House Re-Elects Pelosi; Repeals “Ryan Rule” and Term Limits; Makes Highway Rescission Fix Easier

By Jeff Davis

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At noon yesterday, the 116th Congress began, and as its first order of business, the House of Representatives elected Nancy Pelosi (D-CA) Speaker once again with 220 votes out of 433 (50.8%). Republican leader Kevin McCarthy (CA) got 192 votes, and a total of 18 votes were cast for “shout-in” candidates, split about half-and-half between Republicans who thought McCarthy was not conservative enough and Democrats who opposed Pelosi from either the right or left. Another three Democrats voted “present” (see full roll call vote here).

The next major item of business was adopting the rules of the House for the 116th Congress, with a package of changes unveiled New Years Day at about 8:30 p.m. The text of the resolution adopting the rules changes (H. Res. 6, 116th Congress) is here and a section-by-section analysis is here). The House then split up the vote on adoption of H. Res. 6 into three parts (titles I, II and III). The bulk of the rules package, title I, was adopted by a roll call vote of 234 to 197, with three Republicans breaking ranks to vote “yes” and three Democrats breaking ranks to vote “no.” The three R’s were from blueish districts (Fitzpatrick (PA), Katko (NY), and Reed (NY)), and the three D’s were ultra-progressives who were opposed to a rule change that would require large new entitlement programs to be paid for (Gabbard (HI), Khanna (CA), and Ocasio-Cortez (NY)).

The rules package contains a whole host of changes, from ethical upgrades (#MeToo-related and otherwise), some necessary housekeeping reforms, and some things the Democrats do every time they take over (rename the Education and the Workforce Committee to “Education and Labor,” allow Delegates to vote in the Committee of the Whole, etc.). But the new rules package also repeals term limits for committee and subcommittee chairmen, repeals the “Ryan rule” on Highway Trust Fund bailout transfers, and makes other changes that directly affect transportation and infrastructure programs and committees – including a budget enforcement change that will make it easier to fix the $7.6 billion highway funding rescission scheduled to take effect in July 2020. Those are outlined below.

The new rules package also dodges the question of whether or not to bring back the practice of earmarking. Speaker Pelosi has stated that the Democratic Caucus will address this issue in the coming weeks, before the fiscal 2020 appropriations bills start getting drafted.

All of the changes discussed below were in title I of H. Res. 6, which was adopted yesterday, with the exception of the Select Committee on the Modernization of Congress, which is in in title II to be adopted later.

Non-budgetary rule changes of note:

Repeal of term limits for chairmen. The resolution repeals the six-year term limit for committee and subcommittee chairmen found in clause 5(c)(2) of rule X. The term limit was adopted by Republicans when they took over the chamber in 1995, then repealed by Democrats in 2009, then reinstated by Republicans in 2011. The resolution also repeals the term limit on rank-and-file members of the House Budget Committee, which have been in place since the creation of the Budget panel in 1974 and which distinguished the House panel from its Senate counterpart, which never had term limits.

72 hours notice, not three calendar days. The resolution makes changes in the "three-day layover" waiting periods for consideration of legislation that were first established in the Legislative Reorganization Act of 1970. The rule in effect for the last 47 years requires legislation to be available for three calendar days (excluding Saturdays, Sundays and holidays) before it can be brought to the House floor. But that has consistently been interpreted in a way that allows a measure to be made public at 11:59 p.m. on Day One and then brought to the floor as early as possible on Day Three, which means that three days can be less than 36 hours. The new rule will replace all references to "three calendar days etc." with "72 hours."

Consensus Calendar bypasses committee chairmen. In the unusual circumstance where at least two-thirds of total House membership have cosponsored a bill but the committee chairman of jurisdiction refuses to schedule a markup and report the bill, the new rules package creates a "Consensus Calendar" whereby, if a bill gets the magic 290 cosponsors, its lead sponsor can get it out of the committee of jurisdiction and place it on the Calendar. Then, the Speaker is required to call up at least one bill from the Consensus Calendar each week. The rule does not specify in which order the Speaker must call up those bills on the Consensus Calendar, and the rule also clarifies that if a committee then goes ahead and reports a bill, it comes back off the Consensus Calendar and has to go through the normal process. So this new calendar is unlikely to be used that often and will probably just be more leverage for the body as a whole to force committees to report popular bills.

No extra subcommittees for T&I, Ways and Means. Clause 5(d) of rule X limits each House committee to a specific number of subcommittees. The new rules package allows the Agriculture Committee and the Financial Services Committee to have extra subcommittees in the 116th Congress, but not the Transportation and Infrastructure Committee or the Ways and Means Committee. T&I and Ways and Means will both have to stay at six subcommittees. (So if Earl Blumenauer (D-OR) is to get his Infrastructure Subcommittee on Ways and Means, an existing subcommittee has to be abolished, which may be why we haven't heard much about his new subcommittee proposal for a while.)

Two new temporary, "select" committees. The rules package creates two new temporary, "select" House committees. The first, on climate change, will be 9 Democrats and 6 Republicans and the other, on modernizing Congress, will have 6 Democrats and 6 Republicans. Both select committees "shall not have legislative jurisdiction and shall have no authority to take legislative action on any bill or resolution." Instead, the select committees are to "investigate, study, make findings, hold public hearings" and then "make recommendations" in their areas that would then be considered by the standing committees of jurisdiction. (One can't give legislative jurisdiction to a new committee without also taking it away from an existing committee, and on climate change, the incoming chairmen of the Energy and Commerce, Natural Resources, Transportation and Infrastructure, and Ways and Means Committees were not in a hurry to cede jurisdiction over these critical issues.) Neither select committee will have subpoena power, but they will be able to recommend subpoenas to the pertinent standing committee.

Budget/spending/tax/debt rule changes:

Repeal of the "Ryan rule." Normally, the rules package adopted by a new House provides that the last budget resolution adopted by the old House continue in effect until a new budget is passed. Section 103(m) of the new rules package provides that the budgetary totals in the last budget resolution (H. Con. Res 71, 115th Congress) remain in effect until changed, but only four of the enforcement provisions in H. Con. Res. 71 (sections 5201, 5202, 5203, and 5401) will carry over. (The limitation on advance appropriations in section 5104 of H. Con. Res. 71 is carried over separately by section 103(c) of the new rules package.) Among the provisions that will not carry over into the new Congress is section 5110 of H. Con. Res. 71, the so-called "Ryan rule" that requires that in the House, transfers of money from the general fund of the Treasury to the Highway Trust Fund "shall be counted as new budget authority and outlays equal to the amount of the transfer in the fiscal year the transfer occurs." Under budget scorekeeping law, and under Senate rules, GF to HTF transfers fall into a kind of loophole and don't count as real money – Congress is free to transfer, say, $100 trillion from the GF to the HTF and the only consequence would be a debt limit violation (since by law, all HTF balances are invested in special Treasury debt that is created as needed). The establishment of the Ryan rule by then-Budget-chairman Paul Ryan (R-WI) in 2011 meant that GF to HTF transfers needed to be offset by spending cuts or revenue increases elsewhere in the budget. Now, such "pay-fors" for the next bailout, which will be necessary by 2021, will not be required by House or Senate rules.

Retention of the infrastructure "reserve fund." One of the four provisions of H. Con. Res. 71 that was retained in the new rules package is section 5401, which allows the House to amend budget totals and allow consideration of any "bill or joint resolution, or amendment thereto or conference report thereon, that invests in national infrastructure to the extent that such measure is deficit neutral for the total of fiscal years 2018 through 2027."

PAYGO, not CUTGO. When Republicans took over in 2011, they replaced the pay-as-you-go (PAYGO) budgeting provision in House rules with a "cut-as-you-go" provision (CUTGO). Essentially, PAYGO requires that new mandatory spending or tax cuts be fully offset with tax increases or mandatory spending cuts. CUTGO removed the ability to pay for increased mandatory spending with tax increases – only spending cuts were allowed as a pay-for. The PAYGO rule goes back to the status quo ante of 2010. But there is a particular transportation benefit to the rules change – PAYGO measures the fiscal effect of legislation in terms of the "net effect of increasing the deficit or reducing the surplus," but CUTGO was only concerned with "the net effect of increasing mandatory spending." What kind of net mandatory spending increase isn't scored as directly increasing the deficit? **Highway Trust Fund contract authority**, that's what. The House CUTGO rule effectively prevented any net increases in the total amount of HTF contract authority, and posed a big obstacle to repealing the $7.6 billion rescission of said contract authority that is scheduled to take place per the FAST Act on July 1, 2020. Under CUTGO, a $7.6 billion spending cut would have been required in order to repeal the rescission. Under PAYGO, no spending cuts will be required in order to repeal the rescission.

No more supermajority for tax increases. With much fanfare, the new 1995 Republican majority enacted clause 5(b) of rule XXI, which states that no legislation containing an increase in federal income tax rates can pass the House without a three-fifths vote on a roll call. The Democrats did not repeal this provision when they took office in 2007, but they did repeal it this time. Interestingly, this is a change from an mid-November proposal by Speaker-designate Pelosi to keep the three-fifths vote requirement for increases in individual income tax rates for persons in the bottom 80 percent of taxpayer income levels.

Allow amendments increasing appropriations. The new rules package repeals clause 2(g) of rule XXI, which prohibits floor amendments to general appropriations bills that propose a "net increase in the level of budget authority" in the bill. Traditionally (1974-2010), each bill has a spending allocation, and if the bill comes out of committee below that allocation (which never happens IRL) or if an earlier amendment reduces the net spending total, a member can offer an amendment on the floor increasing spending for an appropriation up to the total budget allocation level. Republicans took that away in 2011, meaning that the appropriation amendment process could only be an endless ratcheting downwards. Democrats are now restoring the ability to add spending on the floor up to the budget allocation total.

Bye-bye, "dynamic scoring." The new rules package repeals clause 8 of House rule XIII, a Republican-backed provision which formerly required that Congressional budget scorekeeping bodies use “dynamic scoring” to “incorporate the budgetary effects of changes in economic output, employment, capital stock, and other macroeconomic variables resulting from such legislation” in its budget scores of major bills. This was originally intended to try and force the Congressional Budget Office to say that tax cuts, to some extent, could pay for themselves. But the dynamic scoring argument has also been used by advocates of infrastructure spending increases. Now, there will be no more dynamic scoring of tax or spending legislation from CBO or the Joint Committee on Taxation.

Return of the “Gephardt rule.” For decades, getting Congress to pass an increase in the statutory ceiling on the public debt has been the political equivalent of pulling teeth. Former Rep. Richard Gephardt (D-MO) got the House to pass an innovation in 1979 to make a debt limit hike easier – whenever Congress passed a budget, the House would be “deemed” to also have passed a joint resolution increasing the debt limit by whatever amount the budget resolution recommended. House members would thus never have to take a painful vote on a debt limit increase directly. This helpful Congressional Research Service report details how the Gephardt rule was used over the years until the outgoing GOP majority repealed it in 2011. Section 102(jj) of the new rules package reinstates a version of the Gephardt rule, with two changes. First, the old Gephardt rule was only activated when Congress adopted a budget resolution, meaning both chambers adopted the exact same version, down to punctuation. A Democratic House and a Republican Senate are unlikely to agree on a budget, so the new version of the Gephardt rule is activated “upon adoption by the House” of a budget. Second, the old Gephardt rule automatically passed a joint resolution amending the dollar amount of the debt limit in section 3101(b) of title 31, United States Code. The new rule automatically passes a temporary suspension of the debt limit, in the following form: “Section 3101(b) of title 31, United States Code, shall not apply for the period beginning on the date of enactment and ending on September 30, _______.” (with the blank being filled with the budget year for the concurrent resolution).