

January 2008

CONGRESSIONAL DIRECTIVES

Selected Agencies' Processes for Responding to Funding Instructions





Highlights of [GAO-08-209](#), a report to congressional addressees

Why GAO Did This Study

In recent years, congressional concern and public debate have increased about the nature and growing number of earmarks. This report seeks to provide Congress and the public with an understanding of how agencies respond to congressional funding directions by examining how selected executive branch agencies translate these directions from Congress into governmental activities.

There have been numerous calls in and out of Congress for earmark reform in response to concerns about the nature and number of earmarks. Both Houses of Congress have taken steps to increase disclosure requirements. The President has also called for earmark reform. In January 2007, the Office of Management and Budget (OMB) directed agencies to collect and submit data to it on fiscal year 2005 earmarks in appropriations bills and certain authorization bills.

GAO collected and analyzed information on four agencies' processes (i.e., the Department of Defense, Department of Energy, Department of Transportation, and U.S. Army Corps of Engineers' Civil Works programs). Our objectives were to identify, for these agencies, (1) their processes for identifying and categorizing congressional directives; (2) their processes for tracking, implementing, and reporting on congressional directives; and (3) agency officials' views on the trends and impact of congressional directives.

To view the full product, including the scope and methodology, click on [GAO-08-209](#). For more information, contact Susan J. Irving at (202) 512-9142 or irvings@gao.gov.

CONGRESSIONAL DIRECTIVES

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What GAO Found

Congress or its committees may use formal vehicles to provide written funding instructions for agencies or to express preferences to agencies on the use of funding. These formal vehicles include statutes (i.e., authorization or appropriations acts) or House, Senate, and conference reports comprising significant parts of the legislative history for a given statute. Often referred to as "earmarks," these written instructions range from broad directions on policy priorities to specific instructions.

The U.S. Constitution gives Congress the power to levy taxes, to finance government operations through appropriations, and to prescribe the conditions governing the use of those appropriations. This power is referred to generally as the congressional "power of the purse" and derives from various provisions of the Constitution. Government agencies may not draw money out of the Treasury to fund operations unless Congress has appropriated the money. At its most basic level, this means that it is up to Congress to decide whether to provide funds for a particular program or activity and to fix the level of that funding. It is also well established that Congress can, within constitutional limits, determine the terms and conditions under which an appropriation may be used. In this manner, Congress may use its appropriation power to accomplish policy objectives and to establish priorities among federal programs.

Our review of four federal agencies' processes for responding to written directives from Congress regarding the use of funds found that each of the selected agencies responds to congressional directives in a manner consistent with the nature of its programs and operations and in response to the desires of its own authorizing and appropriations committees in Congress. Agencies differ in terms of the specific processes followed to respond to congressional directives, and they have also adopted their own approaches for responding to the 2007 request for data on earmarks from OMB. OMB's guidance to agencies excludes from its definition of earmarks funds requested in the President's Budget.

With a few exceptions, officials representing the selected agencies generally expressed the view that the number of congressional directives had increased over time. Agency officials provided a range of views on the impact of congressional directives on budget and program execution. Some agency officials said that congressional directives had a limited impact on their mission requirements or ability to accomplish their goals. Other agency officials reported that implementation of these directives can displace agencies' program priorities as the agencies redirect resources to comply with these directives. Some told us that congressional directives provided money for projects they wanted but had been unable to get funded through budget requests. Agency officials also reported that directives can add uncertainty as agencies respond to congressional priorities identified months later than their planning for items in the President's Budget.

Contents

Letter		1
Section 1	Background	5
	Definitions	5
	Recent Guidance to Agencies on Collecting Data on Earmarks	11
Section 2	Department of Defense	13
	Definition DOD Used for Identifying and Tracking Congressional Directives	13
	DOD's Process for Identifying and Categorizing Congressional Directives	15
	DOD's Process for Tracking, Implementing, and Reporting on Congressional Directives	17
	DOD Officials' Views on Trends and Impact of Congressional Directives	19
Section 3	Department of Energy	21
	Definition DOE Used for Identifying and Tracking Congressional Directives	21
	DOE's Process for Identifying and Categorizing Congressional Directives	22
	DOE's Process for Tracking, Implementing, and Reporting on Congressional Directives	22
	DOE Officials' Views on Trends and Impact of Congressional Directives	24
Section 4	Department of Transportation: Highways and Transit	26
	Definitions FHWA and FTA Used for Identifying and Tracking Congressional Directives	27
	FHWA and FTA Processes for Identifying and Categorizing Congressional Directives	28
	FHWA and FTA Processes for Tracking, Implementing, and Reporting on Congressional Directives	29
	FHWA and FTA Officials' Views on Trends and Impact of Congressional Directives	32
Section 5	U.S. Army Corps of Engineers' Civil Works Programs	35
	Definition Corps Civil Works Used for Identifying and Tracking Congressional Directives	37

	Corps Civil Works' Process for Identifying and Categorizing Congressional Directives	38
	Corps Civil Works' Process for Tracking, Implementing, and Reporting on Congressional Directives	41
	Corps Civil Works Officials' Views on Trends and Impact of Congressional Directives	41
Appendix I	Objectives, Scope, and Methodology	43

Appendix II	GAO Contacts	47
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Table

	Table 1: Data Fields and Summaries of the Information Provided on the Corps' Fact Sheet	39
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Figures

	Figure 1: DOD's Process for Identifying and Categorizing Congressional Directives	16
	Figure 2: Mission and Structure of FHWA and FTA	27
	Figure 3: FHWA and FTA Processes for Administering Congressional Directives	31
	Figure 4: U.S. Army Corps of Engineers' Civil Works Divisions and Districts	36

Abbreviations

CRS	Congressional Research Service
DISA	Defense Information Systems Agency
DOD	Department of Defense
DOE	Department of Energy
DOT	Department of Transportation
DTRA	Defense Threat Reduction Agency
EERE	Office of Energy Efficiency and Renewable Energy
FHWA	Federal Highway Administration
FTA	Federal Transit Administration
FTE	full-time equivalent
NNSA	National Nuclear Security Administration
OMB	Office of Management and Budget
OSD	Office of the Secretary of Defense
SAFETEA-LU	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users
SOCOM	U.S. Special Operations Command
TEA-21	Transportation Equity Act for the 21 st Century

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January 31, 2008

Congressional Addressees

In recent years, both congressional concern and public debate about earmarks have increased. Specifically, congressional concern has focused on both the nature of earmarks as well as the increase in the number of earmarks. At the same time, a great deal of misunderstanding exists about what the term earmark means, about the wide variation in the nature of earmarks, and about how earmarks fit into the broader budget context. This report seeks to move beyond the public debate surrounding earmarks to examine how executive branch agencies translate spending directions in law and committee reports into governmental activities by explaining how executive branch agencies respond to these congressional directives.

Congress or its committees may use formal vehicles to provide written funding instructions for agencies or to express preferences to agencies on the use of funds. These formal vehicles include laws (i.e., authorization or appropriations acts) or House, Senate, and conference reports comprising significant parts of the legislative history of a given law. These instructions are often referred to as earmarks and range from broad directions on policy priorities to specific instructions. The range of these congressional funding directions collectively is so broad that for the purpose of this report, we refer to these directions as “congressional directives” in order to avoid confusion associated with varied legal and common usage definitions and connotations of the term “earmarks.” We identify and use agency-specific terms when discussing definitions agencies use for congressional directives.

The current focus on the number and amount of earmarks overshadows the limited information available about the agency role in this aspect of the appropriations process. This report seeks to fill that knowledge gap and clarify what actually happens after agencies identify their respective congressional funding directives. To provide Congress and the public with a better understanding of how agencies respond to congressional funding directives, the objective of this report is to describe the processes used in selected agencies to identify, categorize, track, implement, and report back on congressional directives as well as how selected officials within these agencies characterize trends in the number and types of directives and the impact of directives on agency budgets and program implementation. The selected agencies were the Department of Defense,

Department of Energy, Department of Transportation, and U.S. Army Corps of Engineers' Civil Works programs.

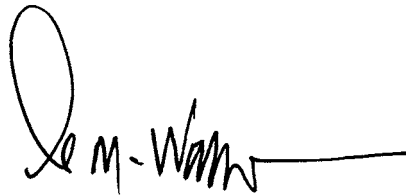
In summary, we found that each agency responds to directives in a manner consistent with the nature of its programs and operations. Each agency reported that it had a definition it believed was consistent with and responsive to its own authorizing and appropriations committees in Congress. The agencies also have recently adopted their own approaches for responding to the Office of Management and Budget's (OMB) January 2007 direction to agencies to collect and submit data on fiscal year 2005 earmarks in appropriations bills and certain authorization bills, including report language.¹ OMB's guidance to agencies excludes from its definition of earmarks funds requested in the President's Budget. Following the issuance of this OMB guidance on earmarks, each agency developed an approach to provide OMB the data it requested. The agencies reported that to respond to OMB's data request, they did not use the definitions they previously used for monitoring congressional directives. Rather, they provided data based on either OMB's definition of earmarks or what was agreed to in a negotiation with OMB.

With a few exceptions, officials representing the selected agencies generally expressed the view that the number of congressional directives had increased over time. Agency officials provided a range of views on the impact of these directives on budget and program execution. Some agency officials said that the impact of congressional directives on their mission requirements or ability to accomplish their goals was limited. Some told us that congressional directives provided money for projects they wanted but had been unable to get funded in their agencies' budget requests. In other agencies, officials reported that implementation of these directives could displace agencies' program priorities as the agencies redirect resources to comply with congressional directives. Agency officials also reported that directives can add uncertainty as agencies respond to congressional priorities identified months after their planning for items in the President's Budget.

This report provides background and context on congressional directives and the use of the term earmarks. Agencies' approaches to defining,

¹Because OMB's guidance uses and provides a specific definition for the term earmarks, when referring to OMB's efforts to collect information from agencies we use the term earmarks.

identifying, categorizing, tracking, implementing, and reporting on congressional directives are discussed in separate sections for the four selected agencies. Appendix I describes our methodology for reviewing congressional directives. Appendix II lists key GAO contacts. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. This report will be available at no charge on GAO's Web site at <http://www.gao.gov>.

A handwritten signature in black ink, appearing to read "D. M. Walker", with a horizontal line extending to the right.

David M. Walker
Comptroller General
of the United States

List of Addressees

The Honorable Daniel K. Inouye
Chairman
Subcommittee on Defense
Committee on Appropriations
United States Senate

The Honorable Carl Levin
Chairman
The Honorable John McCain
Ranking Member
Committee on Armed Services
United States Senate

The Honorable Christopher J. Dodd
Chairman
The Honorable Richard Shelby
Ranking Member
Committee on Banking, Housing,
and Urban Affairs
United States Senate

The Honorable James M. Inhofe
Ranking Member
Committee on Environment and
Public Works
United States Senate

The Honorable Dave Obey
Chairman
Committee on Appropriations
House of Representatives

The Honorable Ike Skelton
Chairman
Committee on Armed Services
House of Representatives

Section 1: Background

This section provides context for understanding the history and use of congressional direction for appropriated funds. It traces the development of authority for congressional direction of funds from the U.S. Constitution to the current focus on reducing the number and amount of earmarks in appropriations legislation.

The Constitution gives Congress the power to levy taxes and raise revenue for the government, to finance government operations through appropriation of federal funds, and to prescribe the conditions governing the use of those appropriations.¹ This power is generally referred to as the congressional “power of the purse.” The linchpin of congressional control over federal funds is found in article I, section 9, clause 7 of the Constitution, which provides that “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” Thus, no officer or employee of the government may draw money out of the Treasury to fund agency operations unless Congress has appropriated the money to the agency. At its most basic level, this means that it is up to Congress to decide whether to provide funds for a particular program or activity and to fix the level of that funding.

It is also well established that Congress can, within constitutional limits, determine the terms and conditions under which an appropriation may be used.² In other words, Congress can specify (or direct) in an appropriation the specific purposes for which the funds may be used, the length of time the funds may remain available for these uses, and the maximum amount an agency may spend on particular elements of a program. In this manner, Congress may use its appropriation power to accomplish policy objectives and to establish priorities among federal programs. It is then the obligation of the agencies under Presidential supervision to ensure that these policy objectives and priorities are faithfully executed.³

Definitions

Historically, the term “earmark” has described legislative language that designates a specified amount of a larger appropriation as available only for a particular object. The term earmark derives from ancient England

¹U.S. Const. art. I, § 8, cl. 1; § 9, cl. 7.

²See, for example, *New York v. United States*, 505 U.S. 144, 167 (1992); *Cincinnati Soap Co.*, 301 U.S. 308, and 321 (1937); *Oklahoma v. Schweiker*, 655 F.2d 401, 406 (D.C. Cir. 1981) (citing numerous cases).

³U.S. Const. art. II, § 3.

where English farmers would mark the ears of their swine, oxen, and other livestock to cull them from the village herd and demonstrate ownership.⁴ In common usage, however, the term earmark soon developed a broader meaning.

There are many definitions of earmarks. For example, our *Glossary of Terms Used in the Federal Budget Process* defines earmarking as either of the following:

1. Dedicating collections by law for a specific purpose or program. Earmarked collections include trust fund receipts, special fund receipt accounts, intragovernmental receipts, and offsetting collections credited to appropriation accounts. These collections may be classified as budget receipts, proprietary receipts, or reimbursements to appropriations.
2. Designating any portion of a lump-sum amount for particular purposes by means of legislative language. Sometimes “earmarking” is colloquially used to characterize directions included in congressional committee reports but not in the legislation itself.⁵

The Congressional Research Service (CRS) dictionary of legislative terms includes a similar definition of earmarks as “to set aside funds for a specific purpose, use, or recipient.” More specifically, CRS notes the following:

“There is not a single definition of the term earmark accepted by all practitioners and observers of the appropriations process, nor is there a standard earmark practice across all

⁴See Bryan A. Garner, ed. *Black’s Law Dictionary*, 8th ed. (St. Paul, Minn.: Thomson West, 2004), quoting Frederick Pollock and Frederic W. Maitland, *History of English Law Before the Time of Edward I*, 2nd ed. (1899): “When now-a-days we say that ‘money has no earmark’ we are alluding to a practice which in all probability played a large part in ancient law. Cattle were ear-marked or branded, and this enabled their owner to swear that they were his in whosoever hands he might find them. The legal supposition is, not that one ox is indistinguishable from another ox, but that all oxen, or all oxen of a certain large class, are equivalent. The possibility of using them as money has rested on this supposition.”

⁵See GAO, *A Glossary of Terms Used in the Federal Budget Process*, [GAO-05-734SP](#) (Washington, D.C.: September 2005). GAO’s glossary fulfills part of GAO’s responsibility under 31 U.S.C. § 1112 to publish standard terms, definitions, and classifications for the government’s fiscal, budget, and program information. It was developed in cooperation with the Secretary of the Treasury, the Office of Management and Budget, and the Congressional Budget Office.

13 appropriation bills. According to Congressional Quarterly's *American Congressional Dictionary*, under the broadest definition 'virtually every appropriation is earmarked.' In practice, however, earmarks are generally defined more narrowly, often reflecting procedures established over time that may differ from one appropriation bill to another. *For one bill, an earmark may refer to a certain level of specificity within an account. For other bills, an earmark may refer to funds set aside within an account for individual projects, locations, or institutions* (emphasis added).⁶

In recent years there has been a significant amount of public discussion about the nature and number of earmarks, with exponential growth reported in the number and amounts. For example, researchers at the Brookings Institution, on the basis of data compiled by CRS, cited dramatic growth in earmarks between 1994 and fiscal year 2006.⁷ In fact, CRS data show increases in the number and amount for individual appropriation bills during that period.

Any discussion of trends, however, is complicated by the fact that different definitions of the term earmarks exist and that the amounts reported vary depending on the definition used. Although CRS has totaled the number and amount of earmarked spending for each of the regular annual spending bills enacted since fiscal year 1994, CRS has cautioned that the data presented for the 13 appropriations cannot be combined into a governmentwide total because of the different definitions and methodologies that were used for each bill. These differing definitions would make any total invalid.

Lump Sum and Line Item

Any definition of the term earmark requires a reference to two other terms in appropriations law—lump-sum appropriations and line-item appropriations. A lump-sum appropriation is one that is made to cover a number of programs, projects, or items. Our publication, *Principles of Federal Appropriations Law* (also known as the Red Book), notes that GAO's appropriations case law defines earmarks as "actions where

⁶CRS, *Earmarks and Limitations in Appropriation Bills*, Report 98-518 (Dec. 7, 2004).

⁷Sarah A. Binder, Thomas E. Mann, and Molly Reynolds, "Is the Broken Branch on the Mend? An Early Report on the 110th Congress," *Mending the Broken Branch*, no. 1. (Washington, D.C.: The Brookings Institution, 2007).

Congress . . . designates part of a more general lump-sum appropriation for a particular object, as either a maximum, a minimum, or both.”⁸

Today, Congress gives federal agencies flexibility and discretion to spend among many different programs, projects, and activities financed by one lump-sum appropriation. For example, in fiscal year 2007, Congress appropriated a lump-sum appropriation of \$22,397,581,000 for all Army Operations and Maintenance expenses.⁹ Many smaller agencies receive only a single appropriation, usually termed Salaries and Expenses or Operating Expenses. All of the agency’s operations must be funded from this single appropriation.

A line-item appropriation is generally considered to be an appropriation of a smaller scope, for specific programs, projects, and activities. In this sense, the difference between a lump-sum appropriation and a line-item appropriation is a relative concept hinging on the specificity of the appropriation. Also, unlike an earmark, a line item is typically separate from the larger appropriation. As noted above, in earlier times when the federal government was much smaller and federal programs were (or at least seemed) less complicated, line-item appropriations were more common. For example, among the items for which Congress appropriated funds for 1853 were separate appropriations to the Army, including: \$203,180.83 for clothing, camp and garrison equipage, and horse equipment; \$4,500 for fuel and quarters for officers serving on the coast survey; and \$400,000 for construction and repair.

Appropriations in the Beginning of the Republic

Congressional direction of funds has a well-established lineage that dates back to the nation’s earliest appropriations. The first general appropriations act, passed by Congress on September 29, 1789, appropriated a total of \$639,000 and was a relatively uncomplicated appropriation. We quote it in full:

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be appropriated for the service of the present year, to be paid out of the monies which arise, either from the requisitions heretofore made upon the several states, or from the duties on impost and tonnage, the following sums, *viz.* A sum

⁸See GAO, *Principles of Federal Appropriations Law*, vol. II, 3rd ed., [GAO-06-382SP](#) (Washington, D.C.: February 2006).

⁹Pub. L. No. 109-289, 120 Stat. 1257, 1260 (Sept. 29, 2006).

not exceeding two hundred and sixteen thousand dollars for defraying the expenses of the civil list, under the late and present government; a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war; a sum not exceeding one hundred and ninety thousand dollars for discharging the warrants issued by the late board of treasury, and remaining unsatisfied; and a sum not exceeding ninety-six thousand dollars for paying the pensions to invalids.”¹⁰

From today’s perspective, some might say that this first appropriation contains several lump-sum appropriations. Others might say that these are line-item appropriations for (1) civil servants, (2) department of war, (3) treasury, and (4) pension payments. In any event, these are congressional directives instructing the executive branch on how funds are to be spent. As discussed earlier, this illustrates the definitional difficulties in this area.

The second appropriation made by the First Congress for 1791 contained a congressional directive to spend “a sum not exceeding fifty thousand seven hundred and fifty-six dollars and fifty-three cents,” for several specific objects requested by Secretary of the Treasury Alexander Hamilton in his budget estimates, such as converting the Beacon of Georgia into a lighthouse and for the purchase of hydrometers.¹¹

By the Second Congress, more and more explicit congressional directives began to appear. For example, the appropriation for the year 1792 contains an appropriation of \$197,119.49, directed by law for 12 purposes, including specific payments for individuals such as the following:

“For payment of the principal and interest on a liquidated claim of Oliver Pollock, late commercial agent of the United States, at New Orleans, for supplies of clothing, arms, and military stores during the late war, one hundred and eight thousand, six hundred and five

¹⁰Ch. XXIII, 1 Stat. 95 (Sept. 29, 1789).

¹¹Ch. VI, 1 Stat. 190 (Feb. 11, 1791). Estimate of the Expenditures of the Civil List of the United States, on the present Establishment, for the year 1791.

dollars, and two cents: Provided, "That the said monies be not paid to the said Oliver Pollock,¹² without the consent of the agents of the court of Spain."¹³

Congressional Directives and Restrictions in Legislative History

Today, congressional committees sometimes insert spending directives and restrictions on the use of appropriated funds in what is known as the legislative history of an act—that is, House, Senate, and conference reports accompanying a piece of legislation. As a matter of law, instructions in committee reports and other legislative history as to how funds should or are expected to be spent do not impose any legal requirements on federal agencies.¹⁴ Only directions that are specified in the law itself are legally binding.¹⁵

This does not mean agencies are free to ignore clearly expressed legislative history applicable to the use of appropriated funds. In a 1975 decision, we pointed out that agencies ignore such expressions of intent at the peril of strained relations with committees and that agencies have a practical obligation to abide by such expressions.¹⁶ This obligation, however, must be understood to fall short of a legal requirement giving rise to a legal infraction where there is a failure to carry out that obligation. In that decision, we pointed out that Congress has recognized that it is desirable to maintain executive flexibility to shift funds within a particular lump-sum appropriation account so that agencies can make necessary adjustments for unforeseen developments, changing requirements, and legislation enacted subsequent to appropriations. This is not to say that Congress does not expect that funds will be spent in accordance with budget estimates or in accordance with restrictions or directions detailed in committee reports. However, in order to preserve

¹²Oliver Pollock was an Irish American merchant. After moving to New Orleans, Pollock speculated advantageously in land and in the slave trade and gained the confidence of the Spanish government. He contributed generously to the cause of the colonies in the American Revolution, obtained supplies from the Spanish, and helped finance George Rogers Clark's conquest of the Northwest. After the war the American government met its debts to him, but repayment was tardy and incomplete. *Columbia Electronic Encyclopedia*, 6th ed. (New York: Columbia Univ. Press, 2003).

¹³Ch. III, 1 Stat. 226 (Dec. 23, 1791).

¹⁴55 Comp. Gen. 307 (1975).

¹⁵This is an application of the fundamental principle of statutory construction that legislative history is not law and carries no legal significance unless "anchored in the text of the statute." *Shannon v. United States*, 512 U.S. 573, 583 (1994).

¹⁶55 Comp. Gen. at 318.

spending flexibility, it may choose not to impose these particular restrictions as a matter of law, but rather to leave it to the agencies to “keep faith” with Congress.

The Supreme Court recently summarized congressional authority to direct lump-sum appropriations as follows:

“Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes (though not . . . just in the legislative history). And of course, we hardly need to note that an agency’s decision to ignore congressional expectations may expose it to grave political consequences.”¹⁷

Recent Guidance to Agencies on Collecting Data on Earmarks

There have been numerous calls in and out of Congress for earmark reform. Both Houses of Congress have taken steps to increase disclosure requirements. In January 2007, the President proposed “earmark reforms” in his State of the Union address. These included cutting the number and amount of earmarks by at least half. According to the Office of Management and Budget (OMB), in fiscal year 2005, there were 13,492 earmarks totaling \$18,938,657,000 for appropriations accounts.

In response to the President’s proposal, OMB directed the heads of departments and agencies to collect data on earmarks and submit the information to OMB. As explained in OMB’s guidance, the purpose of the data collection is “to provide a transparent baseline from which the cut-in-half goal will be measured.” For the purposes of this data collection effort, OMB directed agencies to use the following definition of earmarks:

“Earmarks are funds provided by the Congress for projects or programs where the congressional direction (in bill or report language) circumvents the merit-based or competitive allocation process, or specifies the location or recipient, or otherwise curtails the ability of the Administration to control critical aspects of the funds allocation process.”

OMB asked agencies to provide earmark information encompassed in all enacted appropriations bills in fiscal year 2005 and in any congressional reports. The guidance to agencies also directed prioritization of data collection to focus first on appropriations bills, since legislative action on those bills typically begins in the spring. In addition, OMB directed agencies to plan on providing information on earmarks in authorizing and

¹⁷*Lincoln v. Vigil*, 508 U.S. 182, at 192-193 (1993).

other bills that are identified based on consultation with OMB. OMB's guidance to agencies excludes from its definition of earmarks funds requested in the President's Budget.

OMB posted these data on its Web site and also asked agencies to identify earmarks in fiscal year 2008 appropriations bills as they moved through the legislative process.¹⁸ This request for data asked the heads of departments and agencies to report to OMB the number and dollar value of earmarks in each account within 7 days after an appropriations bill is reported by the House or Senate Appropriations Committee or passes on the House or Senate floor.

¹⁸See OMB's Web site at <http://earmarks.omb.gov>.

Section 2: Department of Defense

The Department of Defense (DOD) is responsible for the military forces needed to deter war and protect the security of the United States. The major elements of these forces are the Army, Navy, Air Force, and Marine Corps. DOD includes the Office of the Secretary of Defense (OSD), the Chairman of the Joint Chiefs of Staff, three military departments, nine unified combatant commands, the DOD Inspector General, 15 defense agencies, and 7 DOD field activities.

We focused on OSD's Comptroller; the military services (Army,¹ Navy, Marine Corps, and Air Force); two defense agencies, the Defense Information Systems Agency (DISA) and the Defense Threat Reduction Agency (DTRA); and one combatant command, the U.S. Special Operations Command (SOCOM).

Definition DOD Used for Identifying and Tracking Congressional Directives

DOD has had a procedure in place for many years that identifies and categorizes all congressional directives—which it calls add-ons or items of congressional interest—for programs and projects contained in the bill language included in the appropriations conference report. DOD does not include items in defense authorization bills in its list of add-ons. According to DOD officials, DOD defines an add-on as an increase in funding levels in the bill language included in the appropriations conference report that was not originally requested in the President's Budget submission.

According to DOD officials, in order to receive an accurate reporting of earmarks the definition had to be refined with OMB because many add-ons go through the merit-based or competitive allocation process. To develop the list of DOD's fiscal year 2005 earmarks for OMB, DOD officials worked with OMB staff and representatives from the military components² to come up with agreed-on criteria. DOD officials said that they began with the DOD list of add-ons and agreed on types of add-ons to exclude from the list to be submitted to OMB. DOD officials told us that OMB and DOD agreed that seven types of add-ons would generally be excluded from the list of earmarks submitted to OMB. DOD does not include items in the defense authorization bill as add-ons because authorization bills do not

¹The U.S. Army Corps of Engineers is part of the Army that has military and civilian responsibilities. In this report, the military programs are covered in our discussion on DOD, and the Civil Works programs are discussed separately.

²Military components include the military departments: Army, Air Force, Navy, Marine Corps; defense agencies; and the combatant commands.

appropriate funds for execution of program directives. DOD follows defense appropriation bills to determine how to execute program directives. Six additional types of add-ons to be excluded were

- funding for the Global War on Terror,
- funding for the National Guard and Reserve Equipment (97-0350) appropriations account for procuring equipment,
- funding for military personnel,
- funding for peer-reviewed Defense health programs,³
- policy decisions for which DOD submitted its budget request with the best estimate available at the time but for which Congress subsequently adjusted the budget request due to refined estimates provided to it, and
- items that are being transferred to other accounts that result in a net zero change to DOD's overall budget.

DOD officials provided their rationale for excluding these types of add-ons for fiscal year 2005. According to DOD officials, the funding for the Global War on Terror is specific to providing support to the troops for ongoing combat operations and related activities. In fiscal year 2005, the Global War on Terror was funded primarily through supplemental appropriations rather than through the DOD base budget request. DOD officials stated that the National Guard and Reserve appropriations account to procure equipment (i.e., account 97-0350) was not an earmark because, although its funding was not requested in the President's Budget, the funding was routinely provided directly by Congress to maximize readiness of the National Guard and Reserve. Congressional add-ons for military personnel appropriated for basic pay and benefits were excluded because these were routine, merit-based administrative costs. Peer-reviewed Defense health programs were not considered earmarks because they were funded based on merit that was determined by a panel of physicians. Policy decisions for which DOD submitted a budget but did not fully fund procurement of an item were excluded because they were based on a preliminary estimate that required additional funding and were not new items. DOD excluded funds that were transferred to other accounts because the funds needed to be aligned with the correct place in the budget before they could be obligated or expended.

³Defense health programs that are peer reviewed are programs funded for research and development directly related to military health.

DOD officials stated that the list of exclusions is guidance for the components to use as they review the congressional add-ons to determine which funds should not be considered earmarks. Components prepared justifications for each add-on they believed should be excluded based on the exclusion criteria. In addition, officials stated that the criteria are evolving and that they are continuing to work with OMB to refine them.

DOD's Process for Identifying and Categorizing Congressional Directives

Before OMB's 2007 guidance, DOD had an established process that it continues to use for identifying congressional directives contained in the bill language of the appropriations conference report. In addition, each component routinely monitors the congressional budget cycle and has its own staff (i.e., legislative liaisons and financial management staff) who work with congressional staff to determine, if necessary, the purposes and objectives of congressional directives. In addition, legislative liaisons are responsible for updating their leadership on the status of congressional directives during House and Senate Appropriations Committee markups, floor debates, and the final conference report.

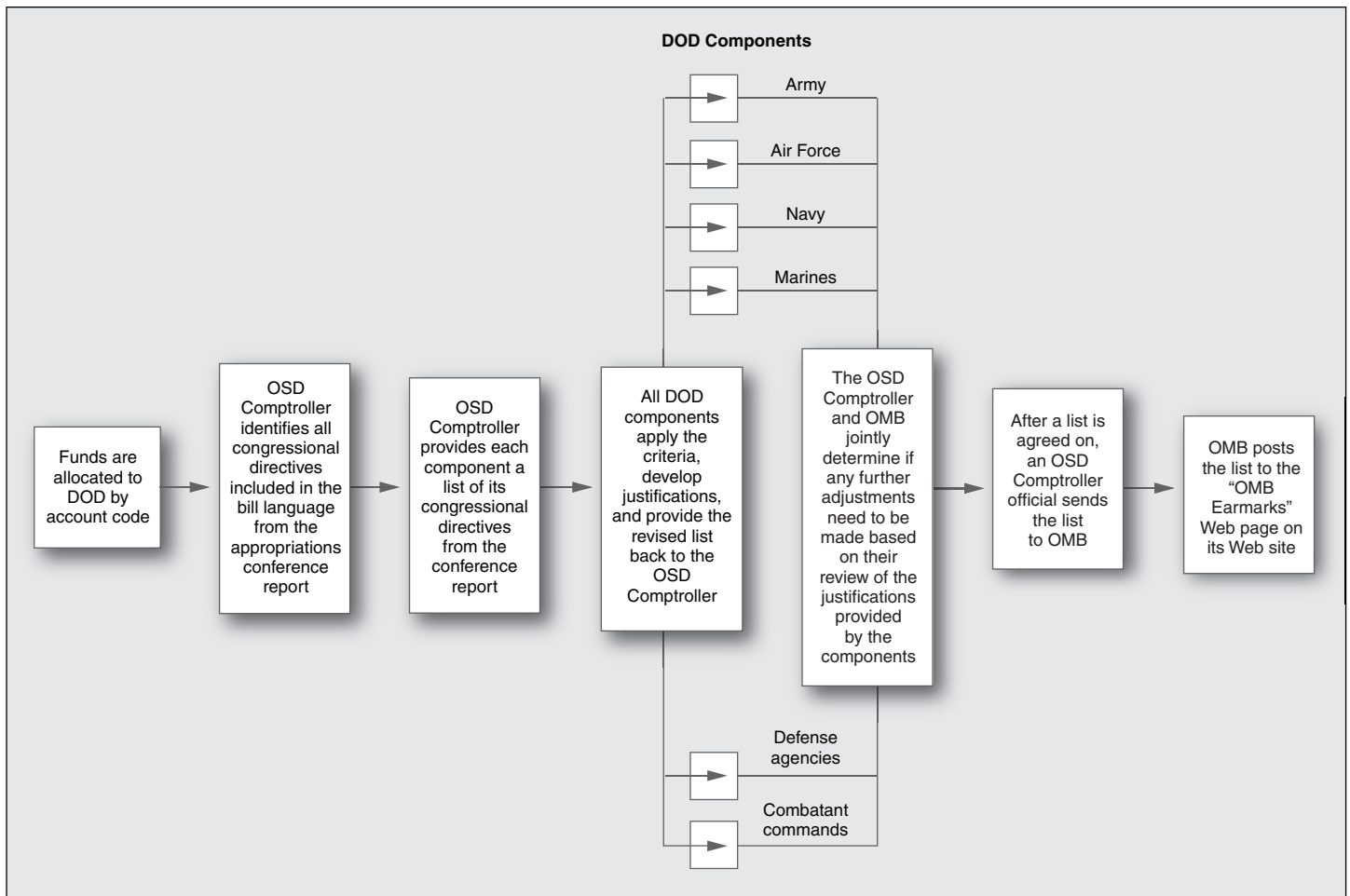
Under the procedure DOD has had in place for years, the OSD Comptroller identifies all congressional directives contained in the bill language from the appropriations conference report, which are categorized by budget accounts and components, and provides the relevant list to the appropriate component.

In response to OMB's 2007 guidance, DOD officials described an additional three-step process they used for identifying and categorizing fiscal year 2005 earmarks:

1. Components reviewed the list of congressional directives identified by the OSD Comptroller and applied the agreed-on exclusion criteria, then developed justifications for any congressional directives they identified as earmarks that met the criteria to be excluded, and then provided the revised list of directives and justifications back to the OSD Comptroller.
2. The OSD Comptroller and OMB jointly determined if any further adjustments needed to be made to the list based on their review of the justification provided by the components.
3. After the list was agreed on, an OSD official created the list that was uploaded to an OMB earmarks site for review. OMB approved the list for release to the public site.

Figure 1 describes DOD’s process for identifying and categorizing fiscal year 2005 congressional directives in response to OMB’s 2007 data collection effort.

Figure 1: DOD’s Process for Identifying and Categorizing Congressional Directives



Source: GAO analysis of DOD information.

Note: According to DOD, congressional directives are all additional funding in the bill language included from the appropriations conference report that was not originally requested in the President's Budget submission.

DOD officials said that in response to OMB’s request for information on fiscal year 2008 earmarks, an OSD Comptroller official will be required to update the OMB database with the fiscal year 2008 earmarks at each stage in the budget deliberation process (House and Senate Appropriations

Committee markups, floor debates, and the conference report) within 7 days. In addition, the DOD components will have access to the OMB database and will be required to enter the details about the earmarks, including recipient, location, and amount, as well as data on the execution status of their respective earmarks. OSD Comptroller officials said that they will be responsible for providing oversight of this process and will monitor the Web site to ensure that the components populate the database within the required time frames.

DOD's Process for Tracking, Implementing, and Reporting on Congressional Directives

DOD does not have a centralized tracking and reporting mechanism that shows to what extent funding has been obligated and expended in accordance with congressional directives. DOD component headquarters staff track the amount of funding provided to them for individual congressional directives. Program offices track the execution of funds for the specific programs covered by the directives but are not required to report the status to the components or to the OSD Comptroller's office.

The OSD Comptroller makes an allotment of funding for the congressional directives to the components, and this funding is tracked by the various components' financial management systems rather than within a centralized system maintained by OSD. We identified the financial management systems for five of the six components that we interviewed. The sixth, SOCOM, at this time uses the department's Programming, Budgeting, and Accounting System to facilitate the tracking of congressional directives. The systems described by the five components track all budget allotments and include unique codes or other features that identify funds designated for congressional directives for tracking purposes.

The financial management systems used by the five components are as follows:

- The Army uses the Funds Control System to track funds allotted for various directives. The system issues a funding authorization document to the Army operating agencies responsible for implementing the directives. Army officials identified two steps within the process that allow operating agencies to track congressional directives. The remarks section of the funding authorization document includes a statement that identifies the item as a congressional directive, and resource managers give each item an execution code that further facilitates tracking of such directives.
- The Air Force Automated Funds Management System tracks all funding provided to the Air Force and specifically tags and footnotes

congressional directives in the system. This process allows the system to produce reports on such directives for review by program managers, as needed.

- The Navy's financial management system is the Program Budget Information System that tracks congressional directives. These directives are tagged and then monitored during execution.
- The Washington Allotment Accounting System is the financial accounting system used by DISA that provides information on the funding execution of congressional directives. Funding is monitored at the program level by DISA's Home Team.⁴ According to DISA officials, congressional directives are assigned a project code that is linked to the funding documents, such as contracting vehicles, and that code allows DISA to determine that funding for a directive has been spent.
- DTRA's financial accounting system is the Centralized Accounts and Financial Resources Management System. According to DTRA officials, congressional directives are given a work unit code in the accounting system that provides the status of funds for these directives through execution.

Furthermore, Navy and Air Force officials provided examples of initiatives intended to streamline the process for tracking the status of congressional directives.

- According to a Navy official, the Navy's Enterprise Resource Planning System is part of its ongoing business transformation effort, which, among other improvements, is intended to enhance its capability to track congressional directives. Through this integrated system, the Navy plans to include a code that identifies congressional directives through its accounting system.
- The Air Force Research Lab has developed a process for tracking congressional directives. The lab set up separate account codes, called Emergency and Special Program Codes, to identify the funding that has been allocated for each directive. According to Air Force officials, they are considering a similar tracking model for Air Force-wide implementation.

According to the components we reviewed, there is no requirement to report back the information from their financial management systems to the OSD Comptroller that would pull together a consolidated picture of

⁴DISA's Home Team was established about 4 years ago to augment and support the Chief Financial Executive/Comptroller Directorate. It consists of subject matter experts in budget, accounting, and information technology.

the funding status for the list of congressional directives. Officials we interviewed from the six components said that once funding has been distributed to the program offices, they do not follow up to determine whether the directives are implemented.

OMB's Web site for fiscal year 2005 earmarks did not provide a means to include the implementation status of individual earmarks. According to DOD officials, DOD has asked OMB to include another field that would show the implementation or completion status of congressional earmarks in OMB's database to facilitate tracking in the future. This field will require DOD components to update information on the Web site beyond the OSD Comptroller's initial posting of data.

DOD does not have a routine procedure for reporting to Congress on the progress being made on individual directives. According to DOD officials, components respond to individual congressional inquiries regarding the status of individual directives. In addition, the legislative liaison coordinates and oversees DOD responses to congressional inquiries on congressional directives as they are received.

DOD Officials' Views on Trends and Impact of Congressional Directives

We interviewed DOD officials who had responsibility for budgeting, financial management, and legislative issues related to congressional directives from six components. Some of the officials stated that they had only been in their positions for a short time and therefore could not comment on the trends and impact of directives on their budget and programs. However, others provided views on how congressional directives affect budget and program execution. Anecdotally, they offered the following views:

- According to OSD officials, they have not maintained data on whether the number of congressional directives has increased or decreased over time. However, two military service officials commented that in their view there has been an increase in the number of such directives.
- DOD officials from the six components we interviewed provided a range of views on how congressional directives affect budget and program execution. These views do not necessarily represent an official agency position on congressional directives. Among the views we heard were the following:

- Congressional directives are viewed as tasks to be implemented and are opportunities to enhance their mission requirements through additional funding in areas that would not have been priority areas because of budget constraints.
- Congressional directives can sometimes place restrictions on the ability to retire some programs and to invest in others. Restrictions have an effect on the budget because they require the components to support an activity that was not in the budget.
- There has always been a feeling that the billions of dollars of congressional directives must come from somewhere, but it is not possible to determine whether any specific directive resulted in reducing funding for another program.
- Congressional directives could tend to displace “core” programs, which according to a DOD official, are programs for which DOD has requested funding in its budget submission.
- Additional time and effort are required to manage the increasing number of congressional directives.
- Program execution of congressional directives is delayed in some cases as efforts are made to identify congressional intent.
- The process for identifying the purposes and objectives of a congressional directive was significantly streamlined in the fiscal year 2008 defense appropriations bill, and it is now easier to determine the source of a directive.

Section 3: Department of Energy

The Department of Energy's (DOE) mission is to promote energy security and scientific and technological innovation, maintain and secure the nation's nuclear weapons capability, and ensure the cleanup of the nuclear and hazardous waste from more than 60 years of weapons production. DOE's nine program offices focus on accomplishing various aspects of this mission.¹ We reviewed documentation and interviewed officials in the Office of Budget, which is within the Office of the Chief Financial Officer, and four DOE program offices: the National Nuclear Security Administration (NNSA),² Office of Science, Office of Energy Efficiency and Renewable Energy (EERE), and Office of Electricity Delivery and Energy Reliability.

Definition DOE Used for Identifying and Tracking Congressional Directives

Since 2005 DOE has generally defined congressional directives, which it refers to as earmarks, as funding designated for projects in an appropriations act or accompanying conference or committee reports that are not requested in the President's Budget.³ These congressional directives specify the recipient, the recipient's location, and the dollar amount of the award and are awarded without competition. DOE officials said that this definition does not include money appropriated over and above the department's budget request (also known as "plus ups") or program direction contained in the act or report language because the department can still develop projects and compete them in following this direction. However, before fiscal year 2005 some DOE program offices considered program direction in committee reports, such as language requesting more research in a certain area, to be earmarks.

¹DOE generally relies on contractors to carry out its diverse missions, with DOE site offices overseeing contractor activities. In addition, these site offices provide contract management and other support services, including administering congressional directives.

²NNSA is a semiautonomous agency within DOE responsible for overseeing the security and ensuring the performance of the nation's nuclear stockpile and for reducing international nuclear proliferation. For our purposes, we have counted it as one of the nine program offices.

³DOE officials also monitor relevant authorization acts, which can sometimes contain congressional directives.

DOE's Process for Identifying and Categorizing Congressional Directives

Officials from DOE's Office of Budget and program offices separately review the appropriations act and accompanying conference and committee reports to identify and categorize congressional directives by program office. These processes are not recorded in written policy but have generally been in place since fiscal year 2005, according to DOE officials. Once the staff of the Office of Budget and each program office develop their lists, they work together to reconcile any differing interpretations of the act and report language to produce a single list. Program office staff make the final determination on whether a particular provision should be considered a congressional directive. During the course of the fiscal year, this list may change as the Office of Budget or a program office learns more about the intent of the appropriations committee responsible for the direction.

The process for identifying and categorizing congressional directives has changed somewhat since OMB issued instructions on earmarks in 2007. According to DOE Office of Budget officials, OMB's January 2007 definition of earmarks differed from DOE's definition, and applying OMB's definition somewhat increased the number of earmarks the department reported to OMB for fiscal year 2005. For example, DOE budget officials said that OMB's definition of earmarks includes money specified for a particular DOE laboratory, while DOE's definition does not because DOE maintains some level of control over project objectives and outcomes at these laboratories. These budget officials also said that DOE is planning to adopt OMB's definition beginning in fiscal year 2008 to identify earmarks to make this process of developing a list of earmarks more uniform.

DOE's Process for Tracking, Implementing, and Reporting on Congressional Directives

DOE program offices generally rely on their contract management staff to implement and track congressional directives using the same procedures and requirements used for processing competitive awards. These procedures, which are governed by DOE's Financial Assistance Rules, typically require the recipient of the congressional directive to submit an application that includes a statement of work, project objectives, and a budget.⁴ In addition, each program's contract management staff determine whether the awardee is subject to cost-sharing requirements for applied

⁴DOE's Financial Assistance Rules are contained in 10 C.F.R. 600. DOE's Office of Procurement and Assistance Policy also issues a *Guide to Financial Assistance* for the department, which provides information to help DOE staff in obligating money.

research or demonstration projects under the Energy Policy Act of 2005.⁵ They also prepare a Determination for Non-Competitive Financial Assistance to explain why the award will not be competed—a document that requires approval by the relevant program Assistant Secretary. Once these paperwork requirements have been met and a financial assistance agreement (grant or cooperative agreement) is awarded, the recipient can begin withdrawing funds from an account set up for the project or submit requests for reimbursements. During the course of the project, the recipient must submit progress reports and a final report to program officials.

Contract management staff in each of the four program offices use administrative databases to track each of their projects, including congressional directives. They use these databases to help manage workload for project officers and to keep track of documentation sent to and received from recipients. Specifically, EERE tracks each of its congressional directives through an Internet-based database. The other three DOE program offices maintain separate, less formal spreadsheets on the congressional directives for their specific programs. These spreadsheets contain background information, such as the project's purpose, dollar amount, and recipient. These spreadsheets are not part of a larger DOE tracking system. In addition, the program offices do not prepare regular reports on congressional directives and generally only follow up on the status of a particular congressional directive if they receive an inquiry from the appropriations committee. DOE Budget Office officials told us that the departmentwide accounting system, the Standard Accounting and Reporting System, cannot generate reports specifically on congressional directives for the department. This is because DOE's program offices differ in the way they assign accounting codes to congressional directives. For example, while EERE assigns an individual accounting code to each directive, NNSA generally does not.

To comply with the Revised Continuing Appropriations Resolution for Fiscal Year 2007, DOE significantly modified its process for administering congressional directives in fiscal year 2007. Specifically, DOE required any

⁵Under section 988 of the Energy Policy Act of 2005, the cost share is to be not less than 20 percent for research and development projects and not less than 50 percent for demonstration projects and commercial applications. However, research of a "basic or fundamental nature" is not subject to cost-sharing requirements. In addition, DOE may reduce or waive cost-sharing requirements if it believes the reduction is "necessary and appropriate."

recipient of congressional directives in prior years that sought continued funding in fiscal year 2007 to submit an application for a formal merit review by the department because (1) the resolution directed all federal departments (including DOE) to disregard fiscal year 2006 congressional directives, cutting off funding for any multiyear directives from previous years, and (2) no committee reports, which are the primary source of the department's congressional directives, accompanied the continuing resolution. As a result of this policy, program officials from the Office of Science told us that they received few applications for continued funding in fiscal year 2007. The department funded substantially fewer congressional directives compared to previous years.

DOE Officials' Views on Trends and Impact of Congressional Directives

DOE officials stated that through fiscal year 2006 the number of congressional directives had increased, and that this growth limited the ability of certain program offices to develop and implement their strategic goals. DOE officials said that the number of congressional directives began a steady rise in the late 1990s that continued through fiscal year 2006. As noted earlier, they said that because of the continuing resolution there were far fewer projects in fiscal year 2007 that were associated with congressional directives. In terms of the types of congressional directives awarded since the late 1990s, DOE officials from two program offices said that there were "hot topics" that garnered attention at certain times. For example, an official from EERE—which had the highest dollar value of congressional directives among DOE program offices—told us that there were directives in recent years to fund fuel cell research at specific facilities.

DOE program officials reported that implementing congressional directives imposed a high administrative burden. For example, many officials reported that it takes longer to process and award congressional directives because DOE personnel need to educate some recipients on DOE's processes, such as how to submit an application and comply with DOE's reporting requirements and the applicability of cost-sharing requirements. To help address this issue, EERE invites all recipients of congressional directives to a presentation at DOE headquarters for an overview of the process.

DOE officials varied in their views of the impact of congressional directives on program execution. For example, Office of Science officials reported that they received additional appropriations for their congressional directives, which made it hard to determine what the program impact has been. On the other hand, program officials from

EERE and the Office of Electricity Delivery and Energy Reliability said that they were not appropriated additional dollars to fund congressional directives. These program officials told us that their ability to accomplish their strategic goals has been limited because congressional directives make up a large percentage of their budget and it is often difficult to align the outcomes of congressional directives with these goals.

Section 4: Department of Transportation: Highways and Transit

The Department of Transportation (DOT) implements and administers most federal transportation policies through its 10 operating administrations.¹ These operating administrations are generally organized by mode and include highways and transit. The operating administrations are responsible for independently managing their programs and budgets to carry out their goals as well as those of the department. As such, DOT has delegated the responsibility for identifying, categorizing, tracking, and reporting on congressional directives to its operating administrations.

The Federal Highway Administration (FHWA) is responsible for the highway program, and the Federal Transit Administration (FTA) is responsible for the transit program. While FHWA and FTA carry out some activities directly, they, like many other DOT operating administrations, do not have direct control over the vast majority of the activities they fund through grants, such as constructing transportation projects. The recipients of transportation funds, such as state departments of transportation, are responsible for implementing most transportation programs and congressional directives. The federal highway and transit programs are typically funded through multiyear authorization acts, such as the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) and its predecessor, the Transportation Equity Act for the 21st Century (TEA-21).² These authorization acts, which are subject to the annual appropriations process, set the upper funding limit for the federal highway and transit programs. Both the authorization and appropriations acts contain congressional directives for the federal highway and transit programs. See figure 2 for additional information on the mission and organizational structure of FHWA and FTA.

¹The operating administrations are the Federal Aviation Administration, Federal Highway Administration, Federal Motor Carrier Safety Administration, Federal Railroad Administration, Federal Transit Administration, Maritime Administration, National Highway Traffic Safety Administration, Pipeline and Hazardous Materials Safety Administration, Research and Innovative Technology Administration, and Saint Lawrence Seaway Development Corporation. In addition, the Surface Transportation Board, which has jurisdiction over such areas as railroad rate and service issues and rail restructuring transactions, is an economic regulatory agency that is decisionally independent but administratively affiliated with DOT.

²Pub. L. No. 109-59 and Pub. L. No. 105-178, as amended.

Figure 2: Mission and Structure of FHWA and FTA

FHWA

FHWA provides financial and technical support to states and localities for constructing, improving, and preserving the national highway system through its headquarters office and 52 federal-aid division offices (division offices). Division offices are located in every state, as well as the District of Columbia and Puerto Rico, and provide front-line delivery assistance in the areas of highway transportation and safety services.

FTA

FTA supports locally planned and operated mass transit systems throughout the United States through its headquarters office and 10 regional offices. The regional offices work with local transit officials in developing and processing grant allocations, providing technical assistance, and monitoring projects.

Source: DOT.

Definitions FHWA and FTA Used for Identifying and Tracking Congressional Directives

DOT's definition of congressional directives, which it refers to as earmarks, has remained generally consistent over a number of years and mirrors OMB's definition. Although DOT has not issued guidance on the definition of earmarks to its operating administrations, DOT officials said that they expect the operating administrations to follow OMB's definition. Although FHWA's and FTA's definitions are generally consistent with OMB's definition, there are a few differences, specifically:

- FHWA defines earmarks as designations that specify a recipient, purpose, and total funding amount. FHWA officials told us that they consider their definition narrower in scope than OMB's definition because OMB does not require an earmark to contain all three elements (i.e., recipient, purpose, and total funding amount). FHWA distinguishes between statutory designations that are binding on the agency and nonstatutory designations identified in congressional reports that are not binding on the agency. FHWA officials did not change their definition of earmarks after the release of OMB's guidance in 2007. FHWA officials told us that they honored fiscal year 2007 statutory designations and handled nonstatutory designations in accordance with the OMB guidance.
- FTA defines earmarks as any project given specific designation in law or conference reports, with the understanding that FTA is not legally bound to honor projects designated in conference reports only. FTA officials told us that they consider their definition broader in scope than OMB's definition because FTA tracks all congressionally designated projects, including projects requested in the President's Budget. For example, FTA's

definition would capture New Starts projects,³ which are typically designated in both the President's Budget and legislation. OMB's definition would not capture the New Starts projects, if the projects and funding levels designated by Congress match the projects and funding levels designated in the President's Budget.⁴ FTA officials did not change their definition of earmarks after the release of OMB's guidance in 2007.

FHWA and FTA Processes for Identifying and Categorizing Congressional Directives

DOT has delegated the responsibility for identifying and categorizing congressional directives to its operating administrations. FHWA has further delegated the responsibility for identifying and categorizing congressional directives to its program offices.⁵ For example, the Office of Infrastructure is responsible for identifying congressional directives in the High Priority Projects program⁶—which falls under this office's purview. When identifying congressional directives, FHWA categorizes them as statutory, nonstatutory, or hybrids.⁷

Unlike FHWA, the responsibility for identifying and categorizing congressional directives for all FTA programs is centralized within FTA's Office of Program Management.⁸ When identifying congressional directives, FTA's Office of Program Management categorizes them as statutory or nonstatutory. This office also compiles and publishes the list of congressional directives in the annual *Federal Register* notice on

³The New Starts program is the federal government's primary financial resource for supporting locally planned, implemented, and operated transit guideway capital investments, including heavy, light, and commuter rail; ferry; and certain bus projects.

⁴FTA reported New Starts projects for which Congress allotted more money than requested in the President's Budget as earmarks to OMB.

⁵FHWA has 13 program offices within headquarters that deal with specific issue areas. Examples of program offices include the Office of Infrastructure, Office of Safety, and Office of Federal Lands Highway.

⁶The High Priority Projects program administered by FHWA provides designated funding for congressionally directed projects.

⁷A statutory earmark is in legislation passed by both Houses of Congress and signed by the President. A nonstatutory earmark is in a report, such as a committee or conference report, that accompanies the legislation but was not enacted into law itself. A hybrid earmark is contained in both statutory and nonstatutory sources—for example, a directive in legislation that refers to a project identified in a nonstatutory source.

⁸FTA's Office of Chief Counsel and Office of Budget and Policy also provide assistance as needed.

apportionments and allocations.⁹ Both FHWA and FTA officials told us that they comply with nonstatutory congressional directives that meet eligibility requirements to the extent possible—although they are not required to do so.

FHWA and FTA Processes for Tracking, Implementing, and Reporting on Congressional Directives

FHWA uses an electronic system to track congressional directives. FHWA's Office of the Chief Financial Officer and program offices collaborate to track most congressional directives.¹⁰ Staff in FHWA's Office of the Chief Financial Officer enter projects into the tracking system after receiving requests from program offices for project identification numbers. Once congressional directives are entered into the system, they are not tracked separately from other projects, such as those funded by formula.¹¹ The program offices then send memorandums to FHWA division offices to notify them of the total amount of funds available for each project. Officials from FHWA division offices and state departments of transportation with whom we spoke have access to FHWA's system and may also track congressional directives using their own systems. Officials in these offices said that they also maintain their own tracking systems to improve their staff's and the public's access to data and to corroborate data in the federal tracking system.

FTA also uses an electronic system to track congressional directives. Officials in FTA's Office of Program Management enter congressional directives into their electronic tracking system after the list is published in the annual *Federal Register* notice on FTA's apportionment and allocations. FTA's electronic system allows users to search by fields such as recipient, amount, year, and name of the project and track the status of a particular project through its implementation. FTA officials noted that although the electronic system was implemented in 2001 to manage all of FTA's grant programs, the module for tracking congressional directives

⁹Federal Transit Administration Fiscal Year 2007 Apportionments and Allocations and Program Information, *Federal Register*, vol. 72, no. 56, March 23, 2007.

¹⁰Officials from FHWA's Research and Technology Division track the congressional directives for their program on a separate spreadsheet.

¹¹Because FHWA assigns a project identification number to each congressional directive, it has the ability to track them either individually or as a group.

was added to the system in 2006, in part, to track what they described as the growing number of congressional directives.¹²

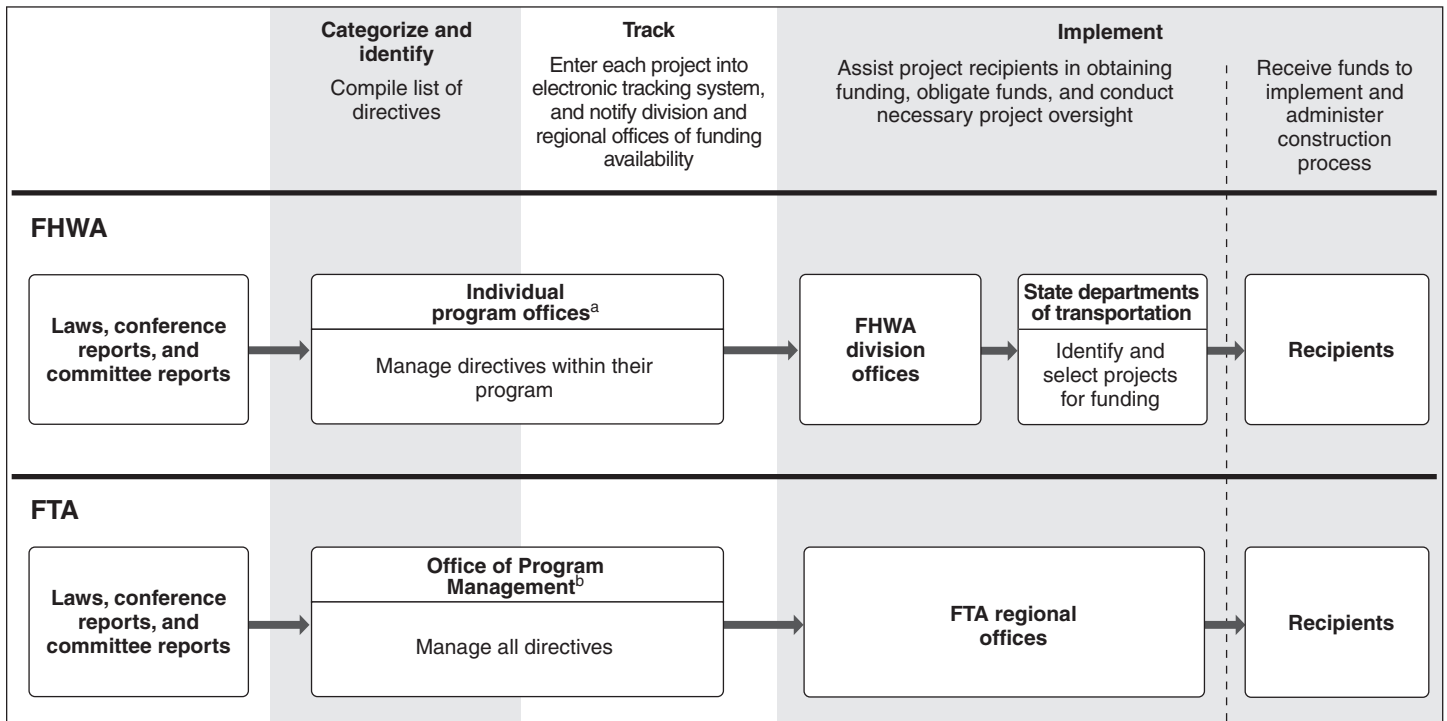
FHWA and FTA do not typically implement congressionally directed projects. Rather, they provide funds through grants, and state and local agencies generally implement the highway and transit congressional directives in carrying out their programs.¹³ Specifically, FHWA division offices and FTA regional offices administer and obligate funds for projects, including congressionally directed projects, to grant recipients and respond to questions from recipients on issues related to eligibility and transferability, among other things. In turn, the grant recipients implement congressional directives. Figure 3 illustrates the processes used by FHWA and FTA to identify, track, and implement congressional directives.

¹²FTA regional offices also have access to the electronic system.

¹³An exception to state and local implementation of congressionally directed projects is FHWA's and FTA's research programs. Both agencies directly implement these programs and, as such, are responsible for carrying out the congressional directives associated with these programs.

**Section 4: Department of Transportation:
Highways and Transit**

Figure 3: FHWA and FTA Processes for Administering Congressional Directives



Source: GAO analysis.

Note: FHWA and FTA do not typically implement congressionally directed projects. Rather, they provide funds through grants, and state and local agencies generally implement the highway and transit congressional directives by carrying out their programs. However, congressional directives in the FTA and FHWA research programs are tracked and administered at headquarters.

^aFHWA’s 13 program offices provide policy and program implementation in each of the administration’s issue areas, such as Safety, Federal Lands Highway, or Infrastructure.

^bFTA’s Office of Program Management administers a national program of capital and operating assistance and provides procedures and program guidance to assist field staff with grant program administration.

Neither DOT nor FHWA and FTA report to Congress on the implementation of congressional directives on a regular basis. According to DOT officials, the department does not have the resources to regularly report on congressional directives, noting that the number of directives would require significant staff time and resources to monitor for reporting purposes. Rather, DOT, FHWA, and FTA officials told us that they respond to congressional inquiries on directives when requested. Officials from FHWA and FTA cited several examples of communication with legislators, including responses to questions about project eligibility or status and requests for technical assistance. DOT also responds to what it refers to as

“clarification letters” that are periodically sent to DOT from congressional committees. These letters are jointly signed by the House and Senate appropriations subcommittees and provide clarification on how Congress would like to see directed funds used. DOT provides the responsible operating administrations, such as FHWA or FTA, with these letters and coordinates responses on whether the operating administration can comply with the request. In addition to responding to specific requests from congressional committees, DOT also communicates some general funding information on congressional directives to Congress. For example, as required by law, DOT notifies the relevant House and Senate Committees prior to announcing a discretionary grant, letter of intent, or full funding grant agreement totaling \$1 million or more. In addition, FTA reports to Congress at the end of each fiscal year on all projects with unobligated funds that have reached the end of their availability period.¹⁴

FHWA and FTA Officials’ Views on Trends and Impact of Congressional Directives

FHWA officials, as well as officials from the state departments of transportation with whom we spoke, stated that the number and value of directives, notably high-priority projects, increased substantially from TEA-21 (1998 to 2003)¹⁵ to SAFETEA-LU (2005 to 2009). FHWA officials provided documentation that showed that the number of High Priority Projects listed in SAFETEA-LU was almost triple that of the number of projects listed in TEA-21. FTA officials also stated that the number and value of authorization and appropriations directives in transit programs increased between TEA-21 and SAFETEA-LU.

FHWA, FTA, and state department of transportation officials with whom we spoke expressed a variety of views about the impact of the growing number of congressional directives on budget and program execution, including the following:

- FHWA and FTA officials said that congressional directives do not always support their program goals, particularly with respect to research. For example, FHWA officials told us that they had no flexibility in carrying out their research priorities because all funding for the surface transportation, research, development, and deployment programs was designated under

¹⁴Earmarked funds have a 3-year availability to the grantee.

¹⁵The period of authorization for TEA-21 was extended numerous times after its expiration until the passage of SAFETEA-LU in 2005.

SAFETEA-LU.¹⁶ FHWA officials further noted that congressional directives can be inconsistent with states' transportation priorities, particularly if the congressional directives are for projects outside of their statewide transportation programs.¹⁷ Officials from one state department of transportation noted that although many congressional directives in SAFETEA-LU were requested by the state, about one-third of the congressional directives did not have statewide benefits or serve an eligible highway purpose.

- A senior FTA official also noted that congressional directives may result in the displacement of projects that FTA views as being a higher priority and ready for implementation with projects that are a lower priority for FTA. For example, some New Starts congressional directives provide funding for projects that are not yet ready for implementation, delaying the implementation of FTA's higher-priority projects that are scheduled to receive federal appropriations.
- FTA officials said that roughly 85 to 90 percent of the congressional directives received in the New Starts program are for projects that FTA has recommended for funding in its budget. One FTA official also acknowledged that some congressional directives provide funding for projects that FTA has identified as priorities in its research program and were included in the President's Budget, although the majority of directives were not requested and displaced research activities FTA identified as being of higher priority.
- Officials from FHWA and FTA stated that congressional directives sometimes displace their priority transportation projects by providing funds for projects that would not have been chosen in a competitive selection process. For example, FHWA officials stated that some congressional directives listed in the Projects of Regional and National Significance¹⁸ program in SAFETEA-LU would not have qualified for

¹⁶In its review of earmarks within DOT programs, DOT's Inspector General also found that funding levels in excess of authorized amounts in some of FHWA's research programs disrupted FHWA's ability to fund these programs as designated, DOT's Inspector General, *Review of Congressional Earmarks Within Department of Transportation Programs* (Washington, D.C.: 2007).

¹⁷States must amend their Statewide Transportation Improvement Programs and obtain approval from FHWA and FTA in order to implement congressional directives that were not included in the programs.

¹⁸The Projects of National and Regional Significance program provides funding for high-cost projects of national or regional importance such as projects that improve economic productivity, facilitate international trade, relieve congestion, and improve safety.

funding in a merit-based selection process.¹⁹ FTA officials also told us that congressional directives sometimes provide funding for projects that would otherwise be considered ineligible, such as directives to construct parking garages with transit funding.

- Officials from FHWA division offices and FTA noted that in some cases, the language of congressional directives makes it difficult to implement projects. For example, an official from one FHWA division office noted that some congressional directives for the state contained language that was either too specific and was therefore inconsistent with the purposes and objectives of the local sponsor or contained language that made the project ineligible because it did not meet certain federal regulations. According to agency officials, in these cases, a technical corrections bill must be passed before the projects can be implemented, delaying implementation of the projects.
- Officials we spoke with from three state departments of transportation also noted that inflexibilities in the use of congressionally directed funds limit the states' ability to implement projects and efficiently use transportation funds by, for example, providing funding for projects that are not yet ready for implementation or providing insufficient funds to complete particular projects.
- An official from one state department of transportation noted that although congressional directives can create administrative challenges, they often represent funding that the state may not have otherwise received.
- FHWA and FTA officials noted that the growth in the number of congressional directives has increased the time and staff resources needed to identify and track projects. For example, FHWA officials noted that relative to their proportion of the budget, they devote a higher percentage of time to administering congressional directives than other projects. Similarly, officials from FHWA division offices stated that they spend a substantial amount of time working with the state to determine whether projects meet federal eligibility requirements, respond to questions of transferability, and provide assistance to the state for projects that were not included in their state transportation plan. FTA officials noted that some recipients of a congressional directive are unaware of the directive and may decide to use the grant for another purpose, making it difficult to obligate funds within the 3-year availability period.

¹⁹In September 2007, DOT's Inspector General also reported that a few of the fiscal year 2006 earmarks in this program did not meet statutory program criteria but were permitted because of a provision in SAFETEA-LU that directed that funds be allocated to these projects notwithstanding the program criteria set forth elsewhere in the statute for the program.

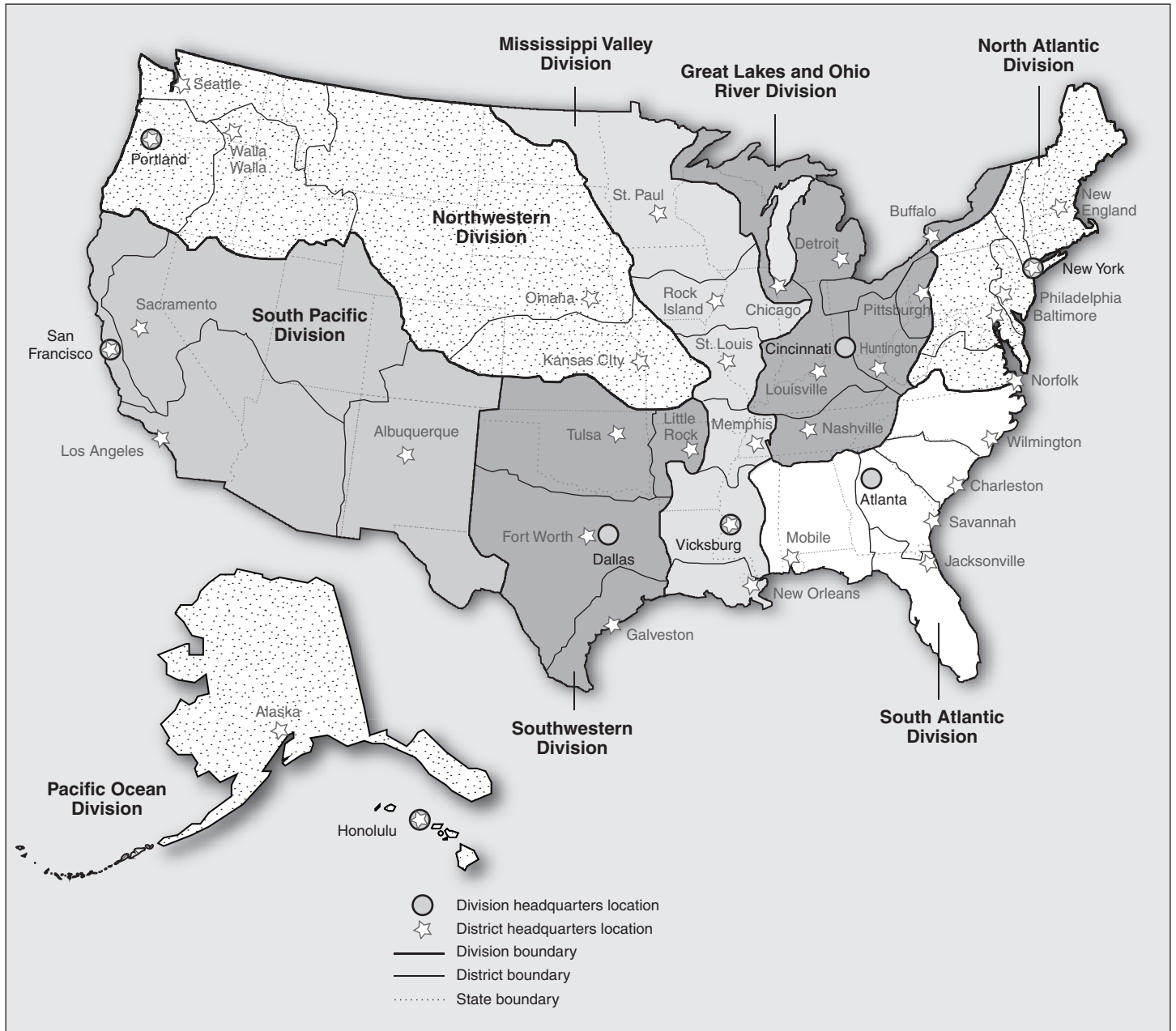
Section 5: U.S. Army Corps of Engineers' Civil Works Programs

Through its Civil Works programs, the U.S. Army Corps of Engineers (Corps) investigates, develops, and maintains water and related environmental resources throughout the country to meet the agency's navigation, flood control, and ecosystem restoration missions. Headquartered in Washington, D.C., the Corps has eight regional divisions and 38 districts that carry out its domestic civil works responsibilities.¹ Figure 4 shows the Corps' divisions and districts.

¹The Corps is also charged with a military mission that includes, among other things, managing and executing engineering, construction, and real estate programs for DOD components and other government entities.

Section 5: U.S. Army Corps of Engineers' Civil Works Programs

Figure 4: U.S. Army Corps of Engineers' Civil Works Divisions and Districts



Source: GAO representation of U.S. Army Corps of Engineers data.

Unlike many other federal agencies that have budgets established for broad program activities, both the President's Proposed Budget and congressional authorizations and appropriations designate most Corps' Civil Works funds to be used for specific projects. Specific projects fall mainly into three categories—investigations,² construction, and operations and maintenance. Generally, nonfederal sponsors share the costs of planning and constructing projects with the Corps.³ Through the conference report that accompanies an appropriations act, Congress provides the Corps with its priorities for accomplishing its water resources projects.

Definition Corps Civil Works Used for Identifying and Tracking Congressional Directives

The Corps has identified congressional directives for many years for project implementation purposes. The Corps has used the term adds to identify some congressionally directed projects. According to Corps budget officials, congressional directives are defined by the agency as any of the following changes to requests made in the President's Budget:

- an increase or decrease in funding levels for a budgeted project,
- the funding of a project that was not included in the President's Budget, and
- any project that has language in a committee or conference report or in statute that restricts or directs the Corps on how to spend funds.

Corps officials told us that this definition is consistent with the definition of earmarks in OMB's 2007 guidance, except that an earmark is a restriction or specification on the use of funds, while a congressional directive can be simply an increase or decrease in funding for a budgeted project. For project implementation purposes, the Corps has continued to identify congressional directives in the same manner as it did before OMB issued its guidance.

To respond to the OMB request for information on fiscal year 2005 earmarks, the Corps assigned a program manager to conduct a separate exercise to identify earmarks as defined by OMB. Corps officials told us

²Investigations are studies to determine the need for and the engineering, feasibility, economic justification, and environmental and social suitability of a project. Investigations include activities related to preconstruction, engineering, design work, data collection, and interagency coordination and research.

³Nonfederal sponsors generally assume responsibility for operating and maintaining most projects.

that a separate effort was needed because (1) OMB required information that was not available from the Corps' normal process for identifying congressional directives and (2) the Corps had only a short time to respond to the request. The program manager responsible for responding to OMB identified the fiscal year 2005 earmarks using appropriations bills and conference reports. To complete the OMB request, the program manager supplemented this information with some project-level details, such as the name of the nonfederal sponsor, which the manager obtained from the relevant districts, according to Corps officials. These officials also said that the results of the program manager's work were reviewed by Corps managers before the information was submitted to OMB.

Corps Civil Works' Process for Identifying and Categorizing Congressional Directives

The Corps identifies all congressional directives included in appropriations statutes, bills, and related conference reports each year and routinely makes this information available to its headquarters and division and district staff, according to Corps officials. With the assistance of the district offices, officials in each of the Corps' divisions develop spreadsheets identifying the congressional directives in their region by examining the language in appropriations committee reports, the conference report, and the appropriations statute and comparing this language to the President's Budget. According to Corps budget officials, most congressional directives receive no special attention because they are generally categorized as being in compliance with the Administration's budget policy and the Corps' policy (i.e., increased funding provided to projects included in the President's Budget).

However, Corps officials said that about 10 to 20 percent of the total number of directives identified in any given year need further discussion on how they should be implemented. According to Corps officials, these directives generally involve projects for which (1) the directive or an aspect of the directive may not be consistent with the Administration's budget policy or (2) the Corps does not have enough information to make this determination. For example, in one instance, language in an appropriations statute directed the Corps to construct a dike on a river as a flood control project, even though the project's benefits might not exceed its costs. Further, the statute directed the Corps to give the nonfederal sponsor credit for the amount already paid into the project. The Corps considered this directive to be contrary to its policies that call for the Corps to

- support projects where the benefits exceed the costs or

- not provide the nonfederal sponsor with credit for work completed before the nonfederal sponsor enters into an agreement with the Corps.

For the congressional directives that require additional discussion on how the Corps will implement the projects, the divisions prepare fact sheets.⁴ Table 1 shows the various types of information provided with each fact sheet.

Table 1: Data Fields and Summaries of the Information Provided on the Corps' Fact Sheet

Data fields	Summary of information provided
Project name and state	Provides the project's name and geographic location
Congressional direction source	Indicates the page number of the language providing congressional direction in committee reports, conference report, or statute
Description of directed work	Provides the amount of funds and, if applicable, any direction/restriction placed on that directed amount
Authorization	Identifies the section of the public law where the project was initially authorized and subsequently amended
Decision document	Describes Corps analysis supporting certain activities or work for an authorized project
Relationship to executive branch policy	Classifies a congressional directive as either being consistent, questionable, or inconsistent and provides reasons for this classification
Congressional interest	Identifies members' names and their districts
Summarized financial data	Includes such data as estimated total project cost, allocations through the previous fiscal year, budget request and conference amount for the current fiscal year, and amount needed to complete the project after the current fiscal year
Recommended implementation plan for directed work	Describes how the directed (or redirected) funds will be used

Source: GAO analysis of Corps data.

According to Corps officials, the fact sheets contain recommended implementation plans that detail how the agency will spend the appropriated funds for a specific congressional directive. Each division

⁴In a few instances, Corps headquarters or the Office of the Assistant Secretary of the Army for Civil Works may request that a division prepare a fact sheet if either one determines that a congressional directive deserves further discussion.

submits all prepared fact sheets with the recommended implementation plans to Corps headquarters and the Office of the Assistant Secretary of the Army for Civil Works for their review. Each division then has a teleconference with these headquarters officials to discuss and approve the plans. Most implementation plans are completed at this stage.

For the fact sheets with unresolved issues, each division holds a videoconference with officials from headquarters and the Assistant Secretary's office. Attendees for each videoconference include senior executives from the Corps and the Office of the Deputy Assistant Secretary of the Army for Management and Budget. After this videoconference, each division incorporates changes to its implementation plan and resubmits it for final approval by headquarters and the Assistant Secretary.

Corps headquarters releases the associated funding for all projects to the districts immediately after the agency receives its appropriation. Corps officials said that while the implementation plans are being discussed for projects with unresolved issues, the districts may obligate funds for certain activities that do not conflict with Administration budget policy or Corps policy. Once the implementation plans are completed, the districts will continue to execute remaining aspects of the plans.

However, according to a Corps official, there are a few instances in which the Corps does not execute the project. These instances may occur, for example, when (1) funds are appropriated for the project, although funds had not previously been authorized; (2) the project was authorized, but the authorized spending limit had already been reached; or (3) the Corps was directed to continue a feasibility study, but the agency found that the least costly alternative was to relocate the affected facilities and the local sponsor was not interested in continuing the study. In such situations, the districts are generally responsible for informing individual Members of Congress about the decisions affecting their respective jurisdictions, and Corps headquarters notifies the relevant congressional committees.

Corps Civil Works' Process for Tracking, Implementing, and Reporting on Congressional Directives

According to Corps officials, the Corps does not have a separate approach for tracking, implementing, and reporting on projects generated from congressional directives. Instead, all projects are managed in the same manner for tracking, implementation, and reporting purposes. The procedures are detailed in a manual that establishes the Corps' project management practices.⁵ For example, all Corps projects require a written project management plan that details how the project will be accomplished. A Corps official stated that the process does not include a distinct method for reporting on the status of directives to Congress or any of its committees or members.

Corps Civil Works Officials' Views on Trends and Impact of Congressional Directives

The Corps does not analyze trends in congressional directives, and there was no consensus among the officials we spoke with on trends in the number of these directives. While some Corps officials told us that they believe the overall number of congressional directives has remained at about the same level for the last decade, another Corps official told us that he believes the number of congressional directives has increased throughout the decade. This official stated that in recent years Congress has added a number of projects that the Corps labels as "environmental infrastructure projects" that are outside the scope of the Corps' historic missions. Those projects included building sewage treatment plants and water supply facilities, revitalizing local waterfronts, and maintaining waterways primarily for local recreation. The Chief of the Programs Integration Division, who is responsible for the Civil Works budget, estimated that these types of congressional directives are a small portion of the Corps' Civil Works program budget.

Corps officials we interviewed also did not have a consistent view about the impact of congressional directives on the Corps' budget and program execution.⁶ Some Corps officials said they believe that congressional directives have not had a serious impact on the Corps, except to increase its budget and resulting activities. However, other officials described the following impacts of congressional directives on the Corps' ability to execute its mission:

⁵The *Project Management Business Process* identifies the scope, schedule, and resources needed to accomplish project execution.

⁶While we talked with officials at various levels who are knowledgeable about the budgetary process and the Corps' use of appropriations, these officials' views were not necessarily representative of the views of all Corps officials.

- If the Corps categorizes a congressional directive as being inconsistent with the Administration or Corps policy, the Corps will not budget for the project in subsequent fiscal years. Officials said that they believe this could potentially increase the Corps' backlog of incomplete projects.
- Congressional directives are more difficult to plan and schedule for execution in advance compared with projects included in the President's Budget. Officials said that this is because it is more difficult to develop an accurate project timeline because of the greater uncertainty about future funding levels for these projects.
- Congressional directives may make it more difficult for the Corps to predict and manage full-time equivalent (FTE) levels and allocations from year to year.⁷ Even though congressional directives increase the Corps' budget authority, the Corps generally establishes FTE levels using the President's Budget much earlier in the year. Because the number and regional focus of congressional directives can change from year to year, the Corps faces some uncertainty about whether it will have adequate staff in the right locations to manage the project workload of each district in response to the changing nature of the congressional directives.

⁷An FTE generally consists of one or more employed individuals who collectively complete 2,080 work hours in a given year. Therefore, either one full-time employee or two half-time employees equal one FTE.

Appendix I: Objectives, Scope, and Methodology

Our objectives were to identify for selected agencies (1) the process for identifying and categorizing congressional directives; (2) the process for tracking, implementing, and reporting on congressional directives; and (3) agency officials' views on the trends and impact of congressional directives. The selected agencies were the Department of Defense (DOD), the Department of Energy (DOE), the Department of Transportation (DOT), and the U.S. Army Corps of Engineers' Civil Works programs (Corps).¹ These agencies cover a range of characteristics concerning congressional directives, including the number of congressional directives.

DOD received the largest number of reported congressional directives and made up 55 percent of discretionary appropriations for fiscal year 2006. We focused our review on the relationship between the Office of the Secretary of Defense's Comptroller and the components (i.e., military services, defense agencies, and combatant commands) and how the components internally process and account for congressional directives.² Specifically, we focused on the Army, Navy, Marine Corps, and Air Force; the Defense Information Systems Agency and the Defense Threat Reduction Agency; and the U.S. Special Operations Command.

DOE generally receives congressional directives in reports that accompany annual appropriations acts. Congressional directives are spread across DOE's programs, with some programs reporting that congressional directives make up a large portion of their budgets. We focused our review on the following program offices that oversee the majority of DOE's congressional directives: the National Nuclear Security Administration (NNSA), the Office of Energy Efficiency and Renewable Energy (EERE), the Office of Electricity Delivery and Energy Reliability, and the Office of Science.

DOT receives congressional directives contained in multiyear transportation authorization acts. We focused our review on the surface transportation programs administered by the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA)

¹The Corps is part of the Army that has military and civilian responsibilities. The military programs provide engineering, construction, and environmental management services for DOD agencies. In this report, the military programs are covered in our discussion on DOD, and the Civil Works programs are discussed separately.

²Organizationally, each component has its own internal legislative support to assist the component in determining, if necessary, congressional directives.

because of the level of funding authorized in the current surface transportation authorizing legislation, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), and the number of congressional directives contained in this legislation for these programs.

The Corps' Civil Works programs maintain a wide range of water resources projects, including flood protection, navigation, or other water-related infrastructure. Under some definitions of directives, the Corps' appropriations could be characterized as consisting largely of directives.

We assessed the reliability of the agencies' data on congressional directives tracking by speaking with knowledgeable officials using a common set of questions about their past and current definitions of congressional directives for purposes of identifying and tracking such directives. We learned that the definitions—both across and, sometimes, within agencies—were not consistent. Therefore the data cannot be used for making comparisons across agencies or showing trends over time, nor can the data from different agencies be aggregated.

This review provides information on the processes described to us by officials at the selected agencies. The information provided is not generalizable beyond the four agencies. In addition, we did not evaluate the agencies' processes for compliance with the Office of Management and Budget's (OMB) guidance on earmarks, memorandum M-07-09.³

To identify the selected agencies' processes for identifying and categorizing congressional directives, we first had to determine how they identified directives (i.e., how they defined them) as well as whether the definition changed after the January 25, 2007, issuance of the OMB guidance.

We determined the extent to which the agencies had established processes for identifying and categorizing congressional directives (e.g., by organization, program, location, statute or report, type of directive, or type of impact). To do so, we reviewed the selected agencies' policies and guidance for identifying and categorizing congressional directives,

³In its guidance, OMB directs federal agencies to submit data for fiscal year 2005 in appropriations bills and certain authorization bills, including report language, to provide a transparent baseline. This baseline is to provide a way to measure the President's January 2007 direction to Congress for reducing the number and cost of earmarks by at least half.

including the source of these directives before fiscal year 2007 (e.g., statute or conference report). We also interviewed knowledgeable agency officials in budget, program, and congressional affairs offices.

At DOD, we interviewed officials from the Office of the Secretary of Defense Comptroller's office and budget officials from components to obtain information on how congressional directives are implemented as well as to obtain their views on the impact of congressional directives on their budget and program execution. We also interviewed officials responsible for legislative affairs who support budget officials in determining congressional intent of congressional directives.

At DOE, we spoke with officials from NNSA, the Office of Science, EERE, the Office of Electricity Delivery and Energy Reliability, and the Office of Budget in the Office of the Chief Financial Officer. We also spoke with officials from some of the site offices that help the program offices implement and track congressional directives.

At DOT, we spoke with officials from the Office of the Secretary, FHWA, and FTA. Because implementation is handled at the division and state levels, we also interviewed officials from FHWA division offices and state departments of transportation in Alaska, Florida, and Maine. We selected the division offices and states to interview based on the number of congressional directives in SAFETEA-LU as well as the level of oversight and involvement of those division offices and states in the administration of congressional directives.

At the Corps, we spoke with the Chief of the Programs Integration Division, who is responsible for the Civil Works budget, and other officials responsible for identifying earmarks for OMB and congressional directives for the Corps' routine management process.

To identify the selected agencies' processes for tracking, implementing, and reporting on congressional directives, we reviewed agency documents related to available data or databases used for tracking and reporting on congressional directives. We also reviewed agency guidance or written protocols to demonstrate actions taken to implement congressional directives. In addition, we also interviewed the relevant agency officials from the units of the selected agencies we previously discussed.

To obtain their views on the trends and impact of congressional directives on agency programs, we spoke with knowledgeable agency officials from the selected agencies using similar questions. Because we assessed

agencies' data on congressional directives to be insufficiently reliable for the purposes of comparing across agencies and showing trends over time, we could not analyze trend data.

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