

# RECONCILIATION REFRESHER

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Budget process geeks will be in high demand again this season as this important, but arcane process once again becomes the talk of the town.

The newest twist in the story is the idea of using two budget resolutions to garner two sets of reconciliation instructions next year. The idea would be to revive the Fiscal Year (FY) 2017 Budget Resolution ([H.Con.Res. 125](#)) produced last spring, which died before floor consideration in the House over a dispute about the topline appropriations allocation, and then write a separate budget for FY2018, both with reconciliation instructions. While no decisions have been finalized the concept is to use one set of instructions for Obamacare Repeal and the other for Tax Reform.

Reconciliation can be a tricky process and there are good reasons it is not the ideal solution in many cases. We are likely to see at least one reconciliation process next year, so now is a good time to brush up on the process.

**Budget Reconciliation is filibuster proof. In the Senate, it provides for expedited consideration of tax, spending and debt related legislation; requiring only a simple majority for passage and limiting the scope of amendments that can be offered.**

## THE GORY DETAILS

Reconciliation is a two-- step process. First, Congress (both chambers) must agree to a budget that includes reconciliation instructions that instruct congressional committees to draft legislation meeting certain budgetary targets. Second, those committees produce legislation to meet those targets.

Budget reconciliation instructions can direct committees to achieve budgetary goals in any fiscal year and over a period of fiscal years. Budget reconciliation instructions can also provide year-- by-- year budgetary goals to achieve which limit the policy options available to a committee.

However, reconciliation instructions can only bind a committee to meet a budgetary goal, not require specific policy outcomes. Even if the budget resolution conference report states that the reconciliation instruction is for savings in a specific program, the committees of jurisdiction are not required to meet the budgetary goal with that program, just from any program in the committee's jurisdiction.

Budget reconciliation instructions must be considered to be identical in the House and in the Senate given the differing committee jurisdictions. For example, the budget resolution conference report cannot direct the Senate Agriculture Committee to achieve budgetary savings and instruct the House Energy and Commerce Committee to achieve the same budgetary savings.

If there are multiple committees with reconciliation instructions, the committees must report their legislation to the House and Senate Budget Committees for combination into an omnibus bill. If the committees meet their instruction, the Budget Committees are not able to make changes in the legislation reported to them. If a committee receiving a reconciliation instruction fails to meet their instruction, the Budget Committees can draft the legislation necessary to meet the instruction.

### THE BYRD RULE

The Byrd Rule provides for a point of order against material extraneous to the reconciliation instructions. Extraneous provisions are defined by one or more of the following six definitions.

1. It does not provide for a change in outlays or revenues;
2. If the net effect of the provisions reported by a committee fails to meet the instruction for that committee;
3. If the provision is not in the jurisdiction of the committee reporting that section of the reconciliation bill;
4. If the change in direct spending or revenues is incidental to the non--budgetary components of the provision;
5. If the provision increases the deficit in a fiscal year outside of the budget window covered by the reconciliation bill;
6. If the provision recommends changes to Social Security.

While extraneous is defined by these six criteria, "provision" is not specifically defined in the Byrd Rule. In the past, a "provision" has been defined as broadly as an entire section of legislative text and as narrowly as a line of legislative text.

The Byrd Rule is a surgical point of order. Accordingly, a Byrd Rule point of order, if enforced, will simply strike the provision from the bill rather than stopping consideration of the underlying legislation. The Byrd Rule can be waived, or an appeal of the ruling of the Chair can be sustained, with 60 votes in the Senate.

There is not a point of order that lies against an amendment that attempts to improve upon the reconciliation instruction. Therefore, a Senator could offer an amendment under the Senate Finance Committee's jurisdiction that achieves additional savings beyond the committee's \$1 billion instruction. Such an amendment can be adopted with a simple majority vote.

### **Role of the Senate Budget Committee and Parliamentarian**

The Senate Budget Committee is required to print in the Congressional Record a list of the potentially extraneous provisions in a reconciliation bill. This list is not binding on the rulings of the Chair and is considered to be advisory. The Senate Parliamentarian advises the Chair on whether a Byrd Rule point of order lies against a provision. The discretion over the gray areas involving the Byrd Rule falls in the hands of the Senate Budget Committee and the Senate Parliamentarian. While the Budget Committee provides advice and guidance to the Parliamentarian, they are not able to control the Parliamentarian's decisions.

### Resolving Differences between the House and Senate

Typically differences between the House and Senate versions of a reconciliation bill are resolved in a conference committee. However, there is precedent for the House and Senate passing identical reconciliation bills and there is also a precedent for the chambers resolving their differences through amendments in disagreement. If there is a conference committee formed for a reconciliation bill, each chamber can instruct conferees as part of the motions to go to conference. In the House, additional motions to instruct conferees can be considered for 20 calendar days or 10 legislative days after the conference committee is formed.

### Order of Consideration

The Budget Act does not require the House to act first on a reconciliation measure. However, all revenue measures must originate in the House even if it is considered under reconciliation. If there is a House passed revenue measure that meets the reconciliation instruction, the House by resolution can vote to deem that revenue measure previously passed by the House as a reconciliation bill. Otherwise, the House would need to initiate any reconciliation bill that includes revenue measures. The Senate could move a reconciliation bill before the House so long as there were no revenue provisions in the measure.

### THE WRINKLES FOR 2017

- Consideration of a Budget Resolution can take significant floor time in each chamber. Conferenced budget agreements are difficult legislative items, highlighted by the fact that Congress does not produce one annually, even when both chambers are controlled by the same party.
- Acting quickly on the House Budget Resolution for FY2017 (H. Con. Res. 125) as written could be difficult. It was never fully debated and never received a House vote, much less any consideration in the Senate. Its chief author, Rep. Tom Price (R-- GA) is under consideration for Secretary of HHS.
  - H. Con. Res. 125 includes reconciliation instructions to twelve House Committees.
- The requirements of reconciliation complicate many legislative initiatives, often requiring significant contortion for successful execution. In addition, there are significant political liabilities to taking on any major reform on a purely partisan basis. The Byrd Rule presents a challenge for elements of Obamacare repeal as well as the Affordable Care Act. The ACA has its own set of challenges if pursued through reconciliation that could limit its scope and impact.

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