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EARMARK TRANSPARENCY – 2011 WISCONSIN ACT 220

2011 Wisconsin Act 220, the “Earmark Transparency Act,” requires the Wisconsin Legislative Fiscal Bureau (LFB) to prepare an “earmark transparency report” on a biennial budget bill and each of its amendments. The report records all earmarks in the budget along with their cost, the name of the legislator who proposed the earmark, and the beneficiary of each earmark. Introduced as 2011 Senate Bill 114, the bill passed 30-3 in the senate on March 6, 2012, 89-4 in the assembly on March 15, 2012, and was signed into law by Governor Scott Walker on April 6, 2012. The law took effect April 20, 2012, and first applies to consideration of the 2013 budget.

BACKGROUND

Earmarks are provisions within legislation that appropriate funds for specific projects, programs, or other beneficiaries, although the precise definition depends on the legislative body. Critics of earmarks point out that their elimination can be a sensible step towards reducing government spending in an era of tight budgets at both the state and federal levels. Defenders argue they can be necessary projects or allotments for targeted deserving individuals or organizations. Other observers of the lawmaking process strike a middle ground, contending that earmarks, though imperfect, help build needed majorities (or supermajorities) to pass bills in highly partisan environments.

As state and federal governments struggled to balance budgets in the mid-2000s, earmark criticism precipitated legislative action. In Wisconsin, the legislature considered 2007 Assembly Bill 739 (companion bill 2007 Senate Bill 414), which contained earmark transparency provisions similar to those in 2011 Act 220. The bill passed the assembly on a voice vote but was not taken up in the senate. According to its drafting file, Assembly Bill 739 bor-

rowed language defining an earmark from House Resolution 1000 of the 109th Congress, which sought to prohibit the U.S. House of Representatives from considering legislation unless it included a list of earmarks and the names of members who submitted those earmarks. An amendment to Assembly Bill 739 tailored the earmark definition towards provisions in the Wisconsin biennial budget, language that eventually became law with the enactment of 2011 Senate Bill 114 (Act 220).

EARMARKS IN THE BIENNIAL BUDGET BILL

Act 220 creates Section 13.95 (1r), Wisconsin Statutes, to identify which budget provisions constitute earmarks. According to the act, an earmark is a provision in a bill or amendment that does either of the following in a manner that is “not determined by laws of general applicability for the selection of the beneficiary”:

- “authorizes or requires the payment of state moneys to a specific beneficiary;” or
- “creates or modifies a tax deduction, credit, exclusion, or exemption that applies to a specific beneficiary.”

The definition distinguishes an earmark from other appropriations or tax breaks with the general applicability clause; if the appropriation or tax break does not apply to a general population and rather has a qualifying criteria limited to one or more beneficiaries, it is an earmark.

EARMARK TRANSPARENCY REPORT

Act 220 requires the LFB to identify all provisions of a biennial budget bill that satisfy the above definition of an earmark in an earmark transparency report. Beyond listing the cost, beneficiary, and supporting legislator

(in an amendment) of each earmark, the report must also identify the assembly and senate district in which the beneficiary resides. If the beneficiary is an entity, Act 220 directs the LFB to note the assembly and senate district in which the entity is incorporated or organized. The LFB must also convey situations where the beneficiary of an earmark provision is indeterminable. To ensure the report is made available to legislators and the public, the act requires the LFB to make the report available on the state legislature's Web site and distribute it to each member.

Although Act 220 requires the LFB to prepare an earmark transparency report on the biennial budget bill and each of its amendments, it further specifies that legislative action on the budget may not proceed without an updated report during two steps of the legislative process:

- 1) Prior to a vote to recommend passage of the budget or an amendment of the budget in the Joint Committee on Finance.
- 2) Prior to final passage in both the assembly and senate.

In other words, neither of these steps in the legislative process may proceed until the LFB has prepared an earmark transparency report on the most recently amended version of the budget.

Lastly, an earmark transparency report is not required prior to a vote of concurrence by a conference committee. But Act 220 does prohibit a conference report from containing any new earmarks that were not included in the budget as passed by either house (Section 13.39 (2), Wisconsin Statutes).

IMPACT

In all, Act 220 identifies several key votes during the legislature's consideration of the biennial budget bill and either requires the LFB

to distribute an updated earmark transparency report before the vote may commence or explicitly bars the inclusion of new earmarks. However, the provisions in Act 220 that regulate the internal operations of the legislature are not legally enforceable. The Wisconsin Supreme Court has held that the courts will not enforce statutes that govern internal legislative procedure, as Act 220 does. The court [see *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 363-369 (1983)] has pointed to Article IV, Section 8 of the Wisconsin Constitution, which states, "Each house may determine the rules of its own proceedings," to preclude enforcement of legislative operations regulation. Even if those rules are contained in the statutes, the courts cannot require the legislature to follow its own procedural rules under the Wisconsin Constitution.

Thus, although the LFB must prepare earmark transparency reports, each house of the legislature may adopt any amendment or pass any biennial budget bill without the report and the legality of the enactment will not be affected. It would also not be affected if the legislature passed a conference report that contained new earmarks. Ultimately, the effectiveness of Act 220 will depend on whether the legislature waits for the LFB's earmark transparency reports before it votes on a biennial budget bill. If the reports are available before the legislature acts, legislators, the media, and the public will have greater information at their disposal on state moneys expended for certain beneficiaries.

FOR MORE INFORMATION

View a copy of 2011 Wisconsin Act 220, its procedural history, and Legislative Council act memo at: <https://docs.legis.wisconsin.gov/2011/proposals/sb114>

Information about earmarks and Congress at: <http://earmarks.omb.gov/earmarks-public/>