited window of applicability for section 311(a)(1): A Senator must raise a point of order against an amendment during the pendency of the amendment, or forever lose the right to question under section 311(a)(1) the deficit-increasing effect of the bill as amended. Note, however, that by virtue of the differing language of section 311(a)(2) (*see infra* p. 186) a point of order will lie under that subsection even when it will not lie under this subsection.

Note the following series of inquiries by Senator Chafee of the Chair (Senator Humphrey of New Hampshire):

The PRESIDING OFFICER. This amendment reduces revenues below the level expressed in the second budget resolution, and therefore the point of order is well taken.

Mr. CHAFEE. I ask the Chair if the entire bill before us does not do the same. We just adopted an amendment of the Senator from Pennsylvania that reduced revenues by \$25 million. Will the Chair offer his opinion on that situation?

The PRESIDING OFFICER. The bill as reported is revenue neutral for the fiscal year 1985. Therefore, it is not subject to a point of order.

Mr. CHAFEE. Would the President be good enough to explain? We just adopted on the floor an amendment by a voice vote that cost \$25 million. Is that de minimis or does that not count? Is that not real dollars?

The PRESIDING OFFICER. That amendment likewise would have been subject to a point of order, but the amendment having been agreed to, the point of order is now moot.

Mr. CHAFEE. But the amendment is now part of the bill. So is the whole bill not subject to a point of order?

The PRESIDING OFFICER. The Parliamentarian advises the bill is treated on the basis on which it was reported from committee.

Mr. CHAFEE. That is parliamentary jargon that I do not quite understand.

Mr. PACKWOOD. Mr. President, I ask what the Chair is ruling: Is it that first we look at the bill as introduced and since the bill is revenue neutral, it is not subject to a point of order? Each amendment as it comes along may or may not be subject to a point of order, but you do not impute it backward to the bill when it is added. Do I understand the ruling correctly?

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<sup>514</sup>(...continued)

The PRESIDING OFFICER. The Senator is correct.

Mr. CHAFEE. That is a bit of ingenuity that I am afraid I have not mastered. Let us take that slowly. You can add innumerable amendments to the bill that cost millions or billions, and if a point of order is not raised to each amendment at the time and is adopted, the whole measure itself, which now involves these billions above any budget limitations that were there, is perfectly all right? Could the Chair lead me through that Alice in Wonderland safely?

The PRESIDING OFFICER. The Senator's analysis is correct.

Mr. CHAFEE. That is the way it works?

The PRESIDING OFFICER. That is what the law says.

Mr. CHAFEE. So the law says you do not pay any attention to the final product.

The PRESIDING OFFICER. The Senator's analysis is correct.

Mr. CHAFEE. Is that what the law says, Mr. President?

The PRESIDING OFFICER. The Chair will read the provision. "The enactment of such bill or resolution as reported." The Chair advises that with respect to points of order in this wise the bill is not affected by amendments.

Mr. CHAFEE. If that is the law I refer the President to Charles Dickens' definition of the law.

*Id.* (Sen. Chafee refers, respectively, to LEWIS CARROLL (CHARLES L. DODGSON), ALICE'S ADVENTURES IN WONDERLAND (1865), and to Mr. Bumble's definition in CHARLES DICKENS, OLIVER TWIST ch. 51 (1838).)

Compare the language of section 301(i), *supra* p. 82; section 303(a), *supra* p. 107; section 401(a), *infra* p. 247; section 401(b)(1), *infra* p. 249; section 402(a), *infra* p. 260; which contain the magic words "as reported."

Contrast the language of section 302(c), *supra* p. 92; section 302(f)(2), *supra* p. 97; section 306, *supra* p. 143; section 310(g), *supra* p. 176; and section 311(a)(2), *infra* p. 186; which *do not* contain the magic words "as reported." Under the logic of this precedent, points of order under section 302(f), for example, *will* apply to bills as amended by amendments against which points of order would lie under section 302(f). (For a table comparing the language of points of order, see below in this note.)

(continued...)

<sup>514</sup>(...continued)

In contrast to the ruling of the Chair, the clause of section 311 listing

- (1) the enactment of such bill or resolution as reported;
- (2) the adoption and enactment of such amendment; or
- (3) the enactment of such bill or resolution in the form recommended in such conference report

appears merely to state the Congress's attempt to cover the complete legislative process at all stages on the floor.

The legislative history of section 311 supports the interpretation that points of order apply to bills as amended by amendments that offend the rule. The report of the Senate Committee on Rules and Administration on the Congressional Budget Act makes clear that the drafters of section 311 wanted the point of order to cover bills as reported and *as amended*:

*Sec. 311.*

After all regular annual bills and resolutions providing new budget authority for a fiscal year have been enacted and, if a reconciliation bill is required to be reported under Section 310(c) such a bill has been enacted, it shall not be in order in either House to consider *any bill or resolution* providing additional new budget authority for such fiscal year, any amendment to any such bill or resolution or any conference report thereon if the enactment of the bill or resolution *as reported, as amended or as recommended in the conference report* would cause the appropriate levels of new budget authority or total outlays, as set forth in the budget resolution then in effect, to be exceeded.

In recent years supplemental and, to a lesser extent, deficiency appropriations have been of such magnitude as to have serious impact on the Federal spending picture. In addition, the spending needs being met with supplemental appropriations are most often unanticipated at the time the regular appropriations are being considered and enacted. For these reasons it is considered necessary to require that *any measure* providing new budget authority for a fiscal year *after* the budget process for such year has been completed shall be within the appropriate levels set forth in the then-effective budget resolution.

S. Rep. No. 93-688, 93d Cong., 2d Sess. 53-54 (1973) (some emphasis added).

The report of the Senate Committee on Government Operations for the Budget Act used the broad term *any measure*:

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<sup>514</sup>(...continued)

Once the budget process for a fiscal year has been completed and appropriations have been effected by a triggering provision described, it shall not be in order to consider *any measure* providing new budget authority for such fiscal year or any conference report thereon if the result of such a measure would be to cause the limitations on new budget authority or on total outlays then in effect to be exceeded.

In recent years supplemental and, to a lesser extent, deficiency appropriations have been of such magnitude as to have serious impact on the Federal spending picture. In addition, the spending needs being met with supplemental appropriations are most often unanticipated at the time the regular appropriations are being considered and enacted. For these reasons the Committee believes it necessary to require that *any measure* providing new budget authority for a fiscal year *after* the budget process for such year has been completed shall be within the limitations set forth in the then-effective budget resolution.

S. Rep. No. 93-579, 93d Cong., 1st Sess. 55 (1973) (some emphasis added).

The conference report for the Budget Act spoke in the general terms *legislation* and *measures*:

The Senate amendment provided that after adoption of all regular appropriations and a required reconciliation bill, Congress could not consider budget authority *legislation* in excess of the appropriate levels in the most recent concurrent resolution.

The conference substitute provides that after adoption of the second concurrent resolution and completion of the reconciliation process, it shall not be in order to consider any new budget authority or entitlement *measure* that would cause the appropriate level of total budget authority or outlays in the most recent budget concurrent resolution to be exceeded. Nor would it be in order to consider a *measure* that would reduce total revenues below the appropriate levels in the budget resolution.

S. Conf. Rep. No. 93-924, 93d Cong., 2d Sess. 64 (1974) (emphasis added).

Similarly, the conference report for Gramm-Rudman-Hollings, which added the language of the maximum deficit amount point of order, spoke of a point of order that covered *legislation*, using that general term:

(a) *Legislation Subject to Point of Order.* — This subsection prohibits consideration in the House or the Senate of *legislation* providing budget authority or entitlement authority, or reducing revenues for the fiscal year to which the most recently agreed to budget resolution applies if enactment of such *legislation* would cause the totals for such authorities, or for revenues, or the total for budget outlays  
(continued...)

<sup>514</sup>(...continued)

set forth in such budget resolution to be breached. A point of order also lies in the Senate against *legislation* that would cause the maximum deficit amount to be exceeded.

H.R. Conf. Rep. No. 99-433, 99th Cong., 2d Sess. 110 (1985) (some emphasis added).

Thus the legislative history contemplates a point of order against any legislation or measure that offends the rule. No provision seems to have been made requiring the point of order to lie only at certain points along the way.

Note also that the Chair's interpretation of the words "as reported" results in another anomaly. Even though the precedent causes a point of order not to lie against a bill amended by an amendment that offends section 311, the terms of section 311 apply to conference reports. Consequently, a point of order would lie against a conference report that contained nothing in substance other than an amended bill that would not be subject to a point of order.

The drafters of the Congressional Budget Act worded its points of order inconsistently, creating anomalies and perhaps loopholes. The table below illustrates the types of legislation covered by points of order:

**APPLICABILITY OF POINTS OF ORDER  
TO TYPES OF LEGISLATION**

Point of Order	Bills		Resolutions	
	As Reported	All	As Reported	All
301(i)	-	-	X	*
301(g)	-	-	X	X
302(c)	X	X	X	X
302(f)	X	X	X	X
303(a)	X	-	X	-
304(b)	-	-	X	X
305(d)	-	-	X	X
306	X	X	X	X
310(e)	X	X	-	-
310(g)	X	X	X	X
311(a)(1)	X	-	X	-
311(a)(2)	X	X	X	X
401(a)	X	-	X	-
401(b)(1)	X	-	X	-
402(a)	X	-	X	-

(continued...)

§ 311(a)(1)(B)            **(B)<sup>515</sup> the adoption and enactment of such amendment; or**

§ 311(a)(1)(C)            **(C)<sup>516</sup> the enactment of such bill or resolution in the form recommended in such conference report,**

**would cause the appropriate level of total budget authority<sup>517</sup> or total budget outlays<sup>518</sup> set forth in the most recently agreed to concurrent resolution on the budget for such fiscal year to be exceeded, or would cause revenues<sup>519</sup> to be less than the appropriate level<sup>520</sup> of total revenues set forth in such concur-**

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<sup>514</sup>(...continued)

\* applies by virtue of H. Con. Res. 287, 102d Cong., 2d Sess. § 12(b) (1992) (adopted).

The "as reported" language also prevents a point of order from lying against a bill during the pendency of a committee amendment that would correct the violation that gives rise to the point of order.

<sup>515</sup> Section 13303(d)(1) of the Budget Enforcement Act redesignated what used to be section 311(a)(2) as section 311(a)(1)(B). *See infra* p. 758.

<sup>516</sup> Section 13303(d)(1) of the Budget Enforcement Act redesignated what used to be section 311(a)(3) as section 311(a)(1)(C). *See infra* p. 758.

<sup>517</sup> Section 3(2) defines "budget authority." *See supra* pp. 11-13.

<sup>518</sup> Section 3(1) defines "budget outlays." *See supra* p. 11.

<sup>519</sup> *E.g.*, 131 CONG. REC. S8806-07 (1985); Senate Precedent PRL19850626-001 (June 26, 1985) (LEGIS, Rules database) (point of order raised by Sen. Packwood).

If the current level is below the revenue floor for a fiscal year, legislation that would result in a loss of revenues for that year would violate section 311. 131 CONG. REC. S6367-68 (1985); Senate Precedent PRL19850516-001 (May 16, 1985) (LEGIS, Rules database) (inquiry of Sen. Metzenbaum).

<sup>520</sup> The Congressional Budget Act makes no exception for very small amounts; even a "negligible" revenue loss can subject legislation to a point of order under section 311(a). 122 CONG. REC. S17,709-10 (1976); Senate Precedent PRL19761001-001 (Oct. 1, 1976) (LEGIS, Rules database) (point of order by Sen. Haskell).



rent resolution<sup>521</sup> except in the case that a declaration of war by the Congress is in effect.

§ 311(a)(2)(A) (2)(A)<sup>522</sup> After the Congress has completed action on a concurrent resolution on the budget, it shall not be in order in the Senate to consider any bill,<sup>523</sup> resolution, amendment,<sup>524</sup>

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<sup>521</sup> Section 13112(a)(10) of the Budget Enforcement Act struck the balance of what used to be section 311(a) from this point on and inserted "except in the case that a declaration of war by the Congress is in effect." See *infra* p. 709. The last clause of the material stricken by the Budget Enforcement Act contained an exception for wartime.

Before enactment of the Budget Enforcement Act, the balance of section 311(a) read as follows:

or, in the Senate, would otherwise result in a deficit for such fiscal year that —

(A) for fiscal year 1989 or any subsequent fiscal year, exceeds the maximum deficit amount specified for such fiscal year in section 3(7); and

(B) for fiscal year 1988 or 1989, exceeds the amount of the estimated deficit for such fiscal year based on laws and regulations in effect on January 1 of the calendar year in which such fiscal year begins as measured using the budget baseline specified in section 251(a)(6) of the Balanced Budget and Emergency Deficit Control Act of 1985 minus \$23,000,000,000 for fiscal year 1988 or \$36,000,000,000 for fiscal year 1989;

except to the extent that paragraph (1) of section 301(i) or section 304(b), as the case may be, does not apply by reason of paragraph (2) of such subsection.

The Congressional Budget Act now addresses this material, sometimes called the "maximum deficit amount point of order" or "MDA point of order," in section 605(b). See *infra* p. 329.

<sup>522</sup> Section 13303(d)(2) of the Budget Enforcement Act added paragraph (2). See *infra* p. 758.

<sup>523</sup> Because section 311(a)(2)(A) does not contain the words "as reported" here, points of order under section 311(a)(2)(A) will apply to bills and resolutions as amended by amendments against which points of order would lie under section 311(a)(2)(A). Cf. *supra* note 514 (regarding the meaning of "as reported" in section 311(a)(1)).

**motion, or conference report that would cause the appropriate level of total new budget authority<sup>525</sup> or total budget outlays or social security outlays<sup>526</sup> set forth for the first fiscal year in the most recently agreed to concurrent resolution on the budget covering such fiscal year to be exceeded, or would cause revenues to be less than the appropriate level of total revenues<sup>527</sup> (or social security revenues to be less than the appropriate level of social security revenues<sup>528</sup>) set forth for the first fiscal year covered by the resolution and for the period including the first fiscal year plus the following 4 fiscal years in such concurrent resolution.<sup>529</sup>**

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<sup>524</sup>(...continued)

<sup>524</sup> An amendment is subject to points of order under the Congressional Budget Act even if the Senate has specified by unanimous consent that the amendment is one of the amendments in order and the yeas and nays have been ordered. *Cf. supra* note 295 (regarding section 303).

The Senate Budget Committee estimates the costs of an amendment based on the assumption that Congress has already enacted the pending bill (to which the amendment has been offered) into law. Thus, when the current level exceeds the outlay ceiling, and a bill is pending that would reduce outlays by less than the amount by which the current level exceeds the outlay ceiling, an amendment that would increase outlays at all (net of outlay reductions in the amendment) will cause outlays to exceed the outlay ceiling.

<sup>525</sup> Section 3(2) defines "budget authority." *See supra* pp. 11-13.

<sup>526</sup> Section 301(a)(6) implicitly defines the term "social security outlays" as "outlays of the old-age, survivors, and disability insurance program established under title II of the Social Security Act." *See supra* note 143.

<sup>527</sup> For examples of legislation violating this section, see, e.g., 138 CONG. REC. S14,880-87, S14,890-91, S14,947 (daily ed. Sept. 24, 1992) (Bumpers motion to waive a Bentsen point of order against his amendment no. 3164 striking a 120 percent estimated tax safe harbor and permanently extending the limitation on the use of the preceding year's tax in computing estimated tax).

<sup>528</sup> Section 301(a)(7) implicitly defines the term "social security revenues" as "revenues of the old-age, survivors, and disability insurance program established under title II of the Social Security Act (and the related provisions of the Internal Revenue Code of 1986)." *See supra* note 145.

<sup>529</sup> In addition to the point of order applied by this section, section 12(c) of the budget resolution for fiscal year 1994 provides further enforcement:

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<sup>529</sup>(...continued)

(c) **ENFORCING PAY-AS-YOU-GO.** — At any time after the enactment of the reconciliation bill pursuant to section 7 of this resolution, it shall not be in order in the Senate to consider any bill, joint resolution, amendment, motion, or conference report, that would increase the deficit in this resolution for any fiscal year through fiscal year 1998 or would increase the deficit for any other fiscal year through fiscal year 2003, as measured by the sum of —

(1) all applicable estimates of direct spending and receipts legislation applicable to that fiscal year, other than any amounts resulting from —

(A) full funding of, and continuation of, the deposit insurance guarantee commitment in effect on the date of enactment of the Budget Enforcement Act of 1990; and

(B) emergency provisions as designated under section 252(e) of that Act; and

(2) the estimated amount of savings in direct spending programs applicable to that fiscal year resulting from the prior year's sequestration under that Act, if any (except for any amounts sequestered as a result of a net deficit increase in the fiscal year immediately preceding the prior fiscal year).

(d) **WAIVER.** — This section may be waived or suspended in the Senate only by the affirmative vote of three-fifths of the Members, duly chosen and sworn.

(e) **APPEALS.** — Appeals in the Senate from the decisions of the Chair relating to any provision of this section shall be limited to 1 hour, to be equally divided between, and controlled by, the appellant and the manager of the concurrent resolution, bill, or joint resolution, as the case may be. An affirmative vote of three-fifths of the Members of the Senate, duly chosen and sworn, shall be required in the Senate to sustain an appeal of the ruling of the Chair on a point of order raised under this section.

(f) **DETERMINATION OF BUDGET LEVELS.** — For purposes of this section, the levels of new budget authority, outlays, and receipts for a fiscal year shall be determined on the basis of estimates made by the Committee on the Budget of the Senate.

H. Con. Res. 64, 103d Cong., 1st Sess., § 12, 139 CONG. REC. H1747, H1753 (daily ed. Mar. 31, 1993) (adopted).

Section 12(a) of the resolution makes clear the purpose of the new point of order:

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§ 311(a)(2)(B) (B) In applying this paragraph —

§ 311(a)(2)(B)(i) (i)(I) estimated social security outlays<sup>530</sup> shall be deemed to be reduced by the excess of estimated social security revenues<sup>531</sup> (including those provided for in the bill, resolution, amendment, or conference report with respect to which this subsection is applied) over the appropriate level of Social Security revenues specified in the most recently agreed to concurrent resolution on the bud-

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<sup>529</sup>(...continued)

(a) PURPOSE — The Senate declares that it is essential to —

(1) ensure compliance with the deficit reduction goals embodied in this resolution;

...

(4) prohibit the consideration of direct spending or receipts legislation that would decrease the pay-as-you-go surplus that the reconciliation bill pursuant to section 7 of this resolution will create under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 . . . .

*Id.* § 12(a). The joint statement of managers accompanying the budget resolution explains: "Section 11 of the Senate amendment contains new enforcement procedures to . . . prohibit the consideration of direct spending or receipts' legislation that would decrease the pay-as-you-go surplus that the reconciliation bill will create." H.R. CONF. REP. NO. 103-48, 103d Cong., 1st Sess. 47 (1993), reprinted in 139 CONG. REC. H1747, H1760 (daily ed. Mar. 31, 1993).

Note that this point of order will apply in at least two situations not covered by sections 602(c) and 311(a). First, the budget resolution point of order will prohibit measures — such as a back-loaded tax cut or a late-starting entitlement — that would worsen the deficit in any of fiscal years 1999 through 2003. Second, the budget resolution point of order would prohibit cutting the taxes used to fund the spending provided for through the use of a reserve fund.

<sup>530</sup> Section 301(a)(6) implicitly defines the term "social security outlays" as "outlays of the old-age, survivors, and disability insurance program established under title II of the Social Security Act." See *supra* note 143.

<sup>531</sup> Section 301(a)(7) implicitly defines the term "social security revenues" as "revenues of the old-age, survivors, and disability insurance program established under title II of the Social Security Act (and the related provisions of the Internal Revenue Code of 1986)." See *supra* note 145.

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§ 311(a)(2)(B)(i)(II) (II) estimated social security revenues shall be deemed to be increased to the extent that estimated social security outlays are less (taking into account the effect of the bill, resolution, amendment, or conference report to which this subsection is being applied) than the appropriate level of social security outlays in the most recently agreed to concurrent resolution on the budget;<sup>533</sup> and

§ 311(a)(2)(B)(ii)(I) (ii)(I) estimated Social Security outlays shall be deemed to be increased by the shortfall of estimated social security revenues (including Social Security revenues provided for in the bill, resolution, amendment, or conference report with respect to which this subsection is applied) below the appropriate level of social security revenues specified in the most recently adopted concurrent resolution on the budget;<sup>534</sup> and

§ 311(a)(2)(B)(ii)(II) (II) estimated social security revenues<sup>535</sup> shall be

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<sup>532</sup> In other words, if Congress raises Social Security revenues in excess of those anticipated in the budget resolution, it may increase Social Security spending beyond that anticipated in the budget resolution by the amount of the excess. The drafters of the Budget Enforcement Act added this and the other provisions of clauses (i) and (ii) of this section, as well as the provisions of section 302(f)(2)(A) and (B) (that is, the second of the two sections 302(f)(2)(A) and (B), *see supra* pp. 103-104), to allow fungibility between Social Security revenues and outlays.

<sup>533</sup> In other words, if Congress cuts Social Security spending below that anticipated in the budget resolution, it may cut Social Security revenues below those anticipated in the budget resolution by the amount of the spending cut.

<sup>534</sup> In other words, if Congress cuts Social Security revenues below those anticipated in the budget resolution, it may not increase Social Security spending above the amount equal to the spending anticipated in the budget resolution minus the revenue shortfall. *See also* section 302(f)(2)(B) *supra* p. 104.

<sup>535</sup> Section 301(a)(7) implicitly defines the term "social security revenues" as "revenues of the old-age, survivors, and disability insurance program established under title II of the Social Security Act (and the related provisions of the Internal Revenue Code of 1986)." *See supra* note 145.

deemed to be reduced by the excess of estimated social security outlays<sup>536</sup> (including social security outlays provided for in the bill, resolution, amendment, or conference report with respect to which this subsection is applied) above the appropriate level of social security outlays specified in the most recently adopted concurrent resolution on the budget;<sup>537</sup> and

§ 311(a)(2)(B)(iii)

(iii) no provision of any bill or resolution, or any amendment thereto or conference report thereon, involving a change in chapter 1 of the Internal Revenue Code of 1986 shall be treated as affecting the amount of social security revenues<sup>538</sup> unless such provision changes the income tax treatment of social security benefits.

The chairman of the Committee on the Budget of the Senate may file with the Senate appropriately revised allocations under section 302(a)<sup>539</sup> and revised functional levels and aggregates to reflect the application of the preceding sentence. Such

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<sup>536</sup> Section 301(a)(6) implicitly defines the term "social security outlays" as "outlays of the old-age, survivors, and disability insurance program established under title II of the Social Security Act." See *supra* note 143.

<sup>537</sup> In other words, if Congress increases Social Security spending beyond that anticipated in the budget resolution, it may not cut Social Security revenues below the amount equal to the revenues anticipated in the budget resolution plus the excess spending.

<sup>538</sup> The drafters of the Budget Enforcement Act intended this language to address the case where changes in income tax law had certain indirect effects on the Social Security trust fund. (See also section 302(f)(2)(C) *supra* p. 104 (to the same effect).) The drafters intended that these changes should not trigger a point of order under this section dealing with the levels in that trust fund. To achieve the intended result, however, the language should have read "social security revenues or outlays." This is so because when revenues result from the taxation of Social Security benefits, the revenues flow into the Treasury and the Treasury then makes a payment to the Social Security Trust Funds. The payment is scored as a positive outlay when made by the Treasury and a negative outlay when received by Social Security. Therefore, any changes to the income tax law that indirectly affect the amount of revenue collected from the income taxation of Social Security benefits would affect Social Security outlays rather than revenues.

<sup>539</sup> See *supra* pp. 88-90.

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revised allocations, functional levels, and aggregates shall be considered as allocations, functional levels, and aggregates contained in the most recently agreed to concurrent resolution on the budget, and the appropriate committees shall report revised allocations pursuant to section 302(b).<sup>540</sup>

§ 311(b) (b) EXCEPTION IN THE HOUSE OF REPRESENTATIVES.<sup>541</sup> — Subsection (a)<sup>542</sup> shall not apply in the House of Representatives to any bill, resolution, or amendment which provides new budget authority<sup>543</sup> or new entitlement authority<sup>544</sup> effective during such fiscal year, or to any conference report on any such bill or resolution, if —

§ 311(b)(1) (1) the enactment of such bill or resolution as reported;

§ 311(b)(2) (2) the adoption and enactment of such amendment;  
or

§ 311(b)(3) (3) the enactment of such bill or resolution in the form recommended in such conference report,

would not cause the appropriate allocation of new discretionary budget authority<sup>545</sup> or new entitlement authority made pursu-

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<sup>540</sup> See *supra* pp. 90-91.

<sup>541</sup> This subsection provides what some call the "Fazio exception."

<sup>542</sup> See *supra* pp. 178-192.

<sup>543</sup> Section 3(2) defines "budget authority." See *supra* pp. 11-13.

<sup>544</sup> Section 3(9) (*see supra* p. 18) defines "entitlement authority" to mean that authority described in section 401(c)(2)(C) (*see infra* p. 252).

<sup>545</sup> Section 3(2) defines "budget authority." See *supra* pp. 11-13.

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ant to section 302(a)<sup>546</sup> for such fiscal year, for the committee within whose jurisdiction such bill, resolution, or amendment falls, to be exceeded.<sup>547</sup>

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<sup>546</sup> See *supra* pp. 88-90. Section 11 of the fiscal year 1993 budget resolution provides:

**SEC. 11. CLARIFICATION OF THE APPLICATION OF SECTION 311(b) OF THE CONGRESSIONAL BUDGET ACT IN THE HOUSE.**

For fiscal years 1992 through 1995, the reference in section 311(b) of the Congressional Budget Act of 1974 to the appropriate allocation under section 302(a) shall be considered to be a reference to the appropriate allocation for the fiscal year concerned under section 602(a) of the Congressional Budget Act of 1974.

Concurrent Resolution on the Budget — Fiscal Year 1993, H. Con. Res. 287, 102d Cong., 2d Sess. § 11, 138 CONG. REC. H3602, H3609 (daily ed. May 20, 1992) (adopted).

The joint statement of managers accompanying the resolution explains:

**CLARIFICATION OF THE APPLICATION OF SECTION 311(b) OF THE CONGRESSIONAL BUDGET ACT IN THE HOUSE OF REPRESENTATIVES**

The conference agreement includes a clarification of the application of section 311(b) of the Congressional Budget Act (2 U.S.C. § 642(b) (1988)), which applies only in the House of Representatives, for fiscal years 1992 through 1995. During those years, allocations of new discretionary budget authority and new entitlement authority are made pursuant to section 602(a) of the Congressional Budget Act (2 U.S.C. § 665a (Supp. II 1990)), rather than pursuant to section 302(a) of that Act (2 U.S.C. § 633(a) (Supp. II 1990)). However, the Budget Enforcement Act of 1990 inadvertently failed to include language providing for such a cross-reference in the application of section 311(b) for those fiscal years. The language in this conference agreement clarifies that, for those fiscal years, section 311(b) will operate in the same manner as it did prior to the enactment of the Budget Enforcement Act.

H.R. CONF. REP. NO. 102-529, 102d Cong., 2d Sess. 63-64 (1992), *reprinted in* 138 CONG. REC. H3602, H3618 (daily ed. May 20, 1992).

<sup>547</sup> Congress adopted a similar, temporary exception for the Senate for fiscal year 1993 in that year's budget resolution:

**SEC. 10. MAXIMUM DEFICIT AMOUNT AND AGGREGATE POINTS OF ORDER IN THE SENATE.**

Notwithstanding any other rule of the Senate, for those years in which this concurrent resolution is in effect and not superseded by adoption of a

(continued...)



§ 311(e)

(c) **DETERMINATION OF BUDGET LEVELS.** — For purposes of this section, the levels of new budget authority,<sup>548</sup> budget outlays,<sup>549</sup> new entitlement authority,<sup>550</sup> and revenues for a fiscal year shall be determined on the basis of estimates made by the Committee on the Budget<sup>551</sup> of the House of Representatives or of the Senate, as the case may be.

<sup>547</sup>(...continued)

subsequent concurrent resolution on the budget, in the Senate, sections 311(a) and 605 of the Congressional Budget Act of 1974 shall not apply to any bill, resolution, amendment, motion, or conference report that —

(1) would, if introduced as a bill or resolution, be referred to the Committee on Appropriations;

(2) would not cause the appropriate allocation of new budget authority or outlays made pursuant to section 602(a) to be exceeded;

(3) would not cause the appropriate suballocation (or suballocations), if any, of new budget authority or outlays made pursuant to section 602(b) to be exceeded;

(4) would not cause the appropriate level of social security outlays to be exceeded;

(5) would not cause revenues to be less than the appropriate level of total revenues; and

(6) would not cause social security revenues to be less than the appropriate level of social security revenues.

Concurrent Resolution on the Budget — Fiscal Year 1993, H. Con. Res. 287, 102d Cong., 2d Sess., § 10, 138 CONG. REC. H3602, H3608-09 (daily ed. May 20, 1992) (adopted); see also H.R. CONF. REP. NO. 102-529, 102d Cong., 2d Sess. 62-63 (1992), reprinted in 138 CONG. REC. H3602, H3618 (daily ed. May 20, 1992) (explaining the provision).

<sup>548</sup> Section 3(2) defines "budget authority." See *supra* pp. 11-13.

<sup>549</sup> Section 3(1) defines "budget outlays." See *supra* p. 11.

<sup>550</sup> Section 3(9) (see *supra* p. 18) defines "entitlement authority" to mean that authority described in section 401(c)(2)(C) (see *infra* p. 252).

<sup>551</sup> This subsection reflects the normal scorekeeping convention that Congress turns to its Budget Committees to assess the costs of legislation. See also section 201(g), *supra* p. 32; section 302(g), *supra* p. 105; section 310(d)(4), *supra* p. 172; section 313(e), *infra* p. 228; and section 258B(h)(4) of Gramm-Rudman-Hollings, *infra* p. 650.