

# Congress of the United States

Washington, DC 20515

March 27, 2009

President Barack Obama  
The White House  
Washington, D.C. 20500

Dear Mr. President,

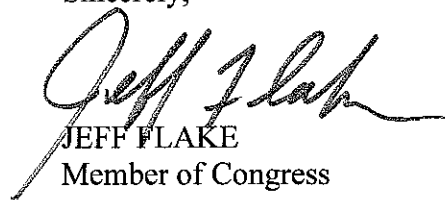
I write to commend you for publicly acknowledging, in your comments announcing your earmark reform proposals on the heels of signing the fiscal year 2009 omnibus legislation, the corrupting nature of earmarks for private entities. In addition, I respectfully request additional information related to how your announced proposals regarding earmarks will be implemented.

Like you, I have long recognized the problems associated with members of Congress handing out earmarks, which are essentially no-bid or sole source federal contracts, to private companies that are often campaign contributors to the members submitting the earmark requests. It is for that reason that I have introduced H.Res. 85, legislation that would prohibit prospective earmark requests for campaign contributors. In addition, I continue to seek an investigation into the relationship between campaign contributions and earmarks requests made on behalf of the PMA Group, a lobbying firm with a prolific donor history whose clients have received millions of dollars in no-bid contracts. Given the corrosive nature of this issue on the public's trust, I would urge you to consider an outright ban on federal agencies funding earmarks for private companies. In addition, any approach to earmarks for for-profit companies will be incomplete if earmarks for non-profit companies like Concurrent Technologies are not also addressed.

If we look to the past for lessons on earmark reform, it is clear that it will take more than speeches and press releases to change the broken earmark process. For example, the majority leadership in the House is quick to herald changes in the House rules that increased transparency. Despite those changes, however, the fiscal year 2009 appropriations cycle set a new low for transparency. The legislative process included the airdropping of more than ten thousand earmarks worth more than \$14 billion shielded from Congressional review, roughly two thirds of which were not even reported out of the House Committee on Appropriations.

With the deadline for House earmark requests quickly approaching, I am certain that your "new rules of the road," without further detail and clear means of enforcement, will do little to prevent Congressional leadership and appropriators from sticking taxpayers with the bill for billions of dollars worth of wasteful projects and no-bid contracts for political donors via a legislative process that is opaque and invites abuse. I would appreciate your consideration of the attached questions regarding the implementation of your proposals.

Sincerely,



JEFF FLAKE  
Member of Congress

cc: The Honorable Peter Orszag, Director, Office of Management and Budget

## SPECIFIC QUESTIONS RELATED TO THE PRESIDENT'S MARCH 11, 2009 ANNOUNCED EARMARK REFORMS

"[A]ny earmark for a for-profit private company should be subject to the same competitive bidding requirements as other federal contracts."

- This provision is specifically oriented toward "for-profit private compan[ies]," although earmark controversies and scandals continue to originate from non-profit entities that are not chartered by the federal government and that have been specifically created to channel earmarks to for-profit private companies. Is it the intent of the administration to specifically avoid subjecting earmarks for non-profit entities to competitive bidding requirements?
- While falling short of an outright ban, a competitive bidding process for earmarks representing sole source or no-bid contracts to private entities would represent a significant departure from the current broken earmark process. Why, in contrast to other provisions in the administration's announced proposals, does this provision suggest that competitive bidding requirements "should," rather than "must," be applied to earmarks?
- Under the current practice, the earmark disclosure tables included in the reports associated with appropriations measures include information related to the requested project, funding level, and requesting member. In order to determine the actual benefactor, one has to consult the certification letters that members are required to submit under the rules of the House of Representatives that, among other details, include the intended earmark recipient. There have been instances, however, when an earmark requested by multiple members listed both a for-profit private company as the recipient on one certification letter but the same earmark's recipient was listed as a university on other certification letters. How will the administration go about determining which earmark requests are, in fact, earmarks for for-profit private companies?
- Given the requirement that earmark requests be made available on-line, it is safe to assume that there will continue to be members requesting funding for specific projects for specific for-profit private companies? How will the administration handle the likely eventuality that the appropriations process will continue to fund projects for for-profit private companies? Should future committee reports include earmark disclosure tables detailing project descriptions and funding levels and member disclosure letters detailing funding for for-profit private companies, has the administration contemplated a means by which to deal with the pressure agencies will be under from members of Congress to ensure that the funding is directed toward these private entities?
- A crucial requirement for an agency to competitively bid a federal contract, satisfied at the start of the federal acquisitions process, is the affirmative determination by the agency that a good or service is needed. Will the administration include this step when subjecting earmark requests for for-profit private company to "the same competitive bidding requirements as other federal contracts," or will simply being listed in the earmark disclosure tables associated with appropriations bills be sufficient to satisfy this requirement?
- What exactly are "the same competitive bidding requirements as other federal contracts?" Is it the intention of the administration to have all earmarks for for-profit private companies comply with the Federal Acquisition Regulations policies and procedures regarding full and open competition?
- Section 6 of the Federal Acquisition Regulations includes an explicit list of circumstances under which federal contracting may proceed without providing full and open competition. Among other exceptions, the acquisition regulations exempt contracts from full and open competition when dealing with industrial mobilization, national security, public interests, unusual or compelling urgency, spending that is authorized or required by statute, or when there is only one source (including follow-up contracts for goods or services that have been previously awarded). It is easy to see how these exceptions could be exploited to circumvent an acquisition process involving full and open competition and all but guarantee that earmark recipients detailed in member certification letters are the actual recipients of funds for projects included in the earmark disclosure tables. Will the goal be to subject earmarks to a full and open competition process as detailed by federal regulations to the maximum extent possible (i.e., the rebuttable presumption that exemptions do not apply)? Who will have the responsibility of ensuring that each earmark request is in fact subject to "the same competitive bidding requirements as other federal contracts" and determining the applications of the Section 6 exemptions?

"Earmarks must have a legitimate and worthy public purpose."

- The current GOP earmark standards, issued on January 28, 2008, suggest that Republican members securing earmarks should explain "why they believe the use of taxpayer funding is justified" in a detailed plan placed in the Congressional Record prior to consideration of the legislation containing the earmark. In addition, the bicameral Democrat earmark reform measures, announced on January 6, 2009 and reiterated by the House majority leadership coincident with the administration's announcement on March 11, 2009, included a provision requiring members to include an explanation of why the earmark is "a valuable use of taxpayer funds" in the request material made available to the public on their websites. Would compliance with these provisions, wherein the requesting member is relied upon to objectively evaluate the justification and value of spending taxpayer dollars on a given pet project, be considered compliance with demonstrating "a legitimate and worth public purpose"?
- Alternatively, a separate reform related to rescission efforts announced on March 11, 2009 indicated the possibility that the administration will evaluate earmarks and make a determination on their legitimacy. Will the administration offer an affirmative confirmation or denial regarding the legitimacy or worthiness of individual earmarks based on the information provided by the requesting member?
- Clearly, one member's legitimate and worthy directed-spending project is another member's wasteful and egregious pork barrel embarrassment and it will come as no surprise that requesting members can be relied upon to provide some sort of justification for funding their parochial interest. On what objective basis and employing what metrics will the administration evaluate legitimacy and worthiness?
- Will the administration provide potential earmark requestors, based on previous earmark requests, with examples of earmarks that the administration would consider to have an illegitimate or unworthy public purpose? For example, will the administration look favorably on earmarks related to highway beautification, aquariums, museums, tourism development, historic properties, hiking trails, bike paths, industry research and development, wood utilization, etc.?
- Will it be safe to assume, as I am certain many will, that a Presidential signature on a bill containing earmarks can be construed as a tacit approval of the legitimacy and public purpose of each and every earmark contained in the bill or related report language?

"Earmarks that members do seek must be aired on those members' websites in advance, so the public and press can examine them and judge their merit themselves."

- The bicameral Democrat earmark reform measures, announced January 6, 2009 and reiterated by the House leadership coincident with the administration's announcement on March 11, 2009, included a provision requiring members to post information on their earmark requests on their websites at the time the request is made. With the House Appropriations Committee requiring a link to such information to be included with each earmark request, will compliance with the House majority leadership's posting requirement be deemed to be compliance with the administration's posting requirement?
- Will the administration be forthcoming with specific information that should be included in the "airing" of member earmark requests?
- Given both the inefficiency inherent in the potential posting of earmark request information on more than five hundred websites and the President's demonstrated support for the consolidation and on-line availability of information related to federal spending (i.e., USAspending.gov and recovery.gov), has a centralized and on-line catalog of earmark request information been considered?

"[E]ach earmark must be open to scrutiny at public hearings, where members will have to justify their expense to the taxpayer."

- Is it safe to assume that the "public hearings" in which earmarks are to be scrutinized are actually hearings held during the appropriations process by the Committee on Appropriations? Under this assumption, under the best of optimistic scenarios, members will have to justify their earmarks to members of the Committee on Appropriations and not, in fact, to taxpayers at all. Alternatively, was the administration contemplating some

type of public hearing, available for taxpayers themselves, in which earmarks would be open to scrutiny and their expense justified?

- It appears that, for the fiscal year 2010 appropriations process, the appropriations subcommittees will be holding members' hearings to provide members with the option of presenting testimony in person or in writing on their project requests in advance of the subcommittee markup. In order for an earmark to be deemed to be in compliance with this provision, would a member be required to affirmatively "justify their expense to the taxpayer" in the context of a public hearing?
- According to earmark reforms announced by the House majority leadership coincident with the administration's announcement on March 11, 2009, earmark disclosure tables will be made available to the public on the same day that those appropriations subcommittees report their individual appropriations measure. However, within the House of Representatives, one can expect the earmark spoils to be divided on a prearranged basis between the majority and the minority, with the Chairman and the Ranking Member signing off on their respective portions prior to the lists being made available. In all but the rarest of instances, it is unrealistic to assume that members of the committee will challenge and force a justification for either a fellow committee member's earmark or an earmark requested by a member not on the committee. Under the administration's proposal, and under the likely scenario that earmarks will receive little scrutiny during the full committee markup, would it be sufficient for an earmark to simply have the potential to be "open to scrutiny at public hearings" in order to be deemed in compliance with this provision?

"It should go without saying that an earmark must never, ever be traded for political favors."

- How will compliance with this provision be assessed? In addition, what will the administration's recourse be, should earmarks be employed for political favors? For example, how will the administration react should earmarks be offered in exchange for votes on forthcoming stimulus legislation, increases in discretionary spending, or emergency spending bills?

"[If the] administration evaluates an earmark and determines that it has no legitimate public purpose, we will seek to eliminate it..."

- Is it the intent of the administration to use the presidential rescission requests provided for under the Impoundment Control Act, which requires both House and Senate approval within 45 days of receiving the request for the rescission to take place?
- In large part due to the entrenched attitude of "you leave my earmark alone and I'll leave your earmark alone," earmark limitation amendments in all but the rarest of exceptions have failed to garner sufficient support to be approved in the House of Representatives. Given that the threat of rescissions appears to be the enforcement mechanism for at least a portion of the administration's announced proposals, is the administration willing to work towards the passage of any future rescission requests dealing with earmarks?
- This proposal indicates that "if" the administration evaluates an earmark and makes a determination that it is illegitimate, action will be taken. What will trigger such an evaluation and under what objective basis and employing what metrics will the administration evaluate legitimacy? Does the administration contemplate an approach by which all earmarks will be evaluated? Or does the administration intend to evaluate only earmarks that have raised the attention of the media, reformers, fiscal conservatives, or political opponents?
- Clearly there have been earmarks approved, within recent months and years, that would be worthy of a legitimacy evaluation and future rescission requests. The administration was loath to deal directly with "the final part of last year's budget," including the thousands of earmarks it contained. Will the administration limit the evaluation and elimination activity contemplated in this announced proposal to only prospective earmarks or will the administration be willing to look backwards and prevent wasteful spending on earmarks of illegitimate public purpose?

#### Additional Questions

- It appears that, as opposed to the House majority leadership, the Senate has responded to the administration's announced proposal coolly. Has the administration contemplated a means by which the Senate will be

- encouraged to comply with the administration's earmark proposals?
- The definition of what constitutes an earmark ranges from a provision that attempts to influence the discretionary spending decision-making authority of the agencies, to the definition specified within the House rules, to whatever a chairman says it is. What definition will the administration use when evaluating compliance with the administration's announced proposals?
  - Is it the explicit intent of the administration to apply the announced proposals only to earmarks associated with appropriations bills or will the proposals also be applied to earmarks within authorizing legislation as well? For example, will the announced proposals be applied to earmarks associated with transportation reauthorization legislation, which has been the focus of one of the more persistent previous earmark controversies?
  - Obviously, public hearings and public disclosure of earmark requests would be inappropriate for earmarks in the classified portions of particular legislation. However, so-called "black earmarks" have been the focus of previous earmark controversies. Has the administration contemplated a means by which members requesting earmarks in the classified portion of particular legislation may comply with the administration's announced proposals?