



October 7, 2015

VIA CERTIFIED MAIL

Honorable Shaun Donovan, Director
Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503

Re: PETITION FOR RULEMAKING

Director Donovan:

Pursuant to Section 553(e) of the Administrative Procedure Act, 5 U.S.C. § 553(e) (“APA”), Cause of Action Institute (“CoA”) and Demand Progress (“Petitioners”) hereby petition the Office of Management and Budget (“OMB”) to issue a rule ensuring the continuing force and effect of Executive Order 13457, *Protecting American Taxpayers From Government Spending on Wasteful Earmarks* (the “Order”).¹

Since August 2011, CoA has examined federal discretionary spending through Freedom of Information Act (“FOIA”) records and federal databases. These records reveal OMB’s efforts to ensure discretionary grant decision-making is transparent and merit-based are ineffective. Instead, federal agencies have struggled to combat abusive administrative earmarking practices.² An earmark, generally speaking, is a provision associated with legislation that specifies certain congressional spending priorities or applies to a very limited number of individuals or entities.³ Earmarks historically have appeared in either the legislative text or report language, although Executive Order 13457 encompasses communications from or on behalf of Members of Congress and other non-statutory sources requests.

¹ Exec. Order No. 13457, 73 Fed. Reg. 6417 (published Feb. 1, 2008) [hereinafter “E.O. 13457”], available at <http://goo.gl/Cvn9tJ>.

² See Stephen Dinan, *House bans earmarks for next Congress*, WASH. TIMES (Nov. 16, 2012), <http://goo.gl/nWof58> (enforcing 2010 earmark ban in 113th Congress); Eric Lichtblau, *New Earmark Rules Have Lobbyists Scrambling*, N.Y. TIMES (Mar. 11, 2010), <http://goo.gl/55a9I3>.

³ See COMPARISON OF SELECTED SENATE EARMARK REFORM PROPOSALS, Congressional Research Service (March 6, 2006), <http://goo.gl/JHSq0G>, for a discussion on the different ways earmarks have been defined. The House of Representatives defined a “congressional earmark” in Rule XXI(8), RULES OF THE HOUSE OF REPRESENTATIVES: ONE HUNDRED FOURTEENTH CONGRESS.

On November 5, 2011, President Obama acknowledged, in a draft memorandum, that agency decision-making has come under pressure to favor special interests.⁴ However, less than four months later, on February 21, 2012, former White House Press Secretary Jay Carney stated he was “confident that the issuance of grants through agencies . . . is done . . . in a merit-based way.”⁵

The current earmarking regime, where Congress has issued a moratorium on earmarks, shifts some pork-spending determinations from Congress to Executive Branch agencies. Earmark decisions that were once made by statute, tying an agency’s hands, are now made as a matter of agency discretion, hampering transparency and accountability.⁶ Other earmark requests, which were once written into committee reports and given great deference by agencies, are now made in secret by letter, phone, or in person. Altogether, “Executive Branch Earmarks,” which allow political appointees and others to use federal monies to reward political allies, appease powerful interests, and/or engage in insider deal-making, demonstrates the need for OMB to act.⁷ Therefore, CoA and Demand Progress petition OMB to issue, at a minimum, a memorandum that:

1. Confirms the Order binds discretionary agency spending;
2. Affirms that the allocation of discretionary funds in response to congressional requests outside of a transparent, merit-based decision-making process is prohibited under the Order’s definition of “earmark” and that agencies are not obligated to fund such requests;
3. Recognizes that congressional and non-congressional entities and individuals such as Executive Branch officials, state and local politicians, registered lobbyists, and donors can and do exert pressure on discretionary spending decision-making on federal projects, programs, contracts, and grants;
4. Requires executive departments and agencies to make available to the public, in searchable form on the Internet, records of all written and oral communications from any source (*e.g.*, federal elected officials, White House staff, congressional officers and staff, Executive Branch officials, state and local politicians, or lobbyists) that reference: (1) earmarks previously enacted into law, (2) earmarks referenced in congressional reports or materials, or (3) discretionary funds not yet awarded, if the agency is “pressured informally to show special favor to certain parties or interests in the course of agency decision-making;”⁸ and
5. Directs executive departments and agencies to make records of these communications publicly available through their respective websites within 30 days of receiving such communications, and that this practice be memorialized in their Open Government Plans. To

⁴ WHITE HOUSE, TEXT OF DRAFT EXECUTIVE MEMORANDUM: PROMOTING MERIT-BASED AND COMPETITIVE ALLOCATION OF FEDERAL FUNDS (Nov. 5, 2011), *available at* <https://goo.gl/vs6lG0>.

⁵ Press Release, Office of the Press Sec’y, The White House, Daily Press Briefing by Press Secretary Jay Carney (Feb. 21, 2012), *available at* <http://goo.gl/62cCr7>.

⁶ See Steven C. LaTourette, *The Congressional Earmark Ban: The Real Bridge to Nowhere*, ROLL CALL (July 30, 2014), <http://goo.gl/ILG39h>.

⁷ Cause of Action Institute defines an “Executive Branch Earmark” as any non-competitive expenditure – including Presidential budget requests, Administration-requested appropriations, and other presidential efforts to influence agency-based discretionary spending – that is meant to achieve political gain through the rewarding of political supporters, campaign contributors, or Members of Congress who have provided support to legislation that furthers presidential priorities. *See generally* <http://www.ExecutiveBranchEarmarks.com>.

⁸ *See supra* note 4.

the extent independent agencies are encouraged and choose to comply with OMB's guidance concerning the Order, they should also comply with the publication requirement.

As President Obama has acknowledged, agencies are politically pressured when making discretionary spending decisions, yet these agencies are universally neglecting their obligations under the Order. And OMB has not provided the necessary direction to hold agencies accountable for their noncompliance.⁹ Therefore, OMB action is needed to enforce the policy mandate of the Order and the President's own draft memorandum, to increase spending transparency and to ensure that agencies are held accountable for their discretionary spending of taxpayer dollars.

I. PETITIONERS

CoA is an "interested party" under § 553(e) of the APA and is statutorily afforded the "right to petition [OMB] for the issuance, amendment, or repeal of a rule."¹⁰ CoA is a non-profit, nonpartisan government accountability organization. CoA's pro bono legal representation of organizations and individuals helps to educate the public about government abuse, wasteful spending, and corruption.

Demand Progress is an "interested party" under § 553(e) of the APA and is statutorily afforded the "right to petition [OMB] for the issuance, amendment, or repeal of a rule."¹¹ Demand Progress is a non-profit, nonpartisan government accountability organization. Demand Progress is a national grassroots group with more than two million affiliated activists who fight for basic rights and freedoms needed for a modern democracy.

II. FACTUAL BACKGROUND

Unlike legislative earmarks, Executive Branch Earmarks have generally escaped significant public scrutiny. However, Congress has identified cases of waste and abuse engendered by Executive Branch Earmarks and urged greater oversight.¹² Good-government advocates have begun to follow suit.¹³ Disappointingly, this Administration has acted inconsistently. Though it has repeatedly expressed great concern for transparency and openness,¹⁴ the Administration has not actually taken the steps needed to provide adequate transparency for discretionary spending decisions, much less prevent non-meritorious Executive Branch Earmarking. As a result, OMB should provide greater clarity and guidance to agencies so that taxpayer dollars are used appropriately for the common good and not to reward partisan interests.

⁹ See *infra* Part II.B.-D.

¹⁰ 5 U.S.C. § 553(e).

¹¹ *Id.*

¹² See, e.g., 156 CONG. REC. S8227 (daily ed. Nov. 29, 2010) (statement of Sen. Harkin) ("Let's consider how the executive branch--the President--directs spending to States and local communities. Make no mistake about it, the executive branch earmarks funding, but there is very little sunshine when it comes to those decisions."); 154 CONG. REC. H977 (daily ed. Feb 14, 2008) (statement of Rep. Wolf) ("[E]xecutive branch earmarks [should] also be studied . . . because I think the Congress has ignored some of this and I think the general public doesn't understand.").

¹³ See, e.g., Howard Husock, *The Americorps Anniversary: What the White House--and New York Times--Don't Get*, FORBES.COM (Sept. 9, 2014), <http://goo.gl/En2247> ("[T]he White House is directing federal funds to hundreds of non-profit organizations . . . without explicit Congressional approval. Such grants can . . . be properly understood as Executive Branch earmarks.").

¹⁴ See, e.g., *Transcript of CNN Democratic presidential debate in Texas*, CNN.COM (Feb. 21, 2008), <http://goo.gl/7k1fCw> (Then-Senator Obama stating: we need "to make sure that we create transparency in our government so that we know where federal spending is going . . . I've been consistently in favor of more disclosure around earmarks.").

A. Agency Grant Spending Is Susceptible To Political Influence.

With the end of congressional earmarking, agency grant spending remains susceptible to political influence and non-meritorious adjudication from the White House, Executive Branch agencies and from Congress as well. Some allocations of pork have shifted from Congress to the discretionary spending of Executive Branch agencies to further Presidential electoral interests.¹⁵ Of course, Congress still retains control to influence discretionary grant spending,¹⁶ and often uses tax policy to achieve the same ends.¹⁷ Even with the congressional moratorium on earmarks, agency grant spending allocations remain at risk for inappropriate politicization.

B. OMB Has Not Clarified The Order's Continuing Force Of And Prior Guidance On The Disclosure Of Earmarks Despite Agency Confusion.

On January 29, 2008, prior to the moratorium on congressional earmarks, President Bush signed the Order, *Protecting American Taxpayers from Government Spending on Wasteful Earmarks*.¹⁸ The Order defines "earmark" as:

[F]unds provided by 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.¹⁹

The Order requires agency heads to take "all necessary steps to ensure" agency funding for "any earmark" is "based on authorized, transparent, statutory criteria, and merit-based decision making."²⁰ The Order also requires federal agencies to reject non-statutory earmarks (*i.e.*, any earmark not explicitly authorized by legislation) and – perhaps most importantly – to make all congressional communications regarding earmarks "publicly available on the Internet by the receiving agency" within 30 days.²¹

¹⁵ See generally JOHN HUDAK, *PRESIDENTIAL PORK 126* (Brookings Institution Press) (2014).

¹⁶ See, e.g., *Lawmakers finance pet projects without earmarks*, The New York Times (Dec. 21, 2010), <http://goo.gl/gCxEjC> ("Lettermarking, which takes place outside the Congressional appropriations process, is one of the many ways that legislators who support a ban on earmarks try to direct money back home. In phonemarking, a lawmaker calls an agency to request financing for a project. More indirectly, members of Congress make use of what are known as soft earmarks, which involve making suggestions about where money should be directed, instead of explicitly instructing agencies to finance a project. Members also push for increases in financing of certain accounts in a federal agency's budget and then forcefully request that the agency spend the money on the members' pet project.").

¹⁷ See, e.g., *Even Without Earmarks, Tax Breaks And Special Deals Fill Bills*, National Public Radio (Feb. 8, 2013), <http://goo.gl/dp96Pf>.

¹⁸ E.O. 13457, *supra* note 1. Prior to E.O. 13457, OMB provided agencies with a memorandum directing them not to fund non-statutory earmarks and that oral or written communications regarding earmarks should not influence merit-based decision-making. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-07-10, *GUIDANCE ON OBLIGATING FY2007 FUNDS* (2007), available at <http://goo.gl/2JgVjF>.

¹⁹ *Id.* § 3(b).

²⁰ *Id.* § 2(a)(ii).

²¹ *Id.* § 2(b).

Eight months after issuing the Order, President Bush signed a large appropriations bill into law.²² Shortly thereafter, OMB released Memorandum M-09-03, instructing agencies how to reconcile the Order with the recent appropriations law.²³ OMB Director Jim Nussle directed that “agencies are legally obligated to fund an earmark only if” it meets criteria explained in the memorandum, providing agencies with the necessary framework to resolve potential discrepancies between the Order and appropriations legislation.²⁴

Despite OMB’s guidance, there was still uncertainty regarding its interpretation of the Order’s requirement that agency decisions to “commit, obligate, or expend funds for any earmarks [should be] based on authorized, transparent, statutory criteria and merit-based decision making[.]”²⁵ The Order dictates that “[a]n agency shall not consider the views of a House, committee, Member, officer, or staff of the Congress with respect to commitments, obligations, or expenditures to carry out any earmark unless such views are in writing[.]”²⁶ For instance, “earmark” could be broadly interpreted to include any non-merit-based agency decision; alternatively, if a Member of Congress made a request to the President and that request was forwarded to an agency procurement official or his or her Secretary, such a request can be interpreted to involve “the views of . . . Congress.” Likewise, if the President or his political appointees make direct requests for agency expenditures to benefit a Member of Congress, whether those requests constitute an “earmark” are open to interpretation.

Because of the vagueness of the term, CoA concluded that determining how OMB conducted a FOIA search for the term “earmark” would reveal how OMB interpreted the term. CoA’s theory was that OMB would construe an Executive Branch Earmark as any non-competitive expenditure – including Presidential budget requests, Administration-requested appropriations, and other presidential efforts to influence agency-based discretionary spending – that is meant to achieve political gain through the rewarding of political allies, campaign contributors, or Members of Congress who have provided support to legislation that furthers presidential priorities.²⁷

On September 9, 2011, CoA filed a FOIA request with OMB seeking documents showing that Members of Congress “recommend[ed] that funds should be committed, obligated, or expended on any earmark from January 2009.”²⁸ OMB was not responsive to CoA’s FOIA request, and on March 7, 2012, CoA sued OMB to comply with its obligations under FOIA.²⁹ As part of the settlement of the litigation, OMB produced the documents featured in this Petition. CoA was wary of whether OMB conducted an adequate search for responsive records and sent OMB a letter requesting that it detail its search. In response to CoA’s letter, OMB disclosed that the employees who processed CoA’s FOIA request were:

[S]pecifically advised to look in particular for any written communication from Congress to an agency recommending that funds be committed, obligated, or expended

²² Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, Pub. L. No. 110 -329, 122 Stat. 3574 (2008).

²³ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-09-03, GUIDANCE ON IMPLEMENTING P.L. NO. 110-329 IN ACCORDANCE WITH EXECUTIVE ORDER 13457 (2008), *available at* <http://goo.gl/Gw8Fqr>.

²⁴ *Id.* at 1 (emphasis in original).

²⁵ E.O. 13457, § 1, *supra* note 1.

²⁶ *Id.* § 2(b).

²⁷ *See supra* note 7.

²⁸ Freedom of Information Act Request from CoA to Office of Mgmt. & Budget (Sept. 9, 2011), *available at* <http://goo.gl/AsQKbi>.

²⁹ Complaint, *Cause of Action v. Zients*, No. 12-379 (D.D.C. Mar. 7, 2012), *available at* <http://goo.gl/0WCYVP>.

on any earmark, as well as any consultations by the agency with OMB about whether the agency head should decline to publish the communication.³⁰

The documents produced by OMB to CoA therefore confirm CoA's theory that the Order applies to both legislative and Executive Branch Earmarks.

OMB provided updated guidance on the Order's application to appropriations legislation in FY2008 and 2009.³¹ However, it has not done so since. This has resulted in an environment of agency confusion. For example, on March 3, 2009, OMB Program Examiner Adam Zeller e-mailed his colleague Robin McLaughry, OMB Budget Preparation Specialist, asking whether "the new Administration has any plans to rescind Executive Order 13457."³² Ms. McLaughry responded, "[The] administration has not finalized any decisions on earmark policy."³³

From: Zeller, Adam J.
Sent: Tuesday, March 03, 2009 11:21 AM
To: McLaughry, Robin J.
Subject: Earmarks Executive Order

Robin,

My agency would like to know if the new Administration has any plans to rescind Executive Order 13457, "Protecting American Taxpayers from Government Spending on Wasteful Earmarks." Have you heard about any such change of policy with regards to earmarks? Thank you.

Adam

Adam Zeller
Office of Management and Budget
Environment Branch
725 17th Street NW, Room 8026
Washington, DC 20503
202.395.6824

From: McLaughry, Robin J.
Sent: Tuesday, March 03, 2009 11:29 AM
To: Zeller, Adam J.
Cc: Jones, Bryant A.
Subject: RE: Earmarks Executive Order

Adam:

The administration has not finalized any decisions on earmark policy (Bryant, please jump with additional information).

Robin
BRB: 5-3025

In early August 2009, OMB staffers recognized the Order was still in place and applied its prohibition on funding earmarks. In an e-mail exchange about how to designate which earmarks the Administration would fund, Ms. McLaughry urged her colleagues to "come to an agreement about what type of earmarks" they are discussing and how to designate them in OMB's database.³⁴

³⁰ Letter from Jonathan E. Rackoff, Assistant Gen. Counsel, Office of Mgmt. & Budget to Lee Reeves, Dep't of Justice, at 6 (Nov. 29, 2012), *available at* <http://goo.gl/YbPFBh> (regarding litigation over CoA's FOIA request).

³¹ See OMB MEM. M-09-03, *supra* note 23.

³² Office of Mgmt. & Budget FOIA Production to CoA, at 0004 (July 13, 2012), *available at* <http://goo.gl/4WM16b>.

³³ *Id.*

³⁴ *Id.* at 0008.

From: McLaughry, Robin J.
Sent: Wednesday, August 05, 2009 11:46 AM
To: McDonald, Christine A.; Karwoski, Jenifer L.
Subject: RE: Status of Earmarks/Reconciliation Report

Christine:

This distinction (between Statutory, Statutory by Reference, and Report Language) is actually pretty critical. Executive Order 13457 prohibits agencies from funding Report Language earmarks. Eventually, we will be using this database to pull out which earmarks are Report Language to make sure they were not funded per the E.O. Therefore, it is important that this designation is correct and that both the RMO and agency agree on it.

I have moved the account back to Agency/RMO Collaboration. Please discuss with the agency and come to an agreement about what type of earmarks these are. Let me know if there are any questions!

Robin
BRB: 5-3025

Later that month, OMB staff participated in a similar e-mail exchange in which they acknowledged the Order was still in force. Dianne Shaughnessy, OMB Deputy Chief for Budget Review, insisted the “order remains in effect unless rescinded.”³⁵ She directed staff to internal OMB guidance on how to apply the Order, referencing the Department of Justice’s website as an example of an agency that was actively posting communications.³⁶

From: Shaughnessy, Dianne M.
Sent: Friday, August 21, 2009 8:36 AM
To: 'O'Connor, Niall'; Lee, Courtney; Karwoski, Jenifer L.
Cc: McLaughry, Robin J.; Jones, Bryant A.; Meter, Erin M.; Vaeth, Matthew; Carroll, J. Kevin
Subject: Follow-Up From Yesterday's Meeting

Jenifer/Niall/Courtney:

There were a couple things I said I would send following yesterday's meeting.

Executive Order on Earmarks. This order remains in effect unless rescinded. We actually have this on our Guidance page, under guidance materials on the main Earmark Page in the community. <https://max.omb.gov/community/x/AwCpEg> One thing you may find insightful is DOJ's website where they post Congressional Communications they are required to post. <http://www.usdoj.gov/imd/ccre/>

Yet, despite these directions, it does not appear OMB took further steps to require agency compliance.

Another example of this confusion can be found in a December 2010 e-mail from Joanne Hoff, OMB Program Examiner in the National Security Division, in which she relayed that the Department of Defense was unsure whether to disregard committee and report language earmarks in FY2010 and whether to apply the guidance from the Bush-era memorandum:³⁷

³⁵ *Id.* at 0006-07.

³⁶ *Id.*

³⁷ *Id.* at 0003.

From: Hoff, Joanne Cianci
Sent: Thursday, December 02, 2010 9:13 PM
To: Aitken, Steven D.; Luczynski, Kimberley S.; Walsh, Heather V.
Cc: Cancian, Mark F.; Klay, Benjamin W.; Henry, Gregory G.; McClelland, John "Ace"
Subject: Question on earmarks

DOD also asked how OMB 09-03, "Guidance on implementing P.L. No. 110-329 in accordance with Executive Order 13457 on 'Protecting American Taxpayers From Government Spending on Wasteful Earmarks'", and the underlying EO interacts with the proposed general provision on earmarks. Does the provision's statement that the "explanatory statement, conference report, committee report or statement of managers accompanying an appropriations Act for fiscal year 2010 shall have no legal effect with respect to funds appropriated by this division" mean that these Congressional directions would not apply under the CR, and therefore the direction in the prior guidance is not an "issue?"

Thanks,
Joanne

The same problem occurred again in January 2011 when Jon Kraft, Comptroller at the Army National Guard, asked OMB Program Examiner Edna Falk Curtin whether the Bush-era "guidance is relevant to our current CR?"³⁸

From: Kraft, Jon E COL MIL NG NGB ARNG [mailto:Jon.Kraft@ (b)(6)]
Sent: Thursday, January 13, 2011 9:07 AM
To: Falk Curtin, Edna F.
Subject: More CR issues (UNCLASSIFIED)

Classification: UNCLASSIFIED
Caveats: FOUO

Hi Edna,

I received a copy of the attached OMB memo referencing earmarks. The document references Pres Ex Order 13457. Do you know if this guidance is relevant to our current CR?

thx

COL Jon Kraft
Comptroller, ARNG
111 S. George Mason Dr.
Arlington, VA 22204
(b)(6)

³⁸ *Id.* at 0001.

By September 2011, despite numerous instances of agencies asking for guidance, OMB had still neither resolved the confusion nor developed an internal mechanism for advising agencies on how to apply the Order. On September 1, 2011, Daphne Dador, Legislative Affairs Specialist at NASA, contacted OMB seeking “clarity regarding” the Order.³⁹ Dador sought information on how long an agency must “post on-line any written communications from Congress that is related to earmark funding.”⁴⁰ What followed was a flurry of e-mails between OMB staffers, none of whom knew how to answer Dador’s question.⁴¹

From: DADOR, DAPHNE (HQ-VA040) [mailto:daphne.dador@(b)(6)]
Sent: Thursday, September 01, 2011 10:15 AM
To: Owens, D. Brooke
Subject: Executive Order 13457

Good Morning Brooke,

I hope this finds you well. I am writing to see if you would be able to point me to a POC in OMB who can provide some clarity regarding an Executive Order.

Specifically, we are looking at EO 13457 dated Jan. 29, 2008 that directs agencies to post on-line any written communications from Congress that is related to earmark funding. The EO says when we need to post, but it does not provide guidance on how long to keep that communication posted.

If you have any thoughts on who can shed some light on this we would greatly appreciate it!

Thanks and take care!
Daphne

Daphne Dador
Legislative Affairs Specialist
Office of Legislative and Intergovernmental Affairs
National Aeronautics and Space Administration

E: (b)(6)
P:

These e-mails from agencies seeking guidance demonstrate OMB has consistently failed to take the appropriate steps to enforce the Order and dispel agency confusion by issuing further guidance for its application.

C. Federal Agencies Are Not Complying With the Order.

Beyond agency confusion, it also appears that no federal agency actually complies with the Order. Only 5 of 17 agencies have a page dedicated to posting congressional communications and only one has been updated since 2009:

³⁹ *Id.* at 0012.

⁴⁰ *Id.* at 0013.

⁴¹ *See id.* at 00012, 00011.

AGENCY	WEB PAGE FOR EO 13457
DEPARTMENT OF AGRICULTURE	NOT FOUND ON WEBSITE
DEPARTMENT OF COMMERCE	NOT FOUND ON WEBSITE
DEPARTMENT OF HEALTH & HUMAN SERVICES	NOT FOUND ON WEBSITE
DEPARTMENT OF HOMELAND SECURITY	NOT FOUND ON WEBSITE
DEPARTMENT OF HOUSING & URBAN DEVELOPMENT	NOT FOUND ON WEBSITE
DEPARTMENT OF THE INTERIOR	NOT FOUND ON WEBSITE
DEPARTMENT OF LABOR	NOT FOUND ON WEBSITE
DEPARTMENT OF STATE	NOT FOUND ON WEBSITE
DEPARTMENT OF THE TREASURY	NOT FOUND ON WEBSITE
DEPARTMENT OF VETERANS AFFAIRS	NOT FOUND ON WEBSITE
DEPARTMENT OF TRANSPORTATION	NOT FOUND ON WEBSITE
ENVIRONMENTAL PROTECTION AGENCY	NOT FOUND ON WEBSITE
DEPARTMENT OF DEFENSE	Links to subagencies that are not up to date ⁴²
DEPARTMENT OF EDUCATION	One joint letter from September 26, 2008 ⁴³
DEPARTMENT OF ENERGY	720 page PDF for January 1, 2008 through November 14, 2008. No other documents found on the website ⁴⁴
DEPARTMENT OF JUSTICE	28 letters ranging from March 2009 through July 2012; last updated August 2014 ⁴⁵
NATIONAL AERONAUTICS & SPACE ADMINISTRATION	Two letters from 2009 ⁴⁶

⁴² *Earmarks*, OFFICE OF THE UNDER SEC’Y OF DEF. (COMPTROLLER), <http://goo.gl/tYB10H> (last visited Sept. 24, 2015).

⁴³ Letter from Hon. Steve Kagen, U.S. H.R., and Hon. Herb Kohl, U.S. S., to Hon. Margaret Spellings, Sec’y, Dep’t of Educ. (Sept. 26, 2008), *available at* <http://goo.gl/X0rHte> (last visited Sept. 24, 2015).

⁴⁴ DEP’T OF ENERGY, COMPILATION OF CONGRESSIONAL CORRESPONDENCE RECEIVED IN THE U.S. DEPARTMENT OF ENERGY JANUARY 1, 2008 THROUGH NOVEMBER 14, 2008 (2008), *available at* <http://goo.gl/lu6ici> (last visited Sept. 24, 2015).

⁴⁵ *Congressional Communications*, DEP’T OF JUSTICE, <http://goo.gl/wHK5Vy> (last visited Sept. 24, 2015).

⁴⁶ Office of Legislative & Intergovernmental Affairs, *Congressional Communications*, NAT’L AERONAUTICS & SPACE ADMIN., <http://goo.gl/l5iPqx> (last visited Sept. 24, 2015).

The Department of Energy has posted the most comprehensive compilation of congressional correspondence with 720 pages dating from January 1, 2008 through November 14, 2008, but has not posted anything since 2008.⁴⁷ The Department of Justice has a woefully incomplete posting of only 28 letters ranging from March 2009 through July 2012, and its website was last updated in August 2014.⁴⁸ The site is missing letters from members of Congress sent in 2010⁴⁹ and 2012,⁵⁰ which have been obtained by CoA.

The Department of Education has one letter from Representative Steve Kagen and Senator Herb Kohl regarding unobligated funds.⁵¹ NASA has one page⁵² with a single letter and its response from 2009.⁵³ The Department of Defense has some links to program offices that have a dedicated page, but most of them are non-working links or have no letters posted.⁵⁴

D. The President Has Acknowledged The Need To Reinforce The Order In A Draft Memorandum.

In November 2011, the White House circulated a draft memorandum to Capitol Hill that “would [have] require[d] executive branch agencies to make public any letter from a member of Congress seeking special consideration for any project or organization vying for government funding.”⁵⁵ The memorandum suggests that President Obama is aware of the Order’s interpretive problems and understands the need to provide clear guidance for achieving earmark transparency. The draft memorandum states, in part:

Earmarks written into law or otherwise referenced in legislative materials are not the only threat to merit-based and competitive criteria for the use of government funds, however. Too often, federal agencies are pressured informally to show special favor to certain parties or interests in the course of agency decision-making concerning federal projects, programs, contracts, and grants. According to some reports, such pressures have increased over the past year. Like legislated earmarks, these pressures on agency decision-making also undermine the neutral application of merit-based and competitive criteria for the allocation of federal resources.⁵⁶

The White House’s acknowledgment that “federal agencies are pressured informally to show special favor to certain parties or interests in the course of agency decision-making” is exactly the problem requiring further attention from OMB. While the President has not finalized this draft

⁴⁷ DEP’T OF ENERGY, *supra* note 44.

⁴⁸ DEP’T OF JUSTICE, *supra* note 45.

⁴⁹ Letter from Hons. Jeffrey Merkley & Ron Wyden, U.S. S., and Hon. Kurt Schrader, U.S. H.R., to Hon. Eric Holder, Att’y Gen., Dep’t of Justice (Sept. 7, 2010), *available at* <http://goo.gl/WqgPTX>.

⁵⁰ Letter from Hon. Harry Reid, U.S. S., to Mr. Bernard K. Melekian, Dir., Office of Cmty. Oriented Policing Servs., Dep’t of Justice (Apr. 17, 2012), *available at* <http://goo.gl/vpe3fn>.

⁵¹ KAGEN, *supra* note 43.

⁵² NASA, *supra* note 46.

⁵³ Letter from Hon. Chaka Fattah, U.S. H.R., to Gen. Charles F. Bolden, Jr., Adm’r, Nat’l Aeronautics & Space Admin (July 23, 2009), *available at* <http://goo.gl/ENZkAw>; Response Letter from Ms. Mary D. Kerwin, Acting Assistant Adm’x, Office Legislative & Intergovernmental Affairs, Nat’l Aeronautics & Space Admin, to Hon. Chaka Fattah, U.S. H.R. (Sept. 22, 2009), *available at* <http://goo.gl/vvqKx3>.

⁵⁴ *Earmarks*, *supra* note 42.

⁵⁵ Reid Wilson, *Name and Shame? Obama May Go Public with Lawmakers’ Funding Requests*, NAT’L J. (Nov. 5, 2011), <http://goo.gl/xgMXvD>.

⁵⁶ WHITE HOUSE, TEXT OF DRAFT EXECUTIVE MEMORANDUM: PROMOTING MERIT-BASED AND COMPETITIVE ALLOCATION OF FEDERAL FUNDS, *supra* note 4.

memorandum, or otherwise publicly directed OMB to enforce earmark disclosure requirements, he is aware of the phenomenon and knows how to require agencies to disclose the sort of behavior prohibited under the Order.⁵⁷

III. LEGAL AUTHORITY

Section 553(e) of the APA requires “[e]ach agency” to “give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” Here, (1) OMB is an “agency” under the rulemaking provisions of the APA for the purposes of this petition; (2) CoA and Demand Progress are an “interested person,” as described above; and, (3) a guidance memorandum qualifies as a “rule.”

OMB is an “agency” within the meaning of the APA because it is an independent authority of the United States Government and is not otherwise excepted as, *inter alia*, a legislative, judicial, military, or non-federal entity.⁵⁸ Moreover, OMB has “substantial independent authority in the exercise of specific functions.”⁵⁹ These functions are described in numerous statutes that concern OMB’s responsibility in establishing government-wide financial management policies; providing overall direction to procurement policies; directing grant programs, cooperative agreements, and assistance management systems; and, promoting economy, efficiency, and effectiveness in the federal government.⁶⁰

The issuance of guidance in the form of a memorandum constitutes the issuance of a “rule” because such an OMB memorandum is an OMB “statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”⁶¹ Here, a guidance memorandum to all executive departments and agencies would provide instructions for applying the Order to current circumstances and assist in reconciling conflicts with current and future legislation.

IV. PROPOSED ACTION

The current earmarking regime shifts some of the allocation of discretionary spending from Congress to Executive Branch agencies, hampering transparency and accountability. These “Executive Branch Earmarks” allow political appointees and others to use federal monies as a reward for political allies, appease powerful interests, and demonstrate the need for OMB to act. Therefore, CoA and Demand Progress petition OMB to issue, at a minimum, a memorandum that:

1. Confirms the Order binds discretionary agency spending;
2. Affirms that the allocation of discretionary funds in response to congressional requests outside of a transparent, merit-based decision-making process is prohibited under the Order’s definition of “earmark” and that agencies are not obligated to fund such requests;

⁵⁷ See OFFICE OF THE PRESS SEC’Y, WHITE HOUSE, MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: ENSURING RESPONSIBLE SPENDING OF RECOVERY ACT FUNDS (2009), *available at* <http://goo.gl/7KJrPT>; *see also* Paul Blumenthal, *Agencies Begin to Post Recovery Lobbying Contacts*, SUNLIGHT FOUND. (Apr. 15, 2009), <http://goo.gl/kQFJby>.

⁵⁸ 5 U.S.C. § 551(1).

⁵⁹ *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971).

⁶⁰ 31 U.S.C. §§ 503, 1101(b)(2), 1111; 41 U.S.C. § 1125(a); *see* 2 C.F.R. §§ 1.300, 1.205; 5 C.F.R. § 1310.1.

⁶¹ 5 U.S.C. § 551(4).

3. Recognizes that congressional and non-congressional entities and individuals such as Executive Branch officials, state and local politicians, registered lobbyists, and donors can and do exert pressure on discretionary spending decision-making on federal projects, programs, contracts, and grants;
4. Requires executive departments and agencies to make available to the public, in searchable form on the Internet, records of all written and oral communications from any source (*e.g.*, federal elected officials, White House staff, congressional officers and staff, Executive Branch officials, state and local politicians, or lobbyists) that reference: (1) earmarks previously enacted into law, (2) earmarks referenced in congressional reports or materials, or (3) discretionary funds not yet awarded, if the agency is “pressured informally to show special favor to certain parties or interests in the course of agency decision-making;”⁶² and
5. Directs executive departments and agencies to make records of these communications publicly available through their respective websites within 30 days of receiving such communications, and that this practice be memorialized in their Open Government Plans. To the extent independent agencies are encouraged and choose to comply with OMB’s guidance concerning the Order, they should also comply with the publication requirement.

V. CONCLUSION

For the foregoing reasons, OMB should issue, at a minimum, a memorandum providing updated guidance on the Order that forbids executive agencies from funding Executive Branch Earmarks unless they are merit-based and transparent, and requires them to disclose when they are “pressured informally to show special favor to certain parties or interests in the course of agency decision-making.” Further, OMB should consider recommending that agencies issue their own respective policy directives embracing the petitioned guidance and putting Members of Congress and politicizing influencers on notice that requests for Executive Branch Earmarks will be disclosed and subject to public scrutiny.

Respectfully submitted,



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CAUSE OF ACTION INSTITUTE



DAVID SEGAL
EXECUTIVE DIRECTOR
DEMAND PROGRESS

⁶² See *supra* note 4.

Hon. Shaun Donovan

October 7, 2015

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cc:

Ms. Aviva Aron-Dine, Acting Deputy Director

Mr. David Mader, Acting Deputy Director for Management