U.S. House of Representatives

COMMITTEE ON STANDARDS OF
OFFICIAL CONDUCT

Washington, DC 20515

March 27, 2007

MEMORANDUM FOR ALL MEMBERS, OFFICERS, AND EMPLOYEES

FROM: Committee on Standards of Official Conduct
Stephanie Tubbs Jones, Chairwoman
Doc Hastings, Ranking Republican Member

SUBJECT: Financial Interests under the New Earmark Rules

The House Rules adopted at the beginning of the 110th Congress include a new provision in the Code of Official Conduct regarding earmarks. This provision, found at House Rule XXIII, clause 17, requires that a Member, Delegate, or Resident Commissioner[1] who requests an earmark or a limited tax or tariff benefit to provide certain information regarding the request and its purpose to the committee of jurisdiction, including a certification that neither the Member nor the Member's spouse has a financial interest in the provision. This advisory memorandum is intended to provide some general guidance based on questions the Committee has received concerning the new certification requirement. Members with specific questions should contact the Committee's Office of Advice and Education, at (202) 225-7103.

Summary

House Rule XXIII, clause 17 imposes a disclosure requirement on a Member who "requests a congressional earmark, a limited tax benefit, or a limited tariff benefit in any bill or joint resolution (or accompanying report) or in any conference report on a bill or joint resolution (or an accompanying joint statement of managers)." The committees with jurisdiction over earmark requests shall determine whether any particular spending provision constitutes an earmark or a "request" for an earmark. A Member who requests an earmark or other provision must provide a written statement to the chairman and ranking member of the committee of jurisdiction of the bill, resolution, or report that contains the following information:

- the name of the Member;
- in the case of an earmark, the name and address of the intended recipient or if there is no intended recipient, the location of the activity;

[1] Hereinafter, Members, Delegates, and the Resident Commissioner are referred to collectively as "Members."

- in the case of a limited tax or tariff benefit, the name of the beneficiary;
- the purpose of the earmark or limited tax or tariff benefit; and
- a certification that both the Member and the Member's spouse have no financial interest in the earmark or limited tax or tariff benefit.

The application of the rule turns on a number of key terms, including "financial interest," "earmark," "limited tax benefit," and "limited tariff benefit." The latter three terms are defined in House Rule XXI, clauses 9(d), (e), and (f).[2]

What is a "Financial Interest" under House Rule XXIII, clause 17?

House Rule XXIII, clause 17(a)(5) requires a Member who requests an earmark[3] to certify that the Member and his or her spouse have "no financial interest in such congressional earmark." Whether a Member or a Member's spouse has a financial interest in an earmark will most frequently depend on the specific facts and circumstances regarding both the proposed provision and the personal financial circumstances of the Member and spouse. In the great majority of cases, Members should readily be able to determine whether they have a financial interest in an earmark. **Members are encouraged to consult the Standards Committee for guidance with any fact-specific questions they may have.** The Committee nevertheless provides the following general guidance.

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[2] The three terms are defined as follows:

(d) For the purpose of this clause, the term "congressional earmark" means a provision or report language included primarily at the request of a Member, Delegate, Resident Commissioner, or Senator providing, authorizing or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity, or targeted to a specific State, locality or Congressional district, other than through a statutory or administrative formula-driven or competitive award process.

(e) For the purpose of this clause, the term "limited tax benefit" means--

(1) any revenue-losing provision that--

(A) provides a Federal tax deduction, credit, exclusion, or preference to 10 or fewer beneficiaries under the Internal Revenue Code of 1986, and

(B) contains eligibility criteria that are not uniform in application with respect to potential beneficiaries of such provision; or

(2) any Federal tax provision which provides one beneficiary temporary or permanent transition relief from a change to the Internal Revenue Code of 1986.

(f) For the purpose of this clause, the term "limited tariff benefit" means a provision modifying the Harmonized Tariff Schedule of the United States in a manner that benefits 10 or fewer entities.

[3] Hereinafter, references to an "earmark" also include limited tax or tariff benefits.

A financial interest would exist in an earmark when it would be reasonable to conclude that the provision would have a direct and foreseeable[4] effect on the pecuniary interests of the Member or the Member's spouse. Such interests may relate to one's financial assets, liabilities, or other interests of the Member and spouse, such as ownership of certain financial instruments or investments in stocks, bonds, mutual funds, or real estate. A financial interest may also derive from a salary, indebtedness, job offer, or other similar interest. Many of these interests are required to be reported on the Member's annual Financial Disclosure Statement.[5]

A financial interest would not include remote, inconsequential, or speculative interests. For example, if a Member proposed an earmark benefiting a certain company, the Member generally would not be considered to have a financial interest in the provision by owning shares in a diversified mutual fund, employee benefit plan (*e.g.*, the Thrift Savings Plan or similar state benefit plan), or pension plan that, in turn, holds stock in the company.

As a general matter, a contribution to a Member's principal campaign committee or leadership PAC does not constitute the type of "financial interest" referred to in the rule. Nevertheless, a political contribution tied to an official action may raise other considerations. It is impermissible to solicit or accept a campaign contribution that is linked to any action taken or asked to be taken by a Member in the Member's official capacity – such as an earmark request that a Member has made or been asked to make. Accepting a contribution under these circumstances may implicate the federal gift statute or the criminal provisions on illegal gratuities or bribery.[6] Guidance in this area is found on pp. 32-34 and 36-37 of the *Campaign Activity* booklet and pp. 7 and 60-64 of the *Gifts and Travel* booklet.

If a Member determines that he or she has a financial interest in an earmark, the Member should not request the provision, nor ask another Member to request the measure on his or her behalf.

If it is not clear whether a Member has a financial interest in an earmark or other provision, the Member should contact the Standards Committee at (202) 225-7103 for guidance.

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[4] An effect is foreseeable if it is anticipated or predictable. For additional guidance, see 5 C.F.R. § 2640.103(a)(3) (defining the term "predictable" as "real, as opposed to a speculative, possibility that the matter will affect the financial interest").

[5] Members are required to report the financial interests of spouses and dependent children on the annual Financial Disclosure Statement. House Rule XXIII, clause 17(a) requires certification only with respect to the Member and spouse.

[6] *See* 5 U.S.C. § 7353; 18 U.S.C. § 201; *see also* House Rule 23, cl. 3 (providing that a Member "may not receive compensation and may not permit compensation to accrue to his beneficial interest from any source, the receipt of which would occur by virtue of influence improperly exerted from his position in Congress").