



CRS Report for Congress

Senate Rules Changes in the 110th Congress Affecting Restrictions on the Content of Conference Reports

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Summary

P.L. 110-81, the Honest Leadership and Open Government Act of 2007 (S. 1), includes provisions that affect Senate rules concerning restrictions on conference reports in two ways. First, it amends Senate Rule XXVIII concerning “out of scope material” in conference reports. The modification to Rule XXVIII does not change existing restrictions on the content of conference reports, but it does significantly alter how the Senate may dispose of points of order raised under the rule. Second, the law establishes a new Senate Rule XLIV concerning congressionally directed spending provisions. Paragraph 8 of that rule creates a new restriction on conference reports; it precludes them from including any specific items of discretionary or mandatory spending that were not in either the House or Senate version of the legislation sent to conference. If a point of order is raised against a conference report under either the modified Rule XXVIII or under the new Rule XLIV, Paragraph 8, the rules allow the Senate to strike out the offending portion of the conference recommendation, but agree to the rest of the compromise. Furthermore, the Senate also can waive either of these rules with a three-fifths vote of Senators duly chosen and sworn (60 Senators if there are no vacancies).

Senate rules have long placed restrictions on what can be included in a conference report. The Senate changed its rules concerning conference reports on September 14, 2007, when the President signed S. 1, the Honest Leadership and Open Government Act of 2007 (P.L. 110-81). Two of the changes that went into effect upon enactment of the law affected the authority of conferees to include in their report matter that was not passed by the House or Senate before the conference committee was appointed. Colloquially, such provisions are sometimes said to have been “airdropped” into the conference report.

First, the enactment of S. 1 affected the consequences of violating the existing Senate Rule XXVIII that precludes conference agreements from including policy provisions that were not sufficiently related to either the House or the Senate version of the legislation sent to conference. Such provisions are considered to be “out of scope” under long-standing Senate rules and precedents. Second, S. 1 created a point of order in Paragraph

8 of Rule XLIV that can be raised against “new directed spending provisions,” or provisions in a conference report that provide specific items of appropriations or direct spending that were not committed to the conference committee in either the House or Senate versions of the legislation.

This report first gives a brief overview of what has been (and what will continue to be) considered “out of scope” material under Senate rules and precedents. It then discusses in detail the definition of a “new directed spending provision.” Finally, the report describes the disposition and waiving of points of order raised against conference reports containing “out of scope” material and “new directed spending provisions.” The **Box**, at the end of the report, outlines the procedural steps for disposing of these points of order when they are raised against conference reports.

The interpretation of Senate rules, of course, ultimately rests with the Senate, and the implementation of the new rules will depend on Senate practice. The discussion here should not be considered a substitute for consultation with the parliamentarian on specific procedural problems and opportunities.

Senate Rule XXVIII: Out of Scope Material. Senate and House rules place restrictions on the kinds of agreements conferees can propose to their two houses. Implicit in the rules of both chambers is the requirement that conferees resolve the differences committed to them by reaching agreements within what is known as “the scope of the differences” between the House and Senate versions of the bill. The conferees may accept the House position, the Senate position, or a position that is a compromise between them. Any position that is not within this range of options exceeds the scope of the differences between the two houses. It constitutes “matter not committed to them by either House,”¹ and makes their conference report subject to a point of order on both the House and Senate floor.

In practice, these restrictions are not as stringent as they may seem on their face. The House often waives its rules that restrict the authority of conferees, and the Senate has developed precedents that grant its conferees considerable latitude in reaching agreements with the House, especially when they are in conference with a bill from one house and a single amendment from the other house that proposes to replace the entire text of the bill.² Rulings and practices in the Senate have left the chamber with a body of precedents that allow the inclusion of new matter as long as it is reasonably related to the matter sent to conference.³

¹ Senate Rule XXVIII, paragraph 2; see also House Rule XXII, clause 9.

² Floyd M. Riddick and Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, 101st Cong., 2nd sess., S.Doc. 101-28 (Washington: GPO, 1992), (Hereafter *Riddick's Procedure*), pp. 460-464.

³ The rules and precedents associated with Senate Rule XXVIII are more complicated than summarized here. For more information, see CRS General Distribution Memorandum, *Senate Decisions Concerning the Authority of Conferees (Rule XXVIII)*, by Elizabeth Rybicki (available from the author).

The amendment to Senate Rule XXVIII did not alter the definition of what constitutes “new matter.” As described below, the significant change to Rule XXVIII was a change to the method for disposing of the point of order.

Senate Rule XLIV, Paragraph 8: New Directed Spending Provisions.

Paragraph 8 of the new Senate Rule XLIV established a new restriction on the content of conference reports.⁴ Under the rule, a Senator can raise a point of order against provisions of a conference report if they constitute “new directed spending provisions.” The rule defines “new directed spending provisions” as:

... any item that consists of a specific provision containing a specific level of funding for any specific account, specific program, specific project, or specific activity, when no specific funding was provided for such specific account, specific program, specific project, or specific activity in the measure originally committed to the conferees by either House.

It is worth emphasizing that Paragraph 8 of Rule XLIV applies only to the *conference report*, and not to the *joint explanatory statement* (also known as the *statement of managers*) that accompanies it. Joint explanatory statements are signed by the conferees, but, like reports of standing committees, are not voted on by the House or Senate, and cannot be changed through any formal amendment process. It is the conference report that contains the formal legislative language that will become law if both chambers agree to the report and the measure is then signed by the President.

In contrast to Rule XXVIII, which applies to the full text of every conference report, Paragraph 8 of Senate Rule XLIV applies only to provisions of conference reports that would provide for actual spending. In other words, it applies only to discretionary and mandatory spending provisions and not to authorizations of appropriations.⁵ Discretionary spending is provided in appropriations acts, and generally funds routine operations of the federal government. Mandatory spending, also referred to as direct spending, is provided in substantive law, and generally funds entitlement programs, such as Social Security and Medicare.⁶

A hypothetical example can illustrate the difference between the Rule XXVIII “scope” point of order and the Rule XLIV, Paragraph 8, “new directed spending” point of order. The House might pass an appropriations bill providing funding for several specific projects. The Senate might pass this bill with an amendment in the nature of a substitute, and the two houses then could agree to a conference. The conferees might agree to include in the conference report funding for several similar projects that were not listed in the House bill or in the Senate substitute. Under Rule XXVIII, the provision

⁴ The rest of Senate Rule XLIV, which establishes disclosure requirements for congressionally directed spending items, limited tax benefits, and limited tariff benefits, is not addressed in this report.

⁵ For more information on the applicability of Paragraph 8 of Rule XLIV, see a letter from the Majority Leader inserted into the *Congressional Record*, daily edition, vol. 153 (September 24, 2007), pp. S11993-S11994.

⁶ For more information on discretionary and direct spending, see CRS Report RS20371, *Overview of the Authorization-Appropriations Process*, by Bill Heniff Jr.

including funding for additional projects would likely be considered to be reasonably related to the matter sent to conference, and therefore not subject to a point of order. Under Rule XLIV, Paragraph 8, however, provisions of this kind would likely be interpreted to be “new directed spending provisions” and therefore subject to a point of order.⁷

Disposing of the Point of Order. The enactment of S. 1 established a procedure, identical in the amended Rule XXVIII and the new Rule XLIV, that allows the Senate to strike “new matter” or “new directed spending provisions” from the conference report but agree to rest of the terms of the compromise. It is not in order, however, for either chamber to alter the text of a conference report, and therefore the process converts the text of the conference compromise minus the “new matter” or “new directed spending provisions” into an amendment. If the Senate agrees to this amendment, it is then sent to the House for consideration in that chamber.

The change in the method of disposing of Rule XXVIII points of order could significantly affect Senate practices. Under the former Rule XXVIII, when a scope point of order was sustained against a conference report, the report was recommitted to the conference committee, assuming the House had not yet acted on the conference report. If the House had acted, then there was no conference committee to which the report could be recommitted, and the report would fall, leaving before the Senate the bill and any amendments that had originally been committed to conference. Before the enactment of S. 1, if a point of order was sustained against a conference report under Rule XXVIII, the conference report typically would either die or face an uncertain fate back in conference committee. This fact likely affected the decisions of conferees to include provisions that could be considered “new matter,” as well as the decisions of Senators about whether to raise a point of order regarding a particular provision and risk the defeat of the conference compromise as a whole.

Under the process established by the enactment of S. 1, a Senator can make a point of order against one or more provisions of a conference report. If the point of order is not waived (see below), the Presiding Officer rules whether or not the provision is in violation of the rule. If a point of order is raised against more than one provision, the Presiding Officer can make separate decisions regarding each provision.

When the Presiding Officer sustains a point of order against a conference report on the grounds that it violates either the prohibition of “new matter” or “new directed spending provisions,” the matter will be stricken from the conference recommendation. After all points of order raised under this procedure are disposed of, the Senate will proceed to consider a motion to send to the House, in place of the original conference agreement, a proposal consisting of the text of the conference agreement minus the “new matter” or “new directed spending provision” that was stricken.⁸ Amendments to this

⁷ On August 2, 2007, the Presiding Officer affirmed, in response to a parliamentary inquiry, that “points of order concerning new directed spending will be considered pursuant to the new rule XLIV, rather than the amended rule XXVIII” (*Congressional Record*, daily edition, vol.153 (August 2, 2007), p. S10718).

⁸ The form of the motion depends on what the House and Senate sent to conference. Very often,
(continued...)

motion are not in order. The motion to agree to the bicameral compromise with the “new matter” or “new directed spending provision” stricken is debatable “under the same debate limitation as the conference report.”⁹ Under the regular rules of the Senate, debate on conference reports is not limited. It is limited only if the Senate agrees to limit debate by unanimous consent, if cloture has been successfully invoked on the conference report, or if the Senate is considering the report under an expedited procedures established by law (such as the procedures for considering budget resolutions and budget reconciliation measures under the Budget Act). In short, the terms for consideration of the motion to send to the House the proposal without the offending provisions are the same as those that would have applied to the conference report itself.

If the Senate agrees to the motion, the conference recommendation as altered by the deletion of the “new matter” or “new directed spending provision” would be returned to the House in the form of an amendment between the Houses. The House would then have an opportunity to act on the amendment. The prohibition against amendments to a conference report does not apply to amendments between the Houses. Accordingly, the House could, under its procedures, agree to the modified compromise version as it was received from the Senate, or offer further amendment(s) thereto. The House could also request a further conference with the Senate, or choose to take no action at all on the new compromise language.

The procedure for disposing of points of order under either Rule XXVIII or Paragraph 8, Rule XLIV is similar to that currently followed for disposing of points of order against conference reports under the “Byrd rule” (Section 313(d) of the Congressional Budget Act). The Byrd Rule applies only to reconciliation measures, however.¹⁰

Waiving the Rule. The new rules also create a mechanism for waiving the restrictions on the content of conference reports. The points of order under Rule XXVIII and Paragraph 8 of Rule XLIV can be waived with the support of three-fifths of all Senators duly chosen and sworn (60 Senators if there are no vacancies). Senators can move to waive points of order against one or several provisions, or they can make one motion to waive all possible points of order under either rule. Under the new procedures, a motion to waive all points of order is not amendable, but a motion to waive points of order against specific provisions is. As a result, it will be possible for a Senator to ensure a vote on waiving all points of order under each rule, and, if successful, no separate motions to waive points of order against individual provisions would be necessary.

⁸ (...continued)

a House bill and a Senate amendment are sent to conference. The motion in that case would be for the Senate to recede from its amendment and concur in the House bill with a further Senate amendment consisting of the conference committee compromise without the “new matter” or “new directed spending provision.” If a Senate bill and House amendment were sent to conference, the motion would be that the Senate recede from its disagreement to the House amendment and concur in the House amendment with a further amendment.

⁹ Paragraph 4(b)(2) of Rule XXVIII; Paragraph 8(b)(2) of Rule XLIV.

¹⁰ For more information on the Byrd Rule, see CRS Report RL30862, *The Budget Reconciliation Process: The Senate’s “Byrd Rule,”* by Robert Keith.

Time for debate on the motion to waive is limited to one hour and is divided equally between the Majority Leader and the Minority Leader, or their designees. If the motion to waive garners the necessary support, the Senate is effectively agreeing to keep the matter that is potentially in violation of the rule in the conference report. Motions to waive “scope” (Rule XXVIII) points of order would be made and considered separately from motions to waive “new directed spending” (Rule XLIV, Paragraph 8) points of order.

The rules further require a three-fifths vote to sustain an appeal of the ruling of the Chair and limit debate on an appeal to one hour, equally divided between the party leaders or their designees. The purpose of these requirements is to ensure that either method by which the Senate could choose to apply these rules, through a motion to waive or through an appeal of the ruling of the Chair, requires a three-fifths vote of the Senate (usually 60 Senators). A simple majority (51 Senators if there are no vacancies and all Senators are voting) cannot achieve the same outcome. The effect of overturning a ruling of the Chair on appeal is quite different from the effect of agreeing to a motion to waive a rule. The decision on an appeal stands as the judgment of the Senate and becomes a precedent for the Senate to follow in future procedure. A decision to waive the rule, in contrast, does not change the interpretation of the rule in future practice.

Table 1. Procedural Steps for Disposing of Rule XXVIII or Rule XLIV, Paragraph 8 Point of Order (Including Motion to Waive)

<p>1. Senator makes a point of order pursuant to Rule XXVIII or Rule XLIV, paragraph 8.</p> <p>2. Senator <i>may</i> make a motion to waive the point of order. Motion to waive is debatable for one hour, divided and controlled by party leaders or their designees. Motion is in order even if a point of order has not been made.</p> <p>3a. If three-fifths of Senators duly chosen and sworn <i>vote in favor</i> of the motion to waive, <i>then consideration of the conference report continues.</i></p> <p>3b. If three-fifths of Senators duly chosen and sworn <i>fail to vote in favor</i> of the motion to waive, <i>then the Presiding Officer rules on the point of order.</i> The decision of the Presiding Officer can be appealed; appeal is debatable for one hour, divided and controlled by party leaders or their designees, and requires a three-fifths vote of Senators duly chosen and sworn to overturn.</p> <p>4. If point of order is sustained, then provisions against which Senator raised the point of order are stricken from the conference agreement.</p> <p>5. After all points of order under either rule are disposed of, the Senate considers an amendment that consists of the text of the conference agreement <i>minus</i> the stricken provisions. More formally, the motion before the Senate is typically either 1) to recede from the amendment to the House bill and to concur in the bill with a further Senate amendment; or 2) to recede from the disagreement to the House amendment and concur in the House amendment with a further Senate amendment. The exact form of the motion depends on what the House and Senate sent to conference. The motion is considered under the same debate limitations, if any, that existed for the conference report.</p> <p>6. If the Senate agrees to the amendment, it is sent to the House for further consideration.</p>
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