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Policy Riders: Bringing Transparency to a Shadowy Legislative Process

Schoolhouse Rock was only partly correct: getting a bill through Congress is just one way to turn proposals into law. Another way to write your policy demands into law is to hide them in the funding bills Congress passes every year to keep the government running. These "policy riders" in appropriations bills are temporary, but they establish new policies just like normal laws. Their use effectively shuts the public out of important policy discussions, and they undermine the openness of the legislative process. To remedy this practice, Congress can take some lessons learned from its reforms of the earmarking process.

Congress has used riders for decades to help set federal policy. According to congressional rules, appropriations, or spending bills, must not contain any policy provisions; new policies are theoretically confined to "authorization" bills. But in practice, Congress has approved of a process of inserting policy language into spending bills, so long as it is couched in specific prose that appears to seek only to direct how federal funds are being spent. For instance, instead of saying "federal agencies cannot buy any SUVs," which would set new federal policy, riders must be worded to limit how funds can be spent, as in "no funds in this bill may be used to buy SUVs." Thus, riders are known as "limitations."

In a sense, policy riders are the anti-earmark. Earmarks are provisions in appropriations bills specifically directing federal funds to a certain area or entity. Conversely, riders prevent funds from being spent in a certain way. But despite having the appearance of helping agencies decide how to spend their funds, cutting off federal funding can put an end to the activities that rely on it. For instance, many policy riders target government activities in Washington, DC, since Congress allocates the funds for the District's budget. One such rider prevented the District from using its funds for abortion (DC general funds are considered federal funds). Other recent riders have aimed to curtail gun regulations, defund the now-defunct community group ACORN, and stifle climate change research.

These policy changes often occur without public debate. Most riders are inserted into appropriations bills when they are created in committee, so when the public first sees appropriations bills, they are already full of policy provisions. Other riders may be added as amendments and openly debated in committee or on the floor, but even this debate is typically curtailed, as the time for amendments is usually limited – even when they aim at sweeping policy changes.

Furthermore, policy riders are difficult for non-policy experts to track. If a citizen is concerned about certain policies, say, access to abortion in Washington, DC, the Financial Services and General Government appropriations bill is likely not the first piece of legislation she would be concerned about.

And there are a lot of riders to keep track of. In recent years, Congress has been slow to individually approve the 12 annual appropriations bills that fund government and has instead been clumping them together in a giant "omnibus" spending bill. Last year's bill had hundreds of policy riders – too many to review in the few days the bill was publicly available before Congress voted on it. In fact, there were so many riders that even some members of Congress were unclear about exactly what they were voting on. In the end, most of the controversial riders were removed at the last second during negotiations between the House and the White House.

This year appears to be more of the same when it comes to riders. The Commerce-Justice-Science appropriations bill passed by the House earlier this month contained more than 60 riders, including a particularly controversial one that would cut off funding for the American Community Survey, a part of the Census that gathers important information about the U.S. population that is used by everyone from the federal government to small businesses. With Congress unlikely to finish the appropriations bills on time, another massive omnibus bill is likely.

Banning riders outright is not a practical solution, since in certain limited circumstances, they are an appropriate tool for Congress to use to guide agency actions. However, increasing transparency could mitigate policy rider abuse, as those inside and outside of Congress would have a greater opportunity to track and understand their implications.

Before it forswore earmarks in the current session, Congress made a concerted effort to bring this hidden aspect of appropriations bills into the light. Several of the steps Congress took to make earmarks more visible to the public could also be used for policy riders.

The most important reform would be to create a central list of all the riders in a bill, as both House and Senate rules required for earmarks. This list should be created by the Appropriations Committee staff and be made available to the public in advance of any vote on an appropriations bill, either in committee or on the floor of either house. The list should be more than a simple enumeration of riders; it should include a section describing the purpose and intent of each provision. Forcing members of Congress to clearly spell out the anticipated impact of their proposed riders would help the public understand just what their representatives are voting on and would bring a great deal of transparency to riders.

Additionally, the list of riders should be made machine-readable, which would facilitate rapid distribution of the list to citizens and interested parties via the web. Making the list available in THOMAS, the legislative database where many people inside and outside of Congress get information on bills, would also help raise awareness of the policy changes contained in riders.

Moreover, the riders should be highlighted in the text of the bills themselves. Currently, riders are often buried deep within the text of appropriations bills, which can stretch hundreds of pages, and if users do not know about the full list, they would find it difficult to find the hidden riders in the legislation. Having some kind of flag for these riders would help make them easier to spot and identify. Also, flagging the riders allows users to understand the provisions in context and draws attention to issues or programs that might have an unusual number of riders targeted at them, something a simple list of riders might not help with.

Forcing Congress to highlight and list all of the policy riders in its appropriations bills will not stop harmful or controversial riders from ever passing. But the steps detailed above will ensure policy changes are not slipped into massive bills without the public or legislators fully understanding their implications, and these reforms will bring transparency to this shadowy corner of congressional policymaking.

Momentum Builds for Legislation to Curb Use of Toxic Flame Retardants

Lawmakers are calling for legislation to protect children from toxic flame retardant chemicals embedded in a host of everyday consumer products. The substances have been linked to cancer, endocrine disruption, and other serious illnesses. Since these chemicals are widely used in furniture, clothes, and carpets, practically every home in the country could be affected.

Dangers of Flame Retardants

For over forty years, a class of synthetic chemicals, called flame retardants, has permeated the lives of all Americans. Flame retardants are used in everything from baby blankets and strollers, children's clothes, electronics, furniture, carpets, vehicle and airplane parts, and many other products. While these chemicals are intended to reduce the flammability of products, they also slowly leak out into the air, dust, and water and eventually enter our food and bodies.

Studies have increasingly shown that these chemicals are harmful and can cause cancer, developmental problems, neurological deficits, and impaired fertility. A Duke University study, released just last week, linked early exposure to one flame retardant, called polybrominated diphenyl ethers (PBDEs), to low birth weight, lower IQs, and impaired motor and behavioral development. The study also revealed that toddlers from lower-income minority families had levels of PBDEs in their bodies nearly twice that of white toddlers. This may be because lower-income families often must rely on less expensive clothing and products, which are usually made of synthetic materials and may have higher treatments of flame retardants. An earlier study by the University of California-Berkeley found that high exposure to flame retardants in pregnant women can alter brain development in the fetus.

Children are particularly vulnerable to exposure because of the higher level of contact they have with furniture, toys, and carpet. "A high proportion of infants are in physical contact with products treated with these chemicals almost 24 hours a day. Some of these chemicals are either known or suspected carcinogens," said Heather Stapleton, assistant professor of environmental chemistry at Duke University.

Secrets and Misinformation

Despite the scientific findings about the dangers of flame retardants, limited information about their risks is available to the public. "It's hard to determine what flame-retardant chemicals are in most products due to confidential business information that protects the companies' proprietary rights," Stapleton said. Environmental and health groups have long complained about chemical companies using trade secrets claims to hide information on the toxicity and health effects of chemicals. These trade secrets/confidential business information claims prevent government agencies and the public from being able to evaluate the risks associated with various chemicals and from taking action to protect public health and the environment.

A recent investigation on flame retardants found that companies went well beyond hiding behind trade secrets claims and actively produced misinformation and manipulated existing science data. In its four-part series, *Playing with Fire*, the *Chicago Tribune* found that both the tobacco and chemical industries waged a "decades-long campaign of deception" to mislead the public, state legislators, and regulatory agencies about the toxicity of flame retardants.

Unknown to many, the use of flame retardants in furniture can be traced back to the tobacco industry. Faced with growing pressure to produce fire-safe cigarettes (in response to the growing number of house fires caused by smoldering cigarettes), the tobacco industry promoted flame retardant furniture instead. Cigarette lobbyists formed the National Association of State Fire Marshals, which includes the top fire marshal in each state, to further the tobacco industry's campaign.

Chemical companies that produced flame retardants also began their own promotion efforts, some of which included very deceptive practices. The top three flame retardant manufacturing companies created a phony citizen's group in 2007, called Citizens for Fire Safety, to push for laws requiring flame retardants in furniture. The group paid a prominent burn doctor, David Heimbach, to testify about children burned to death lying on cushioning which did not contain flame retardants. The *Chicago Tribune* reported that Heimbach's stories were false and that the babies he described did not

exist. Heimbach responded that his testimony was meant to be anecdotal and that he "wasn't under oath."

The chemical industry also manipulated scientific findings to further their campaign for flame retardants and downplay their health risks. For instance, the lead scientist of a government study comparing fire retardant with non-fire retardant products argued that industry's use of the study was "improper and untruthful." Another study, financed by the chemical industry more than 15 years ago, concluded that flame retardants prevent deadly fires. However, that study is only available in Swedish and relied on weak evidence from only eight electrical fires caused by televisions. The newspaper concluded that the industry has disseminated "misleading research findings so frequently that they essentially have been adopted as fact."

Chemical Safety Reform Needed

The government has not taken action to regulate or provide information on toxic flame retardant chemicals because the EPA does not have sufficient authority to test and regulate the more than 80,000 chemicals in use. Under the Toxic Substances Control Act of 1976 (TSCA), the nation's primary and outdated chemical safety law, the EPA is required to prove that a chemical poses a health risk; unlike procedures at the Food and Drug Administration, chemical companies do not have to prove the safety of their chemicals before they are put into commercial use. In fact, under TSCA, companies only have to submit safety data "if they have it." However, there is no legal obligation for chemical companies to research the potential health risks from their products before selling them for use. This creates a perverse incentive to avoid such health research, since any problems discovered could be used by the government to limit use and thereby reduce profits.

In 2010, the EPA attempted to use its authority under TSCA to the fullest extent possible by creating a "chemicals of concern" list to restrict the use of certain chemicals and alert the public to their possible dangers. PBDEs are believed to be among the chemicals the EPA added to the list. However, the rule that created this list has been under review at the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) for the past two years (other important public health and safety rules have also been delayed at OIRA). In the meantime, countless Americans are being exposed to potentially toxic chemicals.

Policymakers have proposed legislative remedies to strengthen EPA's authority in this area, but the measures have not yet been enacted. Sen. Frank Lautenberg (D-NJ) introduced the Safe Chemicals Act of 2011 (S. 847) to increase chemical safety, improve consumer access to information on chemical hazards in products, and protect vulnerable populations, such as low-income communities, children, and pregnant woman. The bill would require safety substantiation of chemicals before they are placed in consumer goods, such as baby cribs. So far the legislation, strongly opposed by the chemical industry, has failed to move in Congress.

Stroller Brigade and Lawmakers Call for New Safe Chemical Legislation

On May 22, families across the country marched in Washington, DC, to lobby for action on the Safe Chemicals Act. The family-oriented campaign, known as the Stroller Brigade, is organized by Safer

Chemicals, Healthy Families, a coalition of 280 public health, parent, environmental, and community organizations.

"It's shocking that toxic chemicals end up in everyday consumer products, and in our bodies, without anyone proving that they are safe," Lautenberg told the gathering on the steps of the Capitol. "The Stroller Brigade is carrying an important message to Congress that we're not going to stand by and let our kids continue to be exposed to chemicals that make them sick. Concerned moms are the best weapons we have in this fight."

"The disturbing truth is that flame retardants are only one example of the many toxic substances that have made their way into American homes as a result of self-serving chemical companies and the weak, ineffective federal law that has regulated chemical safety standards since 1976," Sen. Richard Durbin (D-IL) stated. Durbin urged Senate colleagues to revive the proposed Safe Chemicals Act and questioned the White House on the status of EPA's proposed chemicals of concern rule.

Obama Plans to Further Harness Technology for Transparency

A new White House strategy could revolutionize transparency by reforming the fundamentals of how government uses technology. The plan lays out procedures for establishing openness as the default for public information and raises the bar for usability, efficiency, and innovation. The reforms promise to make government information easier to find and use through a series of concrete actions to be taken over the next year and would help Americans engage with their government.

"The New Normal"

On May 23, President Obama issued a memorandum, "Building a 21st Century Digital Government." The memo introduces a new strategy developed by the Federal Chief Information Officer (CIO), Steven VanRoekel, entitled, "Digital Government: Building a 21st Century Platform to Better Serve the American People." The strategy builds on previous administration initiatives, such as its effort to reform federal websites and using online technologies to improve service to citizens.

The strategy is designed to "ensure that agencies use emerging technologies to serve the public as effectively as possible" and will require agencies "to adopt new standards for making applicable Government information open and machine-readable by default." The memo directs agencies to comply with the strategy's requirements within one year and to publicly report on their progress.

A Plan for Success

The plan calls for strategic coordination and enhanced oversight of IT services across the federal government. Central to the strategy is a shift to designing IT systems to support greater openness. "We will have, from its creation to its dissemination, open data as the new normal," said VanRoekel in an interview with *O'Reilly Radar*.

This strategy is not entirely new to the federal government, but it is different in important ways that may make it more successful than past efforts.

First, the strategy explains the benefits of greater openness to the public as well as to government itself, giving agencies a clear self-interest in delivering on the transparency commitments.

Second, the strategy emphasizes the role of systems design in facilitating or inhibiting transparency, moving the consideration of openness earlier in the information lifecycle – when systems are being created or information is being collected. For instance, by collecting information electronically, non-disclosable information such as an individual's Social Security Number can be easily segregated and automatically withheld, rather than requiring time-consuming and expensive manual redaction of paper records later in the process. Agencies are already required to make such considerations under OMB Circular A-130. OMB Watch has recommended focusing on openness at the earliest stages of designing IT systems (for instance, see our recent testimony to the House Oversight committee on improving implementation of the Freedom of Information Act.)

Third, the strategy requires OMB to issue a policy within six months that will require new IT systems to be designed for openness. Agencies will be required to evaluate new systems to consider whether the information they contain can be released to the public. Each agency must transition two existing major systems within a year and publish a plan for transitioning others. The new policy plus concrete deadlines will set clear expectations for agencies to successfully implement the strategy.

Putting the Public First

The strategy also contains a number of additional reforms to make government more transparent and accessible to the American people:

- *Metadata:* The use of metadata, which helps users find and evaluate information by describing characteristics such as its date and author, will be expanded and standardized.
- *APIs:* Agencies will expand the use of application programming interfaces (APIs), which allow third parties to develop innovative online tools that pull data directly from government databases. Data.gov will expand to include a catalog of agency APIs.
- *Machine-readable:* The strategy also supports greater use of machine-readable data formats, including industry standards such as XML and XBRL, which help citizens analyze the data and facilitate third parties in developing tools that use the data.
- *Mobile:* Within a year, each agency must make two existing services accessible on mobile devices, which are increasingly used by the public, including particular groups – such as African Americans – who trail in home broadband adoption but lead in mobile adoption. Agencies must also publish a plan for improving mobile accessibility of additional services so people can more easily access government information from phones and other mobile devices.
- *Customer feedback:* Within six months, agencies must implement online analytics and customer feedback tools. Collecting this information – standard practice in the private sector – will better inform agencies about what works well and what doesn't and enable targeted improvements to benefit the needs of users.

- *Shared services:* The strategy emphasizes interoperability and shared infrastructure between agencies, which can save money as well as provide more consistent services to the public. For instance, the FOIA portal, a central website currently under development to coordinate information requests across agencies, could reduce costs, speed up processing, and better inform requesters of the status of their requests.

The plan also includes new support systems to aide implementation. A new Digital Services Innovation Center will be created within the General Services Administration (GSA) to support agencies in this work. GSA has already named staff to head the center. Additionally, a new advisory group will publish guidance on optimizing websites to be more usable, coordinating information delivery across agencies, using customer feedback to make improvements, and complying with web standards.

Coinciding with the release of the strategy, the White House also announced a new Presidential Innovation Fellows program, which could bring new energy and expertise to federal IT. Fellows will join the government for six months to a year of focused work on projects such as catalyzing wider use of open government data and streamlining access to government information.

Next Steps

The White House's new digital government strategy is an ambitious and forward-looking plan with the potential to make government more transparent, efficient, and accessible. The plan incorporates many key elements for success, including leadership from the White House, a clearly articulated vision, specific deliverables and timelines, assistance for implementing agencies, and public progress reporting. We anticipate working with agencies to implement the strategy in a way that prioritizes improving services that strengthen democracy and accountability, as well as those that make everyday life more convenient.

Workplace Safety and Randomized Controlled Trials: Another Weapon of Delay?

A fundamental principle of modern workplace safety laws holds that if scientific evidence suggests the health and safety of the public is at risk, the federal government should step in and take action, even if no conclusive proof has yet been generated. The principle is that the government should adopt public protections based on the "best available evidence" rather than wait indefinitely for "proof" of a hazard while workers suffer harm.

In practice, however, this has meant that industries and interests with an economic stake in the status quo often fight against federal health and safety improvements by trying to invalidate the scientific evidence showing that certain processes or products are dangerous to human health. The most flagrant examples are the money the tobacco industry invested in "scientific studies" questioning the finding that smoking causes cancer and the funding oil and gas companies provided to studies questioning the impact of carbon emissions on the earth's climate. Other examples include industry-sponsored studies questioning the relationship between chrysotile asbestos and mesothelioma (a type

of cancer) and formaldehyde and cancer. The deliberate production of studies designed to undermine the scientific consensus about various health risks has delayed the establishment and enforcement of new standards that could have saved the health and lives of hundreds of thousands of Americans.

Now a new hurdle is emerging. The Office of Management and Budget's (OMB) recent draft report to Congress on costs and benefits of federal regulations states that randomized controlled trials (RCTs) might be "appropriate and useful" as a "form of advance testing of regulatory alternatives." This is an alarming development for several reasons.

A randomized controlled trial is a type of epidemiology study, extensively used to test the effectiveness of new drugs seeking Food and Drug Administration approval. One group of people with an illness is given a new drug, and a second group is given the existing treatment (or nothing), and the results are compared over a limited time period, under the careful supervision of medical professionals. Over the past few decades, some social scientists have adapted these methods to try to test the impact of policy interventions. For example, one group of high school dropouts participates in a training program and another demographically similar group does not; employment rates at the end of the training period are compared to determine if the training had the desired effect of boosting employment rates. In these kinds of studies, there are multiple "external" factors that can affect outcomes, so large numbers of participants are required to achieve statistically reliable outcomes.

A number of characteristics of such controlled random experiments make them an inappropriate method for determining occupational or environmental risks. First, as noted above, large numbers of participants are required for statistical validity. To achieve the necessary numbers, one study might need to involve multiple worksites, which would dramatically increase the amount of time required to set up and operate a study and reduce the likelihood that all "control" and "treatment" groups experience the same conditions.

Second, these kinds of studies are extremely costly to conduct. When controlled experiments were used to evaluate job training programs during the 1980s and 1990s, each experiment cost millions of dollars to carry out.

Third, the longer the "experiment" lasts, the less reliable the method becomes because individuals in both control and treatment groups drop out of the study, and it is impossible to know if there is a pattern to the dropouts that would bias the results. Since it often takes decades before workplace health hazards make people sick, random assignment models that last only a year or two cannot accurately identify workplace hazards.

Most importantly, the use of RCTs to measure the effectiveness of workplace safety standards raises moral and legal questions. If there is enough evidence of harm to warrant a multi-year, multi-site, multi-million dollar research project, then surely there is enough evidence to require better working conditions for workers in the facilities. Failing to act is relegating workers in the control group to long-term, and in some cases, irreversible health problems. Some might argue that conducting a five-year study to finally determine that universal standards are needed is worth the sacrifice of the health of people in the control group. Those in the control group would probably disagree.

Despite these clear problems, opponents of workplace standards on repetitive motion disorders, for example, have been pushing RCTs as the gold standard for scientific evidence. Opponents of Occupational Safety and Health Administration (OSHA) ergonomics regulation have argued that repetitive motion injuries do not really exist – despite hundreds of epidemiology studies showing that workers who perform repetitive tasks have significantly higher incidences of tendonitis, carpal tunnel syndrome, and other injuries than those who do not. Having failed to discredit the evidence of a causal link, the industry is now asking for a random assignment experiment showing that regulations that reduce repetitive tasks would reduce workers' injuries.

From a legal perspective, reliance on RCTs would move agencies away from relying on the "best available evidence" as a basis for acting on public health risks to a higher, much more difficult standard to meet – "best *conceivable* evidence." Public health laws now recognize that government should issue protections when the cumulative scientific evidence suggests serious harm to the public, even if there is no "incontrovertible proof of harm." It was the "best available evidence" standard that allowed federal agencies to caution the public about the hazards of secondhand smoke, even when the tobacco industry protested that there was not enough proof of harm; this standard allowed OSHA to regulate vinyl chloride, even though the plastics industry protested there was not enough proof of harm; and it was this standard that allowed EPA to regulate diesel particulate matter even when manufacturers protested there was not enough proof to do so.

The standards of "best available evidence" and "cumulative scientific evidence" have served the public well for four decades. Promoting the use of random assignment evaluations is just another way for industry to slow or shut down new standard setting by federal agencies. This is not an idea OMB should promote.

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