

ONE HUNDRED TWELFTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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May 31, 2011

The Honorable Fred Upton
Chairman
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Upton:

We are writing to alert you that the Energy and Power Subcommittee has acted in violation of the policies you announced at the beginning of this Congress in reporting H.R. 1705, known as the TRAIN Act. We urge you to delay consideration of the legislation until the Congressional Budget Office scores the legislation and the matter is addressed.

When the Committee organized earlier this year, you announced that the Committee would be “THE Austerity Committee in the House of Representatives.”¹ As one of your policies, you stated that the Committee would be following a discretionary CutGo rule.² You announced, “You may have a great idea for a new program; that’s fine. Just tell us how you will pay for it by reducing spending in another discretionary program.”³

You also announced another policy. You stated that the practice of not specifying authorization amounts was over.⁴ You said, “Maybe the authors don’t know how much something will cost – more likely, the authors are afraid to put a gigantic dollar figure on their idea. And so we simply cede discretion to the appropriators. Well, no more.”⁵

¹ Press Release, House Committee on Energy and Commerce, Chairman Fred Upton's Remarks from Committee Organizational Meeting (Jan. 20, 2011) (online at <http://energycommerce.house.gov/News/PRArticle.aspx?NewsID=8155>).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

You described these as “the central policies in deciding what legislation is scheduled for consideration in Committee.”⁶

On Tuesday, May 24, 2011, the Energy and Power Subcommittee reported the TRAIN Act in violation of these policies. This legislation creates a new government entity, the Committee for the Cumulative Analysis of Regulations that Impact Energy and Manufacturing in the United States, and charges it with conducting a complex array of cumulative and incremental impact analyses of ten specified EPA regulations and potentially many other regulations and actions. Each of the analyses must examine fourteen separate factors plus uncertainties plus “covered actions” taken by over 100 state and local agencies implementing aspects of the regulations. As introduced, the TRAIN Act included an authorization for appropriations of \$2 million for fiscal years 2012 and 2013, an authorization many of us thought unrealistically low for such a difficult undertaking.

During the Subcommittee markup, an amendment offered by Rep. Sullivan to strike this authorization was adopted. Rep. Sullivan stated that once the specific authorization amount was removed, the agencies would simply use “existing resources under the current operating budgets” to implement the legislation.⁷ He stated:

I also note that the adoption of this amendment will keep our bipartisan legislation in compliance with both Chairman Upton’s principles for our markups and Majority Leader Cantor’s protocols for floor consideration under discretionary cut-go principles.⁸

However, Rep. Sullivan appears to be fundamentally misinformed about the effect of his amendment.

Striking the authorization from H.R. 1705 does not have the effect of forcing the executive branch to implement the legislation with existing resources. To the contrary, it has the effect of creating an implicit authorization of “such sums as may be necessary.”

The Government Accountability Office publishes the authoritative reference concerning federal fiscal law, *Principles of Federal Appropriations Law*, commonly referred to as the Red Book. According to the Red Book:

⁶ *Id.*

⁷ Statement of Rep. John Sullivan, House Committee on Energy and Commerce, Subcommittee on Energy and Power, *Markup on H.R. 1705, the “Transparency in Regulatory Analysis of Impacts on the Nation Act of 2011” and Discussion Draft of H.R. ___, the “Jobs and Energy Permitting Act of 2011,”* 112th Cong. (May 24, 2011).

⁸ *Id.*

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The existence of a statute (organic legislation) imposing substantive functions upon an agency that require funding for their performance is itself sufficient authorization for the necessary appropriations.⁹

The estimates of the Congressional Budget Office reflect this understanding and consultation with CBO staff confirm it. CBO provides "estimated authorizations" for legislation that do not have specific authorization clauses. For example, in a case particularly analogous to the TRAIN Act, S. 493 was recently reported from the Senate Committee on Small Business and Entrepreneurship. Although the legislation does not contain an authorization clause, CBO provided an estimated authorization for provisions requiring a National Research Council study, reporting that "CBO estimates that conducting a study as required by S. 493 would cost \$4 million over the 2012-2016 period."¹⁰

We do not believe the subterfuge used to report the TRAIN Act by the Subcommittee is appropriate. Members may have different views about the wisdom of the discretionary CutGo rule you announced for the Committee. We should all agree, however, that the rule should be applied evenhandedly.

We urge you to remedy this situation by postponing markup of the TRAIN Act until (1) CBO can score the legislation and provide members with an accurate assessment of its costs and (2) you clarify how the Committee will process legislation that will cost millions of taxpayer dollars to implement but has no specific authorization and no provisions to pay for the costs.

Thank you for the consideration of our request.

Sincerely,



Henry A. Waxman
Ranking Member



Bobby L. Rush
Ranking Member
Subcommittee on Energy and Power

cc: The Honorable Ed Whitfield
Chairman
Subcommittee on Energy and Power

⁹ Government Accountability Office, *Principles of Federal Appropriations Law*, Third Edition, Vol. I (Jan. 2004) (online at <http://www.gao.gov/legal/redbook.html>).

¹⁰ Congressional Budget Office, S. 493 SBIR/STTR Reauthorization Act of 2011 (Mar. 11, 2011) (online at <http://www.cbo.gov/ftpdocs/120xx/doc12098/s493.pdf>).