

# CRS Report for Congress

## Earmark Reform: Comparison of New House and Senate Procedural Rules

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# Earmark Reform: Comparison of New House and Senate Procedural Rules

## Summary

During 2007, both the House and Senate established similar new earmark transparency procedures for their respective chambers. They both require public disclosure of approved spending earmarks (as well as limited tariff or tax benefits) and the identification of their congressional sponsors. In addition, they require disclosure of further information from each congressional sponsor, such as a certification that the sponsor has no direct financial interest. Finally, each House also established procedures regarding new spending earmarks added to conference reports.

The House established its procedures through adoption of two House resolutions. On January 5, 2007, the House completed action on H.Res. 6 (110<sup>th</sup> Cong.), adopting the rules of the House, including new provisions in House Rule XXI to require public disclosure of approved earmarks, their sponsors, and the additional information. On June 18, 2007, the House adopted H.Res. 491 (110<sup>th</sup> Cong.), to require transparency for new spending earmarks added to conference reports on regular appropriations bills.

The Senate included its new parliamentary rule in the Honest Leadership and Open Government Act of 2007 (P.L. 110-81), which became law on September 14, 2007. This act used the term “congressionally directed spending item” rather than earmark, but is otherwise similar to the House requirement. It also includes a procedure to strike new items of spending added to conference reports.

The new House rule generally prohibits consideration of a measure, manager’s amendment, or conference report unless a list of earmarks and the name of each sponsoring Member (or a statement that there are no earmarks) is available before consideration. The new Senate rule prohibits a vote on a motion to proceed to consider a measure or a vote on adoption of a conference report, unless the chair of the committee or Majority Leader certifies that a complete list of earmarks and the name of each Senator requesting each earmark is available on a publicly accessible congressional website 48 hours before the vote.

Both House and Senate rules require earmark sponsors to provide similar information on each earmark to the committee of jurisdiction, but these rules include different public disclosure requirements regarding the information. Neither requirement is enforced by points of order. In the House, the applicable committee is to make “open to public inspection” the Member’s entire written statement on certain approved earmarks. The Senate rule requires the applicable committee to make available on the Internet the certifications of no financial interest.

With regard to certain spending earmarks first specified in conference, the House requires public disclosure of those earmarks and the names of those Members that requested each earmark identified. The Senate rule provides a procedure to strike certain new items of spending, including earmarks, from a conference report.

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# Earmark Reform: Comparison of New House and Senate Procedural Rules

During 2007, both the House and Senate established new earmark transparency procedures for their separate chambers. They provide for public disclosure of approved earmarks and the identification of their congressional sponsors.<sup>1</sup> In addition, they require disclosure of further information from each congressional sponsor, such as a certification that the sponsor has no financial interest in the earmark. Each House has also established procedures regarding new spending earmarks added to conference reports.

The House established its procedures through adoption of two House resolutions. On January 5, 2007, the House completed action on H.Res. 6 (110<sup>th</sup> Cong.), adopting the standing rules of the House, including a new provision to require public disclosure of approved earmarks and sponsors as well as the additional information. On June 18, 2007, the House adopted H.Res 491 (110<sup>th</sup> Cong.), to require transparency for new spending earmarks added to conference reports on regular appropriations bills.

In the Senate, a new parliamentary rule was included in the Honest Leadership and Open Government Act of 2007 (P.L. 110-81), which became law on September 14, 2007. The new rule provides for public disclosure of each “congressionally directed spending item,” its sponsors, and “no financial interest” certifications. It also includes a procedure to strike certain new items of spending added to conference reports.

This report describes and compares the new House and Senate procedures including an additional House requirement regarding the use of earmarks as leverage for votes. Section 404 of H.Res. 6 added:

- one new clause (9) to House Rule XXI; and
- two new clauses (16 and 17) to House Rule XXIII.

Together they provide the new House procedures, except those regarding new earmarks added in conference. These additional procedures were adopted in H.Res. 491, which did not amend House rules, but instead is a House standing order which

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<sup>1</sup> This report uses the term earmark to apply to *congressional earmark* as used in the House rule and *congressionally directed spending item* as used in the Senate rule, as well as limited tax or tariff benefits (see *Earmark Definition* section below).

will be effective during the 110<sup>th</sup> Congress. Section 521 of P.L. 110-81 includes new Senate Rule XLIV.<sup>2</sup>

## Earmark Definition

For purposes of the new procedures discussed below, both House and Senate rules<sup>3</sup> provide definitions for spending earmarks, limited tax benefits, and limited tariff benefits.

### Spending Earmark Definition

The spending earmark definitions in House Rule XXI, clause 9, and Senate Rule XLIV are identical, except the identification of earmark requesters.

For purposes of all the disclosure requirements above, a spending earmark is a provision in legislation or report language<sup>4</sup> that meets specific criteria. First, the provision or language is primarily included at the request of a Representative, Delegate, the Resident Commissioner, or Senator under the House rule (or a Senator under the Senate rule). Second, the provision or language provides, authorizes, or recommends a specific amount of discretionary budget authority, credit authority, or other spending authority for certain purposes (1) with or to an entity,<sup>5</sup> or (2) targeted to a specific state, locality, or congressional district. The purposes are a contract, grant, loan, loan guarantee, loan authority, or other expenditure. Finally, any of the above spending set asides that are selected through a statutory or administrative formula-driven or competitive-award process are excluded.

The definition is broad. It includes earmarks funded or recommended in appropriations legislation, as well as other non-appropriations legislation (such as authorizations), conference reports, and accompanying report language.

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<sup>2</sup> This public law also amended Senate Rule XXVIII, *Conference Committees; Reports; Open Meetings*, to significantly alter the procedure for disposing of points of order against “out of scope material” in conference reports. For more information, see CRS Report RS22733, *Senate Rules Changes in the 110<sup>th</sup> Congress Affecting Restrictions on the Content of Conference Reports*, by Elizabeth Rybicki.

<sup>3</sup> House Rule XXI, clause 9(d) and Senate Rule XLIV, paragraph 5.

<sup>4</sup> The term *report language* refers to information provided in reports accompanying committee-reported legislation as well as joint explanatory statements, which are attached to conference reports. Although the entire document is generally referred to as a conference report, it comprises two separate parts. The conference report contains a conference committee’s proposal for legislative language resolving the House and Senate differences on a measure, while the joint explanatory statement explains the conference report. If enacted, the bill text has statutory effect; the joint explanatory statement does not.

<sup>5</sup> Examples of an entity include a specific university or college, unit of a local or state government, or museum.

## Limited Tariff Benefit Definition

The definitions in the House and Senate rules are identical. Such tariff benefits are defined as “a provision modifying the Harmonized Tariff Schedule of the United States in a manner that benefits 10 or fewer entities.” This definition targets provisions in “miscellaneous duty suspension bills” or “miscellaneous tariff bills” (MTBs) which seek to temporarily reduce or eliminate tariffs on imports of particular commodities. The vast majority of tariff suspensions are on chemicals, raw materials, or other components used in the manufacturing process.<sup>6</sup>

## Limited Tax Benefit Definition

In contrast to the previous definitions, the House and Senate definitions of limited tax benefits are somewhat different. Under the Senate rule a *limited tax benefit* is defined as a revenue provision that provides a tax deduction, credit, exclusion, or preference to a particular beneficiary or limited group of beneficiaries under the tax code and contains eligibility criteria that are not uniform in application with respect to potential beneficiaries of the provision.

The House rule is more specific, and uses the term *limited tax benefit* to apply to (1) a revenue-losing provision that provides a tax deduction, credit, exclusion, or preference to no more than 10 beneficiaries under the tax code and contains eligibility criteria that are not uniform in application with respect to potential beneficiaries of the provision; or (2) a tax provision that provides one beneficiary with transitional relief from a change to the tax code.

## Public Disclosure Procedures on Earmark Requests

### Earmark List and Congressional Earmark Sponsors

The new rules in both the House and Senate include parliamentary procedures regarding greater transparency of congressional sponsors of earmarks.

**House Rule XXI, clause 9.** This rule prohibits House consideration of legislation, certain amendments, or conference reports, unless either

- a list of earmarks in such legislation, amendment, conference report, or any accompanying report language and the name of any House Member<sup>7</sup> who requested an earmark(s) on the list is made available; or
- a statement that there are no earmarks is made available.

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<sup>6</sup> For more on miscellaneous bills, see CRS Report RL33867, *Tariff Modifications: Miscellaneous Tariff Bills*, by Vivian C. Jones.

<sup>7</sup> This provision applies to any Representative, Delegate, or the Resident Commissioner requesting an earmark on the list. The name of any Senator requesting such an earmark that appears in a conference report or accompanying joint explanatory statement is also required.

Only selected amendments to legislative measures are covered under this rule: amendments in committee-reported legislation and manager's amendments. A *manager's amendment* is an amendment offered at the outset of consideration for amendment by a member of a committee of initial referral, under the terms of a special rule.<sup>8</sup> Major legislation is typically brought up on the House floor by a special rule, which provides the terms for consideration of the measure, and may also limit consideration of floor amendments, specify the order for consideration of specific amendments, or waive various House rules. After the House adopts a special rule, by a majority vote, Members consider the measure on the House floor. House Rule XXI, clause 9, does not cover certain forms of amendments,<sup>9</sup> such as an amendment between the Houses,<sup>10</sup> an amendment automatically agreed to upon adoption of a special rule, an amendment offered during floor consideration, or a committee amendment in the nature of a substitute made in order as original text for purposes of amendment.<sup>11</sup>

Under the House rule, the required list of earmarks (and congressional sponsors) or statement that there are no earmarks must be disclosed in specified public documents. For committee-reported legislation and conference reports, either a list or statement must be included in the applicable report language. Regarding non-reported legislation, the chair of each committee of initial referral is required to have a list or a statement printed in the *Congressional Record* prior to consideration of the legislation. The proponent of a manager's amendment must also have a list or statement printed in the *Congressional Record* prior to consideration of the amendment.

While the House has established rules designed to provide time for Members to review the contents of committee reports, conference reports, and joint explanatory statements before floor consideration, the House may waive these requirements. In cases in which a committee provides time for review, Members have an opportunity, for example, to draft amendments striking specific earmarks in a reported bill or lobby against a conference report. Under House Rule XIII, clause 4(a), committee-reported legislation may not generally be considered on the House floor until the accompanying committee report has been available to Members for at least three

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<sup>8</sup> A *committee of initial referral* refers to each committee to which a legislative measure is referred upon introduction of the legislation. In the House, bills are sometimes initially referred to more than one committee. The rule does not, however, cover committee(s) to which a bill is referred after an initial referral(s).

<sup>9</sup> Letter from the Office of the Parliamentarian to the Committee on Rules, inserted in the *Congressional Record* by Rep. Sessions, *Congressional Record*, daily edition, vol. 153, October 3, 2007, pp. H11184-H11185.

<sup>10</sup> To resolve differences between the House- and Senate-passed versions of a measure, Congress may refer the measure to a conference committee or, in other circumstances, Congress may consider amendments between the Houses.

<sup>11</sup> In this situation, a special rule provides for a committee amendment to replace the entire text of the measure and allows that committee amendment to be subsequently amended in two degrees, as if it were the original text of the measure. For more information, see CRS Report 98-995, *The Amending Process in the House of Representatives*, by Christopher M. Davis.

calendar days.<sup>12</sup> House Rule XXII, clause 8(a), provides a similar three-day availability requirement for conference reports. The conference report and attached joint explanatory statement must be available in the *Congressional Record* for at least three calendar days prior to consideration, and copies of the conference report and joint explanatory statement must be available for at least two hours before consideration.<sup>13</sup> The House, however, typically adopts special rules providing for consideration of conference reports that waive all points of order, including these.

The new earmark and sponsor disclosure requirements are not self-enforcing; a Member must raise a point of order on the House floor against consideration of the legislation, amendment, or conference report.

A point of order raised under this subsection may be based only on the failure to include a list of earmarks (and sponsors) or a statement that there are no earmarks in the report language or *Congressional Record*, as applicable.<sup>14</sup> In response to a parliamentary inquiry, the Speaker pro tempore explained that the new rule

... does not contemplate a question of order relating to the content of the statement offered in compliance with the rule. Argument concerning the adequacy of the list or the probity of a disclaimer is a matter that may be addressed by debate on the merits of the measure or by other means collateral to the review of the chair.<sup>15</sup>

Each committee, therefore, is left solely responsible for determining the contents of the list.

The House rule prohibits House consideration of a special rule that waives the new public disclosure requirements, and includes a special procedure to implement this new prohibition. If a Member raises a point of order against considering a special rule that includes such a waiver, the presiding officer does not rule on the point of order. Instead the House decides, by majority vote, whether to consider the special rule.<sup>16</sup> The House rule provides 20 minutes of debate, equally divided and controlled by the initiator of the point of order and an opponent. No other intervening motion is allowed, except one that the House adjourn. This procedure effectively allows the House to decide by a separate vote whether to allow this public disclosure requirement to be waived.<sup>17</sup>

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<sup>12</sup> For more details, see CRS Report RS22015, *Availability of Legislative Measures in the House of Representatives (The 'Three-Day Rule')*, by Elizabeth Rybicki.

<sup>13</sup> Ibid.

<sup>14</sup> House Rule XXI, clause 9(c).

<sup>15</sup> *Congressional Record*, daily edition, vol. 153, May 10, 2007, p. H4880.

<sup>16</sup> The method of resolving a point of order by a question of consideration is similar to that provided in Section 426 of the Congressional Budget Act for dealing with special rules that waive the application of Section 425 of the act prohibiting the consideration of legislation that includes an unfunded federal intergovernmental mandate.

<sup>17</sup> Points of order raised under this requirement are based solely on whether the rule includes (continued...)



**Senate Rule XLIV.** This rule provides different procedures from the House, but it is also intended to improve public disclosure of earmarks including the name of each Senator who requested any identified earmark. New Senate Rule XLIV prohibits a vote on a motion to proceed to consider any committee-reported legislative measure (and any amendment included in the text of the reported bill) or non-reported Senate legislative measure, unless the chair of the applicable committee or the Majority Leader (or designee) provides certain certifications.<sup>18</sup> Similarly, the Senate can not vote on adoption of a conference report unless the chair or Majority Leader (or designee) makes a similar certification.

The chair or Majority Leader must certify that a list (or a chart or other similar form) of all earmarks (including those in the applicable measure, conference report, or accompanying report language, if any) and the name of each Senator who submitted a request for each item listed has been available on a publicly accessible congressional website for at least 48 hours before such vote.<sup>19</sup> In the case of measures, they must also certify that the list of earmarks (and Senate sponsors) on the congressional website are in a searchable format. Lists associated with conference reports should also be in a searchable format, but only to the extent technically feasible.

If the presiding officer sustains a point of order against a vote on a motion to proceed, consideration on the motion is suspended until a certification is made and the sponsor (or designee) of the motion requests consideration to resume. Under Rule XLIV, paragraph 3, if a point of order is sustained against a conference report, it would be set aside.

These rules are not self-enforcing; a Senator must raise a point of order against the vote.<sup>20</sup>

Senate Rule XLIV provides two procedures to waive these requirements and restricts appeals of the presiding officer's rulings on such points of order. Unlike the House, the Senate does not have a generally applicable mechanism to waive its rules. Although a waiver motion is available for points of order under the Budget Act and

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<sup>17</sup> (...continued)

a waiver of Rule XXI, clause 9, and not whether such a waiver is necessary. For example, a point of order was raised against the consideration of a special rule providing for consideration of the conference report for the Department of Defense appropriations act for FY2008 because it waived all rules of the House, including Rule XXI, clause 9 and H.Res. 491. *Congressional Record*, daily edition, vol. 153, November 8, 2007, pp. H13312-H13314.

<sup>18</sup> The Senate typically decides to consider a measure by unanimous consent, but may also do so by a motion to proceed, which requires a majority vote to adopt. House-passed measures not reported from a Senate committee are not included because they do not include earmarks requested by Senators.

<sup>19</sup> Under the rule, the certification authority rests with the Majority Leader (or his designee) and committee chairs, not subcommittee chairs.

<sup>20</sup> For general information on points of order in the Senate, see CRS Report 98-306, *Points of Order, Rulings, and Appeals in the Senate*, by Valerie Heitshusen.

similar requirements, the Senate standing rules must typically be waived by unanimous consent (that is, no Senator objects to a unanimous consent request to waive a rule).<sup>21</sup> The new Senate rule, however, incorporates a waiver motion similar to that used under the Budget Act, and allows any Senator to make a motion to waive any of these points of order. An affirmative vote of three-fifths of all Senators (60, if there are no vacancies) is required to adopt the motion. Senators may debate the motion for up to one hour, with the time equally divided and controlled by the Majority and Minority Leaders (or their designees). These points of order may also be waived if the Majority and Minority Leaders jointly agree that “such a waiver is necessary as a result of a significant disruption to Senate facilities or to the availability of the Internet.”<sup>22</sup>

The Senate rule restricts appeals of the chair’s rulings on these points of order. Any Senator may appeal the presiding officer’s ruling on most Senate rules. Such appeals are generally debatable, and debate may be ended by cloture (requiring three-fifths vote of all Senators to adopt the cloture motion) or by a motion to table, which would uphold the chair’s ruling. The appeal procedure included in the new rule allows only one appeal and limits debate to one hour. A majority vote is generally required to overrule the chair’s ruling under Senate rules as well as under the new rule.<sup>23</sup> It is important to note that while appeals are not uncommon, the Senate rarely overturns the rulings of the presiding officer.<sup>24</sup>

Amendments in the reported bill or offered from the floor that include earmarks are covered under the rule, but the procedures differ. Those amendments in the text of the reported bill are subject to the same point of order described above that applies to reported measures. Regarding amendments offered from the floor, the rule recommends that the sponsor of an amendment that includes an additional earmark<sup>25</sup> ensure, as soon as practicable, that (1) a list of each earmark and (2) the name of any Senator requesting each earmark on the list be printed in the *Congressional Record*. This includes full-substitute amendments offered from the floor. As in the House, amendments between the Houses are not covered under this new rule.

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<sup>21</sup> Ibid.

<sup>22</sup> Senate Rule XLIV, paragraph 12.

<sup>23</sup> In the case of points of order under the Budget Act and similar requirements for which a three-fifths vote would be required for a waiver, any appeal would likewise require a three-fifths vote of all Senators.

<sup>24</sup> CRS Report 98-306, *Points of Order, Rulings, and Appeals in the Senate*, by Valerie Heitshusen. In the House, a Member may appeal the presiding officer’s ruling on a point of order; however, such appeals are routinely tabled. No rulings have been overturned in over a half a century. See CRS Report 98-307, *Points of Order, Rulings, and Appeals in the House of Representatives*, by Valerie Heitshusen.

<sup>25</sup> An additional earmark is one that is not included in the measure as placed on the Senate calendar or as reported by a committee or included in any accompanying committee report.

## Specified Information (Including Certifications) From Congressional Earmark Sponsors

Both House and Senate rules<sup>26</sup> require earmark sponsors to provide similar information on each earmark to the committee of jurisdiction, but these rules include different public disclosure requirements regarding the information. Neither requirement is enforced by points of order.

These rules require each Member requesting an earmark in legislation (conference report or accompanying report language) to submit specific written information to the chair and ranking member of the committee of jurisdiction. Each sponsor shall submit in writing (1) the sponsor's name; (2) in the case of a spending earmark, the name and address of the intended recipient<sup>27</sup> or, if there is no specifically intended recipient, the intended location of the activity; (3) in the case of a limited tax or tariff benefit, the sponsor must identify the individual or entities reasonably anticipated to benefit, to the extent known by the sponsor; (4) the purpose of the earmark; and (5) a certification of no pecuniary interest in such earmark.

While the House rule requires a certification that neither the Member nor the Member's spouse have any financial interest in the earmark, the Senate rule requires a certification that neither the Senator nor the Senator's immediate family have any pecuniary interest, consistent with paragraph 9 of the new rule.<sup>28</sup>

Regarding the differing House and Senate public availability requirements, in the House, the applicable committee is to make "open to public inspection" the Member's written statement on any earmark included in a measure or conference report. Each House committee has the discretion to determine its own public disclosure procedures. The Senate rule, on the other hand, recommends that each committee make available only the certification of "no pecuniary interest" for each earmark included in a Senate measure reported or considered by the Senate, conference report, or report language, if any. In addition, under the Senate rule, committees are to make the certifications available for public inspection on the Internet, as soon as practicable.

**Classified Earmarks.** The Senate rule specifically recommends that the committees of jurisdiction include on these lists applicable classified spending earmarks to the greatest extent practicable, consistent with the need to protect national security (including intelligence sources and methods). The information for

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<sup>26</sup> House Rule XXIII, clause 17, and Senate Rule XLIV, paragraph 6.

<sup>27</sup> The Senate rule requires the "name and location" of the intended recipient.

<sup>28</sup> For more information on the Senate pecuniary interest certification requirement, see Senate Select Committee on Ethics, Dear Colleague Letter, *Definition of "Immediate Family" for Requested Appropriations*, September 12, 2007, available at [<http://ethics.senate.gov/>], visited February 19, 2008. For more information on the House requirement, see House Committee on Standards of Official Conduct's Advisory Memorandum, *Financial Interests under the New Earmark Rules*, March 27, 2007, available at [<http://www.house.gov/ethics/>], visited Feb. 19, 2008.

each earmark identified should include an unclassified program description, spending amount, and name of Senate sponsor. The House rule does not include a specific provision on classified earmarks. Public disclosure of these earmarks and their sponsors are made under the disclosure requirements as discussed above.

## **Conference Report Procedures Affecting New Earmarks**

A new House standing order (adopted under H.Res. 491, 110<sup>th</sup> Congress) and Senate Rule XLIV<sup>29</sup> both address certain spending earmarks, sometimes referred to as “air-drops,” added in a conference report (and joint explanatory statement under the House rule) that were not specified in the House- or Senate-passed versions of the applicable bill (or in the accompanying House or Senate committee reports in the House rule). The House rule provides a public disclosure requirement for such earmark add-ons, while the Senate rule provides a procedure to strike certain add-ons, including certain earmarks.

### **House Standing Order**

This order provides a congressional public disclosure requirement for spending earmarks added to certain conference reports or accompanying joint explanatory statements during the remainder of the 110<sup>th</sup> Congress. The disclosure requirement only covers conference reports to regular appropriations bills, it does not cover other spending measures or revenue or tariff measures.

H.Res. 491 reiterates the prohibition in Rule XXI, clause 9 against consideration of a conference report, specifically as it relates to air-dropped earmarks in conference reports for regular appropriations bills. Analogous to Rule XXI, it requires the joint explanatory statement include a list of earmarks added to the conference report or joint explanatory statement, and the name of any Member or Senator who requested an earmark(s) on the list. As with the House public disclosure procedures described above, the disposition of a point of order under H.Res. 491 is not based on the sufficiency of such a list. Unlike points of order raised under Rule XXI, clause 9(a), however, points of order under H.Res. 491 are not resolved by a ruling of the Presiding Officer. Whereas under Rule XXI, clause 9(a) the Presiding Officer rules based on whether the required list (or statement) has been provided, under the standing order, a point of order is resolved by a question of consideration.

The standing order also prohibits consideration of a special rule waiving this new requirement. Under Rule XXI, clause 9(b), the Presiding Officer does not rule on a point of order against consideration of a special rule that waives the requirements of clause 9(a). Instead, as discussed above, the House decides, by majority vote, whether to consider it. Similarly, under H.Res. 491, the Presiding Officer does not rule on points of order raised against consideration of a special rule

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<sup>29</sup> Senate Rule XLIV, paragraph 8.

waiving the application of the standing order, and the point of order is resolved by a question of consideration.

As a result, a point of order made against either the conference report for a regular appropriations bill or a special rule waiving the requirement of the standing order would be disposed of by a question of consideration. As with Rule XXI, the standing order provides for 20 minutes of debate, equally divided and controlled for considering these questions of consideration. Due to this provision, the standing order allows the House to debate and vote on whether to consider a conference report (or special rule waiving the requirement) even when the standing order may not have been violated.<sup>30</sup>

## **Senate Rule XLIV, Paragraph 8**

The Senate rule establishes a new procedure to strike certain new spending earmarks, as well as other spending, added to conference reports.<sup>31</sup> It applies to provisions providing funds (both discretionary and direct (or mandatory) spending), but not provisions authorizing or re-authorizing funds. The new rule also does not apply to limited tax or tariff benefits added in conference.

The new provision in Senate Rule XLIV concerning conference is not directed against congressionally directed spending items, as are the provisions concerning disclosure described above, but instead allows any Senator to raise a point of order against any provision or provisions in a conference report that contain a specific spending level for a specific program, project, activity, or account when no specific funding level was provided for the applicable item in the House- or Senate-passed versions of the measure. The Presiding Officer may sustain points of order against one or more provisions in the conference report. This rule does not apply to language in joint explanatory statements, only those provisions in the legislative text of conference reports.

The new rule supplements Senate Rule XXVIII, which generally prohibits conferees from including in a conference report a new matter not dealt with in either the House- or Senate-passed versions of a measure. Under current Senate practice and precedents, however, earmarks air-dropped into conference reports are not typically interpreted as new matter. Rule XXVIII provides that in cases in which one of the versions of the bill is an amendment in the nature of a substitute, which is typically the case, the conferees may include a germane modification of the subjects in disagreement. Under existing precedents, earmarks added to a conference report are often considered germane modifications. For example, regular appropriations

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<sup>30</sup> For example, a point of order was raised against the consideration of a special rule providing for consideration of the conference report for the Department of Defense appropriations act for FY2008 because it waived all rules of the House, including Rule XXI, clause 9 and H.Res. 491. *Congressional Record*, daily edition, vol. 153, November 8, 2007, pp. H13312-H13314.

<sup>31</sup> For more information, see CRS Report RS22733, *Senate Rules Changes in the 110<sup>th</sup> Congress Affecting Restrictions on the Content of Conference Reports*, by Elizabeth Rybicki.

measures provide funding to each department and large independent agency by distributing the spending among several accounts.<sup>32</sup> Funding levels for programs, projects, or activities within an account, such as most earmarks included in legislative text, are generally considered germane modifications.

A Senator may raise a point of order under Rule XLIV against any provision or provisions in a conference report that contain a specific spending level for a specific program, project, activity, or account when no specific funding level was provided for the applicable item in the House- or Senate-passed versions of the measure. If a point of order is sustained, the offending provision is stricken from the conference report. After all points of order have been dealt with, the Senate decides whether to send to the House the remaining text of the conference report. The decision is debatable under the same limitations that may apply to the conference report, and no amendments are allowed. The Senate may waive this point of order with regard to a single provision or all provisions constituting new directed spending or appeal the Presiding Officer's ruling by a supermajority vote. Three-fifths of all Senators must vote to waive the rule or overrule the Presiding Officer's decision.

Under this new Senate rule, any Senator may propose a motion to waive all points of order provided in this new rule with respect to a pending measure or motion. A three-fifths vote of all Senators is required to adopt the motion. All motions to waive all such points of order against the pending measure or motion are collectively debatable for no more than one hour, equally divided and controlled by the Senate Majority and Minority Leaders (or their designees). Such motions are not amendable.

## Earmarks and Leverage

The House rule prohibits a Member from conditioning the inclusion of an earmark in a measure, conference report, or report language on any vote cast by another Member.<sup>33</sup> There is no similar Senate requirement.

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<sup>32</sup> Each account, generally, includes similar programs, projects, or items, such as a “research and development” account or “salaries and expenses” account. For small agencies, a single account may fund all of the agency’s activities. These acts typically provide a lump-sum amount for each of these accounts. A few accounts include a single program, project, or item, which the appropriations acts fund individually.

<sup>33</sup> House Standing Rule XXIII, clause 16. While there is no point of order established under this provision, an alleged violation may give rise to a collateral challenge in the form of a question of the privileges of the House pursuant to Rule IX. See, for example, consideration of H.Res. 1040 (110<sup>th</sup> Congress) in the *Congressional Record*, daily edition, vol. 154, March 12, 2008, pp. H1552-H1553.