



Transportation Spending Under an Earmark Ban

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Summary

Earmarks—formally known as congressionally directed spending—have directed a significant amount of federal transportation spending in recent years. Proposals to ban earmarks in authorization and appropriations bills are under consideration in both houses of Congress. This report discusses how federal highway, transit, and aviation funding might be distributed under an earmark ban, and how members of Congress might influence the distribution.

Currently, about 80% of federal highway funds and 70% of transit funds are distributed by formulas set forth in statutes. The distribution of formula highway funds is under the control of the states. The bulk of formula transit funding is under the control of local governments and public transit agencies. Most federal funding for aviation is for operation of the air traffic control system and safety-related programs and is generally not earmarked. Most aviation infrastructure spending is distributed according to priorities set forth in national plans, but a small percentage is available for earmarking. Federal funding for maritime purposes is directed by statute and is not earmarked.

Most of the remaining federal transportation funding is distributed under discretionary programs. U.S. Department of Transportation (DOT) discretionary funds are typically distributed through a competitive grant-making process, within guidelines established by Congress and the department. In practice, however, much of this funding has been earmarked by Congress in recent years. The precise share of federal transportation dollars that is spent on earmarks cannot readily be calculated, but according to a DOT Inspector General report, in FY2006 approximately 13% of DOT's total budgetary resources were earmarked.

Banning earmarks would not eliminate the opportunity for members to direct the allocation of transportation resources. The funding formulas and eligibility rules in authorization bills can be shaped to favor particular states, congressional districts, and projects. “Soft” earmarks can be used to identify a project as a congressional priority in appropriations bill report language apparently without violating an earmark ban, based on current House and Senate rules, by not specifying an amount of funding. Without earmarking, members could continue to call or write DOT in support of projects. Members may also seek to influence the priority a project receives under mandated state and local planning procedures, which can increase the likelihood of federal funding without an earmark.

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Introduction

Proposals in both the House and the Senate to ban earmarks may lead to changes in the way transportation funding decisions are made. This report explains what earmarks are and discusses their use in surface transportation finance. It then considers how federal highway, transit, and aviation funding might be distributed if such a ban goes into effect, and how members of Congress might influence the distribution.

Earmarks and the Structure of Federal Transportation Funding

The structure of federal transportation funding is typically determined in periodic transportation authorization legislation, which continues some existing programs (often with modifications) and creates new programs. The vast majority of funding is distributed directly to states, local governments, and transportation authorities by formulas that are set in these laws. Under the formula programs, the decisions about which projects get funded with that money are made by the states and local governments, subject to federal guidelines.

The authorization legislation also creates a number of discretionary (non-formula) transportation grant programs. These programs collectively distribute a relatively small portion of federal transportation funding. In theory, these programs award grants, at the discretion of the federal Department of Transportation (DOT), through a competitive application process.

In recent years, funding for discretionary transportation grant programs has been heavily earmarked by Congress in the authorization legislation and in the annual DOT appropriations acts. In addition, Congress has on occasion earmarked portions of highway formula funding.¹

The magnitude of transportation earmarking is difficult to estimate. Earmarks are found in both authorization and appropriations legislation, and while Congress has been identifying “earmarks and Congressionally directed spending items” in appropriations legislation since FY2008, those lists do not include earmarks found in the authorization legislation that might be funded in that fiscal year. DOT’s Inspector General (IG) examined transportation earmarking in both the authorization and appropriations bills for FY2006 and estimated that 13.5% of total budget authority provided to DOT in that year was congressionally directed. The IG also estimated that 80% of the earmarks originated in the authorization and 20% in the appropriations bill (**Table 1**).

¹ The appropriators deducted an across-the-board percentage of contract authority from the major highway formula programs for earmarking in FY2004, FY2005, and FY2006. See “Coming in FY2007—No Highway Earmarks?,” *Transportation Weekly*, January 25, 2006, p. 3.

Table I. Congressionally Directed Spending Within the Department of Transportation, FY2006

	Number of Items	Millions of Dollars	Percent of DOT's New Budget Authority
Congressionally Directed Spending	8,056	\$8,545	13.5
Authorization	6,474	N/A	N/A
Appropriation	1,582	N/A	N/A
DOT Agency	Number of Items	Millions of Dollars	Percent of Agency's New Budget Authority
Department of Transportation	8,056	\$8,545	
Federal Highway Administration	6,556	\$5,676	15.5
Federal Transit Administration	1,252	\$2,406	28.0
Federal Aviation Administration	204	\$408	2.8
Other	44	\$56	1.5

Source: Office of the Inspector General, *Review of Congressional Earmarks Within Department of Transportation Programs*, Department of Transportation, "Report Number AV-2007-066," Washington, DC, September 7, 2007, <http://www.oig.dot.gov/library-item/4256>.

Note: N/A means not available. Table includes Congressionally Directed Spending that may not fall within the definition found in House and Senate rules. For example, data include 34 Federal Transit Administration (FTA) New Starts projects that passed through the New Starts program planning and evaluation process. These projects accounted for \$1,370 million of the \$1,500 million New Starts project budget in FY2006, according to the IG's report. Excluding these projects reduces the earmarked portion of FTA's budget to 12.0% and of DOT's budget to 11.3%. New budget authority is authority provided by federal law to enter into financial obligations that will result in immediate or future outlays involving federal government funds.

A major attraction of transportation earmarks to members is that they provide specific, identifiable benefits for constituents.² However, earmarks have not always been part of the transportation funding process. Even now, most of the Federal Aviation Administration (FAA) budget is free of earmarks, with the Airport Improvement Program's discretionary funding being the major exception.

Republican congressional leaders have expressed opposition to earmarks,³ and press reports indicate that Republicans have voted to ban earmarking in the 112th Congress.⁴ As Republicans will control the House of Representatives in the 112th Congress, this could mean that House bills will not contain earmarks. It is not clear that the Senate will follow the same practice. How

² David A. Fahrenthold, "Between Losing and Going Home: the House Basement," *Washington Post*, December 9, 2010, pp. A1, A22. Historically, earmark funding has not been made available in equal amounts to all members of Congress in transportation legislation. Committee leadership decides how and in what amounts earmark funding is distributed. See "In-Depth Analysis: Earmarked Highway Projects: Their History, Their Nature and Their Role in Highway Legislation," *Transportation Weekly*, v. 3, issue 24, April 10, 2002, pp. 4, 10-12. See also "TW Analysis: Above the Line Highway Earmarks," *Transportation Weekly*, v. 7, issue 10, January 17, 2006, pp. 1-10.

³ Office of Representative John Boehner, "House & Senate GOP Leaders United on Earmark Ban," press release, November 15, 2010, <http://www.johnboehner.house.gov/News/DocumentSingle.aspx?DocumentID=214878>.

⁴ Brian Faler, "House Republicans Vote to Continue Ban on U.S. Budget 'Earmarks,'" *Business Week*, November 18, 2010, <http://www.businessweek.com/news/2010-11-18/house-republicans-vote-to-continue-ban-on-u-s-budget-earmarks-.html>; and Stephen Dinan, "With Ban, GOP Calls Duel on Earmarks," *Washington Times*, March 12, 2010, <http://www.washingtontimes.com/news/2010/mar/12/with-yearlong-ban-house-gop-throws-down-gauntlet-o/>.

legislators would deal with bills that contain Senate earmarks but not House earmarks is uncertain. Also, according to press reports, some members have suggested making exceptions to the earmark ban for certain types of projects, including transportation projects.⁵

What is a Congressional Earmark?

The rules in both houses of Congress include identical definitions of “congressionally directed spending.”⁶ The rules define an earmark as

a provision or report language included primarily at the request of a Senator [Representative] 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.⁷

This definition covers earmarks in authorization and appropriations bills as well as in committee reports. Provisions in committee reports may not have the force of law but are often used to give guidance to executive branch departments. One example of such an earmark appeared in the conference committee’s explanatory statement on the Omnibus Appropriations Act, 2009 (P.L. 111-8):

Account	Project	Amount	Requester(s)
Surface Transportation Priorities	Coalfields Expressway, WV	\$4,750,000	Senator Byrd

The effect of an earmark ban based on a House rule might be limited, depending upon the specific rule.⁸ This is because transportation appropriations bills in the House come to the floor under a Rules Committee resolution establishing the rules for consideration of the bill. The Rules Committee can and often does waive rules, and it might have the ability to waive a rule banning earmarks. Consequently, a ban based on a rule or on a rule-based definition of earmarks could be of limited effectiveness.⁹ Also, in both the House and Senate, enforcement of a rule requires that a member stand and object to an identified violation by raising a point of order.¹⁰ Some earmarks include the language “notwithstanding any other provision of law.” This would circumvent even an earmark ban codified in law.

⁵ Jane Sherman, “GOP Gets Queasy Over Earmark Ban,” *Politico*, December 9, 2010, <http://www.politico.com/news/stories/1210/46172.html>.

⁶ See CRS Report RL34462, *House and Senate Procedural Rules Concerning Earmark Disclosure*, by Sandy Streeter, for a more detailed discussion.

⁷ House Rule XXI, clause 9 (e), <http://www.rules.house.gov/ruleprec/111th.pdf>. Senate Rule XLIV, clause 5 (a), <http://rules.senate.gov/public/index.cfm?p=RuleXLIV>. An earmark ban could be established in law or in the rules of the House and Senate.

⁸ CRS Report 98-313, *House Rules Committee Hearings on Special Rules*, by Megan Suzanne Lynch.

⁹ For example, see H.Res. 184, 111th Congress, first session.

¹⁰ CRS Report 98-306, *Points of Order, Rulings, and Appeals in the Senate*, by Valerie Heitshusen.

“Soft” Earmarks and “Hard” Earmarks

The term “congressionally directed spending item” under House and Senate rules appears to permit some “soft” transportation earmarks. Whereas “hard” earmarks specify the project place, purpose, and funding amount in bill or bill report language, “soft” earmarks do not specify the amount of funding.¹¹ Two types of soft earmarks are found in federal transportation finance: place naming and road naming.

Under place naming, the project place is named in the bill or report language, but no funding amount is designated. The appropriators direct the agency to give priority to grant applications from the named places. This form of congressional designation has been most commonly used to influence Airport Improvement Program (AIP) spending. For example, in the FY1990 Department of Transportation Appropriations bill, the House conference report (H. Rept. 101-183) urged the Federal Aviation Administration (FAA) to give priority to

grant applications involving the construction or further development of the following airports:

Akron-Canton Regional Airport, Ohio.

Alexander Hamilton Airport, Virgin Islands ...

By not designating the amount, place naming appears not to be covered by the definition of earmarks under current House and Senate rules.¹²

Road naming is similar to but has been used less often than place naming. The Surface Transportation Assistance Act of 1982 (P.L. 97-424; H.Rept. 97-987) directed the states to give priority in use of federal highway funds to the primary routes designated in a particular committee print.¹³

The definition of an earmark in congressional rules also appears to exclude most of the Federal Transit Administration’s (FTA’s) New Starts and Small Starts Program funding.¹⁴ Congress appropriates amounts for specific projects each year, but these projects have previously been chosen through a competitive, multi-step approval process that is administered by FTA according to law. However, appropriators sometimes add projects to this list, and these additional projects may fall within the definition of earmark in House and Senate rules.¹⁵

¹¹ The terms “hard” and “soft” earmarks are terms of convenience, often used by congressional staff, but have no statutory meaning. Historically, soft earmarks included congressionally directed project spending not listed in the text of the bill itself, but listed in the language of the accompanying report. The current earmark definitions, however, include such designations, making them “hard” earmarks under the House and Senate rules.

¹² The FY1994 Transportation Appropriations Conference Report (H.Rept. 103-300) included language in which the conferees rejected the place name lists in the House and Senate reports arguing that the process was “neither effective at ensuring funding nor useful at identifying those airports with the highest need for federal assistance.” Significant place naming of airports, however, reappeared in the conference report of the FY2000 Transportation Appropriations Act (H.Rept. 106-355). In the FY2001 Transportation Appropriations conference report (H.Rept. 106-940) amounts were specified, effectively making the designations “hard” earmarks.

¹³ “One Possible Way Around an Earmark Ban,” *Transportation Weekly*, vol. 12, no. 4 (November 18, 2010), p. 9. For a discussion of report language earmarks and why the federal Department of Transportation responds to them, see “White House Considers a Ban on Most FY2007 Earmarks,” *Transportation Weekly*, vol. 9, no. 8 (January 17, 2008), pp. 1-2.

¹⁴ The appropriations conference report earmark lists, however, appear to list all New Starts and Small Starts projects.

¹⁵ Office of the Inspector General, *Review of Congressional Earmarks Within Department of Transportation Programs*, (continued...)

New Starts and Small Starts projects are also specifically named in surface transportation authorization legislation, but this does not guarantee funding. The surface transportation authorization bills merely make projects eligible for consideration in the competitive new starts process. This applies even in cases where a dollar amount is assigned because the law specifically states that these authorizations are subject to the new starts process.¹⁶ Moreover, because funds for New Starts projects come from the general fund, not the highway trust fund, an appropriation is necessary once a project has been approved through DOT's process.

Earmarking of Surface Transportation Funding

Extensive earmarking of surface transportation programs is a relatively recent phenomenon. It has been common in authorizations since FY1992 and for appropriations only since FY2001.

The House rule establishing a separate Committee on Roads, adopted on June 2, 1913, included a point of order against any provision for a specific road. According to an analysis by *Transportation Weekly*, the rule was reasonably effective in preventing the earmarking of highway projects until the 1970s, when the House Rules Committee began waiving the rule on earmarks within larger transportation bills.¹⁷ However, highway earmarks in the authorization and appropriations bills were few in number until the late 1980s. The increase to 152 earmarks in the Surface Transportation and Uniform Relocation Assistance Act of 1987 (P.L. 100-17), up from 10 under the 1982 Act, elicited a presidential veto and President Ronald Reagan's comment that "I haven't seen this much lard since I handed out blue ribbons at the Iowa State Fair." Congress overrode the veto.¹⁸

The number of highway earmarks grew in each of the three next surface transportation authorization acts to a high of 5,671 in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA; P.L. 109-59), enacted in 2005.¹⁹ Annual appropriations bill highway earmarks were still under 50 per year through FY1990, and there were none in the FY1996-FY1998 period.²⁰ However, the number of highway earmarks in appropriations bills grew quickly from 96 in FY2000 to 614 in FY2010.²¹ The House ban on highway earmarks was repealed in 1999.

(...continued)

Department of Transportation, "Report Number AV-2007-066," Washington, DC, September 7, 2007, pp. 11, 15-17, <http://www.oig.dot.gov/library-item/4256>.

¹⁶ See section 3043 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA), P.L. 109-59.

¹⁷ "The Last Rule Banning Earmarks," *Transportation Weekly*, vol. 12, no. 3 (November 10, 2010), p. 13.

¹⁸ Federal Highway Administration, *President Ronald Reagan and the Surface Transportation and Uniform Relocation Assistance Act of 1987*, Washington, DC, November 23, 2010, <http://www.fhwa.dot.gov/infrastructure/rw01e.cfm>.

¹⁹ "Congress Completes Work on Highway Bill," *Transportation Weekly*, vol. 6, no. 34 (August 4, 2005), p. 19.

²⁰ "In-Depth Analysis: Earmarked Highway Projects: Their History, Their Nature and Their Role in Highway Legislation," *Transportation Weekly*, vol. 3, no. 24 (April 10, 2002), pp. 1, 3-11. *Transportation Weekly's* earmark totals are used here because they provide a consistent source of earmark analysis over time. The tallies are unofficial. CRS has not verified the counts.

²¹ Federal funding for transportation was provided in FY2007 under a year-long continuing resolution that did not contain earmarks.

The Role of DOT in Project Spending

DOT is responsible for the administration of the transportation programs of the federal government. Most of that funding is distributed under formula programs, with projects selected by states, local governments, or transportation authorities pursuant to a federally mandated planning process at the state and local levels. DOT's direct involvement in project selection is mostly limited to the unearmarked funding in the department's discretionary programs.

Highways

Over 80% of the highway funding in SAFETEA, the most recent surface transportation authorization act, is distributed through formula programs.²² These funds are under the control of the states.

Much of the remaining 20% of highway funding is distributed through discretionary programs, such as the Transportation, Community, and System Preservation Program, the National Corridor Infrastructure Improvement Program, or the Interstate Maintenance Discretionary Program. The Federal Highway Administration (FHWA) administers a competitive grant selection process for discretionary programs, except to the extent that spending under these programs is directed by earmarks. In practice, most of the money available under these programs has been earmarked in recent years.

Whether for discretionary or formula program projects, federal law requires that all highway projects must be a product of the planning process under the auspices of a Metropolitan Planning Organization or the state DOT. The projects must be included in the State Transportation Improvement Plan (STIP). The STIP lists the state's highway projects, often in priority order. To be eligible for federal highway funding, either discretionary or formula, the project must be on the STIP.

Transit and Rail

Like highway funding, most federal transit funding is distributed by statutory funding formulas. Under current law about 70% of the roughly \$10 billion annual budget is distributed in this way. To be eligible for federal funds, transit projects must be included in a Transportation Improvement Program approved by a Metropolitan Planning Organization. Unlike federal highway funding, most of which flows to the states, most transit funding flows directly to local transit authorities. Only transit funds designated for urbanized areas with populations of 200,000 people or less and non-urbanized (rural) areas are administered by the states. Under the formula programs, such as the Urbanized Area Formula Grant Program and the Fixed Guideway Modernization Program, FTA simply administers the funds and does not select projects.

Two major programs overseen by FTA are not governed by formula: the New Starts and Small Starts program (\$2.0 billion in FY2010) and the Bus and Bus Facilities program (\$982 million).²³

²² The elimination of the High Priority Projects program, which is all earmarks, could increase the percent of the Federal-Aid Highway Program that is distributed by formula.

²³ U.S. Department of Transportation, Federal Transit Administration, "FTA Supplemental Fiscal Year 2010 (continued...)"

In the case of the New Starts and Small Starts programs, FTA allocates funding based on factors determined in authorization legislation.²⁴ Bus and Bus Facilities program funding is largely allocated according to earmarks.

As with other DOT modes, the majority of intercity rail funding in the Federal Railroad Administration (FRA) has not been earmarked. The two largest FRA programs are support for Amtrak and the High Speed and Intercity Passenger Rail (HSIPR) Program. Amtrak receives both operating and capital support; the expenditure of these funds is determined by Amtrak (though Amtrak's capital spending is focused in the Northeast, where most of the infrastructure that it owns is located). The HSIPR program began in FY2010 and is a competitive grant program that has not been earmarked.

Aviation

Aviation authorization bills are generally not earmarked. Appropriations bills have in recent years had some FAA discretionary funding earmarked, and in the 1990s some appropriations bills "place named" airports for Airport Improvement Program (AIP) funding.

The (AIP) is both a formula and a discretionary grant program. Generally about two-thirds of funding is distributed as "entitlements" through formulas set forth in the reauthorization bill. Airport projects must be part of the national Airport Capital Improvement Plan, which is developed by the FAA, airport sponsors, states, and planning agencies. This planning process culminates in a list of priority projects. FAA oversees the distribution of AIP entitlement funds and enforces compliance with the eligibility criteria. Unlike the Federal-Aid Highway Program, federal aid to airports flows directly to the airport sponsor, usually an airport authority.

AIP discretionary funds are used by the FAA to fund priority projects through a competitive grant process. In recent years, AIP discretionary funds have often been earmarked substantially. Earmarking moves an airport up the priority list and provides funding. The discretionary funds are also subject to set-asides for nationwide priorities set by Congress, such as the 35% noise set-aside and the 4% Military Airport Program set-aside.

Recently, some earmarks have also appeared in the Facilities and Equipment component of the FAA budget. The most significant of these have been for projects under FAA's Tower/Terminal Air Traffic Control Program and the Instrument Landing Systems Program. The priorities for spending under these programs also are established through a national planning process. According to DOT's inspector general, earmarking has delayed some projects assigned high priority through this process while funding lower-priority projects.²⁵

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Apportionments, Allocations, and Corrections," 75 *Federal Register*, 27056-27109, May 13, 2010, <http://www.fta.dot.gov/documents/2010-11479.pdf>.

²⁴ Congress has been listing all projects funded through the New Starts/Small Starts program in the "Earmarks and Congressionally Directed Spending Items" table for DOT appropriations bills, although by the definition of earmark provided in the rule it is not clear that many of the projects should be in that table, since many are the result of "a statutory or administrative ... competitive award process." For example, in FY2010, only \$136 million was appropriated for projects added by Congress to the list of recommended projects submitted by FTA, 7% of the total program appropriation.

²⁵ Office of the Inspector General, *Review of Congressional Earmarks Within Department of Transportation Programs*, (continued...)

Maritime

DOT's Federal Maritime Administration provides support for certain maritime operations and vessel construction, typically under criteria set by law. Most capital programs to benefit marine transportation, such as harbor dredging and lock repair, are undertaken by other federal agencies, notably the U.S. Army Corps of Engineers, rather than by DOT.

Transportation Spending Under an Earmark Ban

Both highways and transit are included in a single multi-year surface transportation authorization bill, which establishes programs and sets authorized spending levels.²⁶ In the House, both the highway and transit sections of the bill are developed primarily by the Highways and Transit Subcommittee of the Transportation and Infrastructure Committee (T&I), although the full committee also takes an active role. In the Senate, the Environment and Public Works Committee has jurisdiction over the highway provisions, while the Banking, Housing, and Urban Affairs Committee handles transit. Provisions involving highway trust fund and revenue issues are under the jurisdiction of the Ways and Means Committee in the House and the Committee on Finance in the Senate. Aviation reauthorization bills are primarily under the jurisdiction of the T&I Committee in the House and the Commerce, Science, and Transportation Committee in the Senate.

For appropriations legislation, highways, transit, and aviation are under the jurisdiction of the appropriations committees in each house. Members of the appropriations committees also oversee the implementation of federal transportation spending through hearings that provide the opportunity to publicly call the attention of DOT officials to issues that are important to the member's state or district.

The process of developing a transportation authorization bill typically begins with a schedule of hearings in which members can participate, and at which local officials promoting the need for particular projects can testify. Once the bill is introduced, members may discuss their concerns with the committee (both at the member and staff levels). Such discussions may continue through the bill markup and even during the eventual floor debate.²⁷ An earmark ban would not affect the ability of members and their staffs to engage in such discussions. Nor would it limit their ability to correspond and meet with DOT officials in support of projects.

A ban on transportation earmarks would affect principally discretionary programs overseen by DOT. It would likely have little direct impact on the formula programs that make up most federal transportation funding.

Earmarks serve as a way for members of Congress to ensure that discretionary transportation funds are distributed according to their priorities, rather than those of the Administration. If

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"Report Number AV-2007-066," Washington, DC, September 7, 2007, p. 12.

²⁶ After TEA21 expired, Congress passed twelve "stop-gap" extensions for a period of almost two years until SAFETEA (in effect, a five-year bill) was enacted on August 10, 2005.

²⁷ The Department of Transportation usually also drafts a suggested bill. The DOT bill is introduced by request in both the House and Senate.

earmarks are prohibited, and if Congress does not act in other ways to set funding priorities within the discretionary programs, then the job of setting priorities would be left to DOT, subject to the grant selection criteria set forth in law and regulation. One alternative to earmarks would be more detailed legislative language to govern the allocation of funds.

Divergences between congressional and Administration priorities for transportation funding have come to the fore on several recent occasions. In FY2007, a year in which Congress passed a year-long continuing resolution and the appropriators did not earmark the discretionary programs, the George W. Bush Administration decided to consolidate virtually all discretionary funds in the highway and transit programs to advance its focus on comprehensive congestion mitigation strategies in metropolitan areas through urban partnership agreements. The roughly \$850 million in discretionary funding was divided among just five cities.²⁸ This amount included unallocated discretionary bus program funds that had been divided among hundreds of projects by Congress in the previous fiscal year.²⁹

Similarly, the Obama Administration used unallocated FY2009 Bus and Bus Facilities funds to support one of its policy priorities, “livability.”³⁰ Livability, which involves providing alternatives to the car and integrating transportation, housing, and environmental policies, was not specifically established as a policy priority by Congress.

An earmark ban would elevate the visibility of the programmatic selection process and of the selection criteria, which may be established by Congress. Under the proposed earmark ban, other traditional avenues for members of Congress to influence the flow of transportation funding could become more important, such as involvement in the policymaking aspects of transportation budgeting and interaction with both federal and state transportation officials. Increased reliance on formula funding may make it more critical for members to make sure that projects of importance to their constituents are included in transportation plans at an acceptable priority level.³¹

Members of the appropriations committees can improve the chances that a specific project will be funded without earmarking by increasing the amount of funding provided to a particular program.³² Members also have the opportunity to include provisions in appropriations legislation

²⁸ “DOT Urban Partnership Awards a Far Cry from Usual Earmarking,” *Transportation Weekly*, vol. 8, no. 32 (September 5, 2007), pp. 3-4.

²⁹ U.S. Department of Transportation, Federal Transit Administration, “Announcement of Project Selections for FY2007 Discretionary Programs,” 72 *Federal Register*, 47123-47125, August 22, 2007, <http://edocket.access.gpo.gov/2007/pdf/07-4125.pdf>; U.S. Department of Transportation, Federal Transit Administration, “FTA Fiscal Year 2006 Apportionments and Allocations,” 70 *Federal Register*, 75648-75709, December 20, 2005, <http://www.fta.dot.gov/documents/05-24154.pdf>.

³⁰ U.S. Department of Transportation, Federal Transit Administration, “Section 5309 Bus and Bus Facilities Livability Initiative Program Grants,” 74 *Federal Register*, 64984-64989, December 8, 2009, <http://edocket.access.gpo.gov/2009/pdf/E9-29242.pdf>.

³¹ Implementation procedures for an earmark ban could tighten the working definition. For example, see House Republican Conference, *Earmark Moratorium Guidance*, March 16, 2010.

³² SAFETEA included guaranteed funding levels which in effect allowed appropriators to increase funding over the guaranteed amount but not lower funding below these amounts. Changing the funding for any program changes the relative distribution.

that may affect transportation program expenditures, including project selection, without identifying specific projects.³³

How an Earmark-Free Highways Program Might Work

The total size of the Federal-Aid Highway Program has the largest impact on spending at the state and local levels. Reauthorization bills may extend existing programs, create new or revised programs, or allow programs to lapse. Typically, members may support increased spending for programs that are more important to their state or district relative to other programs. For example, a member from a state or district with a large number of deficient bridges might give priority to increased funding of the Highway Bridge Program.

In the absence of earmarks, highway program formulas may become more important in directing the flow of highway funding. For example, the Transportation Equity Act for the 21st Century (TEA-21; P.L. 105-178) added factors based on states annual contributions to the highway account of the Highway Trust Fund to two programs' funding formulas. This directed money toward states whose motorists paid larger amounts of highway taxes and away from states whose motorists paid relatively less in highway taxes.

A provision in SAFETEA, the "Equity Bonus Program," makes the impact of a ban on earmarks difficult to gauge. The Equity Bonus funding distribution functions as an overlay on other highway programs, and is meant to assure that all states receive a share of highway funding equal to at least a specified proportion of their motorists' payments into the highway trust fund.

If the Equity Bonus Program is reauthorized, earmarks under the High Priority Project Program, the largest single source of earmarks, may not change the total any state receives of highway formula funds and High Priority Project Program funds combined. For example, SAFETEA included over 5,000 earmarks under the High Priority Project program, but these earmarks reduced Equity Bonus funding by equivalent amounts and left each state's total under these programs unchanged. Consequently, a ban on earmarks under these programs would not necessarily affect the total flow of federal highway funds to any state, nor would it necessarily affect the total amount of federal spending for highways. However, an earmark ban might affect the flow of highway funds to individual congressional districts, as the Equity Bonus Program does not assure spending at the district level. Earmarks of funds from discretionary programs not affected by the Equity Bonus Program could increase a state's total federal highway funding.

Transit and Rail Programs Without Earmarks

Like the highways programs, most federal transit programs rely heavily on funding formulas established in authorization laws. Formulas are not a neutral way of distributing funds, as the way in which a formula is constructed and subsequently modified can have significant effects on the allocation of funding. For example, in the 1980s transit funding dedicated to fixed guideway modernization was distributed by DOT based on an administrative formula that sent most funds to transit rail systems that existed before the creation of the federal transit program in 1964. This

³³ For example, for several years appropriations acts have included a provision barring FTA from signing full-funding grant agreements for New Starts projects that request more than a 60% federal share, although by statute the federal share can be up to 80%.

administrative formula was altered and inserted into law in 1991 in part to widen the distribution of funds to include rail systems built in the 1970s and 1980s. This change was reinforced by modifications made to the formula in the surface authorization law passed in 1997.

The New Starts and Small Starts Program, which supports construction of rail and bus transit projects, is a particular source of misunderstanding with respect to earmarking. Under current law, a transit project must be specifically mentioned in the authorization legislation in order to be eligible for federal support. However, being named in the legislation does not assure any level of funding, and does not guarantee that the project will be funded at all. Thus, inclusion in the legislation does not constitute earmarking under the current definition adopted by Congress. An earmark ban would not alter the need to include a specific transit project in the authorization bill if its sponsors hope to receive federal assistance.

The allocation of funding among the various transit programs may become even more important in the absence of earmarks. For example, districts with rail transit systems are likely to do well when more funds are dedicated to the Fixed-Guideway Modernization Program. Rural districts, by contrast, are likely to do well when more funding goes to the Non-Urbanized Area Formula Program. FTA also administers the Bus and Bus Facilities Program, which has been heavily earmarked in the past. In the event of an earmark ban, funding under this program presumably would be distributed according to FTA criteria, and Congress may want to provide FTA with guidance in developing those criteria.

An earmark ban will not make much difference in the realm of intercity passenger rail because, as noted earlier, these funding programs have not been earmarked.

Aviation Programs Without Earmarks

An earmark ban would be less significant for aviation than for surface transportation, due to the relatively minor role of earmarking in aviation funding. An earmark ban would not necessarily affect the ability of members to increase the priority given particular projects in the Airport Capital Improvement Plan. Alternatively, members may seek to adjust the entitlement formulas in the Airport Improvement Program in ways that might benefit particular airports.

In the absence of earmarking, members whose states or districts have particular concerns about noise mitigation or conversion of a military airfield to civilian or dual use could support increases in the set-asides for those purposes, increasing the likelihood that a particular project will be funded without naming the project. Members could also intervene in the process of setting priorities for FAA facilities and equipment expenditures under the Tower/Terminal Air Traffic Control Program and the Instrument Landing Systems Program.

One of the federal government's more visible aviation programs, the Essential Air Service Program, subsidizes commercial flights to airports that lost service under airline deregulation. This program is not earmarked, although Congress has from time to time altered the criteria that determine whether a particular airport is eligible for the program.

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