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Energy

ADVISORY

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A Summary of Key Energy and Environmental Provisions of the American Recovery and Reinvestment Act of 2009

On February 13, 2009, Congress passed the American Recovery and Reinvestment Act of 2009 ("the Act"), and President Barack Obama signed it into law on February 17, 2009.[1] The Act contains approximately $787 billion in federal spending and tax provisions. Of that total, approximately 65 percent is appropriations and 35 percent is tax incentives.

Renewable and clean energy, electric transmission, energy efficiency, clean technology, and environmental provisions are a significant part of this massive and unprecedented stimulus package. The Act includes approximately $45 billion in energy appropriations and $22 billion in energy tax incentives.[2]

The following summary highlights what Covington & Burling LLP considers to be the key energy and environmental provisions and is divided into the following topics: (A) State and Local Energy Efficiency and Renewable Energy Grants; (B) Energy Loan Guarantee and Bond Programs; (C) Renewable and Clean Energy, Energy Efficiency, and Green Jobs; (D) Electricity Delivery and Energy Reliability; (E) Renovating Buildings and Homes; (F) Transportation-Related Technologies; (G) Environmental Cleanup and Clean Water; (H) Tax; (I) the "Buy America" provision; and (J) Accountability and Transparency. The summary concludes with brief observations about what's next.

If you would like to receive a copy of the Act or have any questions, please contact Bill Massey (wmassey@cov.com; 202.662.5322), Bob Fleishman (rfleishman@cov.com; 202.662.5523), or Dick Meserve (rmeserve@cov.com; 202.662.5304) at Covington & Burling LLP.

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[1] American Recovery and Reinvestment Act of 2009, H.R. Rep No. 111-16, as published in the Congressional Record on Feb.12, 2009 ("Act"). Unless otherwise indicated, all citations to the Act in this summary refer to this new law.
[2] http:/www.recovery.gov

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A. STATE AND LOCAL ENERGY EFFICIENCY AND RENEWABLE ENERGY GRANTS

1. ENERGY EFFICIENCY AND CONSERVATION BLOCK GRANT PROGRAM

Under the Act, $3.2 billion is provided for the Energy Efficiency and Conservation Block Grant Program, established pursuant to title V, Subtitle E, of the Energy Independence and Security Act, 42 U.S.C. § 17151 *et seq*. Of those funds, $2.8 billon is to be distributed by the Department of Energy through the statutory formula and the remaining $400 million is to be awarded on the basis of a competitive grants program.

Grants are awarded to projects that reduce fossil fuel emissions and energy consumption and improve energy efficiency within the transportation and building sectors. Examples of programs and activities for which Federal funds can be used include: programs to conserve energy used in transportation (*e.g.* encouraging flex-time by employers, satellite work centers, and new infrastructures such as bike paths and pedestrian walkways); installation of renewable energy and energy distribution technologies; development of new building codes and inspection services to promote building efficiency; conducting energy audits; implementing conservation programs; and smart-growth planning and zoning. *See* 42 U.S.C. § 17154.

Funds are available to States, eligible units of local governments, and Indian tribes through an application process. The Energy Independence and Security Act outlines a distribution formula: (1) 68 percent is allocated to eligible units of local government; (2) 28 percent is allocated to States; (3) 2 percent is allocated to Indian tribes; and (4) 2 percent is available for a competitive grant program. 42 U.S.C. § 17153(a).

2. STATE ENERGY PROGRAM

The Act provides $3.1 billion to the Department of Energy's State Energy Program ("SEP"), established under title III, Part D, of the Energy Policy and Conservation Act, 42 U.S.C. § 6321 *et seq.*

SEP provides federal financial assistance to States that propose to undertake various energy-related activities. To apply for assistance, States submit an application to the Department of Energy that includes: a description of the particular energy goals (*e.g.* energy efficiency, renewable energy, alternative transportation fuel); an estimate of anticipated savings; a total program budget; descriptions of the anticipated impact of the project on the environment; and an assurance that federal funds will not merely substitute for existing State and local funds. *See* 10 C.F.R. § 420.13. The Department of Energy's regulations outline a state-by-state base allocation table and an adjustment formula contingent upon total available federal funds. 10 C.F.R. § 420.11.

This additional funding is subject, however, to certain restrictions set forth in Section 410 of the Act. Before States are able to receive funds in excess of the base allocations outlined in 10 C.F.R. § 420.11, the governor must notify the Secretary of Energy that he or she has obtained assurance that the appropriate State regulatory authority will seek to implement a so-called "decoupling" policy for electric and gas utilities that ensures that utility financial incentives are aligned with helping their customers use energy more efficiently and that provide timely cost recovery and a timely earnings opportunity for utilities associated with cost-effective measurable and verifiable efficiency savings, in a way that sustains or enhances utility customers' incentives to use energy more efficiently." In addition, there must be assurances that the State will implement updated building codes to achieve greater energy efficiency and the State will prioritize the granting of funds to those programs geared toward improving energy efficiency and developing renewable energy.

B. ENERGY LOAN GUARANTEE AND BOND PROGRAMS

1. TEMPORARY LOAN GUARANTEE PROGRAM FOR RAPID DEPLOYMENT OF CERTAIN RENEWABLE ENERGY, ELECTRIC POWER TRANSMISSION, AND BIOFUEL PROJECTS (SECTION 406)

In an effort to make credit available for additional energy technology projects, the Act provides $6 billion for the costs of guaranteed loans through the Department of Energy as authorized by a new section 1705 of the Energy Policy Act of 2005. Section 406 permits the Secretary of Energy to make new guarantees for: (1) renewable energy systems (including incremental hydropower); (2) electric power transmission systems (including upgrading and reconductoring projects); and (3) certain "leading edge" biofuel projects that will produce transportation fuels that substantially reduce lifecycle greenhouse gas emissions. The Secretary may make these guarantees only for projects that commence construction before September 30, 2011.

This is a new loan program for renewable technologies and transmission technologies and the $6 billion is expected to support more than $60 billion in loans. The Act limits funds available for leading edge biofuel projects to $500 million; $10 million of the $6 billion is allocated to administrative expenses for the Advanced Technology Vehicles Manufacturing Loan Program. *See* 42 U.S.C. § 17013. The Secretary may consider several factors in guaranteeing loans for electric transmission projects: viability of the project; availability of other incentives; importance of the project; and the project's effect in meeting the area's environment and energy goals.

2. AUTHORIZATION OF CLEAN RENEWABLE ENERGY BONDS AND ENERGY CONSERVATION BONDS (SECTIONS 1111 AND 1112, CODE SECTION 54C [3])

Currently, the qualified issuers may issue bonds to finance certain renewable energy facilities and for qualified conservation purposes. A credit is provided based on the amount of the bonds and other factors. The Act authorizes an additional $1.6 billion of new clean renewable energy bonds to finance qualified renewable energy facilities, and an additional $2.4 billion of qualified energy conservation bonds. Special rules are provided for certain bonds issued to promote green community programs.

C. RENEWABLE AND CLEAN ENERGY, ENERGY EFFICIENCY, AND GREEN JOBS

1. FOSSIL ENERGY RESEARCH AND DEVELOPMENT

Under the Act, $3.4 billion is provided to the Department of Energy for research and development of fossil fuels under section 702 of the Energy Independence and Security Act, 42 U.S.C. §§ 17251-17256. The Energy Independence and Security Act authorizes the Secretary of Energy to provide funding for research, development, and demonstration programs regarding carbon capture and sequestration, including but not limited to field validation testing activities and large-scale carbon dioxide sequestration testing. The Explanatory Statement sets forth the following breakdown: $1 billion for fossil energy research and development programs; $800 million for the Clean Coal Power Initiative

[3] All references to the Code in this summary are to the Internal Revenue Code.

Round III Funding Opportunity Announcement; $1.52 billion for a competitive solicitation for carbon capture and energy efficiency improvement projects; $50 million for a competitive solicitation for site characterization activities in geological formations; and $20 million for geological sequestration training and research grants.

2. Energy Efficiency and Renewable Energy Research

The Joint Explanatory Statement states that $2.5 billion is provided to the Department of Energy for research and demonstration activities to develop energy efficient and renewable energy technologies; it directs $800 million of those funds for programs regarding biomass and $400 million for geothermal activities and projects.

3. Science and Advanced Research Projects Agency-Energy

Under the Act, $1.6 billion is provided to the Department of Energy's Office of Science. Additionally, $400 million is authorized for the Advanced Research Project Agency - Energy ("ARPA-E"). Section 5012 of the America COMPETES Act, 42 U.S.C. § 16538, authorized the creation of ARPA-E. The program is modeled on a similar Defense Department program (Defense Advanced Research Projects Agency or DARPA) that supports transformational energy technology research projects to improve the nation's economy and energy security.

4. Department of Defense - Energy Efficiency Technology Research and Development

The Act provides the Department of Defense $300 million ($75 million to each of Army, Navy, Air Force, and Defense-Wide) for research, development, and evaluation projects that seek to improve energy generation and efficiency, transmission, regulation, and storage for military installations, vehicles, and other equipment. Among those areas identified are fuel cells, wind, solar, biofuels, and bioenergy.

5. Energy Efficiency Appliance Rebate and Energy Star Programs

The Joint Explanatory Statement indicates that $300 million is provided to the Department of Energy for its Energy Efficiency Rebate Program, authorized by section 124 of the Energy Policy Act of 2005, 42 U.S.C. § 15821, and for the Energy Star Program under section 324A of the Energy Conservation and Production Act, 42 U.S.C. § 6294a. Pursuant to these programs, states use federal and state funds to administer appliance rebate programs to create incentives for the purchase of energy-efficient appliances and residential Energy Star products to replace older, inefficient models.

6. Green Jobs Training

The Act provides $3.95 billion for training and employment service activities under the Workforce Investment Act of 1998, 29 U.S.C. § 2801 *et seq.* This is billions more than in the House and Senate bills. Of those funds, the Act provides $500 million to research, labor exchange, and job training projects to prepare workers for jobs in those industries described in the Green Jobs Act of 2007, 29 U.S.C. § 2916(e). The Green Jobs Act established a worker training program for energy efficiency and renewable energy industries, including: the energy-efficient building, construction and retrofits industries; the renewable electric power industry; the energy efficiency and advanced drive train vehicle industry; the biofuels industry; the deconstruction and materials use industries; the energy efficiency assessment industry; and manufacturers that produce sustainable products using environmentally sustainable processes and materials.

D. ELECTRICITY DELIVERY AND ENERGY RELIABILITY

1. SMART GRID INVESTMENT PROGRAM (SECTION 405)

In an effort to jumpstart "Smart Grid" demonstration projects in geographically diverse areas, the Act provides $4.5 billion to the Department of Energy for various Smart Grid programs authorized under title XIII of the Energy Independence and Security Act, 42 U.S.C. §§ 17381-17386, and amends portions of title XIII. Of those funds, $100 million is for worker training activities, $80 million is for an analysis of future demand and transmission requirements (after consultation with the Federal Energy Regulatory Commission), and $10 million is to implement the Smart Grid Interoperability Framework as provided in 42 U.S.C. § 17385. Federal matching grants for Smart Grid technology will increase from 20 to 50 percent and grantees will be required to utilize open protocols and standards if available and appropriate.

The programs authorized in title XIII include, but are not limited to: (1) a Power Grid Digital Information Technology program for research and development of advanced digital technology to save energy and cost, test new reliable technologies, more effectively integrate dispersed renewable and distributed generators, and improve power quality; (2) a Smart Grid Regional Demonstration Initiative composed of demonstration projects for advanced technologies in power grid sensing, communications, analysis, and power flow; and (3) creation of a Smart Grid Investment Matching Grant Program to reimburse 20 percent of qualifying Smart Grid Investments.

2. ELECTRIC TRANSMISSION UPGRADES (SECTIONS 401 - 403)

The Act provides an additional $3.25 billion in borrowing authority for Western Area Power Administration ("WAPA") and $3.25 billion in borrowing authority for the Bonneville Power Administration to make necessary upgrades and infrastructure improvements to electric power transmission lines. These funds are provided to facilitate, among other things, projects that deliver power generated by renewable energy resources. Further, The Act provides $10 million for construction, rehabilitation, operations, and maintenance for WAPA.

3. ELECTRICITY TRANSMISSION STUDY AND RENEWABLES (SECTION 409)

In its National Electric Transmission Congestion Study due in August 2009, the Secretary of Energy shall include an analysis of the transmission issues facing renewable energy, including a discussion of the extent to which legal challenges filed at the State and Federal level are delaying construction of transmission necessary to access renewable energy.

E. RENOVATING BUILDINGS AND HOMES

1. WEATHERIZATION ASSISTANCE PROGRAM (SECTION 407)

The Act provides $5 billion to the Department of Energy for the Weatherization Assistance Program, established under title IV, Part A, of the Energy Conservation and Production Act, 42 U.S.C. § 6861 *et seq.* In addition, the threshold for household eligibility is increased from 150 to 200 percent of the federal poverty income levels and the per-home maximum assistance is increased from $2,500 to $6,500.

2. GREEN FEDERAL BUILDINGS

The Act provides $5.5 billion for the General Service Administration's Federal Buildings

Fund, of which at least $4.5 billion is specifically allocated to the conversion of federal facilities to High-Performance Green buildings.

A "high-performance building" is defined in section 401 of the Energy Independence and Security Act, 42 U.S.C. § 17061, as a building that integrates and optimizes on a life-cycle basis several factors, including energy conservation, environmental considerations, safety, sustainability, and functionality. A "high-performance green building" is a high-performance building that incorporates several additional characteristics, including: (1) reduction of energy, water, and other material resources usage; (2) improvement of indoor environmental quality; (3) minimization of the building's negative impact on the environment; and (4) increased use of environmentally preferable products.

3. Energy Efficiency Improvements to Department of Defense Facilities

The Act provides $4.2 billion to improve, repair, and modernize the Defense Department's various facilities. Of those funds, a significant portion is to be used to invest in the energy efficiency of its facilities.

4. Public Housing Capital Fund

The Act provides $4 billion to the Department of Housing and Urban Development for the Public Housing Capital Fund, authorized under section 9 of the United States Housing Act of 1937, 42 U.S.C. § 1437g. Of those funds, the Secretary of Housing and Urban Development is authorized to allocate $1 billion to a competitive grant program for investments that leverage private sector funding or seek to make renovations that improve energy efficiency.

5. Housing Energy Retrofitting

The Act provides an additional $2.25 billion in loans or grants through the Department of Housing and Urban Development's Office of Affordable Housing Preservation, of which $250 million is to retrofit homes of low-income homeowners to increase energy efficiency.

F. TRANSPORTATION-RELATED TECHNOLOGIES

1. Transportation Electrification Program

The Joint Explanatory Statement indicates that $400 million is provided to the Department of Energy for implementation of programs under the Transportation Electrification Program, authorized by the Energy Independence and Security Act. *See* 42 U.S.C. § 17011. This Department of Energy program provides grants to encourage the use of plug-in electric drive vehicles or other emerging electric vehicle technologies, large-scale electrification projects, and the development of an electric drive transportation technology education program.

2. Advanced Battery Grants

In an effort to encourage the development and manufacturing of advanced vehicle batteries and battery systems, the Act provides $2 billion to the Department of Energy in grants for the manufacturing of advanced batteries and components. The Secretary of Energy is directed to provide funding for facilities of domestic manufacturers of advanced battery systems and vehicle batteries, including advanced lithium ion batteries, hybrid electrical systems, components manufacturers, and software designers.

3. ENERGY EFFICIENT FEDERAL VEHICLES

The Act provides $300 million for the General Services Administration's Motor Vehicle Acquisition and Leasing programs. The funding will support the acquisition of plug-in and alternative fuel motor vehicles to replace a portion of federal vehicles and is designed to stimulate the market for high-efficiency motor vehicles.

4. ALTERNATIVE FUELED VEHICLES PILOT GRANT PROGRAM

The Joint Explanatory Statement indicates that $300 million is provided to implement the competitive grant pilot program administered by the Department of Energy's Clean Cities Program. Pursuant to section 721 of the Energy Policy Act of 2005, 42 U.S.C. § 16071, the Secretary of Energy is authorized to provide 30 different geographically-dispersed project grants to State and local governments and metropolitan transportation authorities for projects that encourage emerging electric vehicle technology. For example, the grants can be used to acquire alternative-fueled vehicles, hybrid or fuel-cell vehicles, ultra-low sulfur diesel vehicles, and the maintenance of vehicles.

5. DIESEL EMISSION REDUCTION GRANTS

The Act provides $300 million to the Environmental Protection Agency for grants under to the Diesel Emission Reduction Act, authorized by title VII, Subtitle G, of the Energy Policy Act of 2005, 42 U.S.C. §§ 16131-16139. Pursuant to the Diesel Emission Reduction Act, the Environmental Protection Agency provides grants on the national and state level and distributes them on a competitive basis to eligible entities able to achieve significant reductions in pollution produced and diesel emissions exposure.

G. ENVIRONMENTAL CLEANUP AND CLEAN WATER

1. LEGACY OF NUCLEAR WEAPONS PROGRAM

The Act provides $5.1 billion to the Department of Energy for Defense Environmental Cleanup to carry out its mission of cleaning up the environmental legacy of the U.S. nuclear weapons program. In addition, the Act provides $483 million to the Department of Energy for Non-Defense Environmental Cleanup.

2. URANIUM ENRICHMENT DECONTAMINATION AND DECOMMISSIONING FUND

The Act provides $390 million for the Department of Energy's Uranium Enrichment Decontamination and Decommissioning Fund. Of those funds, $70 million is to be available for the uranium and thorium program in accordance with title X, Subtitle A, of the Energy Policy Act of 1992.

3. STATE WATER REVOLVING FUNDS

The Act provides an additional $6 billion to the Environmental Protection Agency for additional grants through the Clean Water ($4 billion) and Drinking Water ($2 billion) State Revolving Funds. In addition, 20 percent of water funds are reserved for projects to address green infrastructure, water or energy efficiency improvements, or other environmentally innovative activities to the extent there are sufficient eligible applications.

The Clean Water State Revolving Fund, authorized under title VI of the Federal Water Pollution Control Act, 33 U.S.C. § 1381 *et seq.*, provides capitalization grants to states and territories to establish a fund to assist publicly owned wastewater infrastructure improvements. The Drinking Water State Revolving fund, authorized under section 1452 of the Safe Drinking Water Act, 42 U.S.C. § 300j-12, provides capitalization grants to states and territories to establish a fund for drinking water infrastructure improvements.

H. TAX

1. Extension of Placed in Service Date for Facilities Eligible for the Energy Production Tax Credit (Section 1101, Code Section 45)

The need for annual renewal of the production tax credit has posed a perennial problem for long-term investments in renewable energy facilities. The Act ameliorates this problem by extending the time period during which a renewable electricity-producing facility may be placed into service and thus qualify for the production tax credit. Eligible facilities include those that produce energy from wind, certain biomass, geothermal, small irrigation, hydropower, landfill gas, waste-to-energy, and marine renewable. The time period is extended through December 31, 2012 for wind facilities, and through December 31, 2013 for the other listed facilities.

2. Election to Claim Investment Tax Credit in Lieu of Production Tax Credit (Section 1102, Code Section 48)

The value of the production tax credit is reduced during periods like the present when energy demand is suppressed by market conditions. The Act allows taxpayers to elect to claim a 30 percent investment tax credit in lieu of the production tax credit for facilities otherwise eligible for the production tax credit that are placed in service prior to extended placed in service dates. Taxpayers cannot claim the production tax credit for any facility with respect to which they elect this investment tax credit.

3. Repeal of Certain Limitations on Investment Tax Credit (Sections 1103 and 1122, Code Sections 25D and 48)

The Act repeals the prior restriction that reduced the investment tax credit if the property was also financed by subsidized energy financing or the proceeds from private activity bonds. The Act further repeals certain caps on the amount of credits available with respect to qualified small wind energy property and certain other residential energy efficient property, including qualified solar, qualified fuel cell, and qualified geothermal property.

4. Advanced Energy Investment Credit (Section 1302, Code Section 48C)

The Act further broadens the investment tax credit by establishing a new 30 percent credit for facilities engaged in the manufacture of advanced energy property. Advanced energy property includes renewable power equipment, smart grid technology, carbon capture and storage equipment, energy storage, blending of renewable fuels and other energy conservation, efficient transmission and distribution or electricity, carbon capture and sequestration, and qualified plug-in motor vehicles. The new credit is subject to certification by the Secretary of the Treasury, in consultation with the Secretary of Energy, and is subject to an overall cap of $2.3 billion for all such projects. The Secretary will certify projects for the credit based on a variety of criteria, including commercial viability, job creation, greatest net impact on greenhouse gas emissions, and greatest potential for technological innovation and commercial deployment. There is a two-year time limit for submitting applications for the credit, and a three-year time limit for placing certified projects in service. The credit is unavailable for property eligible for the Energy Credit.

5. Grant in Lieu of Credits (Sections 1104 and 1603, Code Section 48)

The Act also allows taxpayers to apply to the Secretary of the Treasury for a grant in lieu of the production tax credit or investment tax credit. The grant would equal 30 percent of the taxpayer's basis in facilities that produce electricity from certain renewable sources including wind, certain biomass, geothermal energy, solar energy and municipal waste, as well as qualified fuel cell property, solar property and qualified small wind energy property. The grant would be equal to ten percent of the taxpayer's basis in certain geothermal property, microturbine property, combined heat and power system property and geothermal heat pump property. The grant is available only for projects for which construction begins in 2009 and 2010, and which are completed prior to the expiration of the credit period applicable to such property. The grants are not available to governmental entities and certain tax exempt entities, or any pass-thru entities to the extent owned by such governmental or tax exempt entities. The grant amounts are capped for certain properties. Grants will be paid within 60 days of the application or placed in service date, whichever is later. To be eligible, grant applications must be received by October 1, 2011.

6. Energy Conservation Initiatives (Section 1121, Code Section 25C)

The Act also provides benefits for individual taxpayers, in the form of increased tax credits for qualified energy efficiency improvements. Under this provision, individuals qualify for 30 percent of the amount paid or incurred for qualified energy efficiency improvements and the amount of residential expenditures paid or incurred during the tax year. The aggregate amount of the credit is capped at $1,500.

7. Increase in Credit for Alternative Fuel Refueling Property (Section 1123, Code Section 30C)

Taxpayers may currently claim a 30 percent credit for the cost of installing qualified clean-fuel vehicle refueling property, subject to certain caps. The Act increases the caps up to a maximum of $200,000 for hydrogen refueling property and $50,000 for all other property. In addition, the credit is increased to 50 percent of the cost of installing such property, except for hydrogen refueling property. Caps are also increased for residential applications. The increased credit is available for installations through December 31, 2010.

8. Carbon Dioxide Sequestration (Section 1131, Code Section 45Q)

Taxpayers currently can claim a $20 credit per metric ton of qualified CO_2 that is captured and stored at a "secure geological facility" and a $10 credit per metric ton of qualified CO_2 that is captured and used as an injectant in certain enhanced oil or natural gas recovery projects. The Act imposes the storage requirement of the $20 credit on claimants of the $10 credit. The Act correspondingly broadens the list of eligible "secure geological facilities" to include oil and gas reservoirs. The Act instructs the Treasury Department to consult with the Energy Department and the Environmental Protection Agency in promulgating regulations related to storage.

9. Plug-In Motor Vehicle Credit (Sections 1141 through 1144, Code Sections 30, 30B, and 30D)

The Act provides new credits for certain plug-in motor vehicles, including certain specified low speed vehicles. The credit is calculated based on the nature of the vehicle, and is subject to caps and phaseout. Provisions are made for certain conversion kits, and the credit is generally allowed against the alternative minimum tax.

I. "BUY AMERICA" (Section 1605)

The Act contains a controversial "Buy America" provision which would generally prohibit appropriated funds from being used on infrastructure projects "unless all of the iron, steel, and manufactured goods used in the projects are produced in the United States." The Act does not contain precise definitions but could potentially apply to virtually all "public work" projects funded by the stimulus bill.

The "Buy America" requirement may be waived where the head of a Federal department or agency determines that application of the provision; (1) would be inconsistent with the public interest;[4] (2) the iron, steel, or manufactured good at issue is not produced in sufficient and reasonably available quantities in the United States; or (3) the inclusion of the U.S. iron, steel, or manufactured good would increase the overall cost of the product by more than 25 percent. This 25 percent threshold is significantly higher than the 6 percent price differential applicable under existing law.

In addition, the "Buy America" requirement may be waived in cases in which the President (acting through the U.S. Trade Representative) determines that it would be inconsistent with the international obligations of the United States. Basically, this would provide a means to insure that the provision is implemented in a manner consistent with the WTO Agreement on Government Procurement ("GPA") and various U.S. Free Trade Agreements. As a result, parties to these agreements, such as the European Union, Canada, and Japan, may compete for certain contracts from which they would otherwise be barred. This exception would not apply to such major trading partners as China, India, and Brazil because those countries have not joined the GPA.

Finally, the Act does not contain any clear guidelines as to how the "Buy America" provision will be applied to goods produced in the United States that contain foreign components. In other contexts, federal procurement rules require that foreign components be "substantially transformed" by U.S. processing and, in some cases, that the finished goods contain at least 50 percent U.S. content.

J. ACCOUNTABILITY AND TRANSPARENCY

Section 1602 provides that funds are to be given to "quick-start" or "shovel-ready" activities (i.e. those that can be started and completed expeditiously) and to those recipients who can use funds to maximize job creation and economic benefit. To that end, Section 1603 provides that all funds are to be available for obligation until September 30, 2010 unless expressly provided for otherwise in the Act.

The Act includes several provisions governing accountability and transparency with respect to the distribution of funds. Section 1521 establishes a Recovery Accountability and Transparency Board to coordinate and conduct oversight of covered funds to prevent fraud, waste, and abuse; $84 million is provided to this Board for necessary expenses

[4] There is no guidance on what constitutes an application that is inconsistent with the public interest, but similar language has been used to override the Buy American Act for defense purchases from NATO allies.

involved in maintaining oversight and review of all distributed funds. Section 1526 requires the Board to establish a "user-friendly, public-facing website" to foster greater accountability and transparency in the use of covered funds. The website will include information about the contracting process, available grants and loans, estimates of jobs sustained or created, and copies of reports on covered funds. The Recovery Accountability and Transparency website is intended to serve as an important means for the public to obtain information relating to the Act.

Section 1511 outlines certification requirements for governors, mayors, or other relevant chief executives, regarding funds made available for infrastructure investments. The certification must include a description of the investment, the estimated total cost, and the amount of funds that the project is anticipated to require. This certification will be posted and made available to the public on a website linked to the Recovery Accountability and Transparency Board's website. Finally, Section 1512 outlines reporting requirements of both fund recipients and fund-distributing agencies.

K. WHAT'S NEXT?

Numerous federal agencies will make public their plans for distributing stimulus funds under the Act. They will face huge challenges in effectively targeting and allocating appropriated funds in a timely manner, and there will be ongoing implementation by federal agencies of grant and loan guarantees, as well as development of regulatory standards, tax regulations, and related actions. Some of the measures may be implemented very quickly. Covington & Burling LLP will be assisting clients in providing input to federal agencies and in pursuing funding and other initiatives under the Act at the federal, state, and local levels.

In addition, policies regarding the expansion and modernization of the electric transmission grid, the implementation of renewable portfolio standards, and energy efficiency measures will likely be addressed in separate federal energy legislation later this spring. And key committees in Congress have begun to outline sweeping legislation to limit greenhouse gas emissions from U.S. sources and establish related policies. Although the timing and outcome of these efforts are uncertain, Congressional leaders and the Administration remain focused on enacting broad energy and climate legislation later this year.

If you have any questions concerning the material discussed in this advisory, please contact the following Covington attorneys:

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