



# Memorandum

Subject: **GUIDANCE – ACTION:** Repurposing of Earmarks FY 2023

Date:

From: Brian R. Bezio  
Chief Financial Officer

To: Associate Administrators  
Division Administrators  
Division Directors

The Department of Transportation Appropriations Act, 2023, allows States and territories to repurpose certain funds originally earmarked for specific projects more than 10 fiscal years prior to FY 2023. This memorandum provides the implementing guidance for this provision.

Except for the statutes and regulations cited, the contents of this memorandum do not have the force and effect of law and are not meant to bind the public in any way. This memorandum is intended only to provide clarity to States and territories regarding existing requirements under the law or agency policies.

## **Background**

Section 124 of the Department of Transportation Appropriations Act, 2023 (Public Law 117-328, division L, title I) (hereinafter “Repurposing Provision”) provides the authority for a State or territory (hereinafter “State or States”) to repurpose any earmark that was designated on or before September 30, 2012 and is less than 10 percent obligated or final vouchered and closed. The repurposed funds may be obligated on a new or existing project in the State within 25 miles of the earmark designation. The project must be an eligible project under the Surface Transportation Block Grant Program (STBG) (23 U.S.C. 133(b)), or the Territorial and Puerto Rico Highway Program (THP) (23 U.S.C. 165). The Repurposing Provision is available to be applied in fiscal year (FY) 2023.

## **Earmark Eligibility for Repurposing**

For an earmark to be eligible for repurposing, it must meet **all** of the following conditions under the Repurposing Provision:

- ***Meets the definition of an earmark.*** Under the Repurposing Provision, an “earmarked amount” is defined as congressionally directed spending<sup>1</sup> identified in a prior law, report, or joint explanatory statement, which was authorized to be appropriated or appropriated more than 10 fiscal years prior to the current fiscal year and administered by the Federal Highway Administration. This definition includes any discretionary program funding (e.g., Ferry Boat Discretionary, Interstate Maintenance Discretionary, Bridge Discretionary, etc.) that was congressionally designated to a specific project identified in a report accompanying legislation such as appropriations acts. Previously earmarked funding that no longer meets the definition of an earmark due to being repurposed under the FY 2016 through FY 2022 provisions is not eligible.
- ***Authorized or designated on or before September 30, 2012.*** This includes Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Public Law 109-59) earmarks which were authorized in FY 2005 but were allocated from FY 2005 through FY 2011. This includes applicable earmarks for which the description was subsequently revised by Congress.
- ***Administered by FHWA.*** Projects administered by other Federal agencies are not eligible for consideration. However, if the project was completed by another Federal agency and excess funding for the earmark is retained by FHWA, the excess funding may be repurposed.
- ***Less than 10 percent obligated, or the project has been completed and closed.*** Except as provided below, the earmark must have less than 10 percent obligated, of the funds made available, as of October 1, 2022. Funds may not be deobligated after that date to meet this threshold.

Under the Repurposing Provision, if, as of October 1, 2022, a State has obligated 10 percent or more of the funds originally made available for an earmark, all projects that used the earmarked funds must have final voucher of payments processed and closed in the Fiscal Management Information System (FMIS) for the remaining unobligated earmark funds before the repurposing request is submitted by the State for the earmark to be eligible for repurposing. Project closure may occur at any time before the deadline for repurposing earmarks. All of the funds deobligated from the closed project(s) for the earmark should be included in the repurposing.

A list of earmarks with unobligated funds that may be eligible for repurposing is available at <https://www.fhwa.dot.gov/cfo/earmarkrepurposing/>. The list may not include the universe of earmarks that will be eligible under the provision. However, it will give States a good idea of the projects that may be considered. States should work with their FHWA division office to ensure all earmarks and allocated funds listed or otherwise identified meet the repurposing

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<sup>1</sup> The Repurposing Provision defines “congressionally directed spending” in reference to Rule XLIV of the Standing Rules of the Senate and Rule XXI of the Rules of the House of Representatives. The House and Senate Rules define “congressionally directed spending” as a provision or report language “providing, authorizing or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity, or targeted to a specific State, locality or Congressional district, other than through a statutory or administrative formula-driven or competitive award process.”

eligibility criteria and to confirm the amount of funds available. If additional earmarks are identified that are not on the list, the FHWA division office should contact the appropriate program office to determine if they are eligible for repurposing.

### **Requirements for Obligating Repurposed Funding**

Under the Repurposing Provision, the following criteria must be met to obligate funding that has been repurposed from an earmark to one or more new or existing projects:

- ***Type of Project.*** The repurposed funding must be obligated on an STBG (for States) or THP (for Puerto Rico or territories) eligible project.
- ***Location of Project.*** The project(s) receiving the repurposed funding must be within the State that received the original earmark and within 25 miles of the original earmark description. If the earmark was for a geographic area (e.g., city, county, corridor), a project will be considered to meet this location requirement if it is within 25 miles of the area's boundary.
- ***Period of Availability.*** The repurposed earmark funds must be obligated on or before September 30, 2026.
- ***Federal Share.*** The applicable maximum Federal share for obligating the repurposed earmark funds is the same as originally provided for the earmark funds.

### **Other Requirements**

The State should identify the corresponding amount of applicable special or allocated obligation limitation to be transferred with the earmark, if available. Earmarks with insufficient associated limitation available (i.e., excess funds) should use the State's annual formula obligation limitation when obligating those repurposed funds. Most earmarks will have less associated special or allocated limitation than funding and, therefore, will require some amount of formula limitation to obligate the excess repurposed funds. Note that annual formula obligation limitation is not actually used until the funds are obligated to a project, so the repurposing process does not impact the available balance of formula limitation.

To ensure a project meets the requirements under the Repurposing Provision, the State must identify specific projects (i.e., location and scope of work) for the repurposed funding and should repurpose the full unobligated balance of the earmark available as of the date of the repurposing request. Repurposed funds may be identified for one or more new or existing projects, or any combination thereof. The State should identify the specific amount for each project when the request to repurpose is made. Based on the definition of "earmarked amount" in the Repurposing Provision, once funds are repurposed for a specific project, the funds may not be changed to a different project at a later date since the project no longer meets the definition of "earmarked amounts" in the Repurposing Provision. Cost underruns released from one Federal-aid agreement may be obligated for increased costs only on a different project previously identified at the time of repurposing for the same earmark.

Any repurposing requests of pre-Bipartisan Infrastructure (BIL) apportioned funding tied to Delphi fund value 15X0100050 (e.g., program codes 1130, 1570, 2200, and 2210) are subject

to the guidelines in the “Obligation of Apportioned Funding in Pre-Bipartisan Infrastructure (BIL) Program Codes” memo dated February 21, 2023 and will count against the State’s 5% threshold (see FAQ #3).

### **Process for Requesting and Approving Repurposing**

The State, FHWA division office, and the FHWA Office of the Chief Financial Officer (HCF) will process earmark repurposing requests as provided in the attached procedures using a modified transfer request form (FHWA-1575 (ERP 2023)). The Division Administrator’s (DA) review and approval of a State’s repurposing request constitutes FHWA’s concurrence that (1) the repurposed earmark request meets the criteria for repurposing, and (2) any new proposed projects are STBG (or THP) eligible, within 25 miles of the earmark description, and within the State. The division office submits the DA-approved repurposing request to HCF for verification. HCF will (1) ensure there is accurate and complete financial information necessary to process the request and (2) process the request if valid. If HCF review finds inaccurate or incomplete financial information on the request, HCF will contact the State via the division office to revise and resubmit the request as appropriate.

The State may submit a request to repurpose at any time prior to the submission deadlines. The submission deadlines will ensure State requests are revised and approved by the end of the fiscal year and processed in a timely manner. Each FHWA division office should work with its respective State to ensure the division office has adequate time to review, approve, and submit all modified transfer forms prior to the submission deadlines:

- If the State intends to obligate the repurposed funds before the end of the fiscal year, HCF will need to receive the completed request for repurposing from the FHWA division office by August 25, 2023.
- If the State does not intend to obligate the repurposed funds before the end of the fiscal year, HCF will need to receive the completed request for repurposing from the FHWA division office by September 8, 2023.

If the funds to be repurposed are not currently available in FMIS, the State should notify their FHWA division office in writing of their intent to repurpose such funds at least 30 days before the above deadlines. States should prioritize these requests to allow for adequate time to complete the additional steps required to repurpose. The division office must contact the appropriate FHWA program office to allocate the funds and applicable obligation limitation in FMIS, if available, following normal procedures, noting that the purpose is for repurposing the earmark. If no Demo ID (a unique identifier assigned to an earmark) exists for the earmark, the program office must also create one and identify it in the allocation memo (see Attachment 1 for additional information). Once the funds are allocated in FMIS and a Demo ID is provided, the State may then submit the request to repurpose the funds on the modified transfer form to the division office. The State should include the Demo ID from the allocation memo on the transfer form.

FHWA may not consider repurposed funding requests that do not contain the required information or are not received by the submission deadline.

## **Required Congressional Annual Report on Repurposed Earmarks**

After the funds are repurposed, the States must provide an annual report to FHWA on the identified projects as required in the Repurposing Provision. HCF will consolidate the information and submit the final annual report to Congress. Please see the “Annual Report” section of Attachment 1 – FY 2023 Earmark Repurposing Process for more information on the required annual report.

### **Additional Information**

We will provide FAQs on FHWA’s Repurposing website. If you have specific questions, please direct them to the “Repurposed Earmarks” mailbox (RepurposedEarmarks@dot.gov).

cc: Chief Counsel  
Directors of Field Services

#### **Attachments:**

Attachment 1 – FY 2023 Earmark Repurposing Process

Attachment 2 – Modified Transfer Request Form (FHWA-1575 (ERP 2023))