CONGRESSIONAL EARMARKS COULD SOON RETURN: WILL YOU BE READY?

Date: 12 December 2018

U.S. Public Policy and Law Alert

By: Tim L. Peckinpaugh

"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

– U.S. Constitution, Article I, Section 9, Clause 7

INTRODUCTION

The 116th Congress may be poised to reinstate the practice of earmarking federal funds through annual appropriations bills for specific projects, such as those related to infrastructure, economic development, and educational research and development. Congress has not allowed earmarking since 2010, and when Republicans gained control of the House of Representatives the following year, they placed a moratorium on the practice. However, Democrats will control the House in the new Congress, and they are considering bringing back earmarks, although in a more limited fashion than in the past. This would create significant opportunities for certain entities to secure federal funding for specific projects.

WHAT IS AN EARMARK?

The definition of an earmark, or congressionally-directed spending, is open to debate. However, it is a term frequently used to describe the past congressional practice of appropriating a specific sum of money to a specific entity in order to carry out a specific project or activity. The House of Representatives in the 115th Congress defined an earmark more broadly under Rule XXI, clause 9(e):

> *… the term "congressional earmark" means a provision or report language included primarily at the request of a Member, Delegate, Resident Commissioner, or Senator providing, authorizing or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity, or targeted to a specific State, locality or Congressional district, other than through a statutory or administrative formula-driven or competitive award process.*

HISTORY

©2005-2026 K&L Gates LLP. All Rights Reserved.

Prior to 2010, Members of Congress used earmarks to direct specific sums of money to both for-profit and nonprofit entities within their states and districts to undertake certain projects. For example, a for-profit earmark might include funding for a private entity to develop technology for Unmanned Aerial Vehicle (i.e. drone) avoidance, and recognition radar, for eventual use by a government agency such as the Federal Aviation Administration ("FAA"). By contrast, a nonprofit earmark might include funding for the refurbishment of a public museum or for a university to conduct research on a particular topic.

In 2010, House Republicans first moved to impose a "ban" on earmarks in the form of a temporary moratorium within their caucus. Eventually, that moratorium was renewed by Republicans in both chambers in subsequent Congresses. Even though House Republicans failed to continue the moratorium following the 2016 election, Senate Republicans extended their moratorium—as a practical matter, continuing to prevent the practice in both chambers. While the moratorium on earmarks has been adopted by the Republican caucuses and enforced by party leadership, it has never evolved into a formal rule of the House or Senate. To the contrary, the binding rules of each chamber continue to require only that earmarks fulfill certain disclosure requirements.

The earmark "ban" stemmed from concerns among many Members of Congress who believed that it is not the proper role of Congress to decide whether specific projects deserve federal funding. Critics of earmarking believe the process has been abused in the past and argue that federal agencies are better equipped than Members of Congress to assess which projects are a wise use of federal taxpayer dollars through a process of competitive bidding.

Supporters of earmarking argue that Article I, Section 9, Clause 7 of the U.S. Constitution gives Congress the authority to determine how federal funding should be appropriated, and that it is an abdication of their constitutional responsibility to leave it to unelected federal agency officials to determine which projects deserve federal funding. Supporters also argue that earmarking might facilitate a better functioning annual appropriations process since it will afford every Member of Congress a stake in the passage of appropriations bills.

THE RETURN OF EARMARKS

Since there is no formal earmark "ban" in the rules, the House Democratic caucus, which takes power in January, can simply agree to do nothing on earmarks, and the practice would be permitted, subject to disclosure. In fact, opponents of earmarks may need to push for a vote of the Democratic caucus in order to stop them from being allowed. Since many Senators, including many senior Republicans, favor earmarks, the upper chamber could easily follow the example of the House by simply not extending the earmark moratorium.

We do not expect that Congress will lift the moratorium on earmarking funds to for-profit entities. Instead, we expect that Congress will examine ways to earmark funds for nonprofit entities, state and local governments, and economic development organizations. Examples of eligible projects might include, but are not necessarily limited to, the following:

- Road, bridge, and tunnel project upgrades and new starts;
- Ports, airports, and broadband projects;

©2005-2026 K&L Gates LLP. All Rights Reserved.

- Infrastructure upgrades;
- Economic development initiatives;
- Research and development; and
- Historical and artistic preservation

WHICH ENTITIES MIGHT BENEFIT?

Eligible recipients of earmarks might include, but are not necessarily limited to, the following:

- State and local governments;
- Counties, towns, and villages;
- Universities, colleges, schools, and educational organizations;
- Economic and community development groups and agencies;
- Social service and housing agencies;
- Land trusts;
- Charitable organizations; and
- Museums and historical preservation groups.

HOW MIGHT THE PROCESS WORK?

As was the practice during the last few years that Congress permitted earmarks, Members of Congress will likely be required to disclose on their websites the names of the entities requesting an earmarks, descriptions of the projects, and the amounts of funding requested. Additionally, if Members of Congress choose to submit formal requests to the House or Senate Appropriations Committee to earmark funding, they might be required to provide written justifications on their website for funding the projects.

WHAT SHOULD YOU DO?

We strongly recommend that you immediately begin to identify specific projects and suitable recipients for earmark funding. You should conduct a thorough assessment of how your potential projects would affect your local community, congressional district, and/or state. Additionally, you should think about how to best answer the following question: Why is this project worthy of federal funding?

If Congress reinstates earmarks, these are precisely the questions Members of Congress will require their constituents to answer. Interested parties who begin working on their best answers to these questions are more likely to position themselves ahead of the competition—which, because of the limitations imposed by

©2005-2026 K&L Gates LLP. All Rights Reserved.

sequestration, coupled with the pent-up demand for earmarks, is anticipated to be strong. Simply put, the sooner stakeholders formulate their requests and accompanying justifications, the more likely they are to be successful.

KEY CONTACTS



TIM L. PECKINPAUGH
PARTNER

WASHINGTON, DC
+1.202.661.6265
TIM.PECKINPAUGH@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.