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**Scoring and
Revenue Estimation**

Adam Fletcher
Trenton Hamilton

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In the federal budget process, the tools of scoring and revenue estimation are the glue that binds together the other budget enforcement processes. Budget oversight agencies – in particular the Congressional Budget Office (CBO) and the executive Office of Management and Budget (OMB) – employ scoring and revenue estimation to calculate the effects that changes in fiscal policy will have on the federal budget. Whereas calculation of the baseline looks at the effects of *existing* legislation on the budget, scoring and revenue estimation calculate the change that a particular piece of *proposed* legislation will have on the baseline forecasts.¹ Likewise, scoring and revenue estimation are the processes by which CBO informs Congress whether its proposed policies will comport with spending caps (for discretionary spending) and Pay-As-You-Go (PAYGO) requirements (for direct spending). Finally, where Congress has violated its internal enforcement mechanisms, OMB employs scoring and revenue estimation in generating sequestration reports – the President’s budget enforcement tool.

According to OMB, “[s]corekeeping means measuring the budget effects of legislation, generally in terms of budget authority, receipts, and outlays for purposes of the Budget Enforcement Act.”² “Scoring” technically refers to estimating the changes that legislation will have on budget authority or outlays, and “revenue estimation” involves measuring changes in federal receipts. Section I of this paper examines the law and practice governing the processes of scoring and revenue estimation. Section II then presents various assessments of the current practices of scoring and revenue estimation, as well as proposals to reform the systems.

¹ ALLEN SCHICK, THE FEDERAL BUDGET 57 (2000).

² OFFICE OF MANAGEMENT AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES 428 (2005).

I. FACTUAL BACKGROUND

A. Scoring

1. Who Does Scoring?

The two primary budget oversight agencies – CBO and OMB – are responsible for scoring the budgetary effects of newly proposed and enacted legislation. In particular, the Congressional Budget and Impoundment Control Act of 1974 tasked CBO with the responsibility to provide Congress with ongoing estimates of the effects of proposed spending programs.³ CBO is primarily responsible to provide these estimates on demand to the congressional Budget, Appropriations, and Taxation (House Ways and Means and Senate Finance) Committees; that is, CBO must give first priority to their requests for budget estimates.⁴ For example, the Budget Committees of the House and the Senate regularly request that CBO score the President's budget proposal shortly after it is published.⁵ These committees – separately and in conference with each other – then use CBO's estimates when preparing the annual Budget Resolution.⁶ Additionally, the House and Senate Appropriations Committees consider CBO's estimates when determining 302(b) allocations to their various subcommittees.⁷ CBO's other statutory duties include the submission to the Budget Committees, by February 15

³ See Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. § 602 (2005).

⁴ See *id.* § 602(a), (b).

⁵ See Congressional Budget Office, *An Analysis of the President's Budgetary Proposals for Fiscal Year 2006* (March 2005).

⁶ The Budget Committees consider CBO's scoring and revenue estimates at numerous points when preparing the Budget Resolution. They employ the economic assumptions developed by CBO in estimating future revenues and expenditures. See, e.g., Conference Report to Concurrent Resolution on the Budget for Fiscal Year 2002, H. Con. Res. 83, 107th Cong. (2001). Additionally, the Budget Resolution is required by law to contain estimated levels of tax expenditures for the given fiscal year. See 2 U.S.C. §632(e)(2)(E).

⁷ For example, the House Appropriations Committee has used CBO's estimates of the costs of the Federal Housing Administration's mortgage insurance program to determine the level of funding to provide the program. In 2004, unusually low interest rates resulted in numerous new loans being processed, with in turn created large receipts for the FHA mortgage insurance programs. These additional receipts decreased FHA appropriations in 2004. For 2005, however, CBO estimates that such receipts will decline, and thus the Appropriations committee will need to increase its 302(b) allocations for that purpose. See House Budget Committee, *Appropriations Subcommittee Allocations*, 4 APPROPRIATIONS UPDATE 1 (July 7, 2004), available at <http://www.house.gov/budget/302beezau070704.pdf>.

of each year, of a report that includes estimates of total receipts, total new budget authority, and total outlays for the upcoming fiscal year.⁸ Finally, CBO must score all newly enacted spending legislation and submit the scores to both Congress and OMB.⁹

In contrast to CBO's allegiance to Congress, OMB serves as the President's budget oversight agency. Similarly to CBO, OMB is responsible to estimate new budget authority and outlays attributable to each discretionary and direct spending bill. Within seven days of bill's enactment, OMB must transmit these estimates to Congress, along with an explanation of any deviations from CBO's estimates.¹⁰

Though they perform roughly the same estimation procedures, CBO and OMB's use of different assumptions often results in divergent estimates of future spending levels. In practice, CBO often takes the more conservative approach, perhaps because Congress by definition is composed of a variety of political interests. CBO often underestimates revenues and economic growth, and overestimates outlays. OMB, on the other hand, is accountable only to the unitary Executive, and thus has incentive only to reflect the President's preferences in calculating its numbers.¹¹ Where the estimates of CBO and OMB diverge, OMB's estimates by law take precedence over those of CBO.¹² Though Congress generally relies on CBO's estimates when considering proposed legislation, "OMB officially measures the budgetary impact of legislation and determines whether congressional action complies with BEA rules."¹³ If necessary to alleviate a violation of the budget enforcement rules, OMB must employ its own estimates of a

⁸ See *id.* § 602(e)(1).

⁹ See *id.* § 902(d)(1) (scheduled to expire on September 30, 2006). Cf. 2 U.S.C. § 901(a)(7)(A) (expired provision of the Budget Enforcement Act requiring the same procedure).

¹⁰ See Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. § 902(d)(2) (2005) (scheduled to expire on September 30, 2006). Cf. 2 U.S.C. § 901(a)(7)(B) (expired provision of Budget Enforcement Act requiring the same procedure).

¹¹ See SCHICK, *supra* note 1, at 55.

¹² See Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. § 902(d) (2005).

¹³ SCHICK, *supra* note 1, at 55.

bill's budgetary effects when generating sequestration reports. It should be noted, however, that OMB has no authority to police 302(a) and 302(b) allocations, because they are merely part of the budget *process* as opposed to its final *result*. Whereas OMB has sequestration authority to enforce *total* spending caps (the "bottom line"), enforcement of 302(a) and 302(b) allocations is a procedural matter to be addressed by points of order in each House of Congress.¹⁴ This makes sense, under both separation of powers and Article I, section 5 arguments. Not only does the Executive have no authority to govern the Congressional budget *process*, but each House of Congress has autonomy under Article I, section 5 of the Constitution to establish its own procedural rules.¹⁵

To some observers, it may seem duplicative to have to scorekeeping bodies, both of whom perform essentially the same tasks. The purpose of having these two agencies, however, runs to the heart of the separation of powers. Congress and the President each need an office, under their control, that will give them estimates of the effects of their own budget policies.¹⁶ And situations do exist in which one branch may base its budgetary action on the other branch's numbers.¹⁷ First, in order to solve a political impasse, Congress and the President may negotiate an agreement on how to score particular legislation. After all, before discussing the merits of a proposal, it helps to be talking about the same numbers. Second, Congress sometimes employs "directed scoring," in which it instructs CBO to use OMB's data rather than its own. Rather than

¹⁴ See Congressional Budget Act of 1974 § 302(f), 2 U.S.C. § 633(f) (2005).

¹⁵ U.S. CONST. Art. I § 5 cl. 2.

¹⁶ In fact, the House of Representatives at one point attempted to remove OMB's power over the budget by proposing to make CBO's estimates binding for purposes of sequestration. See H.R. Res. 5, 102d Cong. § 10 (1991). At the time, Congressional Democrats were suspicious of the Bush I White House exerting undue control over OMB, and defended its proposal on two grounds: (i) that CBO's projections are free from political manipulation (a very questionable assertion), and (ii) that the budget process would be better served by consolidating the advisory and enforcement elements of budget oversight. See Michael D. Bopp, *The Roles of Revenue Estimation and Scoring in the Federal Budget Process*, 56 TAX NOTES 1629, 1643-44 (1992). The House proposal failed for two reasons: (i) the Senate never adopted a comparable provision, and (ii) it was likely constitutionally suspect under *Bowsher v. Synar*, 478 U.S. 714 (1986), which prohibited congressional control over the executive branch.

¹⁷ See SCHICK, *supra* note 1, at 55-56.

arise out of altruism, however, these situations generally arise when OMB's numbers are more supportive of Congress' policy preferences than are CBO's.

2. How Is Scoring Accomplished?

“Scoring” involves estimating the effects on budget authority and outlays – that is, the deviance from the baseline – that a given piece of legislation will have. Pursuant to the Balanced Budget and Emergency Deficit Control Act of 1985 (“Gramm-Rudman-Hollings”), OMB, CBO, and the congressional Budget Committees have jointly prepared “scorekeeping guidelines” to govern the scoring process (attached as Exhibit A).¹⁸ The Scorekeeping Guidelines provide sixteen rules that establish the scoring methodologies of OMB, CBO, and all other budget enforcement agencies.¹⁹ Additionally, the score is generally computed “as cumulative budgetary changes over the full period covered by the baseline.”²⁰ Because the baseline currently covers the ten years following the current fiscal year, scoring generally measures the effects of new outlays within a ten-year window.²¹

Though scoring theoretically measures the effects of both discretionary and mandatory spending, the estimation procedures are much more involved in the measurement of mandatory spending. For discretionary spending, the scoring process is generally simple and straightforward. Because almost all discretionary appropriations are for a definite amount of funding, the “estimates” of the effects of these appropriations can be relatively precise.²² For example, if Congress wants to build an aircraft carrier, it can decide exactly how much to spend

¹⁸ See Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. § 902(d)(5) (2005).

¹⁹ See OFFICE OF MANAGEMENT AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-11 APP. A, SCOREKEEPING GUIDELINES (2004).

²⁰ SCHICK, *supra* note 1, at 57.

²¹ See Christopher J. Puckett, *Is the Experiment Over? The OMB's Decision to Change the Game Through a Shortening of the Forecast*, 11 GEO. J. POVERTY LAW & POL'Y 169, 178 (2004).

²² See SCHICK, *supra* note 1, at 53.

on the construction, and appropriate those funds as it sees fit.²³ “Scoring” this expenditure merely involves recording the level of appropriated funds.

Scoring discretionary appropriations involves a measurement against both the previous year’s levels of funding, and the President’s request for the next year’s funding. This convention allows Congress to claim credit for spending reductions and increases in the same piece of legislation. For example, the FY 2005 budget allocated \$19.8 billion for foreign operations²⁴ – \$1.6 billion less than the President had requested, but \$2.3 billion more than was authorized for the previous fiscal year.²⁵ By increasing spending from the prior year, Congressmen can brag about pork to their constituents. And by appropriating less than the President has requested, the same Congressmen can claim fiscal responsibility for reducing spending levels.

In contrast to scoring discretionary spending, the scoring process for direct spending is often complicated and imprecise. Much direct spending – especially entitlement spending – is open-ended, establishing only program eligibility requirements and guaranteeing funding to everyone who satisfies those requirements. This structure makes estimating levels of direct spending particularly difficult, because the calculations are based upon *assumptions* regarding future spending levels, rather than annual appropriated amounts. At least three assumptions are built into all estimates of future direct spending: (i) participation levels, (ii) changes in the prices of providing the good or service, and (iii) effects of the economy upon spending levels.²⁶ Calculating the levels of participation in a direct spending program involves estimating future

²³ CBO has scored new defense-spending provisions in the President’s FY 2006 budget proposal as decreasing the deficit by \$31 billion in FY 2005, with a five-year savings of \$139 billion and a ten-year savings of \$336 billion. See CONG. BUDGET OFFICE, CBO’S ESTIMATE OF THE EFFECT OF THE PRESIDENT’S BUDGET ON BASELINE DEFICITS OR SURPLUSES (2005), available at <http://www.cbo.gov/showdoc.cfm?index=1944&sequence=0#table4>.

²⁴ See Consolidated Appropriations Act, 2005, P.L. 108-447, 118 Stat. 2809, 2968, 108th Cong. (2005).

²⁵ See House Committee on Appropriations, Highlights of the Final FY05 Spending Bills (Nov. 20, 2004), available at http://appropriations.house.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=430.

²⁶ See Puckett, *supra* note 16, at 183-85 (analyzing the factors CBO considered in estimating the costs of the newly enacted Medicare prescription drug benefit).

demographics (e.g. the number six-year olds eligible for certain school programs), as well as the incentive effects of the programs (e.g. Medicare's prescription drug benefit has induced many seniors to drop their existing prescription drug insurance). Further, calculating price changes of a program depends on inflation, supply, and various other economic forecasts. Finally, calculating the effects of the overall economy upon direct spending involves both a forecast of future economic conditions and an understanding of how this will intersect with the spending. For example, a downturn in the economy may increase participation levels in Medicaid (as more people live below a specified income level), but may also lower the prices of the program (from decreased demand).

Scoring of direct spending can be most easily understood via a recent illustration. Last year, Congress enacted the Medicare Modernization Act of 2004, the primary purpose of which was to enact Medicare Part D, the prescription drug benefit. Acknowledging the difficulty of scoring this piece of direct spending, CBO Director Douglas Holz-Eakin commented: "Because the new prescription drug program represents a major departure from what currently exists, there is a great deal of uncertainty about its budgetary impact . . ." ²⁷ In November 2003, CBO scored the MMA as costing \$395 billion in direct spending over the ten-year period from FY 2004-2013.²⁸ As of March 4, 2005, CBO had revised its estimates of the costs of the prescription drug benefit, this time calculating that its costs over the same period would total \$593 billion.²⁹ CBO claimed that its updated estimates – totaling \$198 billion, an increase of 50% over its original estimate – resulted from slightly higher than expected inflation rates, small changes in the final

²⁷ Letter from Douglas Holz-Eakin, Director, Congressional Budget Office, to Honorable Jim Nussle, Chairman, House Committee on the Budget (Feb. 2, 2004), *available at* <http://www.cbo.gov/ftpdocs/49xx/doc4995/OMBDDrugLtr.pdf>.

²⁸ Letter from Douglas Holz-Eakin, Director, Congressional Budget Office, to Honorable Joseph Barton, Chairman, House Committee on Energy and Commerce (Mar. 4, 2005), *available at* <http://www.cbo.gov/ftpdocs/61xx/doc6139/03-04-BartonMedicare.pdf>.

²⁹ *See id.*; CONG. BUDGET OFFICE, FACT SHEET FOR CBO'S MARCH 2005 BASELINE: MEDICARE (Mar. 8, 2005), *available at* <http://www.cbo.gov/factsheets/2005/Medicare.pdf>.

version of legislation from the scored version, updated assumptions on participation rates, and updates on calculations on the offsetting savings from lower participation in the Medicaid prescription drug benefit.

The estimates of CBO and OMB often differ with respect to the effects of direct spending legislation. For example, when President Clinton submitted his 1994 healthcare proposal to Congress, OMB was estimating that the legislation would *reduce* deficits by \$60 billion over seven years.³⁰ CBO, however, argued that the proposal would *increase* deficits for the same period by over \$70 billion. Though they use the same formulas to determine these measures, CBO and OMB sometimes employ different assumptions in their models – in this case creating a divergence of over \$130 billion between the two proposals.

A more striking example of differing spending estimates arose with the scoring of the Medicare Modernization Act of 2004. As previously mentioned, CBO initially scored the prescription drug benefit as costing \$395 billion over ten years. As of June 2003, OMB had not completed an estimate of the program's costs, but specifically referred to CBO's estimate as being \$400 billion level allocated by the budget resolution.³¹ By the following year, however, OMB had estimated the ten-year costs of Part D to be \$534 billion, a difference of \$139 billion from CBO's score.³² This was one of the rare times when OMB's scoring estimates were more conservative than CBO's, and apparently following the favorable numbers, OMB initially sought to focus attention on CBO's projections as opposed to its own. CBO would later explain how differences between its and OMB's assumptions caused such a wide variance in projected spending. For example, CBO estimated lower participation rates, lower per capita costs of the

³⁰ See SCHICK, *supra* note 1, at 55.

³¹ See OFFICE OF MANAGEMENT AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R.1 – MEDICARE PRESCRIPTION DRUG AND MODERNIZATION ACT OF 2003 (June 16, 2003), *available at* <http://www.whitehouse.gov/omb/legislative/sap/108-1/hr1sap-h.pdf>.

³² See Holz-Eakin, Letter to Honorable Jim Nussle, *supra* note 19.

program, and higher offsetting savings from Medicaid than did OMB.³³ The important point, however, is that small variations in underlying scoring assumptions can create huge variations in the expected costs of legislation.

B. Revenue Estimation

1. What is Revenue Estimation?

Revenue estimation is the process by which a piece of legislation is analyzed as to its effects on the receipts taken in by the U.S. Department of Treasury. In an era where Federal Budget policy is such a highly visible and contested issue, revenue estimates are critically important.

Estimators measure changes for the fiscal year, usually with a ten-year window.³⁴ Revenue estimates consider the behavioral effects of proposed legislation on taxpayers, for example, how many new people would take advantage of increased income caps on IRA plans. Recently, estimators have also made limited attempts to include “dynamic scoring” – incorporating predicted macroeconomic effects caused by a piece of tax legislation into the underlying revenue estimate. In effect, dynamic scoring attempts to estimate revenue effects from the predicted changes in the economy caused by the legislations as well as the predicted changes in the behavior of taxpayers.

2. Who Provides Revenue Estimation?

³³ See *Board of Trustees 2004 Annual Reports: Hearing Before the House Comm. on Ways and Means*, 108th Cong. (2004) (statement of Douglas Holz-Eakin, Director, Congressional Budget Office), available at <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=2453>.

³⁴ Under the Budget Resolution of 1994, the Senate requires presentation of estimates for each year of a ten-year budget period and totals summing (i) the first five years and (ii) the entire ten-year period. The House, on the other hand, merely requires estimates for each year of a five-year budget period. See JOINT COMM. ON TAXATION, JCX-1-05, OVERVIEW OF REVENUE ESTIMATING PROCEDURES AND METHODOLOGIES USED BY THE STAFF OF THE JOINT COMMITTEE ON TAXATION 12 n.11 (Feb. 2, 2005), available at <http://www.house.gov/jct/x-1-05.pdf>.

Two congressional bodies, the CBO³⁵ and the Joint Committee on Taxation (JCT)³⁶, as well as the Office of Tax Analysis (OTA) in the Department of the Treasury, are the primary entities responsible to provide revenue estimation. The OTA provides revenue estimates for the White House, and also works with Congress through staffers of the CBO or JCT. The JCT is the primary revenue estimator for Congress, as the Congressional Budget Act of 1974 requires the Joint Committee to provide revenue estimates for all tax legislation considered by either the House or the Senate.³⁷ Such estimates are provided at the request of a Member of Congress, and are the official Congressional estimates for reported tax legislation,³⁸ although CBO creates an aggregate receipts estimate that is the baseline for the JCT's estimates of revenue effects.

The JCT is composed of 10 Members: 5 Members from the Senate Committee on Finance (3 majority and 2 minority) and 5 Members from the House Committee on Ways and Means (3 majority and 2 minority). Its staff consists of about 16 economists and senior economists, as well as five supporting statistical and computer specialists.³⁹ The OTA serves a similar revenue estimating function at the request of the President.⁴⁰ Both the JCT and OTA

³⁵ The Congressional Budget and Impoundment Control Act of 1974 directs the CBO to prepare “for each bill or resolution of a public character reported by any committee of the House of Representatives or the Senate . . . an estimate of the costs which would be incurred in carrying out such bill or resolution” *See* 2 U.S.C. § 653(1) (2005).

³⁶ The Internal Revenue Code directs the JCT to “report, from time to time . . . the results of its investigations” *See* I.R.C. § 8022(3)(A) (2005). Further, the Congressional Budget and Impoundment Control Act of 1974 gives the JCT exclusive jurisdiction over estimates of revenue legislation. *See* 2 U.S.C. § 601(f) (“For the purposes of revenue legislation which is income, estate and gift, excise, and payroll taxes (i.e., Social Security), considered or enacted in any session of Congress, the Congressional Budget Office shall use exclusively during that session of Congress revenue estimates provided to it by the Joint Committee on Taxation.”).

³⁷ *See* 2 U.S.C. § 601(f) (“For the purposes of revenue legislation which is income, estate and gift, excise, and payroll taxes (i.e., Social Security), considered or enacted in any session of Congress, the Congressional Budget Office shall use exclusively during that session of Congress revenue estimates provided to it by the Joint Committee on Taxation.”).

³⁸ *Id.*

³⁹ Thomas F. Field, *Transparency in Revenue Estimating*, Center for Data Analysis Report #04-15, at 2 (2004), available at <http://www.heritage.org/Research/Taxes/cda04-15.cfm>.

⁴⁰ *See* 31 U.S.C. § 321(a)(1) (“The Secretary of the Treasury shall prepare plans for improving and managing receipts of the United States Government and managing the public debt.”).

have access to confidential taxpayer returns, which, along with other data sources, serves as the database for all revenue estimates.⁴¹

The JCT's estimates start with the baseline revenue estimates of the CBO. The baseline is an estimate of the receipts the Treasury will bring in over the next 10 years if there are no changes to the current statutes. Thus, the assumptions built into the CBO baseline also play an important role in the process of estimating the revenue effects of proposed legislation. When a Member submits a request to the JCT to analyze a piece of tax legislation that will have revenue effects, it typically provides the estimate on a first-come, first served basis, with legislation that has a larger impact receiving a priority.

C. Importance of Scoring and Revenue Estimates

Scoring and revenue estimation are critical parts of the federal budget process for two primary reasons. First, they provide opportunity for public and media scrutiny of the budget process. Second, they provide the means to comport with the budget control mechanisms adopted over the last thirty years, which require revenue neutrality for tax legislation and direct spending, and impose caps on discretionary spending.⁴² Within the strictures of these budget control tools, “how legislation is scored may determine whether a measure under consideration . . . is in compliance with current budget rules.”⁴³ If the estimates of budget authority or outlays are too high, or the revenue losses from tax cuts are too great, the legislation may die without regard to the merits of its policy. Or as Allen Schick has described the situation, the seemingly

⁴¹ See Bopp, *supra* note 11, at 1632.

⁴² The most important of these statutes were the Congressional Budget and Impoundment Control Act of 1974, P.L. 93–344, 88 Stat. 297; the Balanced Budget and Emergency Deficit Control Act of 1985, P.L. 99–177, 99 Stat. 1038 (commonly known as the Gramm–Rudman–Hollings Act); and the Budget Enforcement Act of 1990, P.L. 101–508 tit. XIII, 104 Stat. 1388–573 (1990).

⁴³ SCHICK, *supra* note 1, at 54. See also Gordon T. Butler, *The Line Item Veto and the Tax Legislative Process: A Futile Effort in Deficit Reduction, But a Step Toward Tax Integrity*, 49 HASTINGS L.J. 1, 16 (1997) (“Revenue estimation and scoring of outlays and budget authority play a crucial role in determining which tax and spending proposals will become law . . .”).

innocuous numbers have “political consequences.”⁴⁴ The PAYGO rules of the Budget Enforcement Act, in particular, increased the importance of revenue estimates, because they required that a decrease in revenues be matched by a cut in entitlements. Even in the last few years, during which the PAYGO rules have not been applied, revenue estimates are still the center of public debate about the merits of any proposed tax legislation. In 1986, the JCT received 474 requests for revenue estimates from Members of Congress, and by 2004, this number climbed to 3,580.⁴⁵

II. ANALYSIS AND CRITIQUES OF CURRENT SCORING AND REVENUE ESTIMATION METHODOLOGIES

A. Scoring

Both government officials and academics have proposed a number of reforms to eliminate the games often played with the scoring process. Perhaps the most dangerous aspect of scoring is its uncertainty, but few reformers have suggested ways to make budget calculations more accurate. Rather, proposals to reform the scoring process have focused upon eliminating the games that manipulate scoring results, merely to comply with political preferences. In particular, reformers have advocated the following five proposals: (i) abandoning directed scorekeeping, (ii) reducing advance appropriations, (iii) preventing the alteration of the budget window or the back-loading of expenditures outside the budget window, (iv) eliminating favorable shifts between mandatory and discretionary budget enforcement rules, and (v) restricting “emergency” spending.

⁴⁴ See SCHICK, *supra* note 1, at 54.

⁴⁵ See JOINT COMM. ON TAXATION, *supra* note 27, at 4.

Table 1: Summary of Scorekeeping Games and Reform Proposals

Type of Game	Gaming Procedure	Reform Proposal
Directed Scorekeeping	Congress specifically changes accounting procedures of CBO or OMB to alter scoring estimates	Disallow any legislation that includes a directed scorekeeping provision, enforceable by (i) a point of order, or (ii) a statutory restriction
Advance Appropriations	Congress authorizes money in one fiscal year, to be spent in future fiscal years	Place absolute caps on advance appropriations, enforceable by (i) a point of order, or (ii) placing any violations of the caps under the current fiscal year's discretionary spending caps
Budget Window Games	Congress alters the budget window, or backloads increased spending outside the budget window	Disallow legislation that would <i>excessively</i> backload spending outside the budget window, enforceable by a point of order
Shifting Mandatory to Discretionary Spending	Appropriations Committee drafts legislation that delays <i>mandatory</i> spending in one fiscal year until the following year, and the Fingerprints Rule thus allocates the "savings" to the <i>discretionary</i> spending levels of the Appropriations Committee; the resulting increase in mandatory spending in the following fiscal year is charged to PAYGO restrictions on <i>mandatory</i> spending	Account for the increased spending in the second fiscal year as an "advance appropriation" and thus charged to the <i>discretionary</i> spending caps of the Appropriations Committee
"Emergency" Spending	Congress and the President designate an expenditure as an "emergency" and thus exempt from budget enforcement mechanisms	Four possibilities: (i) restrict the definition of "emergency," (ii) unpackage "emergency" expenditures, (iii) require accrual funding of "emergency" spending, and (iv) eliminate the "emergency" category

1. Eliminate Directed Scorekeeping

“Directed scorekeeping” can have two different meanings, depending on the degree to which Congress interjects itself into CBO’s budget estimation procedures.⁴⁶ The “light” version of directed scorekeeping – better termed “directed scoring” – occurs when Congress orders CBO to adopt OMB’s estimates of the expected costs of legislation. Though Congress generally relies upon CBO’s calculations, Congress “sometimes directs the CBO to use alternate figures provided by the executive branch OMB when the latter’s figures are more favorable to congressional purposes.”⁴⁷ Because directed scoring may have legitimate policy justifications in certain circumstances, reformers have not advocated eliminating the process altogether. Rather, the reforms simply seek to prevent arbitrary gaming on the part of Congress, by allowing Congress to direct CBO scoring only if Congress provides a rationale explaining its position.⁴⁸

The “heavy” version of directed scorekeeping – known as “directed scorekeeping” – is perhaps more dangerous than directed scoring. Directed scorekeeping involves Congress expressly directing CBO or OMB on *how* to account for various expenditures, in order to lower the score of estimated expenditures. As opposed to instructing CBO to adopt OMB’s ostensibly justifiable economic estimates, directed scorekeeping involves direct congressional encroachment into CBO’s internal accounting procedures. This procedure removes any claim of objective legitimacy to CBO’s budgetary estimates. During his tenure as CBO Director, Dan Crippen expressed the routine nature of directed scorekeeping: “[W]e include the effects of various scorekeeping directives and adjustments made by the budget committees, which would have the effect of reducing the outlays attributed to appropriations bills. . . . In total, these

⁴⁶ See Cheryl D. Block, *Congress and Accounting Scandals: Is the Pot Calling the Kettle Black?*, 82 NEB. L. REV. 365, 451-57 (2003); Cheryl D. Block, *Pathologies at the Intersection of the Budget and Tax Legislative Processes*, 43 B.C.L.REV. 863, 928-30 (2002).

⁴⁷ See Block, *Pathologies*, *supra* note 39, at 928; SCHICK, *supra* note 1, at 63.

⁴⁸ See Block, *Congress and Accounting Scandals*, *supra* note 39, at 452.

adjustments come to about \$17 billion for the House and \$16 billion for the Senate.”⁴⁹ For example, in recent years, Congress has on numerous occasions directed OMB, when preparing sequestration reports, to reset PAYGO balances of direct spending and receipts legislation to zero.⁵⁰ This process undercuts sequestration as a budget control mechanism, because Congress can simply violate the PAYGO rules and then pass a law preventing their enforcement.⁵¹ As one academic has noted, “It seems that Congress has a big magic number eraser that it feels increasingly comfortable using when other gimmicks fail in the budget process.”⁵²

In 2001, Congress tried to curtail the process of directed scorekeeping by permitting a point of order to be raised against “any reported bill or joint resolution, or amendment thereto or conference report thereon, that contains a directed scorekeeping provision.”⁵³ But Congress has rarely, if ever, employed this point of order to stop directed scorekeeping.⁵⁴ One academic proposes that Congress amend the *statutory* budget rules to prohibit directed scorekeeping.⁵⁵

Because the Budget Resolution does not have the binding force of law, its internal procedural rules, though theoretically effective, will only curtail directed scorekeeping if individual

⁴⁹ Letter from Dan L. Crippen, Director, Congressional Budget Office, to Honorable John M. Spratt, Jr., Ranking Member, House Committee on the Budget (Aug. 26, 1999).

⁵⁰ This practice was implemented for FY 2000, 2001, and 2002. *See* Dep’t of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the U.S. Act, 2002, Pub. L. No. 107-117, div. C § 102, 115 Stat. 2330, 2342 (2002) (setting PAYGO sequester balance to zero for 2001 and 2002); Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 2(b), 114 Stat. 2763, 2763-64 (2000) (setting PAYGO sequester balance to zero for 2001); Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, div. B § 1001(c), 113 Stat. 1501, 1537 (2000) (setting PAYGO sequester balance to zero for 2000).

⁵¹ Another, more complicated, example of directed scorekeeping arose with the passage of the Railroad Retirement and Survivor’s Improvement Act of 2001, Pub. L. No. 107-90 § 105(c), 115 Stat. 878, 887 (2001). This Act fundamentally altered the railroad retirement system by increasing retirement benefits, decreasing payroll taxes dedicated to the railroad retirement program, and creating the National Railroad Retirement Investment Trust (RRIT) as a privately-owned government-sponsored enterprise. Because the RRIT was authorized to invest its funds in non-Government securities, CBO and GAO had decided to count Government transfers into the RRIT as budget outlays, with a total estimated cost of \$14.9 billion over ten years. Congress, however, included in the Act a provision stating that “the purchase or sale of non-Federal assets . . . by the [RRIT] shall be treated as a means of financing.” *Id.* In other words, funds invested in non-Government securities would be treated simply as an inter-governmental transfer, and thus exempt from budget enforcement rules.

⁵² *See* Block, *Pathologies*, *supra* note 39, at 929.

⁵³ H.R. Con. Res. 290, 106th Cong. § 31(a)(1) (2000).

⁵⁴ *See* Block, *Pathologies*, *supra* note 39, at 929.

⁵⁵ *Id.*

members raise the point of order while considering a spending bill. Statutory budget laws, on the other hand, “have been more effective fiscal restraint devices than internal procedural rules,”⁵⁶ probably because they increase transparency in the budget process and thus facilitate external political pressures. As one reformer has noted, as Congress controls scorekeeping rules “skillful use of estimating techniques and periods may allow it effectively to circumvent the spirit” of any budget control mechanisms.⁵⁷

2. Cap Advance Appropriations

Advance appropriations, a second scorekeeping game that Congress often plays, involve appropriating budget authority in one year, but not making the funds available for outlay until the following fiscal year. In other words, Congress enacts a discretionary appropriation in FY “n,” but expressly states that the dollars are not available for actual expenditure until FY “n + 1.”⁵⁸ Under the current cash-flow system of budgeting, budget enforcement rules are scored to actual *outlays*, as opposed to budget authority. As the Scorekeeping Guidelines state: “[A]dvance appropriations of budget authority are scored as new budget authority in the fiscal year in which the funds become available for obligation, not the year in which the budget authority was enacted.”⁵⁹ By employing this game, Congress can use advance appropriations to “have its cake and eat it too.” Congress can avoid the spending caps placed on one year’s discretionary spending, by merely obligating an expenditure for the following fiscal year, thereby shifting the accounting for that spending to the next year. Congress thus can take credit for spending on

⁵⁶ *Id.* at 929-30.

⁵⁷ Theodore P. Seto, *Drafting a Federal Balanced Budget Amendment That Does What It Is Supposed To Do (and No More)*, 106 YALE L.J. 1449, 1503 (1997).

⁵⁸ It should be noted that advance appropriations are analytically distinct from mandatory expenditures. Mandatory (or direct) spending involves permanent budget authority to fund programs without going through the annual appropriations process. Advance appropriations, in contrast, arise *during* the annual budget process, as an effort to obligate future *discretionary* expenditures of the Government.

⁵⁹ OFFICE OF MANAGEMENT AND BUDGET, SCOREKEEPING GUIDELINES, *supra* note 14, at para. 7.

constituents, while also claiming to exercise the fiscal responsibility of staying within its budget limits.⁶⁰ For example, in 1999, Congress passed legislation pushing back a military payday by one day, from September 30, 2000, to October 1, 2000.⁶¹ In doing so – even though the expenditure had already been *authorized* – Congress moved this \$2 billion *outlay* from FY 1999 into FY 2000, and thus cleared \$2 billion of space for purposes of FY 1999 caps on discretionary spending.

By FY 2000, advance appropriations had reached \$23.4 billion, or roughly 3.8 % of the \$615 billion in discretionary spending appropriations for that year.⁶² This number has led reformers to argue that advance appropriations dangerously curtail the ability of the next Congress to set its own spending priorities. Accordingly, two different reform proposals have been offered to place a cap on advance appropriations. First, the Bush Administration, in its FY 2006 budget proposal, has proposed capping advance appropriations at \$22.6 billion annually.⁶³ Any amount of advance appropriations above \$22.6 billion would count against the discretionary spending caps in the year the budget *authority* was enacted (the current fiscal year), as opposed to the year of the outlay. Second, thirty-eight Republican Congressmen, in the Family Budget Protection Act of 2003, proposed to cap advance appropriations for a given program at the amount spent on the program in FY 2004.⁶⁴ This provision, however, would be enforceable only

⁶⁰ See L.R. Jones & K.J. Euske, *Strategic Misrepresentation in Budgeting*, 1 J. PUB. ADMIN. RESEARCH & THEORY 437, 445-47 (1991).

⁶¹ See Dept. of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, tit. III § 305, Fiscal Year 2000 Offsets and Rescissions (1999) (“[T]he basic pay and allowances that accrues to members of the Army, Navy, Marine Corps, and Air Force for the pay period ending on September 30, 2000 shall be paid . . . no earlier than October 1, 2000.”).

⁶² OFFICE OF MANAGEMENT AND BUDGET, ANALYTICAL PERSPECTIVES, *supra* note 2, at 237.

⁶³ *Id.* Conveniently, the \$22.6 billion number is the level of advance appropriations requested in the President’s FY 2006 budget proposal. It remains to be seen if the reformers are serious enough actually to *reduce* advance appropriations.

⁶⁴ See Family Budget Protection Act of 2003, H.R. 3358, 108th Cong. § 201(e) (2003) (“It shall not be in order in the House of Representatives or the Senate to consider any [measure] that provides advance discretionary new

by a point of order. As opposed to the Bush Administration's proposal to count excess advance appropriations against the current year's spending caps, the Family Budget Protection Act of 2003 would merely create a procedural enforcement mechanism. If the offending legislators could summon sufficient votes to waive the budget rule, they would undermine the limit on advance appropriations.

3. Prevent Altering the Budget Window or Back-Loading Spending Increases Outside the Budget Window

Yet another common scorekeeping game involves congressional manipulation of *when* various expenditures will be scored. As mentioned previously, CBO and OMB generally employ a ten-year budget window when scoring expected expenditures. By expressly altering the time period over which spending is estimated ("heavy" window gaming), or by stacking the major portions of spending legislation outside the budget window ("light" window gaming), Congress can create a dichotomy between actual expenditures and expenditures accounted for in the scoring process. For example, the 1990 expansion of Medicaid coverage for children initially opened the program only to six-year-olds. The legislation, however, was phased-in via an annual stair-stepping methodology that increased the maximum age of coverage by one year for every fiscal year the legislation had been in effect, up to age nineteen. Because the cost of the legislation was scored in a three-year budget window, however, the scoring covered only one fourth of the total expansion of the program.⁶⁵

Reformers have proposed both to eliminate Congress' ability to manipulate the budget window, and to curtail Congress' ability to back-load expenditures outside the budget window. For example, the Truth in Budgeting and Social Security Protection Act, introduced in the Senate

budget authority that first becomes available for any fiscal year after the budget year at an amount . . . above the amount of appropriations for fiscal year 2004 for such program, project, or activity.").

⁶⁵ See Puckett, *supra* note 16, at 179-80.

by Senators Voinovich and Feingold, would prevent excessive back-loading of expenditures in two manners. First, it would make this game transparent to the public by requiring CBO to publish the long-term costs of legislation. Specifically, CBO would be required, in conjunction with its reports estimating the ten-year costs of legislation, to estimate whether spending in years eleven through twenty of a given program would exceed 150% of the spending in years one through ten (as measured by discounted cash flows). Second, the Act would create a point of order against any measure that would violate this 150% rule.⁶⁶ This point of order would thus require a super-majority of legislators to approve such a back-loaded expenditure, or else it would fail.

Some academics have questioned whether such reforms are necessary, arguing that the ten-year budget window should be sufficient to take the political incentives out of back-loaded spending. That is, a legislator is unlikely to curry political favor for promising his constituents that they will receive a benefit more than ten years down the road, especially when future Congresses could repeal the benefit before it ever reaches its recipients. This argument may hold true for *discretionary* expenditures, because people only remember what was done in the previous annual appropriations cycle. But a ten-year budget window is not sufficient to protect against exploding mandatory expenditures (such as the Medicare prescription drug benefit) or back-loaded revenue losses (such as the Roth IRA, discussed *infra*). These two types of programs elicit the immediate political benefits that legislators seek – because they can claim to have established an entitlement or cut taxes – while simultaneously avoiding budgetary detection under a ten-year window.

4. Eliminate Favorable Shifting Between Mandatory and Discretionary Budget Enforcement Rules

⁶⁶ Truth in Budgeting and Social Security Protection Act of 2005, S. 568, 109th Cong. § 107 (2005); Truth in Budgeting and Social Security Protection Act of 2003, S. 689, 108th Cong. § 107 (2003).

A fourth game in the scoring process exists by virtue of a loophole in the Scorekeeping Guidelines that allows Congress to shift dollars between the direct and discretionary spending categories, merely to avoid the caps on discretionary spending. Under the Scorekeeping Guidelines, “[s]ubstantive changes to or restrictions on entitlement law or other mandatory spending law in appropriations laws will be scored against the Appropriations Committee section 302(b) allocations”⁶⁷ This rule, known as the “Fingerprints Rule,” provides that “legislated changes are scored to the committee reporting the measure – if an appropriations committee reports the bill, the ensuing spending [or savings] is discretionary.”⁶⁸ Accordingly, appropriations committees have incentives to delay obligations of *mandatory* budget authority from one year to the next, because any savings they create are scored as a reduction of *discretionary* spending for the year (because they are included in appropriating legislation). The game arises in the scoring of the increased expenditures of the second-year – increasing because of the delayed obligation. Because the expenditures are technically part of a mandatory spending program, they are treated as direct spending the second year and thus exempt from the caps on discretionary spending. Further, because the second year spending is not “new” legislation, it is exempt from PAYGO requirements. In this way, Congress shifts discretionary spending into the direct category, by creating a temporary “savings” that is scored to discretionary accounts, but which will ultimately be paid off out of direct spending. The Bush Administration has proposed to close this loophole by treating the second-year’s expenditure as an advance appropriation, not

⁶⁷ OFFICE OF MANAGEMENT AND BUDGET, SCOREKEEPING GUIDELINES, *supra* note 14, at para. 3.

⁶⁸ SCHICK, *supra* note 1, at 60. *See also* Donald B. Tobin, *Less Is More: A Move Toward Sanity in the Budget Process*, 16 ST. LOUIS U. PUB. L. REV. 115 n.78 (1996) (“[T]hrough budget scoring conventions, an appropriations bill may get credit, and thus be able to spend more money, if the mandatory spending reduction is added directly to the appropriations bill.”).

mandatory spending, and thus subject to the second-year's discretionary caps.⁶⁹ This reform would counteract the first-year's "discretionary" savings by accounting for the second-year's spending as "discretionary" as well. In other words, it would bring the entire program under the gambit of one set of budget rules.

5. Restrict "Emergency" Spending

When Congress and the President cannot fit annual spending within the budget enforcement rules, they sometimes do an end-run around the rules by invoking "emergency" spending powers. Under current law, if the President and Congress separately designate a spending item as "emergency," then the spending is exempt from enforcement under the budget control rules.⁷⁰ Despite the fact that emergency spending does affect the overall federal surplus or deficit, Congress initially created this provision in order to leave flexibility in government spending for unforeseen contingencies (e.g. war, extreme natural disasters, etc.). In recent years, however, this designation has sometimes been used to fund ongoing programs, being used merely as a tool to avoid budget enforcement mechanisms. For example, in 1999, Congress passed an "emergency" spending bill to fund the 2000 census – even though the census, required by the Constitution, was clearly foreseeable – because it could not fit the funding within the current year's discretionary caps.⁷¹ And in 2005, Congress approved an \$81 billion "emergency" appropriation designated for defense, the global war on terror, and tsunami relief, and included \$10 million earmarked for the University of Hawaii library.⁷²

At least four distinct reform proposals have been put forth to restrict emergency spending. First, in its FY 2006 budget proposal, the Bush Administration advocated tightening

⁶⁹ See OFFICE OF MANAGEMENT AND BUDGET, ANALYTICAL PERSPECTIVES, *supra* note 2, at 237.

⁷⁰ See 2 U.S.C. § 902(e) (2005).

⁷¹ See Consolidated Appropriations Act of 2000, Pub. L. No. 106-113, 113 Stat. 1501 (1999); SCHICK, *supra* note 1, at 62.

⁷² See Emergency Supplemental Appropriations Act, 2005, H.R. 1268, 109th Cong. tit. V, ch. 3 (2005).

the definition of “emergency” to exclude foreseeable or ongoing programs. In specific, the Administration has proposed a definition of “emergency” that includes the following five elements: (i) necessary expenditure, (ii) sudden, (iii) urgent, (iv) unforeseen, and (v) temporary.⁷³ Under this definition, for example, predictable levels of spending on natural disasters (i.e. the average of the previous five years of spending) would not be “unforeseen” and thus would not be subject to classification as emergency spending, even though individual disasters are often unforeseen. Rather, Congress would need to appropriate funds for disaster assistance through the ordinary budget process. This restricted definition of “emergency” would be enforceable by a point of order in either House of Congress.⁷⁴

Second, the Bush Administration’s proposal would unpackage emergency appropriations and delineate individual items of emergency spending, requiring that the President and Congress independently designate *each* item of emergency of spending as an “emergency.”⁷⁵ This rule, effectively a line-item veto for emergency spending, would prevent the bundling of non-emergent expenditures with a true emergency spending bill. If the President does not concur with Congress’ designation of “emergency” for a given item of spending, the expenditure would not be exempt from discretionary caps or PAYGO. Without this additional provision, a tighter

⁷³ See OFFICE OF MANAGEMENT AND BUDGET, ANALYTICAL PERSPECTIVES, *supra* note 2, at 239. In the past few years, multiple bills have been introduced in Congress that would enact this five-part definition of “emergency.” See, e.g., Common Sense Spending Act of 2005, H.R. 523, 109th Cong. § 6 (2005); Common Sense Spending Act of 2004, H.R. 3853, 108th Cong. § 6 (2004); Common Sense Spending Act of 2003, H.R. 1175, 108th Cong. § 6 (2003); Budget Fraud Elimination Act of 2003, H.R. 180, 108th Cong. § 202 (2003). Further, every one of these Congressional bills explains that a “necessary expenditure” is one that would prevent, mitigate, or respond to “loss of life or property, or a threat to national security.” *Id.* None of these bills, however, has been reported out of its respective committee.

⁷⁴ See Common Sense Spending Act of 2005, H.R. 523, 109th Cong. § 7(a) (2005) (“It shall not be in order in the Senate or the House of Representatives to consider any [measure] that contains an emergency designation . . . unless the proposed emergency requirement meets the definition of an ‘emergency’ . . .”); Common Sense Spending Act of 2004, H.R. 3853, 108th Cong. § 7(a) (2004) (same); Common Sense Spending Act of 2003, H.R. 1175, 108th Cong. § 7(a) (2003) (same); Budget Fraud Elimination Act of 2003, H.R. 180, 108th Cong. § 203 (2003) (same).

⁷⁵ *Id.*

definition of “emergency” would be overcome simply by attaching riders onto each emergency appropriation.

Third, various Republican Senators and Representatives have advocated accrual funding of an emergency reserve fund, thereby compelling Congress to appropriate for emergencies through the regular budget process (and under the regular budget enforcement rules).⁷⁶ These proposals would create a “Rainy Day Fund for Emergencies,” and require that Congress appropriate an annual amount into the funds equivalent to the average of the outlays for emergencies in the five preceding fiscal years.⁷⁷ Outlays to cover national emergencies would have to come first from this fund. Further, emergency spending that exceeds the set-aside in the emergency fund would not be exempt from caps on discretionary spending. If Congress decided to spend money on emergencies, it would have to reduce spending in another discretionary category. This proposal, however, would exempt defense spending from this provision; that is, with the President’s approval, Congress could enact emergency / supplemental appropriations for defense spending that would *not* be subject to spending caps.⁷⁸

Fourth, some reformers have proposed to eliminate the “emergency” spending designation altogether, thereby doing away with the ability to avoid budget enforcement.⁷⁹ This proposal, however, has not gained much traction in academia or in Congress.

B. Revenue Estimation

The current methodology of revenue estimation is subject to three major critiques. The first, and most important, is that current methodology does not accurately estimate the true revenue effects of tax legislation, because it does not sufficiently incorporate dynamic estimation

⁷⁶ See Family Budget Protection Act of 2004, S. 2752, 108th Cong. tit. I subtit. B (2004); Deficit Control Act of 2004, H.R. 3925, 108th Cong. tit. I subtit. B (2004).

⁷⁷ See *id.*

⁷⁸ *Id.*

⁷⁹ See Family Budget Protection Act of 2003, H.R. 3358, 108th Cong. § 201(c) (2003).

techniques. The second is that the estimating process is far too opaque, with very little information provided to the public about the means by which estimates are created. The third criticism is that, because revenue estimates are produced with a five or ten year window, legislation can be manipulated so that its full revenue effects fall outside of the window, and are not incorporated in the estimation process.

1. Employ Dynamic Revenue Estimation

The primary critique of the current method of estimating revenue is that it is willfully inaccurate, in that it fails to utilize dynamic scoring. As explained above, dynamic scoring is the process by which the predicted macroeconomic effects of a piece of tax legislation are incorporated into its revenue estimate. If a piece of tax legislation would reduce the marginal rate taxed on wages, for example, then in a dynamic model the revenue reduction caused by the reduced rate would be partially compensated for by the predicted increase in the labor supply, increased consumption, and other macroeconomic effects caused by the tax decrease. Revenue estimates that lack dynamic scoring, however, are not accurately described as static; under their current practices, the JCT and other revenue estimators take behavioral effects into account when preparing their estimates.

Proponents of dynamic scoring believe that current revenue estimates overstate the revenue losses of tax cuts, because they fail to measure the increased growth that the tax cuts would spur. This belief finds its economic underpinnings in the supply-side economics that predict that tax reductions will stimulate savings and investment, and increase labor supply. While it is widely accepted that tax cuts do generally have positive effects on growth, opponents of dynamic scoring believe that the macroeconomic effects cannot be predicted with enough

certainty to be included in revenue estimates, and that if they were, estimators would be particularly susceptible to political pressure to overestimate them.

In 1995, for the first time, the JCT and the House and Senate Budget Committees conducted a joint hearing to consider the role of dynamic scoring in promoting more accurate revenue assessments. The witnesses called to the hearing spanned the political spectrum, and generally agreed that dynamic scoring had the potential to improve revenue estimates, but that more research and modeling would have to be done before any dynamic scoring would be implemented.⁸⁰ In 1996, the JCT conducted meetings with twelve economic modelers to explore dynamic modeling, culminating in a symposium in January 1997.⁸¹ As a result of these efforts, the JCT uses its own internal macroeconomic models as well as commercially available macroeconomic models in an effort to predict dynamic effects.⁸²

In 2002, the JCT convened a Blue Ribbon Panel of experts to assess and improve the models that it had developed to incorporate dynamic scoring into its estimating process. There was significant disagreement among members of the panel about which type of model would be the most appropriate for estimating dynamic effects.⁸³

In 2003, the House of Representatives passed a revised Rule XIII.3(h)(2) pertaining to macroeconomic analysis of tax bills, which directed that it would not be in order to consider tax

⁸⁰ See Field, *supra* note 32.

⁸¹ See JOINT COMM. ON TAXATION, JCX-105-03, OVERVIEW OF WORK OF THE STAFF OF THE JOINT COMMITTEE ON TAXATION TO MODEL THE MACROECONOMIC EFFECTS OF PROPOSED TAX LEGISLATION TO COMPLY WITH HOUSE RULE XIII.3(H)(2), at 4 (Dec. 22, 2003).

⁸² *Id.* The JCT uses two internal models, the Macroeconomic Equilibrium Growth (“MEG”) model, an overlapping generations (“OLG”) model, and has contracts with two commercial modelers, including the Global Insight model.

⁸³ *Id.* at 24 (“Some Panel members supported use of the MEG model, while others expressed firm opposition against relying on the MEG model as the main tool to analyze the effects of changes in tax policy. Other suggested model types included intertemporal life-cycle models, stochastic life-cycle models, structural econometric models, and detailed microsimulation life-cycle models that use individual level detail from the Joint Committee’s microsimulation models.”).

legislation unless it included a macroeconomic impact analysis performed by the JCT.⁸⁴ Earlier rules had made consideration of dynamic estimates permissible, but they had not often been requested.⁸⁵ According to the JCT, most tax proposals would be unlikely to have any significant effect on the economy, and only those proposals which would change the average individual income tax liability, effective marginal income tax rates, average corporate liability, or the present value of tax depreciation on business investments would have dynamic effects.⁸⁶ It is unknown whether this point of order has ever been invoked. It is clear, however, that the existence of this House rule creating a point of order has not led to dynamic estimates becoming the official estimates used in the budgetary process, or to an increase in the status of dynamic estimation generally.

Without dynamic scoring, the macroeconomic effects of tax legislation are presumed to be zero. Proponents of dynamic scoring predict that its practical effect would be to decrease the cost of tax reductions (and to decrease the revenue gained from tax increases). However, some economists predict that the increased deficits caused by some tax proposals would displace private savings, push up interest rates, and cause tax reductions to have a net negative effect on the economy.⁸⁷ Thus, the macroeconomic effects of a tax reduction captured by dynamic scoring would increase the revenue losses when compared to a conventional estimate.

This debate highlights the primary concern with dynamic scoring; that it is too uncertain to rely upon, and that attempting to incorporate it introduces uncertainty and wastes the scarce

⁸⁴ Rules of the House of Representatives, 108th Cong., Rule XIII.3(h)(2) (Jan. 7, 2003), *available at* <http://www.house.gov/rules/108rules.pdf>.

⁸⁵ CHARLES W. JOHNSON, PARLIAMENTARIAN, CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, U.S. GPO 551 (1997). Rule XIII.7.(e), adopted by the 105th, 106th, and 107th Congresses, allowed a Member to request the JCT to perform a dynamic estimate, and stated that such estimates would be used for "informational purposes."

⁸⁶ See Field, *supra* note 32, at 13.

⁸⁷ William Gale & Samara Potter, *An Economic Evaluation of the Economic Growth and Tax Relief Reconciliation Act of 2001*, 55 NAT'L TAX J. __ (2002).

resources of the estimating bodies. This concern finds some support in the JCT's own dynamic analysis of H.R. 2, The Jobs and growth Act of 2003. The JCT performed this analysis in five of its dynamic models and produced a range of revenue estimates from 5.8% to 27.5% higher than the conventional estimate over a five-year period.⁸⁸ When this same analysis was done over a ten-year period, the estimated range of increased revenue dropped to 2.6% – 23.4%.⁸⁹ The mean increase dropped from 13.06% over the five-year period to 8.88% over the ten-year period. The existence of multiple models reflects the disagreement within the JCT and the academic community about which models best predict the behavior of the economy on a macro level.

Table 2: Predicted Effects on Real Revenues Relative to Conventional Estimate for H.R. 2

	2003-2008	2003-2013
Neoclassical Growth Model:		
MEG-aggressive Fed reaction	9.8	3.6
MEG-neutral Fed reaction	27.5	23.4
Economic Model:		
GI Fed Taylor reaction function	16.1	11.8
Life Cycle Model:		
OLG Reduced Government Spending in 2014	6.1	3
OLG Increased Taxes in 2014	5.8	2.6

This debate extends beyond politics and into academics, which is understandable, given the economics and econometrics that underlie the theory of dynamic scoring. The fact that the JCT used multiple models in the analysis described above reflects the disagreement among the academics that made up the Blue Ribbon Panel that advised the JCT in 2002. Some economists, like Peter Orszag, think that dynamic scoring should not be incorporated at all.⁹⁰ Others, such as

⁸⁸ See Field, *supra* note 32, at 36.

⁸⁹ *Id.*

⁹⁰ See *Assessing the Accuracy of Federal Budget Estimating: Hearing Before the Subcomm. on Legislative and Budget Process, House Comm. on Rules, 107th Cong. (2002)* (statement of Peter R. Orszag, Senior Fellow, Brookings Institution), available at http://www.house.gov/rules/orszag_test050202.pdf. Orszag testified that “given the other biases in the budget process toward irresponsible fiscal policies and the inauspicious fiscal outlook for the nation, dynamic scoring poses a significant threat.” *Id.* at 10.

Martin Feldstein, believe that dynamic scoring would improve the estimating process.⁹¹ Most academics hold to the belief expressed by the members called to the first hearing that the JCT conducted on dynamic scoring in 1995: it has the potential to improve estimates, but there are many difficulties.

While the proponents of dynamic scoring for tax legislation are typically supply-side economists, Keynesian economists, by using the logic of dynamic scoring, could argue that the costs of many government expenditures are overstated in the same way that conventional estimates overstate the costs of tax cuts. If the government stimulates the economy through its spending, for example by building infrastructure, then dynamic scoring would take into account the beneficial macroeconomic effects caused by the project and reduce the cost estimate of the proposal.

It is also important to remember that the CBO baselines, which provide the starting point for all of the JCT's estimates, do incorporate macroeconomic policy when they predict what the economy will do during the ten years in the budget window. For example, if the CBO baseline predicts a nominal GDP growth rate of 5%, then a tax cut that occurs three years from will be assumed to apply to a GDP base that has grown by 5% per year in the intervening time.

In some sense, it is easier, but less politically important, to use dynamic estimation in the baseline than in scoring a piece of legislation. The baseline needs to be done every year, or perhaps redone if there is a large change to the economic landscape during the year. Scoring, on the other hand, needs to be done for every bill proposed in Congress. And although the baseline has important political ramifications, in that it is widely consumed by the public and used as a starting point in new legislation, a revenue estimate is even more important under a PAYGO

⁹¹ See JOINT COMM. ON TAXATION, JCX-2-95, METHODOLOGY AND ISSUES IN THE REVENUE ESTIMATING PROCESS § V (Jan. 23, 1995), *available at* <http://www.house.gov/jct/x-2-95.pdf>.

regime. This is because every dollar of tax cut needs to be replaced with a dollar of tax increase or a dollar of entitlement reduction. Thus, a method of estimation that predicts that a tax cut will produce 25% more revenue than the conventional estimate would require fewer hard choices mandates by PAYGO and increases the odds that the bill will be passed. This highlights the importance of using dynamic scoring as the official estimate, rather than as just another estimate provided for the benefit of the Members.

Implicitly or explicitly, most opponents of dynamic scoring exhibit the belief that political pressures create a bias towards deficit spending, and that any policy that would make tax reductions or spending increases look less expensive would only exacerbate the reckless budget policies exhibited by Congress over the last thirty years.

2. Increase Transparency In Revenue Estimates

Due to the increased importance of revenue estimates in the Federal Budget process, there has been dissatisfaction in recent years about the lack of transparency regarding the technical process by which the estimates are produced. Proponents of increased transparency want the estimating bodies to publish explanations of how they prepare revenue estimates, explain the process through seminars or conferences, and publish as much of the source data derived from the IRS as possible within privacy constraints.⁹² They argue that providing this transparency would increase the accuracy and honesty of the revenue estimates, as well as keep tax professionals (academics and practitioners) in the loop. In a process where, as Alan Auerbach, as former Deputy Chief of Staff at the JCT said: “in many instances, the uncertainty is so great that one honestly could report a number either twice or half the size of the estimate actually reported,” many critics desire more transparency about the process.⁹³ It should be noted

⁹² See Field, *supra* note 32, at 2.

⁹³ Alan J. Auerbach, *Dynamic Revenue Estimation*, 10 J. ECON. PERSPECTIVES 141, 156 (1996).

that the JCT releases periodic updates that discuss its methodologies in a general way, and has been very open about the process by which it is attempting to model dynamic effects.

Opponents of increased transparency argue that it would not be cost effective to disclose the details of every one of the thousands of estimates produced each year. More substantially, they argue that transparency would subject the revenue estimators to increased political pressure by subjecting them to further scrutiny by those who would benefit from politicizing the estimation process. Additionally, increased scrutiny would decrease the room for professional judgment of the estimator who must be as much an artist as a scientist.

3. Prevent Budget Window Gaming

In a manner similar to that used in scoring, legislators who want to avoid negative revenue implications commonly structure revenue losses so that they fall outside of the budget window. While manipulating the budget window is more commonly used to diminish the estimates of expenditures (especially long-term entitlements), or to manipulate the CBO baseline (for example, sunset tax cuts), than to minimize the revenue costs of a tax cut,⁹⁴ the existence of a limited year budget window invites these kinds of budget machinations. For example, the creation of the Roth IRA in the 1990s reveals a prime case of back-loaded revenue loss. Because the Roth IRA taxes contributions and allows tax-free withdrawals,⁹⁵ it provides up-front revenue gains to the Government, at least when compared with traditional IRAs. In the long-term, however, Roth IRAs have larger losses than traditional IRAs because the Government does not recognize any revenues on the rear end of the transaction. As of their enactment, the Joint Committee on Taxation estimated the ten-year loss from Roth IRAs to top \$20 billion, as

⁹⁴ Structuring tax cuts such that the main reductions are five or ten years out diminishes the political benefits in an obvious way: the legislator is offering a benefit today that will not be available to the recipient for many years (and may be rescinded before then). In contrast, as mentioned in the section discussing scoring, pushing out the benefits of an entitlement program does not diminish its political advantage nearly as much.

⁹⁵ See 26 U.S.C. § 408 (2000).

opposed to a mere \$ 1.8 billion loss during their first five years of existence.

If dynamic scoring were to be the official method for scoring tax cuts, the choice between a five and ten-year budget window would become more consequential, largely because of the effects in the models that underlie JCT's estimates.⁹⁶ Many macroeconomic theories predict stabilization over time, such that a tax decrease in year one leads to decreased spending or increased taxes in the following years, either of which have contractionary effects that would diminish the predicted revenue increase. However, these effects are largely included in a ten-year budget window, making the difference between a ten-year and infinite window minimal.

CONCLUSION

Scoring and revenue estimation serve such a central position in the federal budget process, for purposes of both creating the budget and enforcing budget control mechanisms. As the various reforms proposals suggest, however, these tools are subject to manipulation at the hands of policy makers intent on pursuing their own agendas. For the budget process to operate in an objective, transparent, and accurate fashion, Congress should seriously consider implementing some of these proposed reforms.

⁹⁶ See *supra* Table 2. Over a ten-year period, the range of predicted revenue increases relative to the conventional estimate decreased.

EXHIBIT A**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
CIRCULAR NO. A-11 (2004)****PART 8****APPENDIX A—SCOREKEEPING GUIDELINES**

These budget scorekeeping guidelines are used by the House and Senate Budget Committees, the Congressional Budget Office, and the Office of Management and Budget (the “scorekeepers”) in measuring compliance with the Congressional Budget Act of 1974 (CBA), as amended, and GRH, as amended. The purpose of the guidelines is to ensure that the scorekeepers measure the effects of legislation on the deficit consistent with established scorekeeping conventions and with the specific requirements in those Acts regarding discretionary spending, direct spending, and receipts. These rules are reviewed annually by the scorekeepers and revised as necessary to adhere to the purpose. They cannot be changed unless all of the scorekeepers agree. New accounts or activities are classified only after consultation among the scorekeepers. Accounts and activities cannot be reclassified unless all of the scorekeepers agree. Even though the Budget Enforcement Act expired at the end of 2002, the scorekeepers continue to apply these scorekeeping principles.

1. Classification of appropriations

A list of appropriations that are normally enacted in appropriations acts is included in the conference report of the Balanced Budget Act of 1997, House Report 105–217, pp. 1014–1053. The list identifies appropriated entitlements and other mandatory spending in appropriations acts, and it identifies discretionary appropriations by category.

2. Outlays prior

Outlays from prior-year appropriations will be classified consistent with the discretionary/mandatory classification of the account from which the outlays occur.

3. Direct spending programs

Entitlements and other mandatory programs (including offsetting receipts) will be scored at current law levels, as defined in section 257 of GRH, unless congressional action modifies the authorizing legislation. Substantive changes to or restrictions on entitlement law or other mandatory spending law in appropriations laws will be scored against the Appropriations Committee’s section 302(b) allocations in the House and the Senate. For the purpose of CBA scoring, direct spending savings that are included in both an appropriations bill and a reconciliation bill will be scored to the reconciliation bill and not to the appropriations bill. For scoring under sections 251 or 252 of GRH, such provisions will be scored to the first bill enacted.

4. Transfer of budget authority from a mandatory account to a discretionary account

The transfer of budget authority to a discretionary account will be scored as an increase in discretionary budget authority and outlays in the gaining account. The losing account will not show an offsetting reduction if the account is an entitlement or mandatory program.

5. Permissive transfer authority

Permissive transfers will be assumed to occur (in full or in part) unless sufficient evidence exists to the contrary. Outlays from such transfers will be estimated based on the best information available, primarily historical experience and, where applicable, indications of Executive or congressional intent. This guideline will apply both to specific transfers (transfers where the gaining and losing accounts and the amounts subject to transfer can be ascertained) and general transfer authority.

6. Reappropriations

Reappropriations of expiring balances of budget authority will be scored as new budget authority in the fiscal year in which the balances become newly available.

7. Advance appropriations

Advance appropriations of budget authority will be scored as new budget authority in the fiscal year in which the funds become newly available for obligation, not when the appropriations are enacted.

8. Rescissions and transfers of unobligated balances

Rescissions of unobligated balances will be scored as reductions in current budget authority and outlays in the year the money is rescinded.

Transfers of unobligated balances will be scored as reductions in current budget authority and outlays in the account from which the funds are being transferred, and as increases in budget authority and outlays in the account to which these funds are being transferred.

In certain instances, these transactions will result in a net negative budget authority amount in the source accounts. For purposes of section 257 of GRH, such amounts of budget authority will be projected at zero. Outlay estimates for both the transferring and receiving accounts will be based on the spending patterns appropriate to the respective accounts.

9. Delay of obligations

Appropriations acts specify a date when funds will become available for obligation. It is this date that determines the year for which new budget authority is scored. In the absence of such a date, the act is assumed to be effective upon enactment.

If a new appropriation provides that a portion of the budget authority shall not be available for obligation until a future fiscal year, that portion shall be treated as an advance appropriation of budget authority. If a law defers existing budget authority (or unobligated balances) from a year in which it was available for obligation to a year in which it was not available for obligation, that law shall be scored as a rescission in the current year and a reappropriation in the year in which obligational authority is extended.

10. Contingent legislation

If the authority to obligate is contingent upon the enactment of a subsequent appropriation, new budget authority and outlays will be scored with the subsequent appropriation. If a discretionary appropriation is contingent on the enactment of a subsequent authorization, new budget authority and outlays will be scored with the appropriation. If a discretionary appropriation is contingent on the fulfillment of some action by the Executive branch or some other event normally estimated, new budget authority will be scored with the appropriation, and outlays will be estimated based on the best information about when (or if) the contingency will be met. If direct spending legislation is contingent on the fulfillment of some action by the Executive branch or some other event normally estimated, new budget authority and outlays will be scored based on the best information about when (or if) the contingency will be met. Non-lawmaking contingencies within the control of the Congress are not scoreable events.

11. Scoring purchases

When a law provides the authority for an agency to enter into a contract for the purchase, lease-purchase, capital lease, or operating lease of an asset, budget authority and outlays will be scored as follows:

For lease-purchases and capital leases, budget authority will be scored against the legislation in the year in which the budget authority is first made available in the amount of the estimated net present value of the Government's total estimated legal obligations over the life of the contract, except for imputed interest costs calculated at Treasury rates for marketable debt instruments of similar maturity to the lease period and identifiable annual operating expenses that would be paid by the Government as owner (such as utilities, maintenance, and insurance). Property taxes will not be considered to be an operating cost. Imputed interest costs will be classified as mandatory and will not be scored against the legislation or for current level but will count for other purposes.

For operating leases, budget authority will be scored against the legislation in the year in which the budget authority is first made available in the amount necessary to cover the Government's legal obligations. The amount scored will include the estimated total payments expected to arise under the full term of a lease contract or, if the contract will include a cancellation clause, an amount sufficient to cover the lease payments for the first fiscal year during which the contract is in effect, plus an amount sufficient to cover the costs associated with cancellation of the contract. For funds that are self-insuring under existing authority, only budget authority to cover the annual lease payment is required to be scored.

Outlays for a lease-purchase in which the Federal government assumes substantial risk (for example, through an explicit Government guarantee of third party financing) will be spread across the period during which the contractor constructs, manufactures, or purchases the asset. Outlays for an operating lease, a capital lease, or a lease-purchase in which the private sector retains substantial risk will be spread across the lease period. In all cases, the total amount of outlays scored over time against legislation will equal the amount of budget authority scored against that legislation.

No special rules apply to scoring purchases of assets (whether the asset is existing or is to be manufactured or constructed). Budget authority is scored in the year in which the authority to purchase is first made available in the amount of the Government's estimated legal obligations. Outlays scored will equal the estimated disbursements by the Government based on the particular purchase arrangement, and over time will equal the amount of budget authority scored against that legislation.

Existing contracts will not be rescored.

To distinguish lease purchases and capital leases from operating leases, the following criteria will be used for defining an operating lease:

- Ownership of the asset remains with the lessor during the term of the lease and is not transferred to the Government at or shortly after the end of the lease period.
- The lease does not contain a bargain-price purchase option.
- The lease term does not exceed 75 percent of the estimated economic lifetime of the asset.
- The present value of the minimum lease payments over the life of the lease does not exceed 90 percent of the fair market value of the asset at the inception of the lease.
- The asset is a general purpose asset rather than being for a special purpose of the Government and is not built to unique specification for the Government as lessee.
- There is a private-sector market for the asset.

Risks of ownership of the asset should remain with the lessor.

Risk is defined in terms of how governmental in nature the project is. If a project is less governmental in nature, the private-sector risk is considered to be higher. To evaluate the level of private-sector risk associated with a lease-purchase, legislation and lease-purchase contracts will be considered against the following type of illustrative criteria, which indicate ways in which the project is less governmental:

- There should be no provision of Government financing and no explicit Government guarantee of third party financing.
- Risks of ownership of the asset should remain with the lessor unless the Government was at fault for such losses.
- The asset should be a general purpose asset rather than for a special purpose of the Government and should not be built to unique specification for the Government as lessee.
- There should be a private-sector market for the asset.
- The project should not be constructed on Government land.

Language that attempts to waive the Anti-Deficiency Act, or to limit the amount or timing of obligations recorded, does not change the Government's obligations or obligational authority, and so will not affect the scoring of budget authority or outlays.

Unless language that authorizes a project clearly states that no obligations are allowed unless budget authority is provided specifically for that project in an appropriations bill in advance of the obligation, the legislation will be interpreted as providing obligation authority, in an amount to be estimated by the scorekeepers.

12. Write-offs of uncashed checks, unredeemed food stamps, and similar instruments

Exceptional write-offs of uncashed checks, unredeemed food stamps, and similar instruments (i.e., write-offs of cumulative balances that have built up over several years or have been on the books for several years) shall be scored as an adjustment to the means of financing the deficit rather than as an offset. An estimate of write-offs or similar adjustments that are part of a continuing routine process shall be netted against outlays in the year in which the write-off will occur. Such write-offs shall be recorded in the account in which the outlay was originally recorded.

13. Reclassification after an agreement

Except to the extent assumed in a budget agreement, a law that has the effect of altering the classification or scoring of spending and revenues (e.g., from discretionary to mandatory, special fund to revolving fund, on-budget to off-budget, revenue to offsetting receipt), will not be scored as reclassified for the purpose of enforcing a budget agreement.

14. Scoring of receipt increases or direct spending reductions for additional administrative or program management expenses

No increase in receipts or decrease in direct spending will be scored as a result of provisions of a law that provides direct spending for administrative or program management activities.

15. Asset sales

If the net financial cost to the Government of an asset sale is zero or negative (a savings), the amount scored shall be the estimated change in receipts and mandatory outlays in each fiscal year on a cash basis. If the cost to the Government is positive (a loss), the proceeds from the sale shall not be scored for purposes of the CBA or GRH.

The net financial cost to the Federal government of an asset sale shall be the net present value of the cash flows from:

- (1) Estimated proceeds from the asset sale;
- (2) The net effect on Federal revenues, if any, based on special tax treatments specified in the legislation;

(3) The loss of future offsetting receipts that would otherwise be collected under continued Government ownership (using baseline levels for the projection period and estimated levels thereafter); and

(4) Changes in future spending, both discretionary and mandatory, from levels that would otherwise occur under continued Government ownership (using baseline levels for the projection period and at levels estimated to be necessary to operate and maintain the asset thereafter).

The discount rate used to estimate the net present value shall be the average interest rate on marketable Treasury securities of similar maturity to the expected remaining useful life of the asset for which the estimate is being made, plus 2 percentage points to reflect the economic effects of continued ownership by the Government.

16. Indefinite borrowing authority and limits on outstanding debt

If legislation imposes or changes a limit on outstanding debt for an account financed by indefinite budget authority in the form of borrowing authority, the legislation will be scored as changing budget authority only if and to the extent the imposition of a limit or the change in the existing limit alters the estimated amount of obligations that will be incurred.

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