Maximizing Opportunities for Federal Funding via Congressional Appropriation (and an explanation of “earmarks”)

One of the growth areas in the Washington government relations industry is Congressional appropriations, specifically obtaining Federal funds for clients by means of what is known as an “earmark.” While the general outline of the legislative process is clear to anyone who has read the classic How Our Laws Are Made (first issued from the office of the Parliamentarian of the House of Representatives in 1953, with updated editions reprinted many times since), the details of how the process actually works and results in the spending of money are less well known to those who have not actually worked in the Congress. Accordingly, a first-hand familiarity with Congressional procedures for allocating funds and an ability to direct Federal funds to designated recipients are marketable commodities in Washington.

The balance of this paper will examine types of government spending, the phenomenon known as the “earmark,” how an earmark is applied for, and how lobbyists can assist in a successful earmark application.

What Can Be Funded

The short answer is: Just about anything for which the federal government provides funding, which is lots and lots and lots and lots of things. These include –

- products or services sold to any department or agency of government (and not just the federal government, because the federal government provides money to governments at the state, local, and tribal level as well);
- programs and activities (for example, grants for research, training, education, health and medical, etc.)
- construction (this is particularly applicable state and local governments and to nonprofits, and can include buildings, roads, bridges, and so forth)

In short, for anyone who wishes to sell something to government, or engages in an activity that is government-funded, an earmark may be a possibility.

What is an “Earmark”?

In general, the Congressional funding process has two steps. These are authorization (which is enactment of legislation providing legal authority for the Executive Branch departments and agencies, and their programs) and appropriation (which is enactment of legislation providing money to the Executive entities). As a general matter of legislative practice, policy issues are supposed to be determined in authorization bills, while appropriation bills are only intended to allocate money. With respect to the latter, the purest form of appropriation is language stating simply that for a specified agency or program, a certain amount of money is provided.

However, one method used by Congress to determine with greater specificity Executive entities’ use of money – and by extension, to more precisely limit the policies funds are used to implement – is to include in the appropriations bill language to limit the purposes for which money may be used. These limitations are commonly known as “earmarks,” though the term has no official status in the legislative process.

For example, it is not unusual for a appropriations bill section providing funds to an office (“For the Office of [name of program], $X,000,000.”) to be followed immediately by a limitation on a portion of that money (“Provided further, That of the funds appropriated under this heading that are available for [name of program], $Y00,000 may be used only for
Earmarks vary widely. Some are firm limitations that money can only be used for the earmarked purpose, others state only that it “should” be so used. There is also a distinction between a “hard” earmark, which is language in the legislative text of an appropriations bill, and a “soft” earmark, which is language in the report accompanying a bill, which by definition is not legally binding on the recipient agency – but is a sign of the Committee’s preferences most Executive Branch entities will not lightly disregard.

Earmarks can be (and if done correctly, are) written with a degree of specificity so that only the intended recipient – a program or project, a local government, a firm, a product produced by a certain firm – can qualify for it.

Typical earmarks look like this (these are real examples):

- **From Department of Justice (soft earmark report language):**
  
  Within the amounts provided, the Department is expected to review, in consultation with DEA [the Drug Enforcement Administration], the following proposals, provide grants if warranted, and report to the Committees on its intentions:
  
  --$500,000 for personnel, training, and equipment under the Arizona Methamphetamine Initiative;
  --$1,000,000 to the Arkansas State Police for the Arkansas Methamphetamine Law Enforcement Initiative;
  --$414,977 for the Oklahoma Bureau of Narcotics and Dangerous Drug Control to properly train and equip officers for operations involving clandestine methamphetamine labs;
  --$150,000 for the Criminal Justice Institute at the University of Arkansas at Little Rock to train rural law enforcement officers in the issues of safety, investigation, and evidence collection related to methamphetamine production;
  --$1,000,000 for the Iowa Office of Drug Control Policy to combat the spread of methamphetamine in east central counties through intelligence gathering, enforcement, and lab clean up operations; [etc., etc., etc.]

- **From Department of Defense (hard earmark language):**
  
  Provided further, That of the amount provided under this heading, $2,000,000 may be obligated for the deployment of Air Force active and Reserve aircrews that perform combat search and rescue operations to operate and evaluate the United Kingdom's Royal Air Force EH-101 helicopter, to receive training using that helicopter, and to exchange operational techniques and procedures regarding that helicopter.

- **From Department of Education (hard earmark, authorized):**
  
  For partial support of Howard University (20 U.S.C. 121 et seq.), $237,474,000, of which not less than $3,600,000 shall be for a matching endowment grant pursuant to the Howard University Endowment Act (Public Law 98-480) and shall remain available until expended.

- **From Department of Transportation (hard earmark):**
  
  For necessary expenses to carry out 49 U.S.C. 5308, 5309, 5318, and 5327, $607,200,000, to remain available until expended: Provided, That no more than $3,036,000,000 of budget authority shall be available for these purposes: Provided further, That there shall be available for fixed guideway modernization, $1,214,400,000; [ . . . ] to be available as follows:

  - Alaska/Hawaii ferries, $10,296,000;
  - Atlanta, GA, North Springs (North Line Extension), $16,110,000;
  - Baltimore, MD, Central LRT Double Tracking Project, $10,500,000;
  - Boston, MA, South Boston Piers Transitway, $681,824;
  - Charlotte, NC, South Corridor Light Rail Transit Project, $14,000,000;
  - Chicago, IL, Douglas Branch Reconstruction, $55,000,000;
  - Chicago, IL, North Central Corridor Commuter Rail, $20,000,000;
  - Chicago, IL, Ravenswood Reconstruction, $4,000,000; [etc., etc., etc.]
Information Needed to Try for an Earmark

Earmarking, like everything else that happens in the Congressional funding process is political. That is, to obtain an earmark it is necessary to give the Appropriations committees of the House and Senate a reason to fund your client’s project rather than the thousands of other requests they receive.

That means that it is necessary to find a nexus between (1) constituent interest on the part of a Member of Congress or Senator and (2) characteristics of the project in comparison to other projects seeking funding. The former factor is far more important and depends as much or more on the project's advocacy as it does on what might be the objective worthiness of the project. That is why the Congressional office to which the earmark request is being submitted will have the applicant indicate on an information sheet accompanying the precise location of the project and the firm, including the number of employees, along with a brief description of the entity to be funded and the project. This information defines the degree to which the relevant Member of Congress or Senator is being told “this project is important to your district, where ABC Corp. employs [however many] constituents.”

Then it is necessary that the Member of Congress or Senator agree that the project is high enough on his or her list of personal priorities to make a case for funding it with the Committee on Appropriations. If the Member is not on the Appropriations Committee, he or she will usually work through a colleague from the same state who is. Ultimately, the goal would be to have the earmark language included in either the legislative text or language in the accompanying report for one of the appropriations bills, which are mainly grouped by department and correspond to the Appropriations subcommittees. (For many years, up until the current, 109th Congress, there were 13 subcommittees in both the House and Senate Committees on Appropriations, with each House/Senate pair of subcommittees producing its own bill: Veterans Affairs/Housing and Urban Development (VA/HUD); Transportation/Treasury; Homeland Security; Defense; Military Construction; Justice, State, Commerce; etc. Thus, each bill neatly reflected the exactly corresponding subcommittee in each chamber. However, in 2005, the House Appropriations Committee announced a fundamental reorganization of its subcommittee structure, reducing the number from 13 to 10. The Senate refused to accept the House’s model of reorganization, instead deciding to eliminate the VA/HUD subcommittee and to assign its work to the remaining 12 subcommittees. This means that the subcommittee structures of the two houses – and the bills that each will produce – no longer correspond. As of this writing, no one knows how this will work in practice. One speculation is that much of the Committees’ business may be left to a future “consolidated” (or “omnibus”) bill encompassing the funds that properly should have been allocated in individual bills.)

The Role of the Lobbyist

As noted at the beginning of this paper, all of the information need to submit an earmark request is available to anyone. Why is it, then, that even large corporations, prestigious nonprofits, and foreign governments retain lobbyists to obtain earmarks for them, often as a subset of a larger lobbying relationship?

The short answer is that there are a lot of practical details to submitting a request that are best known to those in everyday contact with Congressional offices. Among these are:

- **What are the relevant deadlines?** Each House or Senate subcommittee has its own deadline for submission of a request; individual offices have their own deadlines. If a deadline is missed – in most cases, that's the end of the matter until the next fiscal year.

- **How should the form be filed-out?** While filling information into a request form sounds relatively easy, in practice there is a jargon that is used an expected in submitting requests. For example, the typical form asks, “Is this project authorized?” This means, “Is there already legislative language providing legal authority for the project?”. In most cases, the answer will be No, but if there is such authority it will usually help in obtaining the earmark. Also, it is important to know the subcommittee’s practice concerning hard and soft earmarks, and how they are generally worded.

- **To which office should the request be made?** If a company or nonprofit is located in only one state or district, selection of the office may be relatively easy. (Identification of House Members can be made with the relevant nine-digit zip codes; identifying the right Senators is of course comparatively easy). But a larger entity with a presence in several states and numerous districts may require a more sophisticated strategy as to which is most likely to result in success. This strategy may encompass a number of factors, including a thorough knowledge of the state delegation, the makeup of the subcommittee and the full committee, individual Members’ (and staffers’) predilections to favor (or
oppose) various types of spending, Members’ and staffers’ policy preferences, and how the requested spending compares with competing projects.

- **Who will guide the request through the system?** An earmark request is not as simple matter of filling out a form and then waiting for the money. It is essential to follow-up with personal contact with the requesting Member’s office, and then to monitor (and if needed, intervene) at each stage of the process where the request can be inserted into a bill (or, if successfully inserted, knocked out). These include: committee mark-up, floor consideration in both houses, House-Senate conference committee, consideration and passage of conference reports, and the President's signature. If the President vetoes the bill into which the earmark was inserted, it may be necessary to start all over again in a revised appropriations bill that conforms to the veto, in a consolidated bill, or in next year’s bill.

In sum, successful pursuit of earmarks is similar to other tasks lobbyists are called upon to achieve in the legislative context. A combination of access and familiarity with the people in Congress making the funding decisions, plus a working knowledge of the project for which funding is sought, are essential.

******************************************************************************************************************

This Legislative Issue Brief is published by the law firm of Venable LLP, 575 Seventh Street, NW, Washington, DC 20004. Internet address:  [http://www.venable.com](http://www.venable.com). It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations.

James George Jatras is a partner in Venable’s Legislative Group. If you have any questions concerning this brief, please contact Mr. Jatras at 202.344.8308 or at jgjatras@venable.com.

As one of *The American Lawyer’s* top 100 law firms, Venable LLP has attorneys practicing in all areas of corporate and business law, complex litigation, intellectual property and governmental affairs. Founded more than a century ago, Venable has enjoyed a long history of steady growth, quality service and sound management. Chaired by former Attorney General of the United States, Benjamin R. Civiletti, Venable prides itself on being attuned to its clients' business objectives, sensitive to their culture and structured to deliver true value.

* See *How Our Laws Are Made* at [http://thomas.loc.gov/home/lawsmade.toc.html](http://thomas.loc.gov/home/lawsmade.toc.html).