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## CHAPTER 30

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# Lobbying the Appropriations Process

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### 30-1 Introduction

Although it exudes an air of mystery, the secrets of the congressional appropriations process can easily be uncovered by those who take the time to study it. The purpose of this chapter is to provide practical guidance for lobbyists who wish to influence that process. It includes a brief history of the principal overseers of the process, the Appropriations Committees of Congress, and a description of the prerequisite tools and resources for lobbying on an appropriations-related issue. This chapter also outlines each major juncture of the appropriations process, noting tactics the appropriations lobbyist can employ each step of the way. We conclude with some guidance for the lobbyist whose client is seeking a special project request, or what is commonly referred to as a congressional earmark.

This chapter assumes a basic understanding of the general legislative process in Congress and, in particular, knowledge of the role committees play in that process; special note is made only where a rule or custom of the appropriations process differs from the norm. For those who need a refresher on the basics, Chapter 28 provides the necessary background.

### 30-2 History and Organization of the Appropriations Committees

In *Federalist No. 51* James Madison noted that “[i]n republican government, the legislative authority necessarily predominates.”<sup>1</sup> Under the scheme of the Constitution, therefore, Congress was designated to be the principal policy-making branch in a new government. Perhaps to put a finer point on Congress’s role, in *Federalist No. 58* Madison went on to observe that the “power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.”<sup>2</sup> The congressional appropriations process parcels out approximately \$1 trillion annually, making it a principal source of “just and salutary measures.”

Enacted in 1789, the first appropriations bill of record totaled \$639,000 and set the stage for what has evolved into a distinctly unique and arcane subset—some would say subculture—of the legislative process. In the early years of the Republic, appropriations bills were handled by ad hoc committees, and later by the House Ways and Means and Senate Finance Committees. Then, in 1865 and 1867, respectively, the House and Senate each created an Appropriations Committee, assigned them sole responsibility for examining executive branch agency

measured in decades rather than years, with members rarely departing, except by ballot box or coffin. That same adherence to tradition extends to committee staff who, because of their institutional knowledge, tend to retain their jobs regardless of which party controls Congress and proudly embrace the job title of "clerk" in deference to their predecessors who transcribed appropriations clauses dictated by the committee chairman. A seat on one of these panels has always been one of the most coveted assignments in Congress. And while recent rule changes have stripped away many vestiges of the secrecy that once surrounded their deliberations, the inner workings of these two august and venerated committees still project an air of mystery. Perhaps the attraction is that, unlike members of other committees whose work is often sporadic, members of the Appropriations Committees know exactly what they will be doing every year—parceling out money.

### 30-3 Tactical Tools

As with lobbying any other facet of the legislative process, the appropriations lobbyist must enter the game with a strategic plan and the right tools at hand.

*Define the issue; determine "the ask."* The most critical, and oftentimes the most difficult, task confronting the appropriations lobbyist is translating the client's general need into a specific funding request—one that reasonably falls within the mission and parameters of an existing federal agency or program. Most importantly, the client's request must be built on a sound public policy rationale and be defensible enough to withstand public scrutiny. Anything less tempts failure and damages the appropriations lobbyist's credibility over the longer term.

*Prepare the materials.* Lawmakers thrive on issues, especially the pressing issues of the day. In developing what can best be described as a marketing package, the lobbyist should attempt to frame the client's request within the context of what is currently on the legislator's mind. (For example, in a period of rising unemployment, an education appropriation request might be characterized as an investment in a more stable workforce; during austere budget times, a request for medical research funding could be touted for its promise of reducing health care costs over the long run.) Written supporting materials should be artfully drawn to transcend politics and ideologies, and instead stress the nonpartisan, pragmatic nature of the appropriations request.

As for content, clarity and brevity always trump detail and nuance. Typically, the marketing materials should include a one-page fact sheet that describes a problem, proposes a solution, and specifies how much money is being requested. Depending on the subject matter, additional materials might include stakeholder letters of support, case studies, supportive findings of an independent organization, or human interest stories.

*Put a face on the problem.* The most effective way to draw a legislator's attention to a problem is by linking it to a constituent. Members of Congress and their staff are far more receptive when a lobbyist's visit is preceded by calls, visits, or e-mails from concerned constituents. Depending on the issue and the nature of the client organization, constituent contacts may take the form of hundreds of e-mails from ordinary citizens (the classic "grassroots" campaign) or a visit by a prominent community leader or national personality. In either case, the lobbyist should be prepared to mobilize those voices at key points throughout the decision-making



process, specifically well in advance of subcommittee mark-ups, floor debate, and conference committee proceedings.

*Engage the media.* Along with constituents, the media can be a forceful tool in driving issues in Congress. Well before key pressure-points in the decision-making process, the lobbyist should attempt to engage national and/or local media to help spotlight the client's issue, using editorial boards, op-eds, and letters to the editor to call attention to a problem or urge a local legislator to vote the right way.

*Enlist the support of stakeholders.* In Congress, breadth can often substitute for depth. A clear message, when voiced by many, can make taking on an issue more compelling (and more comforting) to a legislator. The appropriations lobbyist should determine who might be the client's natural allies and attempt to enlist their support behind the request. Coalition-building can be time-consuming, but rallying others behind an issue makes it far easier to garner legislative support.

*Identify a lead sponsor.* Even the most popular issues require a champion, an individual (or individuals) who feels passionately enough to take possession of an issue and become an advocate with his or her colleagues. The most effective sponsor is one who has a personal interest in the issue or program and is a member of the Appropriations Committee. A lead sponsor, for example, might be asked to circulate a "Dear Colleague" letter addressed to the subcommittee chairman and ranking member, urging the panel to act on the client's issue. The objective is to garner a large enough number of signatures from rank-and-file members to demonstrate broad support for the issue. The lobbyist, with the help of a grassroots network, should assume responsibility for convincing Members of Congress to join as co-signers.

But even in the best of fiscal times, competition is fierce. Far more appropriations requests end up on a committee cutting-room floor than in an appropriations bill. Success is dependent on the willingness of a sponsor to remain engaged and active throughout the process. It falls to the appropriations lobbyist, however, to follow day-to-day developments, alert the sponsor when his or her direct involvement is warranted, and provide the necessary technical assistance and support, e.g., drafting floor statements and press releases, and other materials. If the lead sponsor happens to be a member of the Appropriations Committee, so much the better.

### 30-4 Working with Federal Agencies

Although the transmittal of the President's budget proposal to Congress in February of each year marks the official start of the appropriations process, work on formulating the budget actually begins eight to ten months earlier, at the federal agency level.

During the spring and early summer agency personnel begin developing preliminary budget documents, usually based on their best estimates of what will be necessary to maintain current services in a fiscal year that will commence nearly a year and a half later. Preliminary budgets are sent up the chain of command to departmental heads for review, then, in early fall, presented to the Office of Management and Budget (OMB), where they are examined within the context of overall presidential priorities. In November, OMB staff inform department and agency heads what their programs' recommended spending levels will be. It then falls to agency personnel to revise their budgets to conform to broad Administration policy.



Working with the federal agencies at the very preliminary stages of the budget's formulation can sometimes help advance a program or project through the congressional process. If the lobbyist's goal is to boost funding for an existing program, having agency support behind it can be invaluable.

The lobbyist should seriously consider approaching agency officials at this early stage, presenting them with the strongest possible arguments for the client's issue. If these officials can be convinced that the proposal fulfills a need and fits within their agency's objectives, they are well-positioned to promote the idea internally, to the hierarchy in their department, and with OMB. Absent a willingness to take a proactive stance, even tacit support can be valuable in subsequent interactions the lobbyist has with Members of Congress, who frequently contact agency officials through back-channels to elicit their views. The best-case scenario (next to having the agency request the funding in the first place) is having an agency official who, when asked, will support the lobbyist's proposal.

On the other hand, if agency officials are unmoved or unwilling to get behind the issue, knowing in advance the reasons behind their opposition can help the lobbyist frame counterarguments when the proposal is raised in Congress.

### 30-5 The President's Budget

The appropriations process officially begins when the President transmits to Congress a budget proposal for the upcoming fiscal year on or before the first Monday in February.

Officially referred to as the *Budget of the United States Government*, this voluminous document contains policy and legislative recommendations, government-wide spending and revenue estimates, and financial statements for every federal department and agency. Here can be found some of the most creative sleight-of-hand gimmicks when it comes to budgeting, including situations where programs targeted for elimination are characterized as "savings," and where ongoing programs are re-packaged and heralded as "new initiatives." But for all the hoopla that occurs when the President's budget is sent to Congress, it is important to understand that the document is nothing more than a proposal; Congress is not bound to adopt any of its recommendations. Indeed, Congress typically makes thousands of changes to the President's budget before all is said and done.

Following the release of the President's budget, lobbyists can respond in a number of ways. One effective strategy is to issue a statement to the media, commenting on the effect the budget proposal would have, pro or con, on the client's interest. This puts the client on record early in the process and can serve as a rallying cry for subsequent advocacy efforts.

### 30-6 Overview Hearings

Shortly after the President's budget is transmitted to Congress, the House and Senate Appropriations Committees each convene hearings where the OMB Director and selected cabinet-rank officials are invited to present testimony explaining the overall policy rationale behind the President's budget proposal. The focus of overview hearings is generally confined to sweeping policy and fiscal issues, where committee members are given the opportunity to probe witnesses about the



overall rationale behind the President's budget proposal and gather information that will help inform decisions the committee must make later in the process.

While framed along broad policy lines, overview hearings may offer the lobbyist an opportunity to call attention to a client's issue, particularly if the issue is of national or regional significance. By virtue of their roles on these panels, members of the Appropriations Committees have sufficient clout to influence policy direction and are free to raise any issue that they consider important.

At this very early stage in the process, overview hearings afford the lobbyist an opportunity to brief a supportive committee member on the effects the President's budget proposal is likely to have on the client's interests. If that stimulates sufficient interest on the lawmaker's part, the lobbyist can offer up a line of questioning the committee member may pursue during the hearings. The questions and answers will help elevate the client's issue, and provide insights that can be used to support or refute the rationale behind the executive's proposal as well as provide a framework for more formal action later in the appropriations process. If the questions are not answered at the hearing, the member should be encouraged to seek written responses for the record, a good tactic for gathering more information and raising the profile of the issue.

### 30-7 Subcommittee Hearings

Unlike most other committees of Congress, which typically convene hearings to act on legislation that has already been introduced, most appropriations hearings are triggered by the transmittal of the President's annual budget request.

On the day the President's budget is unveiled, federal agencies submit "budget justifications" to the House and Senate subcommittees assigned jurisdiction over their programs and activities. These documents, which are also posted online, offer a far more comprehensive description of each agency's proposal than is set out in the formal budget request, providing a detailed breakdown of discrete programs, projects, and activities. While the formal budget may devote only a few pages to a federal department, the budget justifications for that department may constitute as many as 25 to 30 volumes of narrative and budget charts, including a detailed accounting of the current fiscal year's appropriation, how congressional priorities were carried out, and the rationale behind the appropriation request for the upcoming fiscal year. Given the incremental nature of the budget, each budget justification focuses primarily on explaining how much more (or less) the agency is seeking for each of its programs, and the reasons behind those changes.

With this information in hand, the House and Senate appropriations subcommittees each schedule a series of hearings, beginning with departmental and agency heads. The budget justifications are carefully examined by staff, who are looking for trends, inconsistencies, and gimmicks that might warrant clarification or special attention. Also, in advance of the hearing, agency witnesses submit their written statements for review by subcommittee staff. Since a considerable amount of research and preparatory work precedes the committee hearings, subcommittee aides and the personal staff of subcommittee members often welcome outside input from lobbyists, usually in the form of briefing memoranda and lines of questioning used to probe agency witnesses when they testify.



In addition to convening hearings with federal officials who, at least publicly, are bound to defend the President's budget request, some subcommittees have made it a practice of allowing nongovernmental organizations, advocacy groups, and private citizens, or so-called "public witnesses," an opportunity to comment on the President's budget proposal and/or draw attention to their particular concerns.

To take advantage of this opportunity, the lobbyist should arrange for the client to submit a request to testify to the relevant House and Senate appropriations subcommittee(s) soon after the President's budget is transmitted. Since demand far exceeds the number of witness slots available, the lobbyist should consider employing other tactics to improve the chances of winning an invitation to testify, such as offering up a celebrity spokesperson or a prominent figure as a potential witness, or asking the lead sponsor for the client's proposal or another Member of Congress to request a slot on the client's behalf. If the lobbyist is unable to secure an invitation to testify, a written statement may be submitted for the record.

As with most congressional hearings, appropriations subcommittee hearings are intended to serve primarily as fact-finding tools, tracking whether funds are being administered in accordance with congressional directives, and whether program priorities are properly aligned or warrant change. Without question, the majority of appropriations committee hearings are perfunctory, given the number and breadth of programs overseen by the subcommittee. Nevertheless, hearings remain an integral part of the appropriations process—and the lobbying that goes along with it. They provide a public record of the Administration's position and the committee members' interests, and offer the lobbyist a setting to draw attention to, or build support for, a particular program or new idea. The information gained at these hearings can also help inform strategic planning going forward.

### 30-8 Authorizing Legislation

It is vital that the appropriations lobbyist understand that Congress operates under two very distinct and sequential processes when it comes to creating and then funding federal programs. First is the enactment of *authorizing* legislation, which sets the legal framework and ground rules for a federal program; the second is the *appropriation* of funds required to launch and maintain the program. Initially, the practice of distinguishing between authorizing legislation and appropriations grew out of a sense that the two simply should not be commingled. In time, the distinction was institutionalized by the rules of the House and Senate to discourage the insertion of legislative riders incorporating changes in the substantive law into appropriations bills.

Authorizing legislation, which must be approved by each house and signed into law by the President, generally contains two components: substantive language and the authorization of appropriations clause. The substantive language defines the purpose of the legislation, prescribes the organization of the program, and stipulates what can and cannot be done in carrying out the program.

The authorization of appropriations clause establishes the basis for subsequent appropriations, usually for a period of three to five fiscal years. Ordinarily,



the authorizing clause sets out specific dollar amounts for which annual appropriations may be made over multiple years, e.g., "up to \$5,000,000 for fiscal year 2009, \$7,000,000 for fiscal year 2010 and \$10,000,000 for fiscal year 2011." It is very important to keep in mind, however, that the enactment of authorizing legislation does not necessarily guarantee that appropriations will follow, or that the amounts appropriated each year will match those provided in the authorizing legislation.

As with any congressional rules, there are exceptions. The authorization-appropriation rules are not self-enforcing, so either house can choose to waive, ignore, or circumvent the distinction between the two separate processes. If authorizing legislation for an ongoing program has expired, for example, the Appropriations Committees will routinely extend the program's funding for an additional year or more. When that occurs, the appropriation effectively substitutes as the authorization as well.

While an authorization is not always essential, it does put a program in the strongest position during the appropriations process. Programs whose authorizations have expired may see their funding languish because the Appropriations Committees view the lack of authorization as a sign that a program is no longer a priority. For example, authorization for the U.S. Public Health Service's health professions training programs expired in 2003. Annual appropriations for the programs have steadily declined since then.

Depending upon the circumstances, authorizing legislation can be either a necessary prerequisite for achieving the lobbyist's goals or a useful tool for engendering support for future appropriations. Given the magnitude of authorization law already in place, much of which is broadly worded, it is rare that a lobbyist's issue requires new authorizing legislation. However, although it may seem counterintuitive, the lobbyist may nevertheless choose to pursue authorizing legislation as a way to draw attention to an issue that has otherwise gone unnoticed or underfunded in the appropriations process. For example, the Public Health Service Act broadly authorizes the National Institutes of Health to award grants to support medical research. But if research on a particular disease has been overlooked or underfunded, the lobbyist could opt to pursue authorizing legislation as a way to call attention to the need for increased funding for that disease. Whether or not the legislation is enacted, building support behind the initiative may help stimulate favorable treatment by the Appropriations Committees.

### 30-9 The Budget Resolution

Prior to the 1970s, appropriations were handled in a decentralized fashion. Congress never voted in advance on what total appropriations should be nor how priorities should be aligned. Total discretionary spending each year was simply a tally of all the appropriations bills passed for that year; priorities were revealed after the fact and only by comparing the appropriations bills enacted for the year.

After a series of conflicts with President Nixon over his impoundment of appropriated funds, lawmakers passed the Congressional Budget Act of 1974,<sup>3</sup> establishing a framework by which Congress would annually set overall parameters for tax and spending legislation for the year. That framework takes the form of an annual budget resolution, which is a concurrent resolution approved each year by



the House and Senate. (The resolution is *not* sent to the President for approval. It is, therefore, not a law, and no money can be appropriated or spent pursuant to it.)

Rather than supplant the appropriations process, the budget resolution, among other things, sets the financial boundaries within which the Appropriations Committees must operate, in the form of a discretionary spending ceiling, distributed across 20 broad functional categories.

The budget resolution does not attempt to allocate funds to specific agencies or programs so as not to run afoul of the Appropriations Committees' jurisdiction. However, the House and Senate Budget Committee reports accompanying the resolution typically include specific *assumptions*, e.g., "The Committee assumes that summer job training programs for inner-city youth will be expanded." While not necessarily binding on the Appropriations Committees, these assumptions can be a useful tool for influencing decisions made later in the appropriations process.

Once the budget resolution is approved, the House and Senate Appropriations Committees are given their spending ceiling for the year. Both committees, in turn, subdivide that amount among their subcommittees, providing each with what is commonly referred to as a "302(b) allocation" (named for the section of the Budget Act requiring that apportionment). The decision as to how much money is allocated to each subcommittee (see Exhibit 30-2) ultimately rests with the committee chairman, usually with input from subcommittee chairmen and from the congressional leadership, who frequently use the budget to showcase party priorities. Because this decision involves highly aggregated amounts totaling billions of dollars, it is very unlikely that any single organization or interest can influence the decision.

### 30-10 Subcommittee and Full Committee Mark-ups

What happens within the Appropriations Committee is the single most important determinant of whether an issue succeeds or fails.

Appropriations subcommittees are given a wide berth in setting funding levels for programs within their jurisdiction. Other Members of Congress tend to view subcommittee members, especially the chair and ranking member, as the experts on the programs they oversee and therefore are not inclined to challenge their decisions. Indeed, the initial recommendations of a subcommittee bill will closely match what is eventually appropriated. Consequently, the lobbyist should concentrate most of his or her efforts on convincing the subcommittee to address the client's issue.

Several weeks before a mark-up is scheduled, the subcommittee staff will begin drafting the framework for the appropriations bill and the accompanying explanatory report. Well before then, the subcommittee will issue a call for requests from other Members of the Congress, including specific program dollar requests and proposed report language (see Exhibit 30-3). The deadline for submitting those requests is usually in mid- to late March. Most requests must be submitted on-line and be accompanied by a statement certifying that neither the requesting Member nor the Member's family has a financial interest in the request.

The explanatory report accompanying the appropriations bill, much more so than the legislation itself, is the key to success for the lobbyist. The appropriations report is where the subcommittee sets out detailed guidance to agencies as to where and how appropriated funds are to be spent.

**Exhibit 30-2**  
**Sample Allocation\***

<b>110TH CONGRESS</b>			
<i>Report</i>			
<b>SENATE</b>			
<i>1st Session</i>			
<b>ALLOCATION TO SUBCOMMITTEES OF BUDGET TOTALS FROM THE CONCURRENT RESOLUTION, FISCAL YEAR 2008</b>			
<p>Pursuant to section 302(a) of the Congressional Budget Act of 1974, as amended, the joint explanatory statement accompanying the conference report on the concurrent resolution on the budget for fiscal year 2008 (H. Rept. 110-153) contains allocations to the Senate Committee on Appropriations for fiscal year 2008.</p>			
<b>SENATE 302(B) ALLOCATIONS FOR FISCAL YEAR 2008</b>			
<i>(in millions)</i>			
	Enacted 2007	President's 2008 Request	Senate 302(b)
Agriculture . . . . .	17,677	17,719	18,709
Commerce, Justice, Science . . . . .	50,344	51,241	54,418
Defense . . . . .	419,612	462,879	459,332
Energy & Water Development . . . . .	30,298	30,473	32,273
Financial Services, Gen'l Gov't. . . . .	19,615	21,388	21,394
Homeland Security . . . . .	33,734	34,191	36,439
Interior, Environment. . . . .	26,405	25,650	27,150
Labor-HHS-Education . . . . .	144,522	140,284	149,236
Legislative Branch. . . . .	3,773	4,331	4,051
Military Construction & VA. . . . .	49,752	60,743	64,745
State, Foreign Operations . . . . .	31,277	34,943	34,243
Transportation, HUD. . . . .	47,538	47,963	51,063
<b>Total . . . . .</b>	<b>874,547</b>	<b>931,805</b>	<b>953,053</b>

\*Committee on Appropriations, U.S. Senate Report on the Suballocation to Budget Allocations for Fiscal Year 2008 (Washington, GPO), pp.2-3.

At this point, the lobbyist should take the initiative by providing the lead sponsor's office with the information required to complete the form well in advance of the subcommittee's deadline. Specific dollar requests should be backed by a clear and concise description of why the funds are needed and how they will be spent; proposed report language should be to the point and easily understood by a layperson.



**Exhibit 30-3**

**House Appropriations, Subcommittee on Defense**

**FY 2009 Member Request Form\***

**(All Fields are Required for Project Consideration. One Project Request per Page.)**

Member: \_\_\_\_\_ Member's Signature: \_\_\_\_\_  
 Staff Contact: \_\_\_\_\_  
 Phone Number: \_\_\_\_\_

Service/Component: \_\_\_\_\_

Appropriation Account (provide only one): \_\_\_\_\_

2009 Budget Line Title (from DoD Program Justification Materials: MI, OI, PI, or RI): \_\_\_\_\_

**Provide only ONE of the following:**

Military Personnel, O&M	Procurement	RDTE	Intel
Budget Activity #: _____	P-I Line	R-I Line Number: _____	MIP/
Sub-activity ID #: _____	Number: _____	PE #: _____	NIP _____

**Name of Project Requested:**

**Program Description** (must include a clear description of military requirement): \_\_\_\_\_

**Benefit to DoD:**

<b><u>Congressional Funding History:</u></b>	<b><u>FY 2008</u></b>	<b><u>FY 2007</u></b>	<b><u>FY 2006</u></b>	<b><u>FY 2005</u></b>	<b><u>FY 2004</u></b>

**DoD Supporting Program Manager/Agency** (office contact information): \_\_\_\_\_

**FY 2009 Budget Amount** (if applicable): \_\_\_\_\_

**Your FY 2009 Request** (attach bill/report language if applicable): \_\_\_\_\_

\*Defense Subcommittee, Committee on Appropriations, U.S. House of Representatives, Feb. 2008 (online form).

Spending bills most often originate in the House of Representatives, so the House subcommittees typically mark up their bills first, usually in late May or early June. Senate subcommittees generally mark up their bills in June, July, and September.

After the conclusion of the hearings, subcommittee staff will begin drafting the appropriations bill and report, taking into consideration the priorities of the chairman and ranking member, other committee members, and the funding requests submitted by noncommittee Members of Congress. The bill they draft, referred to as the "chairman's mark," serves as a starting point for discussion when the subcommittee meets to discuss and vote on the measure.

To win over enough votes to move the bill out of subcommittee, the chairman's mark and the draft report will generally be written to accommodate the requests of as many subcommittee members as possible, giving them a stake in seeing that the legislation is approved.

During the formal mark-up proceedings, subcommittee members may offer amendments to increase or decrease program funding or modify policy provisions contained in the bill. The ultimate goal of the mark-up is to strike a compromise that will muster enough votes to pass the bill and send it on for ratification by the full Appropriations Committee. At the full committee meeting, members may propose further amendments to the bill before it is voted on and reported out.

If the lobbyist is unable to convince the subcommittee chair, ranking member or subcommittee staff to incorporate the client's request in the chairman's mark, the subcommittee and full committee mark-ups offer additional opportunities to have the request raised in the form of an amendment by a committee member willing to champion the lobbyist's request.

Once the full committee votes its approval, the appropriations bill is ready to be scheduled for floor action.

Whatever tactics are employed, the task falls to the lobbyist to ensure that, throughout the subcommittee and committee processes, messages are clearly communicated to crucial players and that the lead sponsor is kept informed every step of the way.

### 30-11 Floor Action

After the House or Senate Appropriations Committee reports out an appropriations bill to its chamber, the bill is scheduled for floor consideration. The House of Representatives' committee begins reporting out the 12 appropriations bills in late May and June, usually completing all of them by July. (Tradition has it that the House initiates consideration of appropriations bills, though there is nothing to prevent the Senate from acting first.)

Ordinarily, the full House of Representatives begins consideration of each bill within a week or 10 days after it is reported out by the full committee. The procedure followed during House floor consideration usually provides for one hour of general debate on the measure, including opening statements by the chair and ranking member of the relevant appropriations subcommittee, as well as statements from other interested House members. Following the general debate, the House will consider amendments, usually in the order in which they would appear in the bill.

Because appropriations bills must be completed in a timely fashion, House rules designate these measures as privileged. That is, they may be brought to the House floor without first going to the Rules Committee. In recent years, however, the House Appropriations Committee has opted to seek a special rule to waive certain parliamentary procedures or to restrict the number or scope of floor amendments. The House generally takes one day or less to debate and pass each appropriations measure.

The Senate's system for considering scheduling and debating appropriations bills is considerably less regimented than the House, relying more on comity, pre-arranged time agreements, and unanimous consent to advance the process. In the

Senate, consideration of appropriations bills begins with general debate, and then time is allotted for the introduction and debate of amendments. Unanimous consent and time agreements are worked out in advance.

As noted earlier, amending an appropriations bill after the measure is reported out of committee can be difficult. Indeed, when a vote is called on a proposed amendment, many lawmakers, especially those lawmakers whose own requests have been included in the committee's bill, will base their votes on the advice of the committee's leaders. Also, by the time an appropriations bill has made its way through the Appropriations Committee, it is likely to have taken up the entire 302(b) allocation, in which case the amendment's author may be required to identify an offsetting reduction elsewhere in the bill, pursuant to the rules set out in the annual budget resolution. Failing to meet this pay-as-you-go requirement all but invites a procedural point of order that usually results in the amendment's defeat. Oftentimes, floor amendments will be agreed to by voice vote for the sole purpose of speeding the bill's consideration—only later to be dropped when the bill reaches a conference committee.

Once the amending process is completed, the chamber proceeds to a vote on final passage, and the bill is sent to a conference committee to iron out the differences that inevitably arise between House and Senate versions.

Despite the long odds, the lobbyist may decide to pursue a floor amendment, provided the lead sponsor is willing to introduce it. If so, work should begin immediately after the full Appropriations Committee reports the bill. The lobbyist should offer to assist the lead sponsor with the preparation of the formal amendment, drafting a floor statement on its introduction, and preparing talking points to respond to questions or counterarguments from the floor. In addition, the lobbyist should mobilize the grassstops/grassroots network to contact their elected representatives and urge their support for the amendment.

### **30-12 Conference Committee and Final Passage**

Appropriations conference committees are typically made up of all the members of the relevant appropriations subcommittees. Once referred to as "the house of Congress," the conference committee's charge is to resolve what usually amount to hundreds of differences between the House- and Senate-passed appropriations bills.

Although the formal proceedings of the conference committee are open to the public, most of the real negotiating occurs behind closed doors, by the chairmen and the ranking members. The conferees are required to remain within the "scope of the conference," which is to say somewhere between the amounts provided in the House and Senate bills for a particular program. Once conferees reach an accord, the conference agreement is voted on by the House and Senate, and then sent to the President for approval.

Assuming the client's program has been included in one or both of the bills in conference (though most likely at two different funding levels), the lobbyist's focus should be on ensuring that the program is agreed to by the conferees at the higher of the two funding levels. At this juncture of the process, with literally hundreds of interests competing for favorable attention, the lobbyist's most important function is keeping the lead sponsor engaged and directly involved. The sponsor



should be encouraged to contact his or her chamber's chairman or ranking member, reminding them of the program's importance and the need to preserve the requested funding.

### 30-13 Earmarks

The work of the Appropriations Committee goes beyond the disposition of the President's annual budget to include entertaining the requests of Members to earmark funds for projects in their states or districts. While the practice of earmarking has mushroomed in recent years—for fiscal year 2008, Congress adopted over 11,000 earmarks totaling \$16.9 billion—earmarks have been a part of the appropriations process since the late 1700s. Though most fulfill a local or regional need, some earmarks have been test-beds for programs that have grown to national significance, like the unmanned Predator aircraft and a national bone marrow donor registry.

Presidents typically rail against the practice, arguing that earmarks circumvent the competitive review process. On the other hand, lawmakers contend that the review process is often skewed against those who need help most, e.g., small community hospitals. But if the past two centuries of appropriations history are any guide, earmarks will continue—if only for their political value. They enable lawmakers to get money to their districts quickly, help vulnerable colleagues curry favor with the electorate, and generally garner more votes for the appropriations bill in which they are contained.

Exactly what is an earmark? It is a provision in a bill or report that directs funds to a specific nonfederal entity. The preponderance of congressional earmarks flow to public entities, including municipalities, academic institutions, public transit providers, and hospitals. But earmarks also include funds directed to an enterprising entrepreneur to pilot test a new technology, to a library to preserve the history of its community, or to a defense contractor to supply equipment for military troops in the field.

Widely publicized controversies (most notably the Jack Abramoff scandal<sup>4</sup> and the so-called "bridge to nowhere" project<sup>5</sup>) have drawn intense public scrutiny to the practice of earmarking in appropriations bills, prompting Congress to pass new rules requiring greater transparency. Lawmakers who request earmarks now must complete detailed request forms;<sup>6</sup> they must also submit letters certifying that neither they nor their immediate family stand to gain financially from the earmark;<sup>7</sup> and, in the Senate, a point of order may be raised against an earmark added to a conference report that was not contained in either the House- or Senate-passed versions of an appropriations bill.<sup>8</sup>

The appropriations lobbyist should be aware that on January 29, 2008, President George W. Bush signed Executive Order 13,457,<sup>9</sup> asserting that the federal government's policy was "to be judicious in the expenditure of taxpayer dollars," calling for a reduction in the number and cost of earmarks, and requiring that their origins and purposes be transparent. The Executive Order goes on to direct federal agencies *not* to spend funds for earmarks unless those earmarks appear in the statutory language of an appropriations bill. (As noted *supra* Section 30-10, heretofore earmarks have commonly been delineated solely in report language accompanying appropriations bills.) The Executive Order defines an earmark as any

funds 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.<sup>10</sup>

It is likely that this Executive Order will continue in effect, even if amended in some respects, for the foreseeable future. However, it remains to be seen how rigorously it is observed by department and agency officials, who presumably hope to curry the favor of Congress in support of their own priorities.

How are earmarks parceled out? Once each appropriations subcommittee receives its 302(b) allocation at the start of the year, a portion of that amount is set aside for earmarks. The subcommittee chairman, in turn, will retain control of a portion for distribution to members of the majority party; control over the remaining funds is given to the ranking member for distribution. Prior to subcommittee mark-up, the chairman and ranking member will separately review the written requests of other Members of Congress, and decide which request(s) should be approved and for how much. Priority is usually afforded requests from members of the subcommittee, the full committee, the leadership, and lawmakers facing tough re-election fights that year (generally in that order of priority). The approved earmark(s) are then incorporated in the Chairman's mark that is presented to the subcommittee.

In theory, an earmark recommendation must go through the same review process as any other appropriations request, except that the funding determination is resolved at the subcommittee mark-up. If an earmark, no matter how meritorious, fails to pass muster at that point, it is highly unlikely that it will be added later. The lobbyist seeking a congressional earmark must be especially mindful of that important difference in the decision-making process. Ultimately, the lead sponsor will be asked by the subcommittee which of the requests he or she has submitted are genuinely his or her top priorities. Every tactic the lobbyist employs prior to that crucial question—including face-to-face meetings between the client and the subcommittee chair and other subcommittee members, site visits, and contacts by supportive community leaders—will determine success or failure.

## Notes

1. THE FEDERALIST No. 51 (James Madison).
2. THE FEDERALIST No. 58 (James Madison).
3. 2 U.S.C. §§ 601–688 (2006).
4. See, e.g., Susan Schmidt, James V. Grimaldi & R. Jeffrey Smith, *Investigating Abramoff—Special Report*, WASHINGTONPOST.COM, available at <http://www.washingtonpost.com/wp-dyn/content/linkset/2005/06/22/LI2005062200936.html> (last visited June 6, 2008).
5. See, e.g., Associated Press, *“Bridge to nowhere” Abandoned*, CNN.COM/US, available at <http://www.cnn.com/2007/US/09/22/alaska.bridge.ap/> (last visited June 6, 2008).

6. House Rule XXIII, clause 17 (110th Cong.); Senate Rule XLIV, clause 6 (110th Cong.).

7. House Rule XXIII, clause 17 (a)(5) (100th Cong.); Senate Rule XLIV, clause 6(a) (5), (b) (110th Cong.) (certification available on the Internet).

8. Senate Rule XLIV, clause 8 (a) (110th Cong.): "A Senator may raise a point of order against one or more provisions of a conference report if they constitute new directed spending provisions. The Presiding Officer may sustain the point of order as to some or all of the provisions against which the Senator raised the point of order." The House rules, for some time, have included a less ominous prohibition under Rule XXII, clause 9 (110th Cong.) to the effect that "a conference report may not include matter not committed to the conference committee by either House and may not include a modification of specific matter committed to the conference committee by either or both Houses if that modification is beyond the scope of that specific matter as committed to the conference committee."

9. Exec. Order No. 13,457, 73 Fed. Reg. 6417 (January 29, 2008).

10. 73 Fed. Reg. 6417 § 3(b).