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Lifting the Earmark Moratorium: Frequently Asked Questions

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SUMMARY

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Megan S. Lynch
Specialist on Congress and the Legislative Process

Lifting the Earmark Moratorium: Frequently Asked Questions

While the term *earmark* has been used historically to describe various types of congressional spending actions, since the 110th Congress (2007-2008) House and Senate rules have defined an earmark as any congressionally directed spending, tax benefit, or tariff benefit that would benefit an entity or a specific state, locality, or congressional district. In the 112th Congress (2011-2012), the House and Senate began observing what has been referred to as an earmark moratorium or earmark ban. The moratorium does not exist in House or Senate chamber rules, however, and therefore is not enforced by points of order. Instead, the moratorium has been established by party rules and committee protocols and is enforced by chamber and committee leadership through their agenda-setting power.

In recent years, some Members have expressed interest in lifting the earmark moratorium. Whether or not the earmark moratorium is lifted, the House and Senate continue to have formal earmark disclosure rules that were implemented in the 110th Congress with the stated intention of bringing more transparency to earmarking. These rules generally prohibit consideration of certain legislation unless information is provided about any earmarks included in the legislation. House and Senate rules require that any Member submitting an earmark request provide a written statement that includes the name of the Member, the name and address of the earmark recipient, and a certification that the Member has no financial interest in the earmark. House and Senate rules require that committees determine whether a provision constitutes an earmark, and committees must compile and make accessible certain earmark-related information.

If Congress were to lift the current earmark ban, it might also choose to institute any number of policies or restrictions to govern the use of congressional earmarks. These policies or restrictions might be instituted through formal amendments to the House and Senate standing rules, by standing order, or by enacting new law. Such policies might also be instituted through party rules or leadership and committee practices and protocols. Some policies might seek to add more transparency to the earmarking process or prohibit certain types of entities from receiving earmarks. Restrictions might be implemented related to the purposes for which an earmark could be used or limiting the amount of federal dollars that might be spent on earmarks. Other policy approaches might potentially involve the executive branch or the congressional support agencies.

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What Is an Earmark?

House and Senate rules define the term *earmark* slightly differently (**Table 1**) but generally emphasize that any congressionally directed spending, tax benefit, or tariff benefit be considered an earmark if it would benefit a specific entity or state, locality, or congressional district other than through a statutory or administrative formula or competitive award process. For the purposes of this report, from this point forward the term *earmark* includes any congressionally directed spending, limited tax benefit, or limited tariff benefit.

Table 1. House and Senate Earmark Definitions

House Definition	Senate Definition
Congressional earmark- 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. Limited tax benefit- (1) any revenue-losing provision that (A) provides a federal tax deduction, credit, exclusion, or preference to 10 or fewer beneficiaries under the Internal Revenue Code of 1986, and (B) contains eligibility criteria that are not uniform in application with respect to potential beneficiaries of such provision; or (2) any federal tax provision which provides one beneficiary temporary or permanent transition relief from a change to the Internal Revenue Code of 1986. Limited tariff benefit- a provision modifying the Harmonized Tariff Schedule of the United States in a manner that benefits 10 or fewer entities.	Congressionally directed spending item- a provision or report language included primarily at the request of a 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. Limited tax benefit- any revenue provision that (A) provides a federal tax deduction, credit, exclusion, or preference to a particular beneficiary or limited group of beneficiaries under the Internal Revenue Code of 1986, and (B) contains eligibility criteria that are not uniform in application with respect to potential beneficiaries of such provision. Limited tariff benefit- a provision modifying the Harmonized Tariff Schedule of the United States in a manner that benefits 10 or fewer entities.

Source: House Rules XXI, clause 9 and Senate Rules XLIV, paragraph 5.

What Is the Earmark Moratorium?

In the 112th Congress (2011-2012), the House and Senate began observing what has been referred to as an earmark moratorium or earmark ban. The moratorium does not exist in House or Senate rules, however, and therefore is not enforced by points of order. Instead, the moratorium has been established by party rules and committee protocols and is enforced by chamber and committee leadership through their agenda-setting power. For example, the Rules of the House Republican Conference for the 112th Congress (2011-2012) included a standing order labeled *Earmark Moratorium* that stated, "It is the policy of the House Republican Conference that no Member shall request a congressional earmark, limited tax benefit, or limited tariff benefit, as such terms

have been described in the Rules of the House." This language has been included in orders adopted by the conference in the 113th, 114th and 115th Congresses (2013-2018).[1]

Likewise, in early 2011, the Senate Appropriations Committee issued a press release stating that it would implement a two-year moratorium on earmarks (which was later extended).[2] Additionally, the Senate Republican Conference adopted a resolution on November 14, 2012, that included an earmark moratorium. It stated "Resolved, that it is the policy of the [Senate] Republican Conference that no Member shall request a congressionally directed spending item, limited tax benefit, or limited tariff benefit, as such terms are used in Rule XLIV of the Standing Rules of the Senate for the 113th Congress." This same rule has been adopted by Senate Republicans in each Congress through the 115th Congress (2017-2018).

How Would Congress Lift the Earmark Moratorium?

As noted above, the earmark moratorium is not codified in House or Senate rules. Therefore, lifting the earmark moratorium would not require an amendment to either chamber's rules. Since the moratorium has been established through Republican Party rules and committee protocols and has been enforced by chamber and committee leadership through their agenda-setting power, presumably the moratorium might be "lifted" simply by either or both chambers permitting the development and consideration of legislation that includes earmarks.

If the Moratorium Were Lifted, What Rules and Requirements Would Govern the Use of Earmarks?

The House and Senate continue to have formal earmark disclosure requirements in their standing rules that were first established in the 110th Congress (2007-2008) with the stated intention of bringing more transparency to earmarking. A summary of those requirements is presented below. For additional information, see CRS Report RS22866, *Earmark Disclosure Rules in the House: Member and Committee Requirements*, by Megan S. Lynch; and CRS Report RS22867, *Earmark Disclosure Rules in the Senate: Member and Committee Requirements*, by Megan S. Lynch.

House Rules and Requirements

House Rules generally require that certain legislation be accompanied by a list of congressional earmarks, limited tax benefits, or limited tariff benefits that are included in the measure or its report or include a statement that the proposition contains no earmarks.[3] Depending upon the type

[1] House Republican Conference, "Conference Rules of the 115th Congress," Standing Orders for the 115th Congress, https://www.gop.gov/115th-rules/.

[2] U.S. Senate Committee on Appropriations, "Committee Announces Earmark Moratorium," press release, February 1, 2011, https://web.archive.org/web/20110203075236/http:/appropriations.senate.gov/news.cfm?method=news.view&id=188dc791-4b0d-459e-b8d9-4ede5ca299e7; and U.S. Senate Committee on Appropriations, "Senate Appropriations Committee Announces Extension of Earmark Moratorium," press release, February 2, 2012, https://web.archive.org/web/20120214222505/http:/appropriations.senate.gov/news.cfm?method=news.view&id=3883059e-7a0c-496e-8d51-440aa7c2d57c.

[3] House Rule XXI, clause 9.

of measure, the list or statement is to be either included in the measure's accompanying report or printed in the *Congressional Record*.

House earmark disclosure rules apply to any earmark included in either the text of a bill or joint resolution, or the committee report accompanying them, as well as to conference reports and their accompanying joint explanatory statements. The disclosure requirements apply to items in authorizing, appropriations, and tax legislation. Furthermore, they apply not only to measures reported by committees but also to unreported measures, "managers amendments," Senate bills and joint resolutions, and conference reports.[4]

Requirements for House Members Submitting Earmark Requests

Under the House Code of Official Conduct, a Member requesting a congressional earmark is required to provide a written statement to the chair and ranking minority member of the committee of jurisdiction that includes:[5]

- the Member's name;
- the name and address of the intended earmark recipient (if there is no specific recipient, the location of the intended activity should be included);
- in the case of a limited tax or tariff benefit, identification of the individual or entities reasonably anticipated to benefit, to the extent known to the Member;
- the purpose of the earmark; and
- a certification that the Member or Member's spouse has no financial interest in such an earmark.

Requirements for House Committees

Under House rules, the earmark disclosure responsibilities of House committees and conference committees fall into three major categories: (1) determining if a spending provision is an earmark, (2) compiling earmark requests for presentation to the full chamber, and (3) preserving records related to the earmark requests.[6] Individual committees may establish their own additional requirements in the committee rules they are required to adopt each Congress.

Committees of jurisdiction must use their discretion to decide what constitutes an earmark. Definitions in House rules, as well as past earmark designations, may provide guidance in determining if a certain provision constitutes an earmark.

House rules state that in the case of any reported bill or joint resolution or conference report, a list of included earmarks and their sponsors (or a statement declaring the absence of earmarks) must be included in the corresponding committee report or joint explanatory statement.[7] In the case of a measure not reported by a committee or a manager's amendment, the committee of initial referral must cause a list of earmarks and their sponsors, or a letter stating the absence of earmarks, to be printed in the *Congressional Record* before floor consideration. A conference

[4] As defined in the rule and clarified in a letter from the House Parliamentarian to the chairman of the House Committee on Rules (*Congressional Record*, daily edition, vol. 153, October 3, 2007, pp. H11184-H11185), 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."

[5] Specifically, House Rule XXIII, clause 17(a). For the purpose of this report, *Member* includes Members, delegates, or the resident commissioner.

[6] House Rules XXI, clause 9 and House Rule XXIII, clause 17(b).

[7] House Rule XXIII, clause 17(b).

report accompanying a regular appropriations bill must identify congressional earmarks in the conference report or joint explanatory statement that were not specified in the legislation or report as it initially passed either chamber.

Each House committee and conference committee is responsible for "maintaining" all written requests for earmarks received—even those not ultimately included in the legislation or report. Furthermore, those requests that were included in any measure reported by the committee must not only be "maintained" but also be "open for public inspection." Rule XXIII does not define these terms.

Senate Rules and Requirements

Senate rules prohibit 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 the majority leader (or designee) certifies that a complete list of earmarks and the name of each Senator requesting each earmark is available on a publicly accessible congressional website in a searchable format at least 48 hours before the vote.[8] If a Senator proposes a floor amendment containing additional earmarks, those items must be printed in the *Congressional Record* as soon as "practicable."[9] If these earmark certification requirements have not been met, a point of order may lie against consideration of the legislation or vote on the conference report. A point of order could not be raised against a floor amendment.

Senate earmark disclosure rules apply to any congressional earmark included in either the text of the bill or joint resolution or the committee report accompanying the measure as well as to conference reports and their accompanying joint explanatory statement. The disclosure requirements apply to items in authorizing, appropriations, and tax legislation. Furthermore, they apply not only to measures reported by committees but also to unreported measures, amendments, House bills, and conference reports.

Requirements for Senators Submitting Earmark Requests

Under Senate rules, a Senator requesting that a congressional earmark be included in a measure is required to provide a written statement to the chair and ranking minority member of the committee of jurisdiction that includes:[10]

- the Senator's name;
- the name and address of the intended earmark recipient (or, if there is no specific recipient, the location of the intended activity);
- in the case of a limited tax or tariff benefit, identification of the individual or entities reasonably anticipated to benefit to the extent known to the Senator;
- the purpose of the earmark; and

[8] Senate Rule XLIV.

[9] The rule does not apply to all earmarks in floor amendments but only those "not included in the bill or joint resolution as placed on the calendar or as reported by any committee, in a committee report on such a bill or joint resolution, or a committee report of the Senate on a companion measure," as stated in Rule XLIV, paragraph 4(a). The rule does not define the term *practicable*.

[10] Senate Rule XLIV, paragraph 6.

- a certification that neither the Senator nor the Senator's immediate family has a financial interest in such an earmark.[11]

Requirements for Senate Committees

Under the Senate rule, the earmark disclosure responsibilities of Senate committees and conference committees fall into three major categories: (1) determining if a spending provision is an earmark, (2) compiling earmark requests for presentation, and (3) certifying that requirements under the rule have been met.[12]

Committees of jurisdiction may use their discretion to decide what constitutes an earmark. Definitions in Senate rules, as well as past earmark designations during the 110th Congress (2007-2008), may provide guidance in determining if a certain provision constitutes an earmark.

Senate Rules state that before consideration of a measure or conference report is in order, a list of included earmarks and their sponsors must be identified through lists, charts, or other means and made available on a publicly accessible congressional website for at least 48 hours.[13] The rule states that the consideration of a measure or conference report is not in order until the applicable committee chair or the majority leader (or designee) "certifies" that the requirements stated above have been met.

What Additional Policies or Restrictions Might Congress Institute to Govern the Use of Earmarks?

The 116th Congress may examine what changes, if any, are needed in the area of earmark policy. Congress may choose to keep the earmark moratorium in place but insert it into formal chamber rules. Alternatively, Congress might choose to lift the earmark moratorium but institute any number of policies or restrictions to govern the use of congressional earmarks. Just as in the past, these policies or restrictions might be instituted through formal amendments to House and Senate standing rules or by enacting new provisions in law.[14] Restrictions could also be instituted through party rules, leadership and committee practices and protocols, or standing order.

Such policies or restrictions could seek to accomplish a number of goals. For example, some policies could seek to add additional transparency to the earmarking process. In the past the House and Senate Appropriations Committees have required Members requesting earmarks to post information regarding earmarks on their personal websites, including the purpose of the earmark and why it was a valuable use of taxpayer funds.[15] In 2010, the House Appropriations Committee stated that it would "establish a 'one-stop' online link to all House Members' appropriations earmark requests to enable the public to easily view them."[16]

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[11] For more information on the definition of *immediate family*, see Senate Select Committee on Ethics, *Definition of "Immediate Family" for Requested Appropriations*, September 12, 2007, http://www.ethics.senate.gov.

[12] Senate Rule XLIV, paragraph 4.

[13] Senate Rule XLIV, paragraphs 1, 2, and 3.

[14] The Senate included Senate Rule XLIV in the Honest Leadership and Open Government Act of 2007, which became law on September 14, 2007 (P.L. 110-81, 121 Stat.760, §521).

[15] House and Senate Appropriations Committees, "House and Senate Appropriations Committees Announce Additional Reforms in Committee Earmark Policy," press release, January 6, 2009.

[16] House Committee on Appropriations, "Appropriations Committee Bans For-Profit Earmarks," press release, March

Congress could also restrict the purposes for which an earmark might be used or prohibit certain entities from receiving earmarks entirely. For example, according to press reports, the House Appropriations Committee adopted a policy prohibiting earmarks for projects named after the Member of Congress requesting the earmark.[17] In March 2010, the House Appropriations Committee announced that it would no longer consider earmarks directed to for-profit entities.[18]

Congress could also limit the amount that might be spent on an earmark. Such a limit could apply to each specific earmark or to the total cost of all earmarks. For example, in January 2009, the House Appropriations Committee articulated a policy of limiting "total funding for non-project based earmarks" to 50% of the 2006 levels and no more than 1% of the total discretionary budget.[19]

Congress could also choose to institute new policies or restrictions that would involve the executive branch. This could allow the executive branch to affect the earmarking process by, for example, advising committees on whether a potential earmark constitutes a suitable use of funds. Congress could also involve the executive branch by requiring agency inspectors general to audit spending for earmarked projects in order to ensure that the funds are being used for their intended purpose.

Congress could also choose to conduct further research into the practice of earmarking generally. This might involve asking CRS or the Government Accountability Office to perform research or creating a select committee to study earmarks and recommend new policies or restrictions.[20]

Author Information

Megan S. Lynch
Specialist on Congress and the Legislative Process

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[17] David Clarke, "Several Bills Contain Money for Kentucky Institute," *CQ Today Online News*, August 26, 2009; Richard Simon and Kate Linthicum, "Maxine Waters Job-Training Center Caught in Funding Ban," *Los Angeles Times*, July 4, 2009. In early 2008, House Republican leadership issued a ban on earmarks that were popularly characterized as "monuments to me," according to a press release. Office of the Speaker of the House, "Boehner, Cantor Urge Democratic Leaders to Follow Suit by Naming Their Own 10 Members to the Panel Before the Beginning of the New Congress Next Month," press release, December 18, 2008, https://www.speaker.gov/press-release/house-republicans-appoint-members-earmark-reform-committee.

[18] House Committee on Appropriations, "Appropriations Committee Bans For-Profit Earmarks."

[19] This policy was stated to have begun in January in Congressman David R. Obey, "Pelosi, Hoyer and Obey Announce Further Earmark Reforms," press release, March 11, 2009.

[20] Similarly, in November 2008, the rules of the House Republican Conference for the 111th Congress created a Select Committee on Earmark Reform to be composed of 10 Members appointed by the Republican leader. This House Republican Conference panel was directed to study House earmark practices and rules and to report their findings and recommendations to the conference. House Republican Conference, "Rules of the House Republican Conference for the 111th Congress," November 20, 2008.

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