

1 MR. BRAINARD: Thanks. It is an honor to be here
2 today. I would like to tell you a little bit more about our
3 definition of earmarks, the steps that we go through to interpret
4 the language that we see in congressional appropriations acts and
5 conference reports, and translate that into the listings that you
6 see in our pages.

7 And we publish this definition every year with each
8 survey. It is on the website address Ron mentioned. The full
9 address is www.Chronicle.com/stats/pork, and so if you have not
10 yet read that, I encourage you to read it. However, much of what
11 I have got to say today is an attempt to give you some additional
12 detail and insight into the reasoning that underlies our
13 definition. And I apologize in advance if some of our
14 descriptions of the appropriations process are old hat to some of
15 you.

16 From Ms. Horrigan's presentation, it sounds like our
17 definitions are fairly similar to the ones that OMB applied.

18 The Chronicle defines earmarks as specific
19 appropriations that federal agencies give to specific recipients
20 at colleges and universities, without competition, to satisfy the
21 intent of Congress.

22 Most earmarks in our survey appear to involve cut and
23 dry situations. A specific university is named in an
24 appropriations act or a conference report with a specific dollar
25 amount for a specified purpose.

26 We count those as earmarks unless those projects were
27 requested by the President. This rarely appears to be the case
28 and instead these projects are added by Congress to the
29 President's budget proposal.

30 In those cases where a specific recipient is named,
31 agencies typically treat the language as binding and mandated by
32 law, and they get the money without a fully open competition.
33 More on how we define that in a moment.

34 Some people refer to these clear-cut cases, where an
35 appropriation goes to a specific recipient, as "hard earmarks" in
36 order to distinguish them from less obvious or clear-cut cases.
37 And I will get to that also in a moment. But the hard earmarks,
38 represent the majority of earmarks that we list in our survey.

1 The recipients of hard earmarks are usually specified
2 in conference reports. Some in the actual appropriations act
3 language. A conference report is not legally binding, but
4 expresses the intent of the conferees who crafted the final
5 version of each appropriations act.

6 Agencies, nevertheless, appear to pay great deference
7 to conference reports as expressing the intent of Congress.

8 We have not found a case where an agency said it would
9 not honor conference report language giving a hard earmark to a
10 specific university because that named recipient was not named in
11 the accompanying appropriations act.

12 If the conference report merely recommends a recipient
13 to receive a specific amount of money for a certain purpose, that
14 is legally not a hard earmark. This language does not bind an
15 agency, but the Chronicle regards these as hard earmarks in
16 certain circumstances.

17 It seems that members of Congress often include such
18 language with the intent that an agency treats the line item as a
19 hard earmark, and apparently Congress refrains from using more
20 restrictive language of a hard earmark because they anticipate
21 that the agency will object. So Congress recommends that the
22 appropriation go to a specific recipient, which some people would
23 call "soft earmark".

24 Many agencies ignore these because they say the
25 projects don't fit into their priorities. But there have also
26 been cases where agencies ignored these recommendations, and
27 members of Congress eventually get fed up and sought hard
28 earmarks to fund these same projects. Other agencies seem
29 willing to treat recommendations as hard earmarks in order to
30 avoid tempting the wrath of Congress.

31 So in all cases where recipients are recommended, the
32 Chronicle checks with the agency to see if, in fact, it gave
33 money to that recommended recipient. And if so, we ask the
34 agency if it gave the money to that recipient specifically and
35 primarily because of the recommendation.

36 So what is a merit-based open competition as the
37 Chronicle has defined it? It is a grant-making process in which
38 the outcome is not predetermined or swayed by congressional

1 intent.

2 It is a process whereby any interested party can submit
3 an application requesting money from that line item
4 appropriation. The relevant agency responsible for administering
5 the earmark is then free to review and judge the quality of those
6 applications using an external, peer-review panel or internal
7 staff who have expertise about that research topic or activity,
8 and the agency can use its own discretion to award the money
9 based on those evaluations.

10 The ideal for this kind of competition would arguably
11 be the NIH and NSF, which give grants, of course, in response to
12 investigator-initiated proposals, or the agency's own request for
13 proposals on specific topics.

14 Some types of appropriations and earmarks are more
15 complicated than what I have just described, and I want to tell
16 you a little bit about what judgements we made to define those as
17 earmarks.

18 In some cases, Congress provides money for programs
19 that are defined as having specific multiple partners. And these
20 partners are identified as being eligible to compete for the
21 funds through what is termed a merit-based competition.

22 This category appears to correspond to what the OMB
23 described in its analysis of earmarks for 2001 as a "limited
24 competition".

25 An example from this year's Chronicle survey would be a
26 \$15 million earmark from the Transportation Department for
27 something called the Air Worthiness Assurance Center of
28 Excellence. This center involves research to improve the safety
29 of commercial aircraft. It is a consortium that says it
30 distributes funds on a competitive bases among 28 specific
31 universities and several corporations and government agencies.

32 These 28 institutions were not named in the
33 appropriations language, but all of them are considered standing
34 partners on this ongoing project.

35 Although other applicants are free to apply for these
36 funds, the Chronicle's reasoning is that the past involvement of
37 these specified partners in the project makes them
38 disproportionately likely, compared with other applicants, to

1 receive most of the funds from this earmark.

2 We also classify as earmarks cases where a university
3 receives the earmark with the understanding that it will use the
4 money to make awards to other universities which are not named in
5 the appropriations act or conference report, and those awards are
6 made through an open competition that the recipient university,
7 itself, runs. There are several agriculture earmarks of this
8 type.

9 Members of Congress have said that some agriculture
10 earmarks that the Chronicle calls earmarks are, in fact, merit
11 reviewed; specifically, special research grants in the
12 cooperative state research extension and education service.

13 However, these merit reviews by the USDA are after the
14 fact. They are done after the research program funded by the
15 earmark has been operating for as long as several years. These
16 grants are initially hard earmarks and these merit reviews are
17 not used to pick those recipients.

18 Another less than clear cut situation involves line
19 item appropriations where Congress does not specify a recipient
20 by name. This is most common in the Defense Department where
21 there are long tables of line items that name very specific
22 research projects.

23 I have talked privately with DOD staff members about
24 these line items at length and we at the Chronicle have thought
25 about this a great deal. And it is our conclusion that these
26 line items typically represent hard earmarks intended for
27 specific recipients. We have listed these projects as earmarks
28 even though, for many, the DOD says it awarded the money through
29 merit-based, open competition.

30 We have a sense of skepticism about that for a couple
31 of reasons. Congress members routinely issue press releases
32 saying that they secured a particular line item appropriation and
33 that it will go to a specific university, and after the DOD holds
34 its so-called open competition, the earmark goes to that
35 recipient for the exact amount specified by Congress. And
36 Congress issues these press releases before the DOD conducts
37 these evaluations.

38 These so-called competitions are typically called

1 "broad agency announcements" or BAAs. The Defense Department
2 uses BAAs to solicit research proposals covering a broad range of
3 stated scientific areas of interest to the agency.

4 According to the DOD officials we have talked with, the
5 agency typically asks the intended recipient of an earmark to
6 submit a proposal corresponding to the specific research topic in
7 the line item to be evaluated through the BAA process.

8 The specific research topic named in the appropriations
9 act may or may not correspond to a topic of interest named in the
10 BAA.

11 In theory, other applicants are free to submit
12 applications under the BAA for the same money. In practice DOD
13 staff members have told us the agency usually learns through
14 informal contacts with Congress that Congress had a particular
15 recipient in mind for that line item. And then typically the
16 agency tries to satisfy the request.

17 This may involve asking the intended recipient to
18 refine the proposal until it meets or exceeds a minimum threshold
19 of scientific merit.

20 Often the topic of the line item is so specific that it
21 is carried out at only one university in the nation that
22 specializes in that area of research, and it was that university
23 that got its member of Congress to insert the earmark. So that
24 competition becomes a limited competition with only one member
25 really in the running.

26 Let me say, DOD staff members tell me that they ignore
27 the intended recipients of these earmarks at their peril. They
28 have been dressed down by Congress members when they interpreted
29 the lack of a named recipient in the line item as giving the
30 agency license to award the money to someone other than the
31 recipient favored by Congress. And as a result, agency staff have
32 learned not to buck Congress.

33 The attitude of some DOD staffers toward these line
34 items is also telling. They sometimes privately refer to
35 earmarks as dues or tax that the DOD much stomach, however
36 reluctantly, in order to win the support of Congress for the
37 agency's broader mission and priorities.

38 All this said, when one is speaking on the record, we

1 really have little choice but to call this process an open,
2 merit-based competition. Federal Acquisition Regulations dictate
3 that when Congress does not specify the recipient of a line item
4 appropriation, the DOD is legally bound to use merit-based
5 competition to select one.

6 What DOD does not say is that the Federal Acquisition
7 Regulations give them several criteria for picking recipients,
8 and one of those is the agency's interests. And it seems
9 reasonable to assume that the agency would have a major interest
10 in not offending Congress, and would act accordingly.

11 That the recipient will be whomever Congress intended
12 where no recipient is specifically named is supported by all of
13 these observations. And we have concluded that we should
14 consider as hard earmarks all line item appropriations that the
15 DOD gives to universities through the broad agency announcement
16 process, but only in those cases where the DOD gives the majority
17 of funds from that line item to one university or college.

18 And I should add that in some cases, DOD staff members
19 do not claim to use the BAA process at all for particular line
20 items, and confirm flatly that Congress intended them as hard
21 earmarks, which they are.

22 Let me say one other thought about merit review. We
23 have heard the argument that -- well, actually this goes more to
24 limited competitions -- we have heard the argument that some
25 earmarks are not really earmarks, that these earmarks go to a
26 group of universities within the expertise in a specific research
27 area, and that there are only a handful of universities with that
28 expertise in the country. So under this reasoning, Congress is
29 providing an earmark for that field of research, but not
30 specifically those universities. They just happen to have that
31 expertise.

32 The Chronicle does not try to differentiate between
33 those cases and cases where the intended recipient may appear to
34 have no substantial track record in the specific research topic
35 that is the subject of the earmark.

36 Also, some agriculture grants go to land grant
37 universities through Hatch Act or formula funds. We do not
38 classify those as earmarks even though the researchers that

1 receive those funds do not undergo merit-based, open competitions
2 sponsored by the USDA.

3 The Chronicle has made a judgment that formula funds
4 are a long-standing appropriations mechanism that predated the
5 rise of hard earmarking for university research in the early
6 1980's. So formula funds can reasonably be considered as
7 distinct from hard earmarks.

8 With that I will turn over to our next panelist.

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