

University and college earmark probe intensifies

By Michael J. Cooney and Kelly B. Kramer
August 18, 2006

“Although this is a very gracious and nice-sounding letter, this is going to be a very messy September and October.”

—A university lobbyist regarding Senator Tom Coburn’s recent letter to 100+ colleges and universities

Senator Tom Coburn, chairman of the Federal Financial Management Subcommittee, has begun an investigation into six years of earmarked funds won by colleges and universities. The investigation only became public this month, when the Senator sent letters to more than 100 universities that received significant earmarks. Higher-education lobbyists said their clients were blindsided when they received Coburn’s letters, which asked detailed questions about their earmarks and work with lobbyists to secure these politically popular funds. According to Senator Coburn’s spokesman, the Senator, an aggressive budget hawk and a leading critic of the earmark process, is looking for corruption, campaign finance violations, and spending mismanagement.

Washington is awash with lobbying probes. Rep. Duke Cunningham, lobbyist Jack Abramoff, and others exploited connections with the Appropriations Committee – Mr. Abramoff reportedly called it the “favor factory” – to secure earmarks for their clients. Now, many of those lobbying practices are under scrutiny, and the impact has been felt in many industries.

Senator Coburn’s is the first probe to focus squarely on university earmarks. This is a hot topic, in part because universities have won increasingly large earmarks in recent years, often with the help of retained lobbyists. Senator Coburn’s investigation seems calculated to examine the lobbying process, as opposed to the merits of any particular earmark, meaning that colleges and universities might be subject to scrutiny even with respect to meritorious projects. Colleges and universities should recognize that Senator Coburn’s letters are only the beginning of the process, which might take many months to play out. For now, the letters only request information about appropriations, but the Senator may follow up on these letters with formal or informal document requests. The Senator has even suggested that he may hold public hearings to explore possible earmark abuses based on the response to his letters.

As a national leader in representing educational and other non-profit organizations in congressional and government investigations, Nixon Peabody provides the following general guidelines for preparing for and responding to these sorts of inquiries.



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1. Alert designated legal counsel.

If you receive a document requesting earmark or other potentially sensitive information, do not try to “wing it” on your own, even if the request appears to be informal. Call the person in the legal counsel’s office who has been designated to handle situations like this, or call outside legal counsel trained to respond to government investigations. If the only thing you do to respond to a government demand is immediately involve in-house or outside counsel, you will do much to protect the institution and yourself. In-house counsel should, in turn, carefully assess whether this sort of probe is best handled by outside counsel, considering factors such as in-house counsel’s own involvement in the earmark process, the potential for an extended government investigation, and the potential for criminal referrals.

2. Do not ignore a government request simply because it does not legally require a response.

An e-mail or a letter from the government may not compel a response, but your institution should give one, after consulting with counsel. The fastest method for arousing the curiosity (and potential hostility) of the government is to ignore its inquiry. A college or university that mutely lets a deadline for information pass will almost certainly be handed a subpoena or search warrant. This escalation will also attract more publicity.

Being the target of a government request for information, a subpoena, or a search warrant is always a serious matter. But all is not lost, no matter how calamitous it may seem. Remember, the government may make less-formal inquiries — such as Senator Coburn’s recent letter requests — based on little or no evidence at all. Responding appropriately when the government contacts you is essential to ensuring that misinformation does not carry the day.

3. Prepare for publicity — do not speak to the media without preparing text with counsel.

Contact your internal public relations personnel to alert them about possible inquiries from the press. Statements of any kind to the media should be carefully vetted with legal counsel. What an employee says to the media can be detrimental to the speaker and to the institution.

4. Advise employees that they are under no obligation to respond to government agents who seek to communicate with them.

Advise employees — both as part of standard company policy and at the time an investigation commences — that while they may choose to speak with government agents, they are under no duty to answer questions, whether by e-mail, letter, fax, or telephone, without first consulting legal counsel. Moreover, advise them that, if they do choose to answer questions about the subject matter of an investigation — even in what the employee may consider an informal interview — they can be charged with federal crimes if agents later allege any of the statements to have been false or misleading. Employees also need to be informed of their rights should government investigators seek to interview them later, whether at work or their homes. If an employee does talk to an investigator, it is always essential that he or she be truthful. Anything else could be considered criminal.

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