



*Earmarking Away the Public Interest
How Congressional Republicans Use
Antiregulatory Appropriations Riders to
Benefit Powerful Polluting Industries*

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Introduction

The past few years have seen the U.S. system of regulatory safeguards come under increasingly intense attacks from the business community and their conservative allies in Congress. During this time, antiregulatory lawmakers have deployed a wide range of tactics aimed at preventing such agencies as the Environmental Protection Agency (EPA), the Food and Drug Administration (FDA), and the Occupational Safety and Health Administration (OSHA) from carrying out their statutory missions of protecting people and the environment. These tactics include slashing these agencies' budgets, berating administrators and wasting their time in "show" hearings, and promoting so-called "regulatory reform" bills that aim to delay or block rulemaking by forcing agencies to satisfy dozens of new analytical and procedural requirements before issuing new safeguards.

Now that Republicans control both chambers of Congress, antiregulatory forces are trumpeting the use of another legislative weapon against public safeguards: antiregulatory appropriations riders. Opponents of regulation insert these provisions into must-pass appropriations bills to block agencies from using funding to develop or enforce particular regulatory actions. Commenting on the power of this approach, Senate Majority Leader Mitch McConnell observed in an interview that the "only good tool" Congress has for reining in the EPA "is through the spending process."¹

When the budget process is working normally, Congress passes annual appropriations bills, doling out funds to agencies and specified agency programs for the coming fiscal year. Congress, of course, uses its "power of the purse" to advance its particular policy priorities by, for example, providing greater budgetary resources to favored agencies or programs while decreasing budgetary resources for those agencies or programs that are disfavored. By its nature, appropriations legislation carries high stakes, since the failure to pass any one bill will result in the shutdown of all the agencies that the bill funds (unless other revenue streams, such as licensing fees, happen to pay for particular agency programs).

Individual members of Congress who are hostile to particular regulations have sought to exploit the appropriations process by attaching what are commonly known as "limitation riders" to relevant bills that prohibit an agency from expending any of the appropriated funds on a particular activity, such as the development, implementation, or enforcement of particular regulations.² Once added, these limitations "ride" along through the expedited legislative process that typically applies to appropriations bills, increasing their chances of reaching the President's desk and getting signed into law.³ Because the underlying appropriations bills are "must pass," the successful inclusion of limitation riders creates a difficult dilemma for other participants in the budget process, including the president and other members of Congress. They can reject the whole bill, but doing so increases the chances of shutting down all of the affected agency's

activities, including those targeted by the rider. Alternatively, they can accept the rider-laden bill, even though they might have opposed the rider's provisions if presented as a stand-alone bill.

This CPR Issue Alert refers to antiregulatory limitation riders as “negative earmarks” to emphasize that they are the mirror image of the earmarking practice that has been so widely condemned in recent years—especially by conservative lawmakers. A classic “earmark” is a legislative instruction directing an executive branch agency to spend appropriated funds on specific organizations or projects favored by politically powerful constituents. By contrast, an antiregulatory limitations rider (*i.e.*, “negative earmark”) directs an executive branch agency *not* to spend appropriated funds on specific programs or activities that are opposed by politically powerful constituents.⁴ As developed below, almost all of the arguments against the abandoned practice of “affirmative earmarks” apply with equal strength to “negative earmarks.” Both are tailor-made devices for conferring benefits on special interests without transparency or deliberation.

This CPR Issue Alert shines a light on two basic problems associated with the extortionate use of negative earmarks in appropriations bills. The first and more obvious problem is that these provisions can cause lasting damage to the public interest by leaving people and the environment at unnecessary risk of harm. For example, as detailed below, the Fiscal Year 2016 Interior and Environment Appropriations bills moving through both chambers of Congress contain several dangerous negative earmarks, including some that would halt regulations to address climate change and to protect the health of critical water bodies. **Using the agency's own estimates, this Issue Alert calculated that just three of these antiregulatory negative earmarks would bar the EPA from preventing 10,900 premature deaths; 5,000 non-fatal heart attacks; 1,110,000 asthma attacks in children; and 1,690,000 missed school and work days. Combined, these negative earmarks would also enable the emission of an additional 730 metric tons of carbon dioxide and the waste of up to \$572 million in taxpayer money.**

Second and more insidiously, negative earmarks upend the normal legislative process and entrench a system of policymaking that undermines core principles of representative democracy. In particular, negative earmarks involve the use of extortion to advance policies that are counter to the public interest. In contrast to the use of normal legislative procedures for policymaking, the process of including negative earmarks into appropriations and other must-pass bills is marked by a distinct lack of transparency and deliberation. Because they confer significant benefits on favored industries, antiregulatory negative earmarks also create the risk of encouraging lawmakers to pander to corporate interests. Indeed, a review of the campaign contributions to members of the House and Senate appropriations subcommittees that were supportive of the negative earmarks included in the Fiscal Year 2016 Interior and Environment funding bills reveals strong financial ties between the lawmakers and affected industries. **Just five of the appropriations subcommittees' most influential members received a total of \$3,600,644 in campaign contributions during their most recent election cycle from industrial sectors that would directly benefit from the negative earmarks included in the funding bills.**

Of course, while the abusive use of negative earmarks for antiregulatory purposes has been around for decades, the dysfunction and extreme polarization that now characterizes the U.S.

Congress provides a particularly fertile environment for their continued and expanded use. Nevertheless, some hope remains for ending this harmful practice. As a first step, the public interest community and the mainstream media must work to focus the public's attention on the issue of antiregulatory negative earmarks and the harms they entail. With sufficiently widespread public condemnation, Congress might be persuaded to enact needed reforms that significantly limit their use. A similar movement helped to convince Congress to adopt reforms to limit the use of "affirmative earmarks" in appropriations bills, which could conceivably provide a model for pursuing similar reforms aimed at limiting the use of antiregulatory negative earmarks.

To be sure, negative earmarks can and have been used to advance the public interest as well by, for example, blocking the implementation of deregulatory programs. Consequently, any reforms aimed at restricting negative earmarks risks defeating their use to overcome the opposition of an obstructionist bloc in Congress in order to promote certain public health, safety, or environmental goals. As explained, though, the disadvantages of negative earmarks far outweigh their advantages, providing strong support for the conclusion that the United States would be better off if this practice were abandoned.

The High Environmental and Public Health Costs of Negative Earmarks

Negative Earmarks in the Fiscal Year 2016 Interior and Environment Appropriations Bills

The most direct and obvious harm caused by negative earmarks is that they will, if enacted, halt agency efforts to protect people and the environment against unnecessary risks. The resulting delays in agency action permit corporations to continue evading meaningful accountability for the harms associated with their business activities or products. This arrangement benefits the bottom line of businesses that are spared—even if only temporarily—the expense of complying with regulatory safeguards. Meanwhile, the costs of their harmful products and activities—whether measured in premature deaths, instances of chronic disease, or irreversible environmental degradation—continue to be borne by the general public.

The Fiscal Year 2016 Interior and Environment appropriations bills under consideration by the House of Representatives and the Senate respectively each contain several antiregulatory negative earmarks. Congress uses these appropriations bills to provide funding for several agencies that it has charged with protecting public health and natural resources, including the EPA, the Department of the Interior, the Agency for Toxic Substances and Disease Registry (ATSDR), the Council on Environmental Quality (CEQ), the U.S. Forest Service, and the National Institute of Environmental Health Sciences (NIEHS). Accordingly, the antiregulatory negative earmarks added to them have a particularly harmful impact on the public interest, as the following examples illustrate:

- Section 428 of the House appropriations bill and Section 417 of the Senate appropriations bill would block the EPA from effectively implementing national standards to limit greenhouse gas emissions from new and existing fossil-fueled power plants. The EPA projects that these rules would reduce power plant emissions of carbon dioxide by about 730 million metric tons, which is roughly equivalent to the emissions produced by two-thirds of the country's automobiles. By limiting other

The Curious Case of Appropriations Committee Reports

Antiregulatory negative earmarks need not even be included in the language of the appropriations bill itself to harm the public interest. Members of Congress have also succeeded in blocking industry-opposed regulations by inserting language into the reports that accompany appropriations bills that instructs or directs agencies to carry out onerous procedures and requirements prior to proposing or finalizing specified regulatory actions. For example, the committee report for the Senate Interior and Environment appropriations bill directs the Department of Interior's Office of Surface Mining Reclamation and Enforcement (OSMRE) to conduct extensive outreach with relevant state agencies before taking any further action on its pending rule to protect streams from pollution caused by mountaintop removal mining. As interpretive guides, these reports have no independent legally binding effect. Agencies generally obey the antiregulatory provisions in the reports, however, rather than risk antagonizing the appropriations committee members, who might retaliate with even greater unfavorable treatment in future funding bills.

harmful pollutants, the agency estimates that the rules would also annually prevent up to 6,600 premature deaths, 3,300 non-fatal heart attacks, 150,000 asthma attacks in children, and 490,000 missed school and work days.⁵

- Section 435 of the House appropriations bill would block the EPA from implementing emissions limits for hydrofluorocarbons (HCFs), which are ozone-depleting substances and potent greenhouse gases. In particular, this section would block the agency from implementing a recently finalized rule that it estimates will prevent the release of between 54 million and 64 million metric tons of carbon dioxide-equivalent greenhouse gases by 2025.⁶
- Section 424 of the Senate appropriations bill would block the EPA from implementing its pending update to the national ozone air pollution standard. The agency estimates that this rule would annually prevent up to 4,300 premature deaths, 1,700 nonfatal heart attacks, 960,000 asthma attacks, and 1.2 million missed school and work days.⁷ During the full committee markup, the House Appropriations Committee added an amendment sponsored by Rep. Evan Jenkins (R-WV) that would also block the EPA's pending ozone rule.
- Section 422 of the House appropriations bill and Section 421 of the Senate appropriations bill would permanently block the EPA from implementing a rulemaking that clarifies the jurisdictional reach of the Clean Water Act over wetlands, tributaries, and various isolated water bodies that are critical to the health and quality of larger lakes and rivers. These smaller water bodies deliver significant economic and recreational benefits and serve as essential habitat to a wide variety of plants and animals, including many threatened and endangered species. The rule would have significant fiscal benefits, too, with the EPA finding an estimated reduction of Clean Water Act-related administration costs by between \$339 million and \$572 million every year.⁸
- Section 423 of the House appropriations bill would block the Department of the Interior's Office of Surface Mining Reclamation and Enforcement (OSMRE) from developing a "stream buffer" rule to protect environmentally sensitive streams from pollution associated with mountaintop removal mining. An extremely destructive practice, mountaintop removal mining involves using explosives to blow up the top portions of mountains and removing the wastes to nearby valleys in which headwaters and streams are located. The Department of the Interior's rule would generally prevent mining companies from dumping debris and waste too close to the edge of these fragile water bodies.
- The section of the House appropriations bill providing funding for the ATSDR imposes arbitrary and unnecessary restrictions on that agency's ability to conduct health assessments of facilities on the Comprehensive Environmental Response, Compensation, and Liability Act's (CERCLA) National Priorities List of hazardous wastes sites. It also imposes arbitrary and unnecessary restrictions on the agency's ability to conduct toxicological profiles for hazardous substances that are commonly found at these waste sites. These assessments and profiles are essential for successfully identifying and cleaning up the most dangerous waste sites in the United States, as mandated under CERCLA.

- Section 421 of the House appropriations bill and Section 425 of the Senate appropriations bill would permanently prohibit the EPA from issuing regulations under the Toxic Substance Control Act (TSCA) to restrict the lead content of fishing gear or ammunition. Lead is potent neurotoxin in children and at high enough exposures can cause kidney and cardiovascular disease in adults. Environmental lead pollution is also harmful to several animal and plant species. Fishing gear and ammunition are among the major remaining sources of human and environmental exposure to lead.
- Section 426 of the House appropriations bill would stop the EPA from implementing its regulations aimed at protecting children from being subjected to harmful lead paint exposure. Lead paint is another common source of harmful lead exposure, especially among economically disadvantaged and racial minority children that live in inner-city communities where decades-old lead paint is still prevalent.
- Section 114 of the Senate appropriations bill would greatly restrict the ability of the Department of the Interior to implement a rule aimed at improving the safety of hydraulic fracturing operations. Among other things, the Department of Interior's fracking rule would establish minimum requirements for well integrity, wastewater disposal, and chemical disclosure that would better protect workers at drilling sites and reduce the chances of spills and groundwater contamination. During the full committee markup, the House Appropriations Committee added an amendment sponsored by Rep. Tom Cole (R-OK) that would completely block implementation of the Department of the Interior's hydraulic fracturing rule.

During the full committee markup hearings in the House and Senate Appropriations Committees, several amendments were offered that would have removed some of these antiregulatory negative earmarks. All of these amendments were rejected on mostly party-line votes with Republicans providing near-unanimous support for retaining the negative earmarks.⁹

Because the data are incomplete, it is impossible to provide a full accounting of the cumulative costs that all of these antiregulatory negative earmarks would impose on public health and the environment if they were to be enacted into law. Considering the impacts of just three of the nine negative earmarks described above—those blocking the EPA's greenhouse gas standards for power plants, ozone rule, and Clean Water Act jurisdiction rule—provides a glimpse of the extent of the damage that would be done. According to the EPA's own estimates, these negative earmarks would potentially bar the agency from preventing the following:

- 730 million metric tons of carbon dioxide emissions
- 10,900 premature deaths
- 5,000 non-fatal heart attacks
- 1,110,000 asthma attacks in children
- 1,690,000 missed school and work days
- Between 339 million and 572 million dollars in wasted government spending.

The full costs of the antiregulatory negative earmarks in Fiscal Year 2016 Interior and Environment appropriations bills would, of course, be much greater. Other costs would include the potentially irreparable destruction of countless miles of rivers and streams and acres of wetlands; numerous cases of cancer and other diseases associated with exposure to hazardous waste sites; hundreds if not thousands of preventable cases of kidney and cardiovascular disease in adults and irreversible brain damage in children; acute damage to critical groundwater sources; and dozens of fatal and non-fatal injuries resulting from hydraulic fracturing-related disasters. Regardless of how they are ultimately measured, though, all of these harms would be preventable. As these numbers indicate, the various antiregulatory negative earmarks have the potential to do great damage to the public interest.

Pay to Play? The Financial Ties Between Legislative Sponsors of Negative Earmarks and Impacted Industries

The Republican members of Congress who sponsored or strongly supported the negative earmarks contained in the Fiscal Year 2016 Interior and Environment appropriations bills have all received significant campaign contributions from the polluting industries that these provisions would most directly benefit. Even if not part of a real *quid pro quo* transaction, these contributions still create the unmistakable appearance that corporate interests are seeking to use their considerable financial resources to induce members of Congress to ignore their responsibility to their constituents and instead insert and support negative earmarks that will benefit their bottom lines. Just the appearance of lawmakers readily selling their support for antiregulatory negative earmarks would only further erode the public's already low confidence in Congress.

A few examples illustrate the strong financial support that select industries have provided to key lawmakers involved in the development of the Fiscal Year 2016 Interior and Environment appropriations bills:

- **Rep. Ken Calvert (R-CA)**. Rep. Calvert is the chairman of the House appropriations subcommittee in charge of the Interior and Environment appropriations bill, and thus authored the first draft of the bill that contained several of the antiregulatory negative earmarks described above. During the most recent election cycle, Rep. Calvert received \$46,500 from the defense electronics industry, \$43,300 from the crop production and basic processing industry, \$41,500 from the electric utilities industry, and \$39,000 from the oil and gas industry.¹⁰ These industries would benefit from antiregulatory negative earmarks blocking action on the greenhouse gas rules, the ozone rule, the ATSDR's health assessments and toxicological profiles, and the hydraulic fracturing safety standards.
- **Rep. Evan Jenkins (R-WV)**. Rep. Jenkins sponsored the amendment to add a negative earmark blocking the EPA's ozone rule. During the most recent election cycle, Rep. Jenkins received \$187,400 from the mining industry, \$48,666 from the oil and gas industry, and \$25,950 from the manufacturing industry.¹¹ Each of these industries would benefit from continued delay of the ozone rule.
- **Rep. Tom Cole (R-OK)**. Rep. Cole sponsored the amendment to add a negative earmark blocking the Department of the Interior's rule to improve the safety of

hydraulic fracturing on federal and Indian lands. During the most recent election cycle, Rep. Cole received \$114,500 from the oil and gas industry, which would benefit from weaker standards governing hydraulic fracturing.¹²

- Sen. Lisa Murkowski (R-AK). Sen. Murkowski is the chairwoman of the Senate appropriations subcommittee in charge of the Interior and Environment appropriations bill, and thus authored the first draft of the bill that contained several of the antiregulatory negative earmarks described above. During the most recent election cycle, Sen. Murkowski received \$561,096 from the electric utilities industry, \$550,531 from the oil and gas industry, and \$143,944 from the real estate industry.¹³ These industries would benefit from negative earmarks blocking action on the greenhouse gas rules, the ozone rule, the Clean Water Act jurisdiction rule, the stream buffer rule, and the hydraulic fracturing safety standards.
- Sen. Mitch McConnell (R-KY). Earlier this year, Sen. McConnell took the unusual step of joining the Senate appropriations subcommittee in charge of the Interior and Environment appropriations. As Senate Majority Leader, Sen. McConnell would have direct influence over the bill's provisions even if he were not a member of the subcommittee. Many thus interpreted his decision to join as a signal of his determination to pursue negative earmarks blocking regulations that affect the coal mining industry and electric utilities.¹⁴ During the most recent election cycle, Sen. McConnell received \$1,049,308 from the oil and gas industry, \$425,600 from the mining industry, and \$323,349 from the electric utilities industry.¹⁵ These industries would benefit from negative earmarks blocking action on the greenhouse gas rules, the ozone rule, the Clean Water Act jurisdiction rule, the stream buffer rule, and the hydraulic fracturing.

In total, these five members of the House and Senate appropriations subcommittees with jurisdiction over the Interior and Environment funding bills received \$3,600,644 during the most recent election cycle for each member from industrial sectors that would most directly benefit from the antiregulatory negative earmarks that they supported.

More broadly, many of these industries have been generous in their contributions to the members of the House and Senate appropriations committees. Disproportionately, these contributions have gone toward the Republican committee members, as the following tables illustrate.

Selected Industry Contributions to House Appropriations Committee Members During the 2014 Election Cycle¹⁶		
<i>Industry</i>	<i>Contribution</i>	<i>Percent of Contribution to Republican Members</i>
Real Estate	\$2,707,745	55 percent
Miscellaneous Manufacturing	\$1,442,479	66 percent
Oil and Gas	\$1,418,616	83 percent
Crop Production and Basic Processing	\$1,334,323	72 percent
Electric Utilities	\$1,284,292	69 percent

Selected Industry Contributions to Senate Appropriations Committee Members During the 2014 Election Cycle¹⁷		
<i>Industry</i>	<i>Contribution</i>	<i>Percent of Contribution to Republican Members</i>
Real Estate	\$8,152,038	59 percent
Oil and Gas	\$5,632,966	90 percent
Electric Utilities	\$3,423,333	67 percent
Miscellaneous Manufacturing	\$3,419,947	72 percent

Antiregulatory Negative Earmarks are a Destructive Policymaking Tool

Negative Earmarks Legislate by Extortion

Appropriations bills offer ideal vehicles for the use of extortionate riders, because they must be enacted on an ongoing and periodic basis or else the government will cease functioning. As the deadline for completing appropriations bills approaches, the leverage that proponents of particular negative earmarks wield to coerce acquiescence in their demands grows greater. With the threat of government shutdown looming, other legislators will feel increasingly compelled to vote in favor of the bill even though they are opposed to a particular negative earmark and would not support it as a stand-alone measure. Similarly, the president will likely find it difficult to veto an appropriations bill simply because of the antiregulatory negative earmarks it contains.¹⁸ In addition to appropriations bills, legislation to raise the debt ceiling or to reauthorize critical existing programs—such as those contained a Farm Bill or Highway Bill—offers opportunities for lawmakers to attach antiregulatory negative earmarks to benefit favored industries. Because these bills also qualify as “must pass,” the other participants in the legislative process are likely to be coerced into agreeing to the antiregulatory negative earmarks as a cost of supporting the underlying legislation.

Negative Earmarks Enable Secret Sabotage of Popular Safeguards

In contrast to the procedures that govern traditional authorizing legislation, a distinct lack of transparency and accountability marks the appropriations process. In particular, the process of adding riders to appropriations bills is clouded in secrecy, which can make it nearly impossible for the public to hold legislators accountable for sponsoring especially controversial negative earmarks. Because antiregulatory negative earmarks are often buried in appropriations bills that run hundreds of pages in length, it is easy for them to slip past the scrutiny of concerned citizens and lawmakers. These bills thus offer the proponents of negative earmarks an ideal opportunity to conceal their attacks on popular consumer and environmental legislation. Committee consideration of appropriations bills often follow an expedited timetable as well, which makes it even more difficult for the public and their representatives to detect problematic negative earmarks and successfully eliminate them before it is too late.¹⁹ These transparency and accountability challenges are made worse when appropriations committees must consider “omnibus” spending bills that combine several large appropriations measures in a single legislative package that might be over 1,000 pages long.

Negative Earmarks Lobotomize the Deliberative Process That Should Govern Lawmaking

The use of antiregulatory negative earmarks also enables lawmakers to engage in a powerful form of substantive policymaking but without the due deliberation that normally accompanies the enactment of authorizing legislation. Broadly speaking, Congress divides the labor of preparing bills for full consideration between the authorization committees—which are responsible for considering substantive legislation creating, modifying, or eliminating federal programs—and the budget and appropriations committees—which are responsible for funding authorized programs. The institutional design and processes of authorization committees renders them far more suitable to engage in substantive policymaking. Negative earmarks generally do

not receive anywhere near the same level of deliberative consideration from appropriations committees that usually takes place in authorization committees for the provisions of substantive legislation—if indeed they receive any deliberative consideration at all. Whereas authorizing legislation is often the subject of multiple hearings involving witnesses who represent a wide range of perspectives on a bill’s potential impacts, appropriations committees rarely consider specific negative earmarks during markup sessions or take public testimony on them.²⁰ Another critical difference is that pending authorization bills often spend months before the relevant authorization committees. In contrast, the members and staff of appropriations committees might have just few days or even a few hours to review and debate a particular spending bill. This leaves appropriations committees with little meaningful opportunity to deliberate even the most controversial of negative earmarks.²¹

Finally, with respect to the policy matters that negative earmarks implicate, the appropriations committees often lack the same level of subject matter expertise as the relevant authorizing committees. Congress has long divided its authorizing committees according to subject matter to ensure proposed legislation is considered and developed by lawmakers with the relevant substantive knowledge. Over time, the committee members and staff acquire expertise in the applicable body of law and in the way that related agencies are implementing and enforcing that law. The authorization committees also gain a sense of the practical effects that flow from making substantive changes to the law, including how difficult it is to establish new programs and the level of disruption that sudden changes to ongoing programs can produce for the agencies, the regulated industries, and the beneficiaries of those programs. Of course, authorizing committee members may bring their expertise to bear on antiregulatory negative earmarks when they are considered on the floor of the House or Senate. Even so, such negative earmarks do not necessarily receive the full benefit of the expertise of the authorization committee members because the provisions are usually taken up in rapid succession with little time allocated for serious study and debate.²²

Antiregulatory Negative Earmarks Encourage Pandering to Corporate Interests

Because they are adopted with little transparency or deliberation, negative earmarks are uniquely well designed to provide individual lawmakers with the ability to confer benefits on favored special interests. Much like traditional earmarks, which Congress has effectively banned, antiregulatory negative earmarks are thus highly susceptible to abuse by members of Congress looking for an easy way to curry favor with politically powerful businesses or industries. Indeed, in the wake of *Citizens United*, which allows virtually unlimited corporate spending in federal elections, the value of using negative earmarks to pander to the business community has only increased.

To be sure, negative earmarks are equally available to proponents of more stringent regulations²³, but historically they have been employed far more frequently by opponents of regulatory safeguards working on behalf of corporate interests. It makes sense that corporate interests would wield their considerable influence to seek negative earmarks at a disproportionately greater rate. After all, antiregulatory negative earmarks effectively provide affected industries with a free pass to continue polluting or engaging in other harmful activities that would otherwise violate existing law. The short-term costs savings of avoiding such

regulatory accountability provides the business community with a powerful incentive to seek out negative earmarks, and the members of Congress most beholden to these industries are only too happy to oblige. In contrast, the beneficiaries of public health and environmental programs are far too dispersed and comparatively unorganized to mount similar campaigns to seek negative earmarks that have the effect of delivering greater regulatory protections.²⁴ Regulatory beneficiaries are also less likely to be able to organize in opposition to negative earmarks, making it easier for corporate interests to successfully include provisions that advance their narrow interests while undermining the implementation of protective safeguards to the detriment of the broader public interest. In contrast, the business community—particularly with the aid of well-funded lobbyists and trade associations—is well situated to oppose efforts by public interest groups seeking to use negative earmarks to achieve stronger safeguards.

A Symptom of Congressional Dysfunction, Negative Earmarks are Likely to Remain an Ongoing Problem

Over the last few years, Congress has become mired in dysfunction and political gridlock. When Congress has been spurred into action in the arena of public health and environmental protections—such as updates to food safety laws or addressing unregulated compounding pharmacies—it has usually come in response to well-publicized tragedies caused by problems long in search of legislative solutions, and even then the resulting reforms often fall well short of what is needed. Meanwhile, the most pressing public health and environmental threats—such as the overuse of antibiotics in agriculture and global climate change—have received little meaningful attention from lawmakers.

Beyond affirmative policymaking, Congress has proved largely unequal to the task of carrying out even its core obligations, including raising the debt ceiling, funding government agencies, and reauthorizing key programs, such as financing for transportation infrastructure. In these areas, Congress has resorted to a pattern of “governing by crisis,” stumbling from one high-stakes showdown to the next. As a result, this era of government has been marked by a series of government shutdowns and near-misses that have quickly eroded public’s confidence and trust in Congress.²⁵ Unsurprisingly, Congress’s public approval rating has remained consistently at or below 20 percent for the last several years.²⁶

One of the chief underlying causes of this state of dysfunction is the highly corrosive and partisan atmosphere that has come to characterize 21st century politics. The debate over virtually all policy matters has become highly polarized, and perhaps none more so than those issues related to the role of government in regulating business activities. Not only is there little agreement on common goals, there is also a much-reduced commitment to civility in political discourse, as lawmakers seek to distinguish themselves with overblown rhetoric and stunts rather than through reasoned deliberation and compromise.²⁷ Reinforcing this counterproductive dynamic is the fact that many congressional districts have become gerrymandered so that they are safely controlled by a single party. In most districts, primaries have replaced general elections as the key electoral battle for incumbents seeking to retain their position. Unlike in the general elections, primary voters tend to look favorably on candidates with a demonstrated commitment to uncompromising views on key policy issues and reward those who adopt the most combative or even bombastic style.

The problem of polarization has even infected the appropriations process, which was long a bastion for bipartisanship and compromise. Starting in the 1990s, Republican Party leadership began instituting changes in its practices and rules to increase party control over the appropriations committees. Most notably, the party abandoned its practice of awarding appropriations committee chairs on the basis of seniority, choosing instead to award the positions to members who have been most loyal to the party leadership. Significantly, one of the motivations for these strategies was to better enable the Republican Party to effect substantive policy changes through the strategic use of the appropriations process.²⁸

Such dysfunction and polarization provides the perfect breeding ground for the extortionate use of negative earmarks. With Congress largely unable to move bills through normal legislative

order, members have increasingly turned to the appropriations process—including riders—to achieve whatever policy victories they can muster. Controversial antiregulatory negative earmarks that target popular environmental and public health safeguards are especially unlikely to become law as stand-alone legislation. The only really viable pathway for these provisions to become law is for their proponents to attach them to must-pass appropriations bills.²⁹

Moreover, in this toxic environment in which lawmakers are more focused on scoring political points than advancing the common good, negative earmarks offer a relatively simple and low-cost means for securing legislative victories.³⁰ For example, each successful inclusion of a negative earmark into an appropriations bill might provide a member of Congress with a new opportunity to boast of his or her legislative “effectiveness” in a press release, at a press conference, or in an e-mail newsletter to constituents. Finally, as noted above, antiregulatory negative earmarks supply lawmakers with seemingly endless opportunities to pander to influential business interests. With the Supreme Court’s decision in *Citizens United* all but guaranteeing an outsized role for corporations in financing election campaigns, the imperative for lawmakers to deliver tangible favors to their most generous contributors will only grow greater.

Conclusion: Ending the Extortionate Use of Antiregulatory Negative Earmarks to Undermine the Public Interest

The problems with antiregulatory negative earmarks are clear. When successfully included in appropriations bills, these limitation riders serve to put people and the environment at unnecessary risk by blocking the implementation of crucial safeguards. More broadly, as a form of policymaking, negative earmarks are fundamentally inconsistent with the principles of representative democracy, and their widespread abuse risks long-term damage to Congress as an institution.

One straightforward solution for limiting the use of negative earmarks is for Congress to enact legislation that tightens existing restrictions on appropriations riders. As noted above, the existing rules in both chambers of Congress have proved largely ineffective because the rules committees enjoy great latitude to waive them. Congress should therefore institute something similar to the “Byrd Rule” for appropriations bills. The Byrd Rule prohibits Senators from including “extraneous provisions” in a type of legislation known as a budget reconciliation bill, and then clearly defines what characteristics would render a provision to be considered “extraneous.” All Senators are empowered to challenge any provision as extraneous, and if the challenge is successful, the provision is automatically removed from the bill.³¹ The Senate may still try to waive this removal, but this can only be accomplished with the support of a three-fifths supermajority.³²

Similarly, both houses of Congress could enact a law prohibiting the inclusion of “extraneous” provisions in appropriations bills. The law could specify that negative earmarks would constitute an “extraneous provision” and would thus be subject to a point of order, which any member could raise during consideration of the underlying appropriations bill. In particular, the law could define as extraneous any provision added to an appropriation bill that seeks to accomplish a substantive change to existing legal requirements during the fiscal period covered by the appropriations bill. These legislative reforms would carry the risk of blocking potentially “beneficial” negative earmarks (*i.e.*, those aimed at blocking the implementation of deregulatory programs that are harmful to the public interest).³³ On balance, though, the disadvantages of negative earmarks are so great that this trade-off would ultimately still be worthwhile.

Short of these legislative reforms, Congress could also adopt more modest procedural reforms aimed at improving the transparency of the appropriations process and the level of deliberation that negative earmarks actually receive. For example, both houses of Congress could establish new rules requiring appropriations committees to conduct more extensive hearings on appropriations bills and giving the minority party the chance to request witnesses for those hearings. In particular, the new rules could require both chambers to conduct legislative hearings to examine every negative earmark that by its terms changes substantive law during the period covered by the appropriations bill. These hearings would ensure greater deliberation of these negative earmarks, and the transparency they would introduce would likely discourage lawmakers from attempting to attach particularly controversial negative earmarks. Alternatively, both houses of Congress could establish rules that require appropriations bills that are over a certain length to have a more detailed table of contents or to employ comprehensive subject

headings throughout the body of the bill. Another possibility would be to require these longer appropriations bills to include a detailed index of all the topics that they cover.³⁴

Restricting the misuse of negative earmarks poses a significant challenge, since ultimately reform will have to come from Congress itself. Congress, of course, will be reluctant to relinquish this power. Worse still, the current dysfunctional state of Congress suggests that the task of enacting any of the reforms suggest above will be especially challenging.

Nevertheless, the best hope for persuading Congress to limit its own use of negative earmarks is to build up and sustain a broad public campaign against them. The historical example of restricting the use of “affirmative earmarks” provides a model for what this campaign might look like. The national media played a critical role in focusing the public’s attention on earmarks that affirmatively directed spending toward certain projects or programs. News stories famously highlighted such examples of wasteful, earmark-fueled spending projects as the Gravina Island Bridge—or as it was better known, the “Bridge to Nowhere”—and in the process made affirmative earmarks a prominent campaign issue. Eventually, the House and the Senate were shamed into adopting reforms that greatly restricted their use.³⁵ (Of course, the conservative movement has long made rooting out wasteful spending a key element of its platform, so reforms aimed at restricting affirmative earmarks would have already been appealing to them. In contrast, the conservative movement is likely to be less sympathetic to a campaign to limit antiregulatory negative earmarks, given that these riders are generally seen as a way of reducing the size and reach of government.)

The media should now focus its attention on educating the public about negative earmarks. A strong public reaction against these provisions will be necessary to similarly induce the leaders of both parties to prohibit them.³⁶ While thus far sparse, a few prominent news stories about antiregulatory negative earmarks demonstrate they can have strong resonance with the public. For example, in the popular television news show *Last Week Tonight*, host John Oliver discussed a negative earmark supported by the industrial poultry farming industry that blocked the Department of Agriculture from implementing economic protections for contract chicken farmers. The story highlighted how the negative earmark to block the program had been sponsored by Rep. Steve Womack (R-AR), who has received significant campaign contributions from the poultry industry. Oliver urged his viewers to support efforts by Rep. Marcy Kaptur (D-OH) to strip the negative earmark from a pending agriculture appropriations bill. In an interview after the show aired, Rep. Kaptur noted that the publicity that the negative earmark received on Oliver’s show might improve the chances of success for her next attempt to have it removed.³⁷ A copy of the segment posted on YouTube has already tallied close to 3.3 million views.³⁸

The public interest community will have a role to play in this campaign as well. All public interest organizations, regardless of their specific missions, face the possibility that programs they support will be targeted by an antiregulatory negative earmark in the dead of the legislative night. As such, the entire community should band together and speak with a unified voice to demonstrate how widespread the opposition to antiregulatory negative earmarks is. Putting this issue high on the public agenda will likely require a lot financial resources as well. Thus, the public interest community may wish to consider reaching out to foundations or civic-minded wealthy individuals who have previously been involved in “good governance” projects and

persuade them to help make the campaign against antiregulatory negative earmarks a defining issue. The fact that ending the use of these harmful negative earmarks is such a discrete issue and one for which a “win” can be measured and defined so clearly should make the campaign a worthy candidate for this kind of support.

As a preliminary step, this activist campaign could work to improve and coordinate their efforts to quickly review pending appropriations bills as they are released to find harmful antiregulatory negative earmarks and alert the public, press, and sympathetic lawmakers. Thanks to the hard work of groups such as the Natural Resources Defense Council and the Sierra Club, such efforts are already taking place for the environmentally-related appropriations bills.³⁹ Other groups such as the Coalition for Sensible Safeguards are also beginning to look for antiregulatory negative earmarks in other appropriations measures as well. To highlight particular controversial antiregulatory negative earmarks, the activist campaign could pursue well-placed op-eds in targeted local newspapers where a critical mass of the regulatory beneficiaries live or work. Alternatively, the op-eds could be aimed at influential newspapers located within the state or congressional district of the lawmaker who sponsored the antiregulatory negative earmark.

Endnotes

¹ Sam Youngman, *Kentucky's McConnell Reflects After Reaching the Top*, LEXINGTON (KY.) HERALD-LEADER, Nov. 6, 2014, available at http://www.kentucky.com/2014/11/06/3525294_kentuckys-mcconnell-reflects-after.html?rh=1.

² Members might also attempt to include “legislative riders” that are antiregulatory in nature, such as provisions that require agencies to undertake new onerous processes while implementing regulatory programs. Separate House and Senate rules technically prohibit any such riders that create new law or change existing ones by, for example, creating new rulemaking requirements. These rules have been interpreted as not prohibiting limitation riders, however, which arguably do not change or create law and are applicable for a defined period of time. Even with respect to legislative riders, the rules are often flouted when the rules committees of both houses liberally issue waivers for riders the leadership prefers and deny waivers for riders the leadership opposes. Thomas O. McGarity, *Deregulatory Riders Redux*, 1 MICH. J. ENVTL. & ADMIN. L. 33, 73 (2012). One noteworthy example was the inclusion of the Data Quality Act in the 2001 appropriations bill for “Treasury and General Government Operations.” Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619, 647-48 (2006). This rider requires agencies to ensure and maximize the quality of information that they disseminate and to establish an error correction process. The rider also directs White House Office of Management and Budget (OMB) to issue guidelines outlining how agencies are supposed to implement these new requirements and incorporate them into their day-to-day work.

³ The Antideficiency Act gives limitation riders teeth by prohibiting any individual to spend monies in contravention of such a command in an appropriation act. 31 U.S.C. § 1512.

⁴ McGarity, *supra* note 2, at 52.

⁵ ENVTL. PROTECTION AGENCY, EPA FACT SHEET: CLEAN POWER PLAN, BY THE NUMBERS: CUTTING CARBON POLLUTION FROM POWER PLANTS (2014), available at <http://www2.epa.gov/sites/production/files/2014-06/documents/20140602fs-important-numbers-clean-power-plan.pdf>.

⁶ ENVTL. PROTECTION AGENCY, PROTECTION OF STRATOSPHERIC OZONE: CHANGE OF LISTING STATUS FOR CERTAIN SUBSTITUTES UNDER THE SIGNIFICANT NEW ALTERNATIVES POLICY PROGRAM 16 (prepublication version of the final rule signed by Env'tl. Protection Agency Admin. Gina McCarty, July 2, 2015) (to be codified at 40 C.F.R. pt. 82), available at http://www.epa.gov/ozone/snap/download/SAN_5750_SNAP_Status_Change_Rule_FINAL_RULE_signature_version-signed-7-2-2015.pdf.

⁷ ENVTL. PROTECTION AGENCY, REGULATORY IMPACT ANALYSIS OF THE PROPOSED REVISIONS TO THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR GROUND-LEVEL OZONE ES-14 – ES-15, tbl.ES-7 (2014), available at <http://www.epa.gov/ttn/ecas/regdata/RIAs/20141125ria.pdf>.

⁸ ENVTL. PROTECTION AGENCY, ECONOMIC ANALYSIS OF THE EPA-ARMY CLEAN WATER RULE x-xi, figs.ES-1 & ES-2 (2015), available at http://www2.epa.gov/sites/production/files/2015-05/documents/final_clean_water_rule_economic_analysis_5-15_2.pdf.

⁹ Geof Koss, *Tempers Flare As Senate Panel OKs Interior-EPA Spending Bill*, GREENWIRE, June 18, 2015; Jean Chemnick, *House Panel Clashes on Spending, Policy Provisions of Interior-EPA Bill*, GREENWIRE, June 16, 2015.

¹⁰ Ctr. for Responsive Politics, OpenSecrets.org, Rep. Ken Calvert, Top Industries, 2013-2014, <https://www.opensecrets.org/politicians/industries.php?cycle=2014&cid=N00007099&type=I&newmem=N> (last visited July 6, 2015).

¹¹ Ctr. for Responsive Politics, OpenSecrets.org, Rep. Evan Jenkins, Top Industries, 2013-2014, <https://www.opensecrets.org/politicians/industries.php?cycle=2014&cid=N00035531&type=I&newmem=N> (last visited July 6, 2015).

¹² Ctr. for Responsive Politics, OpenSecrets.org, Rep. Tom Cole, Top Industries, 2013-2014, <https://www.opensecrets.org/politicians/industries.php?cycle=2014&cid=N00025726&type=I&newmem=N> (last visited July 6, 2015).

¹³ Ctr. for Responsive Politics, OpenSecrets.org, Sen. Lisa Murkowski, Top Industries, 2013-2014, <https://www.opensecrets.org/politicians/industries.php?cycle=2014&cid=N00026050&type=I&newmem=N> (last visited July 6, 2015).

¹⁴ Emily Atkin, *Mitch McConnell's Move To Oversee EPA Budget Means One Thing: The Climate Fight Is Personal*, CLIMATEPROGRESS, Feb. 3, 2015, <http://thinkprogress.org/climate/2015/02/03/3618570/mcconnell-epa-budget-subcommittee/> (last visited July 6, 2015).

¹⁵ Ctr. for Responsive Politics, OpenSecrets.org, Sen. Mitch McConnell, Top Industries, 2009-2014, <https://www.opensecrets.org/politicians/industries.php?cycle=2014&cid=N00003389&type=I&newmem=N> (last visited July 6, 2015).

¹⁶ Ctr. for Responsive Politics, OpenSecrets.org, House Appropriations Committee, Top Industries, 114th Congress (2014), <https://www.opensecrets.org/cmteprofiles/indus.php?cmteid=H03&cmte=HAPP&congno=114> (last visited July 6, 2015).

¹⁷ Ctr. for Responsive Politics, OpenSecrets.org, Senate Appropriations Committee, Top Industries, 114th Congress (2014), <https://www.opensecrets.org/cmteprofiles/indus.php?cmteid=S03&cmte=SAPP&congno=114> (last visited July 6, 2015).

¹⁸ The fundamentally anti-democratic nature of negative earmarks is particularly egregious because the explicit purpose of these provisions is to override laws that reflect the previous exercise of democratic authority. Indeed, all of the regulatory actions targeted by the negative earmarks in the pending Fiscal Year 2016 Interior and Environment appropriations bill are the direct outgrowth of laws such as the Clean Air Act and the Clean Water Act, which were enacted by Congress and signed into law by the President following regular legislative order.

¹⁹ McGarity, *supra* note 2, at 71-72; Lazarus *supra* note 2, at 660-61.

²⁰ McGarity, *supra* note 2, at 74.

²¹ Lazarus, *supra* note 2, at 660-61.

²² McGarity, *supra* note 2, 76-77.

²³ Public interest groups have occasionally used riders to stop agencies from implementing policies they opposed. For example, during the George W. Bush Administration, several public interest groups successfully supported the inclusion of a limitation rider into the Fiscal Year 2002 appropriations bill for the Federal Motor Carrier Safety Administration (FMCSA), which prohibited expenditures to implement a program that would allow trucks from Mexico to serve destinations in the interior of the United States. The FMCSA's regulations were a prerequisite to allowing trucks from Mexico to enter the country. The public interest community opposed these standards because they were very weak, potentially endangering the safety of U.S. drivers. Jason M. Patlis, *Riders on the Storm, or Navigating the Crosswinds of Appropriations and Administration of the Endangered Species Act: A Play in Five Acts*, 16 TUL. ENVTL. L.J. 257, 269 (2003).

²⁴ McGarity, *supra* note 2, at 78; Lazarus, *supra* note 2, at 663-64.

²⁵ McGarity, *supra* note 2, at 80.

²⁶ *Congress and the Public: Congressional Job Approval Ratings Trend (1974-present)*, GALLUP, <http://www.gallup.com/poll/1600/congress-public.aspx> (last visited July 6, 2015).

²⁷ McGarity, *supra* note 2, at 35.

²⁸ Lazarus, *supra* note 2, at 674-75.

²⁹ *Id.* at 622.

³⁰ McGarity, *supra* note 2, at 36.

³¹ 2 U.S.C. § 644.

³² Lazarus, *supra* note 2, at 678-79.

³³ A legislative reform could attempt to minimize this harmful consequence somewhat by providing Congress with the option of waiving a prohibition of an extraneous provision in an appropriations bill through a three-fifths supermajority vote, much like the Byrd Rule allows. Given the highly polarized state of Congress at the present time, the prospects for achieving such a vote would often be remote.

³⁴ Lazarus, *supra* note 2, at 679-80.

³⁵ McGarity, *supra* note 2, at 83-84.

³⁶ *Id.* at 84-85.

³⁷ Nathaniel Haas, *John Oliver vs. Chicken*, POLITICO, June 1, 2015, available at <http://www.politico.com/story/2015/06/john-oliver-vs-chicken-118510.html>.

³⁸ Last Week Tonight with John Oliver: Chickens (HBO), YouTube, <https://www.youtube.com/watch?v=X9wHzt6gBgl> (last visited July 6, 2015).

³⁹ Natural Resources Defense Council, 2014 Anti-Environmental Budget Riders, <http://www.nrdc.org/legislation/2014-riders.asp> (last visited July 6, 2015).

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Founded in 2002, the Center for Progressive Reform is a 501(c)(3) nonprofit research and educational organization comprising a network of scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. CPR believes sensible safeguards in these areas serve important shared values, including doing the best we can to prevent harm to people and the environment, distributing environmental harms and benefits fairly, and protecting the earth for future generations. CPR rejects the view that the economic efficiency of private markets should be the only value used to guide government action. Rather, CPR supports thoughtful government action and reform to advance the well-being of human life and the environment. Additionally, CPR believes people play a crucial role in ensuring both private and public sector decisions that result in improved protection of consumers, public health and safety, and the environment. Accordingly, CPR supports ready public access to the courts, enhanced public participation, and improved public access to information. CPR is grateful to the Bauman Foundation, the Deer Creek Foundation, and the Public Welfare Foundation for funding this report and for their generous support of CPR's work in general.

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