

New Federal Earmark Rules Will Impact For-Profit Companies

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The system by which Congress awards earmarks during the annual appropriations process has recently come under increased scrutiny. As a result, both the President and congressional leaders have introduced initiatives aimed at increasing the transparency of the earmark process. The most recent reforms are two new policies—enacted in FY10 appropriations bills and thus now law—that require executive branch review of all congressionally-requested earmarks and a “competitive bidding process” for all earmarks designated for for-profit entities. Understanding these significant new restrictions on earmarks is therefore essential for any company or organization that is considering applying for federal earmark funds. Of the new reforms, Congressman David Obey (D-WI), Chairman of the House Appropriations Committee, [recently stated](#) that **“in practical terms, it ends the practice of earmarks being the functional equivalent of sole source contracts.”**

Earmarks 101

The Office of Management (“OMB”) [defines](#) an earmark as:

“[F]unds provided by the Congress for projects, programs, or grants where the purported congressional direction (whether in statutory text, report language, or other communication) circumvents otherwise applicable merit-based or competitive allocation processes, or specifies the location or recipient, or otherwise curtails the ability of the executive branch to manage its statutory and constitutional responsibilities pertaining to the funds allocation process.”

Earmarks, also known as “congressionally directed spending,” have long been targeted as wasteful, since earmarks circumvent the normal process for appropriating government funds. Any Member is allowed to request that an appropriations bill include a line item authorizing spending on a specific project, usually on behalf of a specific constituent located in the Member’s district.

On the other hand, earmarking can also be both valuable and necessary when it directs funds to projects that, while sorely needed by a particular district, could be overlooked in the normal appropriation process. For instance, the Chairman of the Senate Appropriations Committee, [Daniel Inouye \(D-HI\)](#), [has stated](#) that

“I fully agree with the President that Senators and Congressmen know the needs of their constituents and their districts, and that when it comes to deciding which projects should receive funding, it is the elected representatives of the people who are best positioned to make these difficult decisions.”

Notwithstanding the potential value of earmarks, past abuses of the earmarking process have led Democrats to initiate new reforms aimed at improving transparency and oversight. For example, all earmarks and earmark recipients must now be identified in the Committee Reports that accompany each annual appropriations bill, and must be posted on the committee's website. Moreover, funding for earmarks has been steadily reduced – [Chairman Obey announced](#) in March 2009 that earmarks would be held below 1% of discretionary spending in FY10 and subsequent years.

New Reform Initiatives: Executive Review of Earmarks & Competitive Bidding for For-Profit Earmarks

The impacts of the newest earmark reforms are just now beginning to be felt by companies and organizations who are interested in obtaining federal earmark funds. In March 2009, a new set of earmark reforms were announced by [President Obama](#), [Chairman Inouye](#), [Speaker Nancy Pelosi \(D-CA\)](#), [Majority Leader Steny Hoyer \(D-MD\)](#), and [Chairman Obey](#) when the President signed the FY09 Omnibus Appropriations Bill. These reforms have since been included in almost every FY10 appropriations bill and accompanying report, and are now law.

According to the [press release](#) from Pelosi, Hoyer, and Obey, the Appropriations Committees in both chambers now require:

- **Increased Executive Branch review.** When a Member submits a request for an earmark, the appropriate Executive Branch agency will be given 20 days to review the project to ensure that the earmark is eligible to receive funds and meets goals established in law.
- **Competitive bidding for “For-Profit” earmarks.** For any earmark intended to be directed to a for-profit entity, the Executive Branch will be required to ensure that the earmark is awarded through a competitive bidding process.

As one example of how the new process works, the [FY10 Department of Defense appropriations bill](#) states that “[s]pecific projects contained in the report of the Committee Appropriations of the House of Representatives accompanying this Act” will be considered congressional earmarks “when intended to be awarded to a for-profit entity, [and] shall be awarded under a full and open competition.”

Future Outlook

This latest step in earmark reform represents a sea-change in the federal appropriations process. These new initiatives could have a significant impact on both the ability of private companies to secure congressionally-directed spending, and the willingness of Members to seek earmarks for favored projects. Because FY10 commenced October 1, 2009, these new reforms are just now beginning to be implemented at the agency level. It will thus be important for companies and organizations who are interested in earmarked funds to monitor how each federal agency interprets and implements the new eligibility review process and competitive bidding requirements. These initial responses by agencies will provide a valuable indication of how restrictive the new earmark policies will be in practice, and the extent to which these new initiatives will restrict the ability of organizations to obtain earmarked funds.

Nor is it likely that these initiatives will be the last word in earmark reform. President Obama reiterated his commitment to additional earmark transparency in his [State of the Union Address](#), and [Chairman Obey indicated](#) on January 25, 2010 that the FY10 earmark policies will continue to apply in the FY11 cycle. Both of these actions signal that earmark reform will remain a priority for the immediate future, thus forcing interested companies to pay close attention to changing rules and requirements.

Contact [Paul T. Kim](#), [Kalah Auchincloss](#), [Tad Heuer](#), or any member of the [Government Strategies](#) group for more information on this topic.