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The ECONOMIC STIMULUS BILL: Opportunities and Risks



A Comprehensive Overview of The American Recovery and Reinvestment Act of 2009

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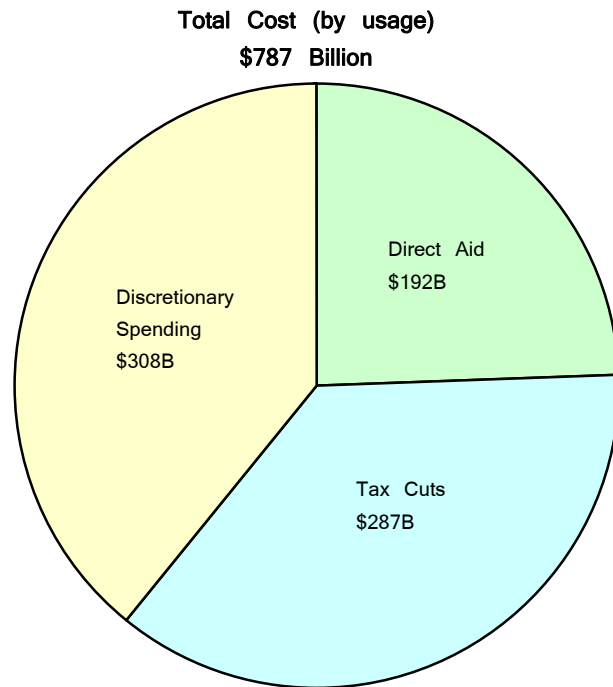
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INTRODUCTION

On February 17, 2009, President Obama will sign the “American Recovery and Reinvestment Act of 2009” (the “Act”). This legislation will impact many different sectors of the economy. The intent of this memorandum is to provide a broad overview of the various provisions of the Act, show how those provisions will affect different business sectors, and shed light on opportunities and risks that this Act may present.

The main objective of the Act is to stimulate the economy by putting money back in the hands of consumers and creating millions of jobs. The Act seeks to accomplish this goal through a series of spending initiatives and tax cuts, with approximately two-thirds of the cost of the Act consisting of spending initiatives and approximately one-third consisting of tax cuts. The Act focuses on some long term goals, such as making the country more energy-efficient and improving the nation’s transportation systems, including maintenance and repair of roads and bridges. The Act also contains provisions that offer federal aid to the states to help with states’ budget shortfalls, help the states pay for Medicaid, and provide a fiscal stabilization fund that states may use to build and repair schools and improve facilities at institutes of higher learning.



The test will be whether the Act’s mix of tax cuts and government spending, including public works projects, will create jobs and spur a recovery. Time will tell whether the scope of the Act, and the timing of the expenditures, will achieve the desired results. The Congressional Budget Office now projects that it will take more than 18 months until 75% of the money will be spent.

We hope that this memorandum is helpful and that you find the information useful. Please contact your Haynes and Boone, LLP attorney for additional information on any of the material or topics contained herein.

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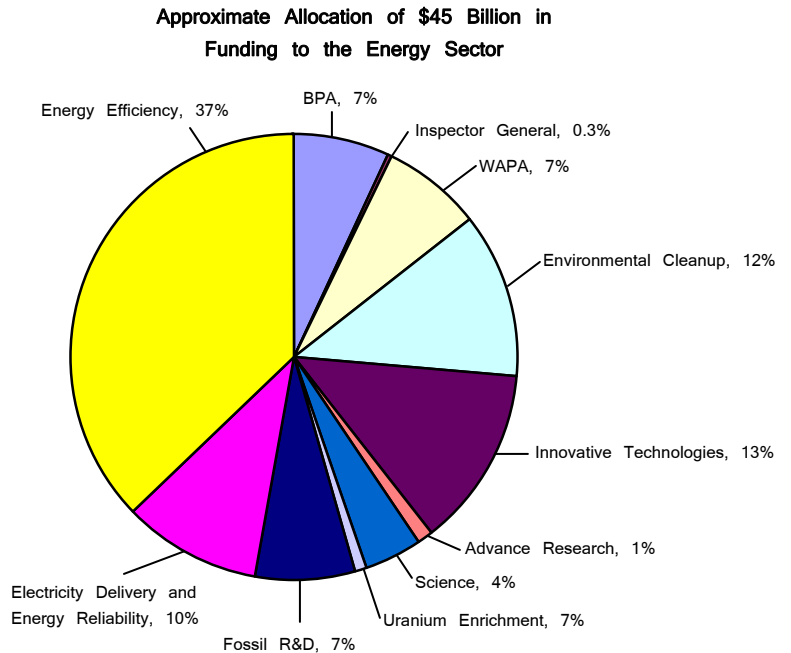
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ENERGY/ENERGY REGULATION:

Funding Is Primarily For Alternative Energy And The Electric Power Industry, But Possibilities Are Raised For Traditional Energy Development

The Act encompasses wide-ranging energy initiatives which affect numerous aspects of the energy industry: energy infrastructure, biomass, geothermal, fossil fuel emissions reduction, renewables, energy efficiency programs, alternative and plug-in vehicle programs, clean coal initiatives, transmission lines and “Smart Grid” research and equipment development, among others. The funding under the Act is allocated generally as follows (in billion dollars), and will be administered by or under the authority of the U.S. Department of Energy (“DOE”) and the U.S. Department of Defense (“DOD”).

The Act provides a number of incentives to encourage greater investment and stability in the electric grid, and to further renewable and clean energy investment, such as wind power and clean coal production. The Act also contains provisions for certain research and development expenditures and energy-efficient consumer goods and construction.



Promote Energy Efficiency, Energy Conservation and Renewable Energy

The Act provides a substantial amount of funds to the DOE, the Western Area Power Administration (“WAPA”) and the states for energy efficiency, conservation and renewable energy purposes. The goal is to promote reductions in energy usage among all forms of energy and to stimulate the renewable energy sector.

- The Act provides \$16.8 billion to the DOE for energy efficiency and renewable energy programs. Among the recipients of the \$16.8 billion are the following programs:
 - \$3.2 billion for Energy Efficiency and Conservation Block Grants under an existing DOE program. The Secretary of Energy may make grants under this program to states, local governments and Indian tribes. Recipients are to use the grants to implement strategies to reduce fossil fuel emissions created as a result of activities

within their jurisdictions, to reduce their total energy use and to improve energy efficiency.

- \$5 billion for the DOE's Weatherization Assistance Program. The DOE's Project Management Center awards grants to state-level agencies, which in turn contract with local agencies. The purpose of this program is to reduce energy costs for low-income households by increasing the energy efficiency of their homes. Under the program, households that are at or 200 percent above the poverty line will be eligible to receive \$6,500 to install residential energy efficiency improvements.
 - \$3.1 billion for the State Energy Program that the DOE administers. The State Energy Program provides grants to states to design and carry out renewable energy and energy efficiency programs. State energy offices manage these programs, not DOE.
 - \$2 billion for grants to manufacture advanced battery systems and vehicle batteries produced in the United States, including lithium ion batteries, hybrid electrical systems, component manufacturers and software designers.
- The Act provides WAPA with \$10 million for its conservation and renewable resources programs.
 - The DOE will receive \$6 billion to guarantee loans for projects involving renewable energy systems and biofuel projects. The Act requires that, of the allocated amount, not more than \$500 million may be used to guarantee loans to biofuel projects, and specifies that \$25 million will go to covering administrative expenses. The program also includes loan guarantees for electric power transmission systems, which are discussed below. To qualify for assistance, each of the foregoing categories of project must start construction by September 30, 2011.
 - The Act allows the DOE to make additional grants to states for energy efficiency and renewable energy programs, subject to the recipient fulfilling certain conditions. This grant is in addition to the annual \$125 million in grants already allocated to states to promote energy efficiency and renewable energy. As a condition of receiving the grant, a state must notify the DOE that (1) its utility commission will seek to implement rate decoupling policies; (2) it will adopt certain building energy codes; and (3) it will prioritize the use of the grants for preferred energy efficiency and renewable energy measures, such as retrofitting buildings and industrial facilities.

Promote Enhanced Electricity Delivery and Reliability; Modernize the Electricity Grid

The Act provides the DOE, WAPA and the Bonneville Power Administration ("BPA") with over \$10 billion in funding and increased borrowing authority to modernize the electric transmission grid and enhance electricity deliverability and reliability. In addition, the DOE also will receive

increased funding to give out grants under its “Smart Grid” programs that promote energy efficiency and “smart” use of the electric grid.

- The DOE will receive \$4.5 billion to modernize the electric transmission grid, promote the use of demand response equipment, enhance the security and reliability of energy infrastructure and promote energy storage and smart grid programs. Of the \$4.5 billion, the DOE’s Office of Electricity Delivery and Energy Reliability will use \$80 million to conduct a resource assessment and analysis of future demand and transmission requirements, and to provide technical assistance to the North American Electric Reliability Corporation and others for the formation of transmission plans for the Eastern and Western Interconnections, and the Electric Reliability Council of Texas.
- WAPA will be able to borrow from the U.S. Treasury up to \$3.25 billion to construct new or upgraded transmission lines, with a primary focus on enabling the delivery of electricity generated by renewable energy resources.
- The BPA will be able to borrow from the U.S. Treasury up to \$3.25 billion to construct new transmission lines and to carry out the activities of the BPA Administrator.
- The DOE will receive increased funding for its Smart Grid Regional Demonstration Initiative (the “Initiative”). Under the Initiative, the DOE collaborates with electric utilities to facilitate the integration of smart grid technology into the regional grid system. In addition, DOE and the utilities are required to collect data relating to energy savings and emission reductions that result from the integration of such smart grid technology. Electric utilities and other parties that participate in the regional demonstration projects will receive financial assistance that covers 50 percent of the cost incurred for making qualifying advanced grid technology investments.
- The DOE will receive additional funding for its Smart Grid Investment Grant Program. Under this program, parties such as electric utilities, distributors, power marketers, regional transmission organizations and independent system operators will receive grants to cover 50 percent of the costs incurred for installing “Smart Grid” equipment to their electric systems.

Support for Traditional Energy Sources

In addition to increased funding for renewable energy, conservation and efficiency, the Act offers some support for traditional energy sources, such as nuclear and fossil-fuel sourced energy. Specifically, the Act provides:

- \$3.4 billion for fossil energy research and development.
- \$390 million to DOE to set up a Uranium Enrichment Decontamination and Decommissioning Fund. The DOE is to allocate \$70 million of this amount to pay certain parties to decontaminate, decommission, reclaim and conduct other remedial actions at active uranium

or thorium processing sites. The Act requires that these monies be paid only to licensed persons.

Increased Funding for DOE Agencies

Two DOE research agencies will receive a total of \$2 billion in increased funding for their activities.

- The DOE's Office of Science will receive \$1.6 billion. The Office of Science oversees basic research in the physical sciences and manages the DOE's national laboratories.
- The DOE will receive \$400 million for its Advanced Research Projects Agency - Energy ("ARPA-E"). ARPA-E is a DOE program that researches and promotes technologies that reduce energy imports from foreign sources and energy-related emissions.

Additional Funding for Environmental Cleanup Programs

Notwithstanding its overall focus on energy programs and initiatives, the Act also allocates funds to DOE to promote environmental programs. The DOE will receive \$483 million for its Non-Defense Environmental Cleanup program and \$5.127 billion for its Defense Environmental Cleanup program.

Funding to the DOD to Promote Energy Efficiency and Renewable Energy

In addition to its funding of various DOE programs, the Act provides funding for energy efficiency and renewable energy programs that fall under the DOD. DOD will receive over \$4 billion to promote energy efficiency and renewable energy.

- The DOD will receive \$3.84 billion to repair, restore and to invest in energy efficiency at its facilities and barracks. The \$3.84 billion is allocated among the different military branches.
- The DOD also will receive \$300 million to improve generation efficiency, transmission, storage and for use on its military installations. The DOD also is required to use the funds to research and develop generation from fuel cells, wind, solar, biofuels and other renewable energy sources.

Opportunities

The Act's energy provisions, which take the form of tax relief, direct grants and loan guarantees, are primarily aimed at supporting energy efficiency and conservation measures, increasing marketplace penetration of renewable energy projects, and augmenting the transmission grid, while offering less support for traditional sources of energy such as nuclear power and clean coal. Taken together, these provisions sound three broad, interrelated policy themes. First, they are designed to support the Administration's goal of reducing greenhouse gas emissions and global warming in the absence of a federal "cap-and-trade" program. Second, they appear designed to reduce dependency on foreign oil. Third, they emanate from the Administration's desire to provide an economic stimulus by buttressing the "green economy."

Turning first to the Act's energy conservation and efficiency provisions, the Act places tremendous emphasis on spending in this area, with a significant amount of aid to be funneled through state-level energy offices. All told, as summarized above, over \$20 billion is allocated to energy conservation and efficiency programs of the DOE and DOD. Devoting a large block of spending to energy conservation and efficiency is consistent with the view of many commentators that conservation and efficiency measures constitute the "low-hanging fruit" of the energy sector – meaning that they are relatively easy to implement, quick to take effect, and capable of providing an immediate stimulus in the form of jobs for companies that conduct energy efficiency audits, for the chemical industry, and for specialized manufacturers of products such as weather-stripping materials, insulation foam, caulking and sealants. In addition, conservation and efficiency measures are largely fuel-neutral, with equal emphasis on saving electricity, natural gas, and when considered in combination with the Act's support for advanced batteries, motor fuels in the form of gasoline and diesel fuel. The electric utility industry will receive a special benefit in the form of "decoupling" rate structures. In order to qualify for energy efficiency grants, the governor of a state must certify that the state regulatory authority will seek to implement such rate structures, which ensure that electric utilities are made whole against declining sales volumes associated with customers' reducing electricity consumption.

The Act also offers substantial tax relief and funding for alternative energy research and development and renewable energy sources. The Act provides as much as \$20 billion in tax incentives for wind, solar, hydro and other renewable energy sources and \$6 billion in grants to the DOE for its renewable energy loan guarantee program. Of particular note is the three-year extension of the production tax credit ("PTC") for electricity produced from wind, water, and certain other renewable sources. Previously, Congress had only extended the PTC in single-year increments, and had allowed the PTC to expire three times between 1999 and 2004, yielding a "boom and bust" construction cycle in the wind industry. Now, with an extension in place for three years beyond the current expiration date of December 31, 2009, for the wind-related PTC, and for an additional four years for other renewable energy technologies, such as landfill gas, the renewable power sector is very likely to experience continuing growth. Domestic manufacturers of wind turbine equipment are likely to see robust demand. Domestic wind developers also are likely to see increased activity, assuming financing entities rationally respond to the availability of DOE loan guarantees.

The Act also provides over \$10 billion to modernize and expand the electricity grid. This funding will be directed to investor-owned electric utilities as well as the U.S. Government-owned WAPA and BPA and will be aimed, in large part, at improving grid efficiency by enhancing the ability of the grid to control power flows, to modify and manage grid congestion, and to enable the grid to automatically respond to power flow disruptions. Over the long run, these improvements will benefit transmission customers, such as electric utilities, independent power producers and electric marketers, who depend on the grid to deliver electricity to wholesale and retail customers. The electricity manufacturing sector also will benefit from increased demand for transmission and digital equipment. But the primary beneficiaries will be wind project developers and owners who depend on a robust transmission grid to deliver wind-sourced electricity from remotely located wind projects to urban load centers. In other words, the renewable energy emphasis of the Act can be seen even in the Act's transmission provisions.

While focused on the renewable energy sector, the Act also offers some assistance to traditional sources of energy in the form of support for clean coal development, nuclear power (uranium enrichment and decontamination), fossil energy research and development, and carbon capture and sequestration. The Act seems to support revival of the suspended DOE Clean Coal Demonstration Project in Illinois. Nevertheless, the degree of support for traditional energy sectors is small (or non-existent) as compared with the Act's overall emphasis on the energy efficiency, conservation and renewable sectors. The following areas appear to be neglected, unless they are capable of being included in the Act's provisions dealing with "energy reliability" and "energy infrastructure":

- power production from natural gas
- natural gas, crude and liquids pipelines (transmission and distribution);
- natural gas storage development;
- gathering systems and gas processing facilities;
- oil and gas production, refining and distribution; and
- liquefied natural gas and regasification facilities.

Risks

While the Act's energy provisions appear at first glance to be comprehensive, they leave a lot of implementation issues on the table.

First, a number of issues remain with respect to the procedures that will ultimately be adopted and utilized by the various federal and state government agencies to implement the flow of funds into the marketplace. Our experience has shown that there are practical issues in the actual procurement of funds from loan guarantee and other government programs, and until these procedures have been formulated and adopted, the availability of funding under the Act will be delayed. We also note that the Act vests discretion for the various governmental agencies charged with funding initiatives. For example, understanding how funding will be made,

in what form (*e.g.*, grants, loans, guaranties, reimbursements, tax relief and incentives) and on what timeline will be paramount to a client's ability to secure necessary funding, especially given the current marketplace and attendant stress on corporate budgets. Further, and analogous to the Troubled Asset Relief Program, understanding what restrictions will be placed on the receipt of funds will be important in evaluating the overall cost of capital to clients. For example, will recipients of funding be required to document and report employment growth or wage and benefit thresholds in utilization of the funds, or be required to open their books and records to inspection and audit requirements?

Second, although the Act will provide some funding for renewable energy projects, Congress did not enact a national renewable portfolio standard, although it was considering doing so in this round of legislation. Lacking such a mechanism to force the hand of utilities to purchase electricity from renewable projects, renewable project developers will still face challenges in obtaining construction and development financing. Moreover, with respect to the PTC, Congress did not eliminate limitations on the availability of the credit, which excludes those without sufficient tax capacity from investing and increases transaction costs in the form of extremely complicated ownership structures.

Third, the transmission expansion that the Act hopes to foster might falter because no mechanism has been provided to facilitate licensing and siting of transmission lines. Many electric industry stakeholders, for example, believe that Congress should have enacted enhanced federal siting authority, which would enable transmission developers to pre-empt state utility commissions who might be inclined to bow to local NIMBY (not in my backyard) interests. These stakeholders view existing provisions under the Energy Policy Act of 2005, which are dependent on the designation by DOE of National Interest Electric Transmission Corridors, as inadequate.

PROJECT FINANCE:

Funding Is Provided For Infrastructure, Including Energy, Transportation And Telecommunications

The Act reflects the Obama administration's view that investments in infrastructure are essential to economic recovery. The Act allocates billions of dollars over the next few years to domestic infrastructure through investments in renewable energy, energy efficiency, modernization of the electric grid, improvements to transportation infrastructure and the expansion of broadband internet access in rural and other underserved areas. The Act provides approximately \$45 billion for promotion of renewable energy and energy efficiency, approximately \$48 billion for building and repairing highways and bridges, expanding public transportation systems and upgrading airports and rail systems and approximately \$7 billion for the expansion of broadband internet access.

Energy

As covered in greater detail elsewhere in this memorandum, the Act allocates major funding, tax cuts and credits in furtherance of the goal of promoting energy efficiency, research, and "green" energy.

- \$16.8 billion is allocated for promotion of energy efficiency and renewable energy as follows:
 - \$3.2 billion for energy efficiency and conservation block grants to be administered by the Department of Energy.
 - \$5 billion for home weatherization grants to low and middle-income families,
 - \$3.1 billion for funding for states and local governments to buy efficient alternative fuel buses and trucks under the State Energy Program.
 - \$2 billion for grants for the manufacturing of energy efficient vehicle batteries
 - \$2.5 billion for applied research, development and deployment activities of biomass and geothermal projects.
 - \$300 million for tax credits under the Energy Star Program to consumers purchasing new, efficient appliances.
- \$6 billion is allocated for new loan guarantees for renewable energy projects under the Innovative Technology Loan Program.
- \$5.5 billion is allocated for the construction of energy-efficient government buildings.
- \$3.4 billion is allocated for fossil energy research and development, including research and development of clean coal technologies and energy-efficiency improvements.

- \$4.5 billion is allocated to modernize the electric grid.
- \$4.6 billion is allocated to the Army Corps of Engineers for use in energy and water development programs.
- \$3.25 billion is allocated for construction of power transmission lines and delivery of power generated by renewable energy resources within areas served by the Western Area Power Administration.
- \$3.25 billion is allocated for construction, acquisition and replacement of the transmission system of the Bonneville Power Administration.
- \$20 billion of tax incentives are provided over ten years for renewable energy and energy conservation. See elsewhere in this memorandum for more details.

Transportation

The Act also contains billions in funding for transportation system improvement, repair, and maintenance.

- \$1.5 billion is allocated for capital investments in surface transportation infrastructure, including bridges and highways, to be distributed by the Secretary of Transportation as discretionary grants to state and local governments or to transit agencies.
- \$27.5 billion is allocated to the Federal Highway Administration for highway infrastructure investment.
- \$9.3 billion is allocated for investments in rail transportation, of which \$8 billion is allocated for the development of intercity high speed rail service. \$1.3 billion is allocated to the National Railroad Passenger Corporation (Amtrak) as capital grants to improve security, upgrade infrastructure and expand passenger rail capacity.
- \$8.4 billion is allocated for grants for public transportation.
- \$1.3 billion is allocated for investments in air transportation, of which \$200 million is allocated to the Federal Aviation Administration for improvements to power systems, air route traffic control centers, air traffic control towers, and navigation and landing equipment and \$1.1 billion is allocated for discretionary grants by the Secretary of Transportation for the procurement, installation and commissioning of runway incursion prevention devices and systems at airports.

Telecommunications

The Act provides almost \$7 billion in funds to accelerate the penetration of broadband internet to currently underserved, mostly rural areas.

- \$2.5 billion is allocated to the Distance Learning, Telemedicine and Broadband Program for grants, loans and loan guarantees for broadband infrastructure in any area of the United States pursuant to the Rural Electrification Act of 1936. At least 75 percent of the area to be served must be rural areas without sufficient access to high speed broadband service. This program will be administered by the Department of Agriculture.
- \$4.7 billion is allocated to the National Telecommunications and Information Administration's Broadband Technology Opportunities Program. Funding is provided to award competitive grants to accelerate broadband deployment to unserved and underserved areas. Of this amount, a minimum of \$200 million is allocated for grants for expanding public computer center capacity, including at community colleges and public libraries; a minimum of \$250 million is allocated for grants for innovative programs that encourage sustainable adoption of broadband service; and a minimum of \$350 million is allocated for establishment of the State Data Broadband Data and Development Grant program for development and maintenance of a broadband inventory map. Programs that receive funding under the Distance Learning, Telemedicine and Broadband Program are not eligible to receive funding under the Broadband Technology Opportunities Program.

Opportunities

Infrastructure projects are capital-intensive investments. Even before the current credit crisis, sourcing of capital for these investments was an ever-increasing challenge; in the current credit environment, capital is a scarce resource. By providing capital, and identifying projects that are priorities for the current administration, the Act is likely to make credit for project finance more accessible for investors, lenders, manufacturers, vendors and contractors in the energy, construction, materials, aviation and telecommunications industries.

Risks

The DOE will play a key role in the implementation of the Act and must transition to its new-found responsibility of managing substantial amounts of investment activity. The Act allocates approximately \$40 billion to the DOE, an amount that, in and of itself, is almost double the DOE's present budget of \$25 million. Companies that apply for loan approvals and grants may face delays in obtaining necessary approvals and funding from the DOE as the agency adopts to its new duties. Further, the Act does not create the national infrastructure bank President Obama had called for to set national priorities and coordinate the financing of large transportation infrastructure projects. As a result, a substantial portion of the money for transportation infrastructure will be distributed under existing formulas that give funds to each state regardless of the state's needs or the merits of its projects. Finally, the process for project approval and contracting is new and will evolve under substantial scrutiny from Congress;

entities seeking financing in this area will need to be able to adapt to these evolving requirements under intense scrutiny by government officials and the general public.

ENVIRONMENT/CLIMATE CHANGE:

More Funds Are Provided For Environmental Projects And Cleanups

The Act reflects the Obama administration's commitment to green programs. Much of the environmental emphasis in the bill is in the form of tax credits and other incentives for alternative or renewable energy projects, which are summarized in greater detail elsewhere in this memorandum. However, a number of other non-energy projects - including remediation projects and water and wastewater infrastructure needs - received a funding boost from the Act. Those programs foreshadow an increased emphasis on environmental programs.

The non-energy environmental provisions generally focus on remediation, abatement and restoration projects under existing programs, rather than implementing sweeping new programmatic changes. However, the funding of these various environmental programs suggests that the Obama administration will be aggressive in enforcing existing environmental programs. And the emphasis on "green" energy in the Act indicates that sweeping change is likely on the horizon when Congress takes up its next environmental initiative - climate change and greenhouse gases.

More Site Cleanups and Remediation Projects

The Act provides increased funding for site clean-up and remediation projects.

- The Act specifically allocates funding for site remediation programs as follows:
 - \$600 million for the Hazardous Substance Superfund, allowing for 3% for management and oversight purposes;
 - \$200 million for Leaking Underground Storage Tank Trust Fund Program for cleanup activities authorized by section 9003(h) of the Solid Waste Disposal Act, provided funds are not subject to cost share under same provision and allowing 1.5% for management and oversight;
 - \$100 million for Brownfield programs under section 104(k) of CERCLA; and
 - \$100 million for the reduction of lead-based paint hazards.
- EPA may use the Superfund for the emergency response and long term remediation of some of the nation's most highly contaminated sites. In order to be eligible for funds from the Superfund, contaminated sites needs to have been listed on the National Priorities List (NPL). With nearly 1300 sites on the NPL, many opportunities exist for the new funds.
- The allocation to the Leaking Underground Storage Tank Trust Fund provides significant additional funding for cleanup activities that are typically undertaken at sites where the site owner or operator is unknown or is unwilling or unable to cooperate or that require emergency response. These funds can be used by states under agreements with EPA. The Act eliminates the state's cost share obligations (which are 10% of the cost of the

corrective action) for the Act funds. The average leaking storage tank site remediation costs approximately \$125 thousand, indicating that the \$200 million in additional funding will touch a number of sites.

- Another cleanup program receiving funds is the Brownfield remediation program. The Brownfields program under EPA addresses properties where contamination hinders the redevelopment or reuse of the land. Many of these sites are inner city sites that have gone unused for years. EPA views the Brownfield program as taking development pressure off of undeveloped open land by allowing for redevelopment. The Brownfield funds can be used to inventory, characterize, assess and conduct planning at a Brownfield site as well as to fund loans and grants for Brownfield site remediation. These funds generally are provided to governmental or quasi-governmental entities under cost sharing arrangements for remediation projects. This cost sharing is waived for funds received under the Act.
- Significant funds (\$5.127 billion) have also been allocated to the Defense Environmental Cleanup Fund, an environmental program responsible for identifying and reducing risks and managing wastes at sites where the Department of Energy has carried out defense-related nuclear research and production activities that resulted in contamination. See elsewhere in this memorandum for more detail.

Water and Wastewater Infrastructure Get a Boost

The Act provides much needed funding for water and wastewater infrastructure projects.

- Under the jurisdiction of the Environmental Protection Agency, the Act allocates \$6.4 billion to state and Tribal Assistance grants, with the bulk of this money (\$6 billion) going to capitalization grants for state revolving fund programs addressing water and wastewater infrastructure needs, specifically:
 - \$4 billion to Clean Water State Revolving Funds under title VI of the Federal Water Pollution Control Act; and
 - \$2 billion to capitalization grants under section 1452 of the Safe Drinking Water Act.
- Consistent with the stated goal of the Act to provide immediate jobs, projects funded under this provision are not subject to the usual priority ranking system, but instead those projects able to proceed to construction within 12 months will receive priority. Additionally, the funds are subject to reallocation if projects are not under contract or construction within 12 months of the date of the Act. To further emphasize the job creation goal, none of these funds may be used for the purchase of land or easements. Consistent with the Administration's "green" goals, a preference is given for a portion of the funding to "green" infrastructure, water or energy efficiency improvements, or other environmentally innovative activities.
- The Act also allocates funding to \$290 million for Department of Agriculture, Natural Resources Conservation Service programs related to watershed and flood prevention

operations, half of which is for necessary expenses to purchase and restore floodplain easements, and it allocates \$50 million for Water Rehabilitation Program, which generally provides for the rehabilitation of dams.

- The U.S. Army Corps of Engineers (“Corps”) programs, which can include infrastructure construction (including hurricane and storm damage reduction infrastructure), the regulation of impacts to wetlands and other waters, and the dredging of waterways, also received additional funding. The Act allocates:
 - \$25 million for civil investigations;
 - \$2 billion for construction (not less than \$200 million of which shall be for water-related environmental infrastructure assistance);
 - \$2.075 billion for operation and maintenance;
 - \$25 million for regulatory programs; and
 - \$100 million for formerly utilized sites remedial action program.
- The Corps is directed to use such funds on programs, projects or activities that, among other things, can be executed quickly and will result in high, immediate employment.
- The Act provides \$1 billion for the Department of Interior, Bureau of Reclamation, which develops and manages water and related resources, including dams and reservoirs. Not less than \$126 million of this amount is to be used for projects authorized under the Wastewater and Groundwater Study and Facilities Act of 1992 - a statute that directs the Secretary of Interior to identify opportunities for water reclamation and reuse.

Opportunity missed for “Green” Schools

The final version of the Act eliminated specific funding to create 21st Century Green High Performing School Facilities (which was passed by the House). Instead, the bill allocates more generally to the “State Fiscal Stabilization Fund”, a portion of which may be used for school projects, including “modernization, renovation, and repairs consistent with a recognized green building rating system.”

Funds for “Green” Programs

The Act provides significant tax credits, grants and other incentives for “green” projects and alternative energy projects. See elsewhere in this memorandum for more details.

Opportunities

Additional funding for the various infrastructure and remediation projects will provide a clear, immediate business opportunity for companies in the remediation, construction and waste management businesses. A secondary impact of the funding, particularly for remediation activities, will be to return currently underdeveloped or unused property to the market as usable sites; however, the results of the remediation funding may take some time to be realized on this front.

In addition, the emphasis on water and wastewater efficiencies, water conservation and water reuse will provide opportunities for companies specializing in water-related technologies to innovate.

Risks

Many of the remediation programs funded under the Act provide mechanisms for EPA to seek cost recovery from those parties responsible for the contamination. EPA's ability to proceed to remediation activities with the new funding may allow EPA to apply more pressure on responsible parties to enter into agreements to take over remediation activities. Moreover, the funding of administrative costs under the Act should provide EPA with additional funds to pursue responsible parties in cost recovery actions.

Of equal or perhaps greater concern, particularly to developers whose activities often fall under the Corps of Engineers jurisdiction, is the increase in funding of the Corps' civil investigatory and regulatory program functions. This funding priority, one of the few noted to specifically address investigations, indicates a focus on increased enforcement activities addressing wetlands and jurisdictional waters.

BANKING:

Small Business Lending Programs Are Temporarily Expanded

Title V of the Act provides temporary opportunities for loans made or guaranteed by the Small Business Administration (the "SBA") to qualifying small business concerns and for secondary market trading in such loans. Title V of the Act appropriates \$636 million to underwrite the cost of implementing the fee reductions and new loan and loan guarantee programs described below.

Establish a Secondary Market Lending Authority

The Act establishes a Secondary Market Lending Authority authorized to make liquidity enhancing secured loans to Systemically Important SBA Secondary Market Broker-Dealers ("SISMBDs") who operate in the secondary market for SBA guaranteed loans.

- SISMBDs will be designated by the SBA in consultation with the Federal Reserve and the Secretary of the Treasury. The interest rate on the loans is limited to the Federal Funds Rate plus 25 basis points.
- Sunset February 17, 2011.

Facilitate Secondary Market for SBA Loans

The Act establishes the SBA Secondary Market Guarantee Authority and authorizes a process, by rule, for private sector entities to apply for a federal guarantee on pools (in an aggregate amount up to \$3 billion) of non-guaranteed loans made under Section 504 of the Small Business Investment Act that are packaged and sold into the secondary market to third party investors.

- The Act requires the seller of the pools to retain a residual interest of not less than 5% of the dollar amount of the pools to be sold to investors.
- The SBA is required to charge fees at a percentage of the loan amount so that the program cost is equal to zero.
- Sunset February 17, 2011.

Increase Loan Guarantee

The Act permits the SBA to guarantee certain qualifying small business loans.

- The guarantee is up to 90% of qualifying small business loans made by eligible lenders.
- Sunset on February 17, 2010.

Elimination or Reduction of Fees to Small Business Concerns

The Act eliminates or reduces fees to the maximum extent possible for loans to small business concerns.

- The loans must be made or guaranteed under Section 7(a) of the Small Business Act or Section 504 of the Small Business Investment Act.
- Sunset on September 30, 2010.

Increase SBA Guaranteed Surety Bond

The Act increases the size of SBA guaranteed surety bonds issued for a small business concern's account.

- The bond may be in an amount up to \$5 million (from existing \$2 million) for work orders or contracts not to exceed \$10 million, if a contracting officer of a federal agency certifies that such a guarantee is necessary.
- Sunset September 30, 2010.

Community Development Financial Institutions Program

The Act appropriates funds for Community Development Financial Institutions.

- The Act appropriates \$100 million until September 30, 2010 to the Community Development Financial Institutions Program, subject to the limitation that no awardee, together with its subsidiaries and affiliates, may be awarded more than 5% of the \$100 million during fiscal year 2009.
- The Community Development Financial Institutions Program awards capital to institutions chartered by the Treasury Department who provide financial products and services to those individuals and businesses that have few alternatives in the nation's economically hardest hit areas.

Simplify Leverage of SBICs

The Act restates the maximum leverage of licensed Small Business Investment Corporations ("SBICs") to be the lesser of 300 percent of private capital or \$150 million (higher levels are possible for multiple licensed companies under common control and for licensed companies that do the majority of their business in low-income geographic areas) and modifies the aggregate per-company investment limit of SBICs to 10% of the sum of the private capital of the SBIC and the total amount of leverage projected in the SBIC's business plan approved by the SBA.

- Licensed SBICs will be required to certify in writing to the SBA that not less than 25% of the aggregate dollar amount of financings of that licensee are provided to smaller enterprises before an application for leverage can be approved.

Opportunities

Small businesses have a narrow window to take advantage of a wide variety of opportunities to seek new loans and/or guarantees, refinance existing loans and reduce borrowing costs and fees under the provisions of the Act.

For a two year period, there are fee income opportunities for private sector fiduciaries, custodial agents and other third parties who can contract with the SBA to assist in operating the Secondary Market Guarantee Authority and the Secondary Market Lending Authority.

Risks

Many of the SBA programs and the benefits conferred by the Act are temporary and subject to the sunset provisions specified above. Furthermore, additional details for some of the programs are the subject of emergency rulemaking authority that authorizes the SBA to issue rules within 15 days (or 30 days for the Secondary Market Lending Authority) of February 17, 2009 (the anticipated signing date). Accordingly, interested parties should consult the emergency rules to learn more about the program details.

The Act states that SBA loans and loan guarantees are not available to any entity in which an alien unlawfully present in the United States has a direct or indirect ownership interest.

HEALTHCARE:

A Significant Investment In The Nation's Health Care Infrastructure Is Provided

The Act provides a huge infusion of federal money - more than \$487 billion - to the states for Medicaid - without which many people would soon lose coverage. The Act also provides more than \$20 billion for improving the country's healthcare infrastructure. The largest portion of these funds are for electronic health records, and linking doctors and hospitals with information technology. The Act also provides safeguards to protect the privacy and security of individual's health information. The Act provides funding or changed legal requirements in many specific areas, which are discussed below.

Substantial Investment in Health Information Technology and Quality

The Act will speed adoption of health information technology ("HIT") through incentives to health care providers to participate in a nationwide system of electronic medical records ("EMR").

- The National Coordinator of Health Information Technology will be responsible for strategic plan development to coordinate community resources in technology design, to estimate resources needed to establish a sufficient health information technology workforce and to ensure that every person in the United States has an electronic health record ("EHR") by 2014.
- The HIT Policy Committee is responsible for making policy recommendations to the National Coordinator relating to the implementation of a nationwide HIT infrastructure, including implementation of the National Coordinator's strategic plan.
- The HIT Standards Committee will recommend to the National Coordinator standards, implementation specifications, and certification criteria for the electronic exchange and use of health information.
- Private entities are not required to adopt or comply with a standard or implementation specification adopted by the Secretary.
- The National Coordinator will make available qualified EHR technology unless the Secretary determines that the needs and demands of providers are being substantially and adequately met through the marketplace.
- Health care payers and providers that contract with the federal government are required to use HIT systems and products that meet the standards adopted by the Secretary.
- The National Coordinator will award competitive grants to states or Indian tribes to establish loan programs for health care providers to purchase certified EHR technology, train personnel

in the use of such technology, and improve the secure electronic exchange of health information.

Opportunities

As a result of the incentives and appropriations for HIT provided in this Act, it is expected that nonprofit organizations may be formed to facilitate the electronic use and exchange of health-related information consistent with standards adopted with HHS, and that such organizations may seek exemption from income tax as organizations under IRC sec. 501(c)(3). Activities to facilitate the electronic use or exchange of health-related information will be considered activities that substantially further an exempt purpose under IRC sec. 501(c)(3).

Risks

The Joint Commission points out that as HIT and “converging technologies” are increasingly adopted by health care organizations, users must be aware of the safety risks and preventable adverse events that these implementations can create or continue. Typically, unintended technology-related adverse events stem from human-machine interfaces or organization/system design. The overall safety and effectiveness of HIT ultimately depends on its human users. HIT must be designed to be safe and must also be operated safely within a safe workflow process.

Medicare/Medicaid Incentives For Use of Health Information Technology

A number of programs will promote electronic health record (“EHR”) adoption. The Act adds incentive payments to eligible professionals and hospitals for the adoption and meaningful use of a certified EHR system.

- With respect to covered professional services, the eligible professional is entitled to an amount equal to 75 percent of the Secretary’s estimate of the allowed charges in addition to the amount otherwise paid for showing meaningful use of an EHR in 2011 or 2012.
 - No incentive payments will be made after 2016.
 - The Act limits the amount of incentive payments each year.
 - Incentives will not be paid to a hospital-based eligible professional. A “hospital-based eligible professional” furnishes substantially all of such services in a hospital setting through the use of the facilities and equipment of the hospital.
- With respect to inpatient hospital services, if the eligible hospital is a meaningful EHR user, the eligible hospital is entitled to an additional payment combined with the amount otherwise paid.
- “Meaningful use” includes all of the following elements:

- The professional or hospital uses certified EHR technology in a meaningful manner, which shall include the use of electronic prescribing;
 - Certified EHR technology is connected in a manner that provides for the electronic exchange of health information to improve the quality of health care; and
 - Submission of information to the Secretary on clinical quality measures.
- “Certified EHR Technology” means a qualified electronic health record that is certified as meeting standards that are applicable to the type of record involved.
 - The Secretary of Health and Human Services will study the extent to which and manner in which payment incentives should be made available to health care providers who are receiving minimal or no payment incentives for such purposes.
 - The Secretary shall conduct a study on: 1) the current availability of open source health information technology systems to federal safety net providers; 2) the total cost of ownership of such systems in comparison to the cost of proprietary commercial products available; 3) the ability of such systems to respond to the needs of, and to be applied to, various populations; and 4) the capacity of such systems to facilitate interoperability.

Opportunities

Early implementation of EHR technology results in potentially significant monetary benefit and efficiency. For those providers not already participating in Medicare or Medicaid, or considering opting out, it is an incentive to treat Medicare and Medicaid patients.

Risks

Due to increased privacy laws, the use of EHRs may expose health care providers and hospitals to new civil and criminal sanctions. The development of appropriate security measures and policy is imperative. The Act also phases-in Medicare payment penalties, starting in 2014, for those physicians and hospitals not using electronic health records.

Medicaid Provider HIT Adoption and Operation Payments

The Act pays certain high-volume Medicaid providers a subsidy for the adoption of a certified HIT system. In addition to payment incentives, the Act provides for expanded funding to pediatricians, federally qualified health clinics, rural health clinics and physician assistants in physician assistant-led rural health clinics.

- “Medicaid provider” means an eligible professional who: 1) is not hospital-based and has at least 30% of the professional’s patient volume attributable to Medicaid patients; 2) is a non-hospital based pediatrician who has at least 20% of patient volume attributable to individuals who are Medicaid patients; 3) practices predominantly in a federally qualified health center or rural health clinic and has at least 30% of the patient volume attributed to needy

individuals; 4) is a children's hospital; or 5) is an acute-care hospital that has at least 10% of the hospital's patient volume attributed to Medicaid patients.

- In order to qualify as a Medicaid provider, the professional will have to waive any right to Medicare EHR incentive payments.

Opportunities

For eligible professionals with a high volume of Medicaid patients, this program pays for most of the implementation of a certified HIT system. Hospitals are also reimbursed a very high percentage of the HIT system implementation expenses. It is important, however, to project whether the Medicare HIT benefits or the Medicaid HIT benefits will be most valuable.

Risks

Due to HIPAA and state laws, the use of EHRs may expose physicians and hospitals to new civil and criminal sanctions. The development of appropriate security measures and policy is imperative.

HIPAA Privacy and Security Scope Substantially Changed

The Act presents a number of challenges for entities subject to the HIPAA privacy and security regulations' requirements. HIPAA privacy and security requirements apply to healthcare providers, health plans and health care clearinghouses. The Act includes extensive provisions on HIT and privacy of electronic health information. The Act promotes the use of EHRs and funds studies on health care quality and outcomes. The Act now extends certain privacy and security standards to vendors of electronic personal health records ("PHR").

Privileged Security Standards and Penalties Provisions Apply to Business Associates

HIPAA privacy and security standards and the civil and criminal penalties for violating those standards that currently apply to health care providers, health plans and clearinghouses now also apply to the business associates that work for them. Business associates must incorporate additional privacy and security requirements into their business associate agreements.

Technical Safeguards Guidance

HHS will issue annual guidance on most effective and appropriate technical safeguards for implementing security standards.

New Security Breach Notification Requirements Similar to State Laws

Covered entities must notify individuals, HHS and media of discovered breaches of unsecured PHI, subject to certain exceptions:

- Covered entities must notify each individual of a discovered breach of the individual's unsecured PHI that has been, or is reasonably believed to have been, accessed, acquired or disclosed as a result of the breach, unless an exception applies.
- "Breach" does not include disclosure of PHI to an authorized person who would not reasonably have been able to retain such information.
- Exceptions to "breach" include:
 - Any unintentional acquisition, access or use of PHI by an employee or individual acting for a covered entity or business associate made in good faith and within the course and scope of employment;
 - Any inadvertent disclosure from an individual authorized to access PHI at a covered entity's or business associate's facility to another similarly situated individual at the same facility; and
 - The PHI is not further acquired, accessed, used or disclosed.
- "Unsecured PHI" means PHI not secured through the use of a technology or method recommended by HHS guidance issued within 60 days of the Act's enactment, specifying the technologies and methodologies rendering PHI unusable, unreadable, or indecipherable to unauthorized individuals.
- A business associate must notify the covered entity of a discovered breach of unsecured PHI under the business associate's control.
- If 500 or more individuals in a state or jurisdiction are impacted by a breach, the covered entity must notify HHS and prominent media outlets serving the area. HHS must post such breaches on its website. If fewer than 500 individuals are impacted, the covered entity must maintain a log of the breach and submit it annually to HHS.
- All notifications must be made within 60 days after discovery of a breach.
- The Secretary of HHS must issue regulations respecting breach notification within 180 days of the Act's enactment. The Act's notification provisions will become effective 30 days after such publication.

Sale of PHI Prohibited

Covered entities and business associates are prohibited from, directly or indirectly, receiving remuneration in exchange for any individual's PHI unless a valid authorization is obtained from the individual specifying permission for such exchanges:

- Exceptions to the prohibition include recognizing the costs of preparing and transmitting data for public health or research activities, providing individuals with copies of their own PHI, or exchanges for health care operations, treatment of the individual or activities to be performed by a business associate.
- HHS must issue regulations within 18 months of the Act's enactment, and the sale prohibition will apply to exchanges occurring on or after 6 months from the publication date.

HIPAA Enforcement Expanded To Individuals And Penalties Increased

The Act clarifies that criminal penalties for wrongful disclosure of PHI applies to individuals, whether they are employees or not, who without authorization obtain or disclose such information maintained by a covered entity. A new tiered system of civil monetary penalties and a private cause of action for HIPAA non-compliance is established by the Act:

- A violation of HIPAA due to willful neglect will result in mandatory penalties.
- Tiers of civil monetary penalties for HIPAA violations are established based on whether the violation was committed without knowledge, due to reasonable cause or due to willful neglect. Penalties begin at \$100, \$1,000 and \$10,000 per violation for the respective violations, and violations for willful neglect that are not corrected will begin at \$50,000.
- State attorney generals are authorized to bring a civil action in federal district court against individuals who violate HIPAA to enjoin further such violation and seek damages on behalf of affected individuals of up to \$100 per violation, capped at \$25,000, for all violations of an identical HIPAA requirement.

Breach Notification Extended to Non-HIPAA Covered Entities

Personal health record ("PHR") vendors, third party service providers and entities that handle unsecured PHR health information are required to notify individuals and the Federal Trade Commission ("FTC") upon discovery of a breach of unsecured PHR health information.

HIPAA Restrictions on PHI Disclosures, Accounting of PHI Disclosures, Access to Electronic Health Records and PHI Use in Marketing Communications and Fundraising

- Individuals may receive an electronic copy of their PHI if it is maintained in an EHR.
- Health care providers must honor a patient's request that the PHI regarding a specific health care item or service not be disclosed to a health plan for purposes of payment or health care operations if the patient paid out-of-pocket in full.
- Covered entities will be treated as compliant with the "minimum necessary" requirement in use, disclosure or request of PHI only if the covered entity limits such PHI to a limited data set or, if needed by such covered entity, to the minimum necessary to accomplish the intended purpose of the use, disclosure or request. HHS is required to issue guidance on what constitutes "minimum necessary" within 18 months after enactment.
- If a covered entity uses or maintains an EHR with respect to PHI, then with respect to an accounting of PHI disclosures requested by an individual:
 - Disclosures made for the purpose of carrying out healthcare operations, payment and treatment related to the individual must be part of the accounting; and
 - The individual's right to receive an accounting applies only to PHI disclosures made during the three years prior to the date the accounting is requested.
- Within 18 months of adopting standards on accounting of disclosures, HHS is required to issue regulations on the information to be collected for each disclosure.
- For current users of EHRs, the accounting requirements would apply to disclosures made on or after January 1, 2014. For covered entities yet to acquire EHRs, the accounting requirements would apply to disclosures made on or after January 1, 2011, or the date of EHR acquisition, whichever is later.
- Communications by a covered entity or business associate that address a product or service and encourage recipients to purchase or use it shall not be considered a health care operation unless the communication is made as described in the description of marketing communications in the Privacy Rule. Such marketing communications are not considered a health care operation if the covered entity receives, or has received, direct or indirect payment in exchange for making such communication, unless an exception for communications regarding currently prescribed drugs or biologics applies.
- HHS shall promulgate a rule providing that any written fundraising communication that is a healthcare operation shall, in a clear and conspicuous manner, provide an opportunity for the recipient to elect not to receive any further such communication.

Opportunities

The need for electronic health records is heightened by these new privacy and security requirements. The expansion of privacy and security requirements and liability to business associates will assist health care providers and health plans maintain PHI in a confidential and secure manner. New business associate agreements will need to be negotiated. Government-approved technology and methods to secure PHI will create a security standard upon which providers and plans can rely.

Risks

As with the initial implementation of HIPAA, these changes will be phased in and involve revisions to many contracts, policies, procedures, security systems and training. Costs may be considerable to implement the changes needed to already-deployed EHRs. Brief notification may pose additional public relations issues.

Moratoria on Certain Medicare and Medicaid Regulations

The Act requires that the Secretary of HHS not phase-out or eliminate the budget neutrality adjustment factor in the Medicare hospice wage index before October 1, 2009. The hospice wage index used for FY2009 would be recomputed as if there had been no reduction in the budget neutrality factor. The Act extends the moratoria on four Medicaid regulations set to expire April 1, 2009 and extends them to July 1, 2009.

- Final regulations relating to optional case management services and allowable provider taxes;
- Final regulation relating to school-based administration and school-based transportation; and
- Final regulation relating to out-patient hospital facility services.
 - Congress states that the Secretary of HHS should not promulgate as final the proposed regulations relating to Graduate Medical Education, Cost Limit for Public Providers, and Rehabilitative Services.

Opportunities

The Medicare payment reduction to teaching hospitals has been temporarily suspended which will significantly improve cash flow. The moratoria will provide much needed relief to struggling hospitals at risk of losing Medicaid funding.

Risks

The Obama administration only has until July 1, 2009, to rescind these Medicaid regulations.

State Medicaid Bailout

The Act contains provisions aimed at helping hospitals and health systems weather the nation's financial crisis. The federal government is channeling \$87 billion to the states through the Medicaid program to provide medical insurance to low-income Americans, just in time to save many state Medicaid programs and to provide short-term Medicaid coverage options for certain involuntarily unemployed people.

- The Act provides for a temporary Medicaid assistance percentage ("FMAP") of 6.2 percentage points across-the-board.
- Additional bonus payments are made to states with the highest rates of unemployment. The reductions in state share for states with increases in unemployment rates would be 5.5%, 8.5%, and 11.5%. These percent reductions would be applied against the state share after the hold harmless reduction and after an across-the-board increase of 3.1 percentage points. Each territory would be allowed to choose between an FMAP increase of 6.2 percentage points along with a 15% increase in its spending cap, or its regular FMAP along with a 30% increase in its spending cap.
- States that are not in compliance with existing requirements for prompt payment of practitioners under Medicaid are prohibited from receiving the temporary increase.

Opportunities

More health care providers may participate in Medicaid if they believe funding is secure.

Risks

Critics contend that the tweaking of the Medicaid matching formula ends up giving an excessive boost to the bigger-spending Medicaid states.

Community Health Centers

During the economic downturn, access to quality and affordable health care continues to be a nationwide problem. As the economy worsens and individuals find themselves without jobs and health coverage, demand for the health services provided by our nation's public health system will continue to grow. Community health centers help address these problems by providing primary health care, pediatric care, dental and mental health services in underserved urban and rural areas. These services are vital to ensuring access to quality health care and other important public health services, regardless of the ability to pay.

- Congress set aside \$500 million for grants to community health centers authorized under the Public Health Service Act.

- \$1.5 billion was appropriated for grants for construction, renovation, equipment and the acquisition of health information technology systems for community health centers.
- The Act provides \$500 million to the National Health Service Corps for scholarships, loan repayment and grants to training programs for equipment to address health professions workforce shortages.

Opportunities

For those considering health care professions, scholarships, loans and training programs will enable students to receive the requisite education and training without the burden of overwhelming debt. The growth of community health centers will present job opportunities for health care providers and administrators. The implementation of health information technology systems in community health centers will require technical support as well as health professionals trained in the use and implications of the new electronic medical record system.

Risks

Continued investment and support from Congress and this and succeeding presidential administrations will be needed for community health centers.

Healthcare Research

Health care research ensures that patients and doctors have the information they need to evaluate the safety, effectiveness, and value of health care. Investing in science, research, and technology leads to new medical breakthroughs to improve the health of all citizens.

- The National Institutes of Health (“NIH”) will receive \$8.2 billion for research. Another \$5 million will be available for construction and renovation of NIH buildings, and an additional \$1.3 billion will go to grantees to renovate their research facilities and to purchase shared equipment.
- \$1.1 billion is allocated between the NIH, the Agency for Healthcare Research and Quality and the Secretary of Health and Human Services to conduct or support research to evaluate and compare the clinical outcomes, effectiveness, risk and benefits of two or more medical treatments and services that address a particular medical condition.

Opportunities

Investment in science through the Act will immediately create new jobs and prevent job losses for researchers, technicians and others who provide equipment, supplies and services to laboratories.

Risks

Opponents to comparative effectiveness research fear rationing of healthcare and government interference with and oversight of physician treatment decisions will result. Additional fears surround payment decisions, such as what therapies Medicare, Medicaid and other payors will cover or pay for once the research determines the most cost-effective treatments.

Public Health Prevention and Wellness Program

Community-based clinical preventive interventions promote and facilitate healthy lifestyles and offer an effective means for the primary prevention of many chronic conditions. Provisions for the Prevention and Wellness Fund are as follows:

- The Centers for Disease Control and Prevention will receive \$300 million for immunization programs.
- \$50 million will be provided to the states for carrying out activities to implement healthcare-associated infections reduction strategies.
- Evidence-based clinical and community-based prevention and wellness strategies authorized by the Public Health Service Act will be supported with \$650 million to deliver specific, measurable health outcomes that address chronic disease rates.

Opportunities

The infusion of money into the public health system will restore jobs lost in public health departments and laboratories and will create new jobs in the public health and wellness sector.

Risks

Complementary and alternative providers oppose using only evidence-based strategies.

LABOR/EMPLOYMENT/IMMIGRATION:

Recipients Of Funds Face Increased Regulations And Costs For Labor, Employment And Immigration Matters

The Act creates additional direct and indirect regulation of the workplace. Thus, although the funds being provided under the Act will create opportunities for additional work for businesses in many industries (particularly in construction), and will obviously benefit American workers through provisions such as the required use of American iron, steel and manufactured products, it will increase the cost of doing that work because of the strings attached to recipients of the funds. The Obama administration's stated goal is to have much of the funds accounted for within 120 days of the passage of the Act. Some of the more notable ways in which the Act can be expected to impact the workplace include the addition of a new private whistleblower cause of action, measures that will increase organized labor's leverage and employer costs, and a broadening of the impact of numerous existing employment and immigration laws and regulations.

New Private Whistleblower Cause of Action

The Act has created a new private whistleblower cause of action for employees of fund recipients. This will allow employees to try to enforce their rights both through an administrative procedure and in court.

- Prohibitions Against Taking Adverse Action Against Whistleblowing Employees.
 - Section 1553 of Division A of the Act prohibits fund recipients from discharging, demoting, or otherwise discriminating against an employee because that employee has disclosed information, including in the ordinary course of the employee's duties, which the employee reasonably believes evidences:
 - Gross mismanagement of an agency contract or grant relating to funds under the Act;
 - Gross waste of funds under the Act;
 - A substantial and specific danger to public health or safety;
 - An "abuse of authority" related to the use of funds under the Act (which is defined to mean an arbitrary and capricious exercise of authority by a contracting official or employee that adversely affects the rights of any person or that results in gain or advantage to the actor or a preferred group); or
 - A violation of a law, rule or regulation related to an agency contract or grant awarded to carry out the Act.
 - Disclosures made to the following individuals or groups are protected:

- The new “Recovery Accountability and Transparency Board,” which is tasked with conducting oversight of the funds provided under the Act to prevent fraud, waste and abuse;
 - An inspector general (“IG”) of one of the federal agencies;
 - The Comptroller General;
 - A member of Congress;
 - A state or federal regulatory or law enforcement agency;
 - The employee’s supervisor(s) or another employee that has the authority to investigate, discover or end misconduct;
 - A court or grand jury;
 - The head of a federal agency, like the Secretary of Labor; or
 - A representative of any of the foregoing.
- Procedures, Burden of Proof and Remedies for Whistleblower Complaints before an Agency or in Court
 - At the agency level, if it is determined that there has been a violation, the employer may be ordered to take affirmative steps, including:
 - Correcting the violation;
 - Reinstating the employee with back pay, benefits and compensatory damages; and/or
 - Paying the complainant an amount equal to the cost and expenses that were reasonably incurred in connection with pursuing the complaint, including attorney’s fees and expert witness fees.
 - Aggrieved parties have appeal rights to the appropriate United States Court of Appeals concerning the IG’s or agency’s actions, but must file the appeal within 60 days of the agency’s order.
 - If the IG declines to conduct an investigation, or the agency issues an order denying relief (in whole or in part) or fails to issue an order within the time limits specified in the Act, the employee may bring a claim in federal district court against the employer, and either party may request a jury trial.
 - Before the agency or in a district court trial, the complainant must prove only that the protected disclosure was a contributing factor in the reprisal, and can do so through minimal circumstantial evidence, such as employer knowledge of the protected disclosure or proximity in time between the protected disclosure and alleged reprisal. An employer must rebut the employee’s prima facie showing

through clear and convincing evidence that the employer would have taken the same action irrespective of the employee's protected disclosure.

- An employee cannot waive the rights and remedies provided by the Act, and any predispute arbitration agreement (other than one in a collective bargaining agreement) that requires arbitration of a dispute arising under the whistleblower provision of the Act is invalid and unenforceable.

- **Practical Consequences and Risks**

- This new whistleblower protection will subject the personnel decisions made by fund recipients to additional regulation and review, and may spawn the development of a subset of new whistleblower law, such as happened with Sarbanes-Oxley and the various environmental whistleblower statutes.
- This can be expected to increase the cost of doing business on projects funded by the Act.
- Under the new law, it will be relatively easy for employees to establish a violation and, correspondingly, more difficult for employers to defend against a claim.
- Employers will have to approach personnel decisions involving putative whistleblowing employees with great caution.
- Documentation and sound analysis will be paramount.
- Employers should expect aggressive efforts by employees and their representatives (such as a counsel or a union) to police the workplace and enforce employees' rights under the Act.
- Employers may find it worthwhile or deem it necessary to hire or reassign employees whose duty it is to ensure compliance with the laws and regulations governing use of funds under the Act and to handle whistleblower complaints internally.

Organized Labor's Influence Is Enhanced Through the Combination of Increased Funding Under the Act and Existing Regulations

The "Buy American" provisions increase organized labor's leverage at the bargaining table.

- Section 1605 of Division A of the Act requires contractors receiving funds under the Act to purchase and use American iron, steel and manufactured goods in the projects for which they are receiving funding, unless, as determined by the contracting department or agency:
 - Doing so would be inconsistent with the public interest;
 - There is insufficient iron, steel or manufactured goods of a satisfactory quality produced in the United States; or

- Inclusion of such goods or products in the project will increase the cost of the project by more than twenty-five (25%) percent.
- While this is good for American steel and iron producers and American manufacturers, since they can expect increased demand for their products, it will also increase organized labor's leverage at the bargaining table.
- The steel and iron producers and manufacturers will, understandably, want to take advantage of the expected increased demand by producing more of their products. Knowing this, organized labor will realize that such businesses will be less willing to weather strikes or other job actions, which would hinder their ability to participate in the increased market, to support their collective bargaining demands.
- Thus, American steel and iron producers and American manufacturers should expect unions representing their workers to seek and demand more at the bargaining table.

The Act and the February 6, 2009 Executive Order Mandating Project Labor Agreements on projects worth \$25 million or more will strengthen the position of the Building Trades and other unions:

- Much of the funding provided by the Act is earmarked for large-scale construction projects, including highway construction. For a host of historical reasons, workers in the heavy and highway construction industry have traditionally been more likely to be represented by organized labor.
- While the enormous outlay of funds for projects presents a real opportunity for significant additional work for construction contractors that may be struggling in today's economy and can be expected to create new, or enhance existing, employment opportunities for construction industry workers, these provisions are almost certain to also increase organized labor's influence on America's economy.
- This is particularly true in light of a federal contracting executive order that President Obama signed on February 6, 2009.
 - Under the executive order, federal agencies contracting with private businesses for construction projects worth \$25 million or more are encouraged to mandate project labor agreements ("PLA") for the construction project.
 - Much of the funds provided for in the Act lend themselves to use in construction projects that would be subject to the executive order.
 - From an employer's perspective, this can be both good and bad.
 - Generally speaking, a PLA is a labor agreement that is intended to apply to all phases of, and all contractors and employees working on, a single large construction project.

- A typical PLA provides several potential benefits for contractors that become signatory to them, including strong no-strike pledges, expedited dispute resolution mechanisms, and promises not to oppose the contractors' efforts to secure needed permits for the project, all of which can minimize delay and disruption to the project.
 - Because all contractors are required to provide the wages and benefits contained in the PLA, each contractor is assured that it will not be at a competitive disadvantage on that basis.
- One significant disadvantage of a PLA is that the costs for a project covered by one are typically higher, sometimes significantly so.
 - A contractor must pay its employees the wages and benefits set forth in the PLA, which are typically higher than those for a non-union project, and over which the contractor has little or no influence.
 - In addition, PLA's almost universally require contractors to make contributions to various union benefit funds, such as health and welfare and retirement funds, on behalf of their employees working on the project, and also to deduct union dues from their paychecks. These deductions create additional administrative burdens and costs.
 - The restrictions contained in a typical PLA regarding management's rights to make and implement business decisions, such as to whom work will be assigned, can also increase the costs involved in the project.
 - A typical PLA also requires the contractors to use union hiring halls.

The Reach and Impact of Existing Labor and Employment Laws and Regulations is Broadened by Additional Funding Under the Act

There are numerous existing labor and employment laws and regulations with which federal contractors already must comply. Although these existing laws and regulations are not even mentioned in the Act itself, the Act's funding for construction projects will necessarily broaden the reach and impact of existing laws and regulations to new contractors, employees and/or projects. Additionally, it will also be required that all suppliers and subcontractors comply with these laws. These laws and regulations include, most notably, those administered by the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") - such as Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 - as well as the Davis-Bacon and Related Acts, which are administered by the Department of Labor's Wage and Hour Division. Any contractor receiving funds under the Act will need to understand the requirements of these laws and regulations and take steps to ensure compliance.

A brief summary of the requirements of each of the referenced laws and regulations is set forth below:

- Executive Order 11246 - This executive order prohibits federal contractors and federally-assisted construction contractors and subcontractors that do over \$10 thousand in business with the federal government in one year from discriminating against their employees on the basis of race, color, religion, sex, or national origin. Contractors that have 50 or more employees and \$50 thousand or more in government contracts must develop and implement written affirmative action programs (“AAP”) for each of their establishments, in an effort to ensure equal employment opportunities for women and minorities.
- Section 503 of the Rehabilitation Act of 1973, as amended - This statutory provision mandates that any contract for more than \$10 thousand entered into by a federal department or agency for personal property or non-personal services, such as construction contracts, contain a provision requiring the contractor to take affirmative action to employ and advance in employment qualified individuals with disabilities.
- Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended - This statute mandates that any single contract of \$100 thousand or more entered into by a federal department or agency for personal property or non-personal services, such as construction contracts, contain a provision requiring the contractor to take affirmative action to employ and advance in employment certain groups of veterans. The statute requires the same for any subcontract entered into by the prime contractor. Covered contractors must list with state employment services all employment openings except for executive and top management jobs, jobs that the contractor expects to fulfill from within and jobs lasting three days or less.
- Davis-Bacon Act - The Davis-Bacon Act applies to all contractors and subcontractors performing on federally funded or assisted contracts in excess of \$2 thousand for the construction, alteration or repair (including painting and decorating) of public buildings or public works. Covered contractors must pay laborers and mechanics employed under the contract no less than the locally prevailing wages and benefits for the same or similar work performed on similar projects, as determined by the Department of Labor. Covered contractors also must pay their employees weekly and submit certified weekly payroll records to the contracting agency.

Additional Funding to the Department of Labor Will Increase Enforcement of Existing Laws and Regulations

Title VIII of Division A of the Act also ensures that the reach and impact of existing labor and employment laws and regulations administered by the Department of Labor will be broadened by providing \$80 million in additional funding to that agency “for the enforcement of worker protection laws and regulations.” This represents a significant increase in the agency’s existing enforcement budget. Employers, even those who do not receive funds under the Act, can expect increased enforcement efforts by the Department of Labor of, among others, the following laws:

- Fair Labor Standards Act (“FLSA”) - The FLSA requires employers to pay their employees at least minimum wage and, with minimal exceptions, overtime payments of at least time-and-a-half for all hours worked over 40 in a workweek. The FLSA also contains various recordkeeping requirements. Further, the FLSA prohibits retaliation against employees for reporting or opposing unlawful practices under the FLSA.
- Occupational Safety and Health Act (“OSH Act”) - The OSH Act requires employers to comply with basic workplace safety and health standards. It is administered by the Occupational Safety and Health Administration (“OSHA”), which investigates complaints of unsafe practices made by employees or their representatives.
- Mine Safety and Health Act (“MSH Act”) - The MSH Act requires employers in the mining industry to comply with basic mining workplace safety and health standards. It is administered by the Mine Safety and Health Administration (“MSHA”), which investigates complaints of unsafe practices and conducts periodic safety inspections at mining sites.
- Whistleblower Laws Enforced by OSHA - In addition to enforcing the OSH Act, OSHA also enforces a host of whistleblower laws that prohibit discrimination or retaliation against an employee who complains about or opposes violations of the various laws. The whistleblower laws enforced by OSHA include: the Surface Transportation Assistance Act; the Asbestos Hazard Emergency Response Act; the International Safe Container Act; the Federal Rail Safety Act; the National Transit Systems Security Act; the Clean Air Act; the Comprehensive Environmental Response, Compensation and Liability Act; the Energy Reorganization Act; the Federal Water Pollution Control Act; the Pipeline Safety Improvement Act; the Safe Drinking Water Act; the Sarbanes-Oxley Act; the Solid Waste Disposal Act; the Toxic Substances Control Act; and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century.

The Act Restricts Certain Employers’ Ability to Hire H-1B Workers

Section 1611 of Division A of the Act imposes limitations on the ability of companies that receive Troubled Assets Relief Program (“TARP”) funding under the Emergency Economic Stabilization Act of 2008 or certain Federal Reserve loans to hire new H-1B workers. While the Act does not entirely prohibit these companies from filing H-1B petitions, it does attach additional obligations on employers seeking to conduct H-1B hiring.

Employers covered by Section 1611 of the Act are required to attest that they have taken good faith steps to recruit U.S. workers for the job for which an H-1B non-immigrant is sought, and that the job was offered to any U.S. worker who applied who was equally or better qualified than the H-1B non-immigrant. Employers are also required to attest that the H-1B worker did not displace a U.S. worker in an essentially equivalent job during certain periods before and after the filing of an H-1B petition, either at the employer’s own worksite or at any outside worksite where the employer has placed an H-1B worker.

Under current law, these recruitment and non-displacement attestations are required only of employers whose workforce contains a large percentage of H-1B workers ("H-1B dependent" employers) and employers that have willfully violated Department of Labor regulations concerning H-1B workers. Additionally, employers that are H-1B dependent or willful violators can qualify for certain narrow exemptions from the attestations. Employers covered by the Act, however, will not qualify for these exemptions and will be subject to even stricter limitations than those imposed on companies that have knowingly violated Department of Labor rules.

Opportunities

The Act will create opportunities for additional work for business in many industries, and will benefit American workers through provisions requiring the use of American manufactured products.

Risks

From the labor and employment and immigration perspective, the principal impact of the Act is increased regulation of the workplace and the resulting additional costs and burdens placed on employers. It will be imperative for recipients of funds under the Act to ensure that they understand the Act's requirements and then take affirmative steps to comply with those requirements.

EMPLOYEE BENEFITS:

COBRA And Transportation Fringe Benefits Expand As Executive Compensation For TARP Recipients Shrinks

The Act has the dual goals of (i) expanding fringe benefits for employees and health coverage for former employees, while (ii) restricting executive compensation for certain executives. The first goal is achieved by raising the amount that may be excluded from gross income for transit passes and transportation in a commuter vehicle, and reducing the cost of and expanding the period for health care continuation coverage ("COBRA") to terminated employees.

The Act achieved its second goal by imposing executive compensation restrictions on entities that received or will receive financial assistance under TARP ("TARP recipients"). These restrictions range from prohibiting payment and accrual of bonuses to requiring establishment of a Board Compensation Committee that meets certain requirements.

New Transportation Fringe Benefit Limits

The Act modifies existing law to increase the limits of transportation fringe benefits.

- Under prior law, the amount that could be excluded from gross income each month for transit passes and transportation in a commuter highway vehicle was \$120, and the amount that could be excluded from gross income each month for qualified parking was \$230.
- Beginning in March 2009 and ending December 2010, the amount that can be excluded each month for transit passes and transportation in a commuter highway vehicle has been expanded to the amount excludible for qualified parking, (i.e., \$230).

COBRA Subsidized

The Act provides for premium assistance for COBRA premium payments.

- Starting in March, eligible individuals are only required to pay 35% of the COBRA premium payment under an employer's group health plan. The other 65% is paid for by the federal Government in the form of a credit against the employer's payroll taxes at the time the eligible individual makes his 35% premium payment. To the extent that the credit is greater than the employer's payroll tax liability, the excess is paid to the employer as if the employer overpaid payroll taxes. In order to receive these credits, the employer must submit required reports to the Treasury Department.
- Generally, the premium assistance continues until the individual is (i) eligible for other health coverage, (ii) has received 9 months premium assistance, or (iii) the COBRA coverage otherwise expires. An individual is subject to a penalty if he fails to notify the health plan if he becomes eligible for other health coverage.

- Premium assistance is available to individuals whose employment was involuntarily terminated between September 1, 2008 and December 31, 2009. If an eligible individual did not elect COBRA before the enactment of the Act, that individual may, within 60 days after receiving appropriate notice from their former employer, elect COBRA for the period after the enactment of the Act. However, the COBRA coverage will not extend beyond the date it would have terminated had it been elected at the time otherwise required under COBRA. This new employer notice, which must be provided within 60 days after enactment of the Act, must detail the availability of premium assistance and contain other information on enrollment. The Secretary of Labor will issue a model notice that can be used by employers to satisfy the new COBRA notice requirements.
- High-income individuals (those with modified adjusted gross income over \$145,000 a year; \$290,000 in the case of a joint return) have their taxes increased by the amount of the premium assistance unless they waive the premium assistance. There also is a phase-in of the taxes for individuals earning between \$125,000 (\$250,000 for a joint return) and \$145,000.

The Act provides a change in coverage option under COBRA.

- Normally, if an employee wants to continue coverage under COBRA, he must continue the same coverage he had prior to termination of employment. If the employer chooses to offer the option, an eligible individual now may elect to enroll in coverage that is different from the coverage he had prior to termination of employment. This election must be made within 90 days of receiving notice of this option from the employer. Employers who offer this option must meet certain notice and other requirements.

The Act expands the TAA/PBGC coverage period.

- The Act extends the maximum period of COBRA coverage beyond the normal 18- and 36-month limits for individuals who are eligible for Trade Adjustment Assistance (“TAA eligible individuals”) and individuals who have a nonforfeitable right to a benefit guaranteed by the Pension Benefit Guaranty Corporation (“PBGC recipients”). If those individuals are eligible for COBRA due to a termination of employment, COBRA coverage will continue until:
 - For TAA eligible individuals, the earlier of the date such individual ceases to be a TAA-eligible individual or December 31, 2010; and
 - For PBGC recipients, the earlier of the date of death of such individual (or 24 months after the date of death of such individual in the case of the individual’s surviving spouse and dependents) or December 31, 2010.
- The group of TAA eligible individuals has been expanded to cover trade-affected service sector workers and workers affected by offshoring or outsourcing to any foreign country.

- In addition, the tax credit given to TAA eligible individuals has been increased from 65% to 80% until January 1, 2011.

Executive Compensation Restricted

The Act contains several provisions that restrict executive compensation. More specifically:

- A TARP recipient is required to meet certain standards for executive compensation and corporate governance as long as an obligation arising under TARP remains outstanding. These standards, to be established by the Secretary of the Treasury, are to include:
 - Exclusion of incentives to take unnecessary and excessive risks;
 - Recovery of any bonus, retention award or incentive compensation which was based on materially inaccurate financial statements and was paid to senior executive officers and the next 20 most highly compensated employees;
 - Prohibiting golden parachute payments to senior executive officers and the next 5 most highly compensated employees;
 - Prohibiting payment or accrual of any bonus, retention award or incentive compensation, except payments pursuant to contracts executed before February 12, 2009 and certain restricted stock that does not have a value greater than 1/3 of the total amount of annual compensation and does not vest until all TARP obligations are satisfied. The number of highly compensated employees to whom this prohibition applies depends on the amount of financial assistance received under TARP;
 - Prohibiting any compensation plan that would encourage manipulation of reported earnings to enhance compensation; and
 - Establishing a Board Compensation Committee that meets certain specified requirements.
- A TARP recipient also must adopt a company-wide policy regarding enumerated excessive or luxury expenditures, permit shareholder (non-binding) approval of executive compensation, and provide a written certification of compliance with the executive compensation provisions of the Act signed by the CEO and CFO.
- The Secretary of Treasury has the obligation to review bonus and retention awards and other compensation received before the enactment of the Act and to seek reimbursement from TARP recipient employees of any that were excessive, inconsistent with the Act or TARP, or contrary to the public interest.

Opportunities

The amount that may be excluded from gross income for transit passes and transit in a commuter vehicle has been raised.

Risks

Employers who maintain health plans subject to COBRA must take certain actions with respect to the new COBRA provisions under the Act, including the following:

- Amend health plans to comply with the new extended election provisions;
- Amend or create new COBRA notices that satisfy the additional COBRA notice requirements;
- Comply with certain reporting requirements in order to receive reimbursement for subsidized COBRA premium payments;
- Reimburse employees who incorrectly pay the full amount of the COBRA premium payment; and
- Identify the high income individuals who are not eligible for the premium assistance to ensure that the employer does not erroneously subsidize those individuals' COBRA coverage.

There is a risk that an employer's COBRA costs will increase as a result of the Act. The longer election period and lower cost is likely to increase the number of participants with COBRA coverage, and could raise claims costs for self-funded plans or cause premiums for insured plans to increase.

In addition to the foregoing, employers affected by the expanded application of TAA face the possibility of former employees continuing on COBRA beyond the normal COBRA timeframes. With respect to the extension of the maximum COBRA coverage period for TAA-eligible individuals and PBGC recipients, the new coverage periods are limited only by TAA-eligibility, the death of the PBGC recipient, and December 31, 2010. There is a risk that this December 31, 2010 limiting date could be pushed back in the future, and such individuals would remain covered under employer group health plans well beyond the normal 18 to 36 months, which would increase COBRA costs.

It is likely that the executive compensation of almost all TARP recipients will have to be restructured to comply with the Act. Although final rules and regulations may not be issued for up to a year after the enactment of the Act, employers should begin to implement the restrictions to enable CEOs and CFOs to sign written compliance statements that must be submitted with their annual securities filings to the Secretary of the Treasury.

SCIENCE/TECHNOLOGY:

Science And Technology Receive Significant Boost

The Act provides tens of billions of dollars in new funding for basic research, science infrastructure, and clean-energy initiatives. More specifically, the bill funds a health information technology program and the building of infrastructure to promote the electronic exchange of health records; expansion of broadband internet access for businesses in rural and other underserved areas; deployment of smart grid technology; and scientific research, instrumentation and upgrading of infrastructure to support quality research. The relevant sections of the bill focus on promoting science and innovation, preventing and treating disease, tackling climate change, and lessening dependence on conventional energy sources.

The specific science/technology appropriations are as follows:

Biomedical Research

The Act provides over \$11 billion for biomedical research, consisting of:

- \$10 billion for the National Institutes of Health (NIH) for:
 - Expansion of jobs to conduct biomedical research in areas such as cancer, Alzheimer's, Parkinson's, and heart disease.
 - Construction and renovation of buildings and facilities.
- \$1.1 billion to the Agency for Healthcare Research and Quality, NIH and the (Health and Human Services (HHS) Office of the Secretary to perform studies to identify which of several different treatments are most beneficial.

Infrastructure Modernization

The Act provides for over \$11.7 billion for infrastructure modernization, consisting of:

- \$7.2 billion to increase broadband access across the nation to facilitate rural economic development.
- \$4.5 billion for activities related to modernizing the electrical grid.
- Investment in health information technology (IT) infrastructure and Medicare and Medicaid incentives to encourage doctors and hospitals to use health IT. See elsewhere in this memorandum for more details.

Renewable/Alternative Energy Research

The Act provides for over \$12 billion and a series of tax incentives for renewable and alternative energy research, consisting of:

- \$6 billion for loan guarantees for renewable energy systems.
- \$3.4 billion for fossil energy research and development.
- \$2 billion for grants to manufacturers of advanced battery systems and vehicle batteries.
- \$400 million for the Advanced Research Projects Agency-Energy (ARPA-E) to support revolutionary and transformational energy research where risk and payoffs are high.
- \$300 million for the Department of Defense to research energy efficiency technology.
- Tax incentives for renewable energy and energy conservation.¹

See elsewhere in this memorandum for more details.

Scientific Research

The Act provides for over \$7 billion for scientific research, consisting of:

- \$3 billion for the National Science Foundation (NSF) for basic research in science and engineering, divided as follows:
 - \$2.5 billion for research and related activities, including \$300 million for major research instrumentation and \$200 million for academic research facilities modernization.
 - \$100 million for education and human resources.
 - \$400 million for major research and facilities construction.
- \$1.6 billion for the Department of Energy's (DOE) Office of Science, which funds research in the physical sciences such as climate science, high-energy physics, nuclear physics, and fusion-energy sciences.

¹ This tax incentive is not part of the appropriation division of the Act.

- \$1 billion for the National Aeronautics and Space Administration (NASA), divided as follows:
 - \$400 million for Earth science missions to provide critical data about the Earth's resources and climate.
 - \$400 million for exploration.
 - \$150 million for aeronautics.
 - \$50 million for cross agency support.

- \$830 million for the National Oceanic and Atmospheric Administration (NOAA) in areas such as research and construction.

- \$580 million for the National Institutes of Standards and Technology (NIST) for research, competitive grants, additional research fellowships, advanced research and measurement equipment and supplies, and construction of facilities.

- \$140 million for the United States Geological Survey (USGS) for surveys, investigations, and research.

Opportunities

The tax incentives and loan guarantees on alternative/renewable energy will motivate research and development in this area. Biomedical and biotechnology companies, universities, battery manufacturers, and other research-oriented groups can receive government grants to fund projects in medicine, climate change, and energy. As a result of increased scientific research, chemical suppliers and instrument manufacturers that provide materials to research facilities have been further incentivized to continue developing better materials for experiments.

Broadband equipment manufacturers, cable companies, and telephone companies may potentially reap the benefits of the money the bill provides to expand broadband access by supplying the equipment and services needed in areas with little or no Internet access. Similarly, electric utilities will receive new opportunities to update the transmission and distribution of electricity. Software, hardware, information technology, and personal computer manufacturers may see increased revenue by developing what is needed to set up and maintain a health care information technology system.

Risks

If an invention results from federal funding, the organization that conceived and reduced the invention to practice is permitted obtain title to the invention. The government, however, still retains several rights. First, the federal government is granted a non-exclusive, non-transferable, irrevocable, paid-up license to practice or to have practiced the invention on its behalf throughout the world. In addition, if the organization is not diligently taking steps to achieve

practical application of the invention, the government has march-in rights and can force the organization to license the patents to others upon reasonable terms. Although no federal agency has exercised its march-in rights yet, organizations that receive federal funding should be mindful of this risk.

COMMERCIAL REAL ESTATE:

Substantial Opportunities Are Provided For The Commercial Real Estate Industry

The Act provides appropriations for billions of dollars of investment for the rehabilitation, construction and acquisition of education, office, medical, military and housing projects, as well as infrastructure and transportation development and modernization.

Education, HUD, Federal and Military Facilities Receive Substantial Funding Support

The Act provides substantial funding for a variety of construction, renovation, rehabilitation, and conversion projects for real estate assets.

- The Department of Education will be able to make \$53.6 billion in grants to states to modernize, renovate and repair elementary and secondary schools and institutes of higher education, but will specifically prohibit use of these funds for maintenance, athletic facilities or facilities used for worship.
- The Department of Housing and Urban Development will be able to spend \$7 billion on various real estate projects, including \$4 billion for capital and management activities for public housing agencies, \$1.5 billion for community development block grant programs for certain critical social, economic and environmental problems facing communities and for certain affordable housing block grants, \$1 billion for construction and renovation of non-federal research facilities, and \$500 million for repair, construction and improvement projects for National Institutes of Health facilities.
- \$5.5 billion will be available to the GSA to carry out the purposes of the Federal Buildings Fund, with not less than \$750 million for federal buildings and United States courthouses, not less than \$300 million for border stations and land ports of entry, and not less than \$4.5 billion for measures necessary to convert GSA facilities to High-Performance Green Buildings. \$108 million may be expended for rental of temporary space in connection with these projects, and other portions may be used for building operations, administrative costs, and apprenticeship and training programs related to these appropriations.
- The Department of Defense will be able to spend \$2.475 billion for troop and family housing; hospitals; warrior transition complexes; energy conservation programs; nursing homes and other residential facilities for veterans; child development centers; and other military construction projects.

Attention to Energy Conservation and Green Building Practices

All appropriations for real estate projects emphasize energy conservation, alternate energy and construction consistent with a recognized green building rating system.

Opportunities

The Act provides substantial opportunities for anyone with experience in rehabilitation or construction of federal, state or government owned facilities and those experienced with alternate energy, energy conservation and green development strategies.

Risks

Each appropriation section in the Act includes specific requirements for the required start and completion dates for projects funded under that section and mandates the way the funds will be awarded - by direct federal investment, grants to states, local governments, non-profits, etc. We recommend that anyone interested in pursuing any of these appropriations call us or review the specific language in the Act, as well as the other legislation and regulations cited in the various sections, to provide further guidance and limitations for each appropriation.

Also, for each contract awarded under these appropriations, the Comptroller General is authorized to examine any records of, and interview any officer or employee of, the contractor or any of its subcontractors, or any state or local agency administering such contract or that relate to the transaction. The Act also establishes the Recovery Accountability and Transparency Board to coordinate and conduct oversight of covered funds to prevent fraud, waste, and abuse, and further requires that the Board establish and maintain a user-friendly, public-facing website to serve as a gateway to key information relating to the Act, provide connections to other government websites with related information, and include data on relevant economic, financial, grant, and contract information. Those not experienced with the government contracting process or these new requirements imposed by the Act should consider the rigorous oversight and transparency requirements before proceeding with any funded project.

PUBLIC LAW:

Funds To Stabilize State Education Aim To Relieve Potential Cutbacks

The Department of Education will administer \$53.6 billion in funds aimed at stabilizing state education funds. More than eighty percent of the funds allocated to the states are to be used first to restore state support for elementary, secondary, and post-secondary education. Such funds may also be utilized to implement and fund state formula increases for fiscal years 2009, 2010, and 2011. Remaining funds may also be granted to local educational agencies within the state to improve public safety or used for other government services.

Primary, Secondary, and Higher Education to Benefit

Local educational agencies must use the funds for primary, secondary, and higher education for specific activities and subject to certain restrictions.

Any activity authorized by the following Acts is eligible:

- Elementary and Secondary Education Act of 1965, the Individuals with Disabilities Education Act, the Adult and Family Literacy Act, the Carl D. Perkins Career and Technical Education Act of 2006; or for modernization, renovation, or repair of public school facilities, including modernization, renovation, and repairs that are consistent with a recognized green building rating system.
- Local education agencies must not use the funds for payment of maintenance costs, stadiums or other athletic facilities, vehicles, or improvements of stand-alone facilities whose purpose is not the education of children.
- Institutions of higher education must use the funds for education and general expenditures, mitigating the need to raise tuition and fees for in-state students, or modernization, renovation, or repair of institution of higher education facilities that are primarily used for instruction, research, or student housing, including modernization, renovation, and repairs that are consistent with a recognized green building rating system.
- Institutions of higher education must not use the funds for the purposes of increasing its endowment; maintenance of systems, equipment, or facilities; modernization, renovation, or repair of athletic facilities; or modernization, renovation, or repair of facilities for religious instruction.
- Funds may be granted to all institutions of higher education.

New Grant Programs Created

Five billion dollars are reserved for the following two newly-created programs:

- State Incentive Grants. The Secretary of Education may make grants to states that demonstrate significant progress in meeting the following objectives:
 - Achieving equitable distribution of effective teachers and principals in high-poverty schools and local educational agencies throughout the state;
 - Improving the collection and use of data regarding graduation rates under the America COMPETES Act;
 - Enhancing the quality of academic assessments;
 - Complying with statutory requirements related to the inclusion of children with disabilities and limited English proficiency;
 - Improving state academic content and student academic achievement standards; or
 - Improving support for struggling schools.

- An *Innovation Fund* is created with a reserve of up to \$650 million of the \$5 billion allocated between the Innovation Fund and the State Incentive Grants. The Secretary of Education may grant awards to a local educational agency or a partnership between a nonprofit organization and a local educational agency or consortium of schools. To qualify for an award, an eligible entity must have:
 - Closed the achievement gaps between identified student groups;
 - Exceeded the state's annual measurable objectives or demonstrates increased student academic achievement for identified sub-groups;
 - Made improvement in areas such as graduation rates or recruitment of high-quality teachers; and
 - Demonstrated established partnerships with the private sector.

Other Government Services

A state's allocation may be used for public safety and other government service.

- The Governor of a state shall use 18.2% of a state's allocation from the State Fiscal Stabilization Fund for public safety and other government service.

Opportunities

The state fiscal stabilization funds will provide significant opportunities to public primary, secondary, and higher education institutions. The funds will renew state educational funds that have been or are being depleted. In addition to direct funding, two new grant programs have been established to provide additional resources to local educational institutions that show innovation and improvement.

Risks

Educational institutions should be aware that many of the funds allocated under this Title are tied to performance and retention measures. As such, it will be of crucial importance that these entities have strong data collection and tracking techniques in place and that they show progress in achieving Title XIV's outlined objectives.

Housing And Urban Development Also Get Increased Funding

The Act provides substantial funding for housing, both to relieve foreclosure issues and to increase aid to public housing agencies.

Increase in Community Development Fund

The Housing Secretary shall administer \$1 billion in funds to carry out the community development block grant program.

- The funds shall be available until September 30, 2010. The funds shall be distributed to those grantees that received funding in 2008 under the Housing and Community Development Act of 1974. Priority shall be given to projects that can award contracts based on bids within 120 days from the date the funds are made available to the recipients.

New Grant Program Created for Redevelopment of Foreclosed Homes

Two billion dollars shall be made available through competitive grants until September 30, 2010, for the provision of emergency assistance for the redevelopment of abandoned and foreclosed homes.

- States, units of local government, and nonprofit entities or consortia of non-profit entities may apply for the grants. In awarding the grants, priority will be given to grantees in areas with the greatest number and percentage of foreclosures. Other criteria include demonstrated capacity to execute projects, leveraging potential, and concentration of investment to achieve neighborhood stabilization. Funds cannot be used to demolish public housing.
- The Housing Secretary will publish the requisite criteria within 75 days of enactment, and applications will be due to HUD not later than 150 days after enactment. Grantees shall spend at least 50 percent of the allocated funds within 2 years of the date the funds become available, and 100 percent of such funds within 3 years of such date.

Increase in Public Housing Capital Fund

The Housing Secretary shall administer \$4 billion in funds to assist public housing agencies in their capital and management activities.

- The funds shall be available until September 30, 2011. The funds must supplement rather than supplant expenditures from other federal, state, or local sources or funds independently generated by the grantee.

- Public housing agencies must obligate 100% of the funds within one year of the date on which funds become available to the agency for obligation, 60% of the funds must be expended within 2 years of the date on which the funds become available to the agency, and 100% of the funds must be spent within 3 years. Funds held by an agency that fails to meet these conditions may be subject to recapture and reallocation by the Housing Secretary.

Public Housing Agencies to Benefit

Three billion dollars must be obligated within 30 days of enactment to Public Housing Agencies by the Housing Secretary by the same formula used for amounts made available in fiscal year 2008.

- A public housing agency that receives funds shall prioritize capital projects that are already underway or included in the agency's 5-year plan.
- Funds shall not be allocated to agencies that have been designated as troubled or that decline to receive the funds, and may not be used for operating or rental assistance activities. Any restriction of funding to replacement housing uses shall be inapplicable.

New Grant Program Created

One billion dollars shall be allocated to a competitive grants program for priority investments including renovations and energy conservation retrofit investments that leverage private sector funding or financing.

- Competitive funding must be obligated by September 30, 2009. Priority consideration shall be given to capital projects that can award contracts based on bids within 120 days from the date the funds are made available to the public housing authorities, and the rehabilitation of vacant rental units.

Opportunities

The funds will provide significant opportunities to buffer the impact of home foreclosure and abandonment in many communities. Public housing agencies will be able to improve existing units owned, assisted or operated by the agencies or initiate new public housing projects. The funds awarded through the competitive grants program will serve to renovate, rehabilitate or retrofit existing housing units.

Risks

Public housing agencies and other grantees should be aware that the funds allocated to them or awarded through the grant program must be expended within specified deadlines. Failure to comply with the deadlines may result in recapture and reallocation of any unexpended funds by the Housing Secretary.

National Transportation Infrastructure Receives Much Needed Funding

Federal and state transportation infrastructure funds have continued to fall short of the increasing demands and needs of an overburdened system. Shortages in gas-tax funded state transportation funds coupled with aging bridges, rails, and roads have created a critical need for increased funding in this area. The Act allocates significant funding to transportation infrastructure projects ranging from road construction and maintenance to high-speed passenger trains.

Funds will be distributed through numerous federal level agencies and by grants to the states and local governments. Combined, over 30 billion dollars have been allocated to improving the roads, rails, airports, and shipyards across the United States and its territories. The emphasis in appropriating the funds is on speed, with an aim to fund projects that may be quickly completed. Traditionally, infrastructure programs take considerable time to be completed. Under many of the transportation provisions priority is given to projects that can be completed within 3 years. The application and allocation process is equally swift with most projects being funded within 180 days of enactment of the Act. In order to encourage prompt usage of the allocated funds, the Act provides that failure by the states or local agencies to grant and utilize the funding within certain quick turnarounds may result in a reallocation of funds to other states.

National Roadways Receive Bulk of Funds

Roadways and related infrastructure projects will receive the bulk of transportation-related funding under the Act. Funds for highway infrastructure projects may be deployed through the Federal Highway Administration infrastructure investment program or through supplemental discretionary grants from the Department of Transportation.

- The Act provides \$27.5 billion for projects that build and repair the nation's highways and bridges. Projects are not limited to traditional construction projects. Other areas that may qualify for funds include research and development, traffic monitoring, environmental control measures, and natural habitat mitigation efforts.
- An additional \$1.5 billion in discretionary grants may be granted to states, local governments, or transit authorities for road repair and construction, and may also be utilized to fund public transportation projects, passenger and freight rail transportation projects, and port infrastructure investments, including projects connecting ports to other modes of transportation.
- There are significant set asides for transportation programs on Indian reservations, federal lands, in Puerto Rico and other territorial areas. \$550 million was set aside for transportation improvements on Indian reservations alone.

Public and Mass Transportation a Central Emphasis

In keeping with the Administration's emphasis on alternative energy and conservation, as seen throughout the Act, there is significant transportation funding for improving the nation's public and mass transportation systems. Monies have been allocated to high speed and intercity passenger rail service, local transit authority improvements, and aid to Amtrak. Funds are not limited to the construction of new facilities, but also may be utilized to update facilities, planning and maintenance, as well as equipment and facilities costs. An emphasis is placed on giving funds to urban areas with congestion problems and to assist in the reduction of energy consumption or greenhouse gas emissions of public transportation systems.

An additional \$750 million of discretionary major capital investment grants has been allocated with priority given to projects currently in construction or are able to obligate funds within 150 days of enactment.

- The creation of intercity passenger rail and other congestion related projects has been awarded \$8 billion dollars in the form of discretionary grants to the states. Projects may include the design, building, or rehabilitating rails and facilities associated with providing public rail transportation.
- Public transportation systems including bus transportation and fixed guideway projects have been granted over \$7 billion in funds.
- Amtrak will receive much-needed funds, including \$1.3 billion in capital grants to repair, rehabilitate, or upgrade railroad assets or infrastructure, and to expand passenger rail capacity. Amtrak is not, however, allowed to use the funds to subsidize operating losses and no more than 60 percent of the funds may be used for projects along the Northeast Corridor.

Air Funds to Improve Central Systems and Security

Airports are faced with unique infrastructure demands separate and apart from road, rail, and public transportation.

- The Act awards \$1 billion in aviation-related funding that will be awarded as supplemental financing and discretionary grants.
- Airport-related funds may be utilized for a number of projects ranging from facilities to security. Improvement of technical infrastructure is a central concern receiving \$200 million for improvements to power systems, air route traffic control centers, air traffic control towers, terminal radar facilities, and navigation and landing equipment.
- In addition to these operational improvements, grants may also be utilized to improve airport physical plants. Surrounding neighborhoods and security, however, are also eligible for

funding and projects seeking to abate noise and to improve runway security are also to receive funds.

Opportunities

The opportunities for local governmental entities, cities, counties, and the states are significant. With over \$30 billion dollars allocated to improvements of roads, bridges, access to ports, and rail, both public and private entities should be able to conceive, execute, and complete extensive infrastructure projects. Private builders, engineering and construction companies, as well as materials and heavy equipment suppliers in particular will directly benefit from these funds. Port, rail, and public transportation providers will also be able to utilize funds for various purposes including the construction and maintenance of the intermodal transportation system. Airports will also have wide discretion in implementing security and runway protection devices.

The distribution of funds to transportation-related projects is intended to be swift, with most programs intended to be fully funded within 180 days of apportionment. Public and private entities currently undertaking programs, seeking new funds, or poised to quickly propose new programs, will most benefit from these appropriations.

In addition, some of these programs have general exceptions from approval or inclusion in a state-wide transportation plan. This may facilitate the creation and adoption of new transportation-related projects in a relatively quick timeframe, thus eliminating some of the political and administrative hurdles normally faced.

Risks

With speed comes the risk that states will be unable to properly allocate the funds and subsequently lose them. The transportation infrastructure funding has a relatively short time frame. Most application processes and distributions will be concluded within 180 days. Entities seeking funds must be poised to move quickly in the application process which will require vigilance in monitoring the application requirements and an almost immediate response.

The funds are generally subject to a “use it or lose it” requirement. Failure to distribute the funds may result in a revocation of funds, thereby significantly diminishing the overall amount eligible in a given state. Private entities and local governments will be largely dependent upon the strength of their state’s administrative procedures in distributing the funds and it will be impossible to determine the total amounts used by a state until the process is over.

Grant recipients are also subject to significant reporting requirements evidencing their efforts to fund projects. Recipients of funds under the various grant programs must report periodically to the respective departmental secretaries. If it is determined that a state is unable to maintain the level of effort required for receipt of monies, it will be prohibited from receiving any additional amounts.

TAX:

Significant Tax Developments

The Act makes a number of notable changes to the tax laws, many of which are summarized below. As a result of these changes, both individuals and businesses will have opportunities to reduce their federal income tax liabilities. In addition, although a significant number of the changes relate to and will impact the Clean Tech and renewable energy industries, certain of the changes may be applicable to a variety of industries. The changes to the tax laws described below generally are beneficial to taxpayers. However, to obtain a complete understanding of how it may be impacted by these changes, each taxpayer should consult with its own tax advisor.

General Business Tax Breaks and Incentives

- *Extension of Bonus Depreciation.* For 2008, certain “qualified property” held by a taxpayer was eligible for an additional depreciation deduction equal to 50% of the property’s tax basis (such additional depreciation is herein referred to as “bonus depreciation”). For this purpose, qualified property included most tangible personal property having a recovery period of 20 years or less, water utility property, computer software and certain leasehold improvements, provided that the original use of the property commenced with the taxpayer and generally was acquired and placed in service by the taxpayer during 2008. Pursuant to the Act, the acquisition and placed in service dates applicable to the bonus depreciation rule have been extended for another year. Consequently, bonus depreciation will now be available to taxpayers with respect to otherwise qualified property that is acquired and placed into service by the taxpayer in 2009.
- *Acceleration of Certain Tax Credits.* During 2008, corporate taxpayers were permitted to accelerate the recognition of a portion of their alternative minimum tax and research and development (R&D) credits in lieu of taking bonus depreciation. The Act extends this temporary benefit through 2009.
- *Extension of Enhanced Section 179 Deductions.* Pursuant to Internal Revenue Code (the “Code”) Section 179, taxpayers generally may deduct during any taxable year, subject to certain limitations, the costs of “Section 179 Property” (*i.e.*, generally depreciable personal property purchased by the taxpayer and placed in service in an active trade or business during the taxable year), up to a maximum amount of \$25,000 (\$125,000 in the case of taxable years beginning after 2006 and before 2011) per year rather than recovering such costs through the normal depreciation rules. The amount that may be deducted during any taxable year is reduced (but not below zero) to the extent that the cost of Section 179 Property placed in service during such taxable year exceeds \$200,000 (\$500,000 in the case of taxable years beginning after 2006 and before 2011). Notwithstanding the foregoing, the general dollar limitations were previously increased to \$250,000 and \$800,000, respectively, for taxable years beginning in 2008. Pursuant to the Act, these enhanced dollar limitations also now apply to taxable years beginning in 2009.

- Extension of NOL Carrybacks. Pursuant to Code Section 172, taxpayers are allowed a deduction during any taxable year for any net operating loss (“NOL”) carrybacks or carryovers to such taxable year. In general, an NOL may be carried back 2 years and carried forward 20 years. To the extent that a taxpayer does not have income sufficient to offset its NOL during these taxable years, the NOL is lost. Pursuant to the Act, certain small businesses (*i.e.*, those that average no more than \$15 million in gross receipts per year) may now elect to have an NOL arising in a taxable year that ends or begins in 2008 carried back for up to 5 years. An election to use the extended carryback period for such NOLs must be made by the due date (including extensions) for filing the taxpayer’s return for the relevant taxable year.

- Limitation on Application Section 382. Pursuant to Code Section 382, the ability of a corporation that undergoes an ownership change to use its pre-change NOLs to offset its post-change income is significantly limited. The Act provides an exception to this limitation for taxpayers that undergo an ownership change as a result of a restructuring undertaken pursuant to the Emergency Economic Stabilization Act of 2008.

- Sales Tax Deductions for Motor Vehicle Purchases. Pursuant to the Act, taxpayers are now permitted to take an “above the line” deduction (*i.e.*, for purposes of determining their adjusted gross income for a taxable year) for state and local sales or excise taxes incurred in connection with the purchase of certain qualified motor vehicles. In general, to constitute a qualified motor vehicle for this purpose, the vehicle must be a new passenger automobile or light truck, a motorcycle or a motor home that is acquired by the taxpayer for its use before January 1, 2010. This deduction is subject to both a price cap and an income phase out/limitation.

- Enhanced Exclusion of Gain on Small Business Stock. Pursuant to Code Section 1202, non-corporate taxpayers are permitted to exclude from their gross income 50% of any gain realized on the sale or exchange of qualified small business stock held for more than 5 years. As a result of the Act, the 50% exclusion has been increased to 75% for gains relating to qualified small business stock purchased between the effective date of the Act and January 1, 2011.

- Limitation on the Built-In Gains Tax. In general, pursuant to Code Section 1374, if an S corporation (that was previously a C corporation) has a net recognized built-in gain within 10 years of becoming an S corporation, the corporation, itself, is subject to tax (at the highest corporate tax rate) on such net recognized built-in gain. Notwithstanding the foregoing, pursuant to the Act, if an S corporation has a net recognized built-in gain during a taxable year beginning in 2009 or 2010, no built-in gains tax will be imposed on such net recognized built-in gain; provided that the corporation became an S corporation more than seven years prior to the beginning of such taxable year.

- Deferral of COD Recognition. In general, if a taxpayer acquires its own debt instrument for less than the principal balance of the debt, the taxpayer realizes and must recognize

cancellation of indebtedness income (“COD”). However, pursuant to the Act, if a taxpayer (or a person related to the taxpayer) reacquires (generally for cash or otherwise), for an amount less than its principal balance, debt that it previously issued in connection with its trade or business, and thereby realizes COD, the taxpayer will be permitted to defer the recognition of such COD over a 5-year taxable period that commences with the fifth taxable year following the reacquisition if the reacquisition occurs in 2009 (or with the fourth taxable year following the acquisition if the reacquisition occurs in 2010).

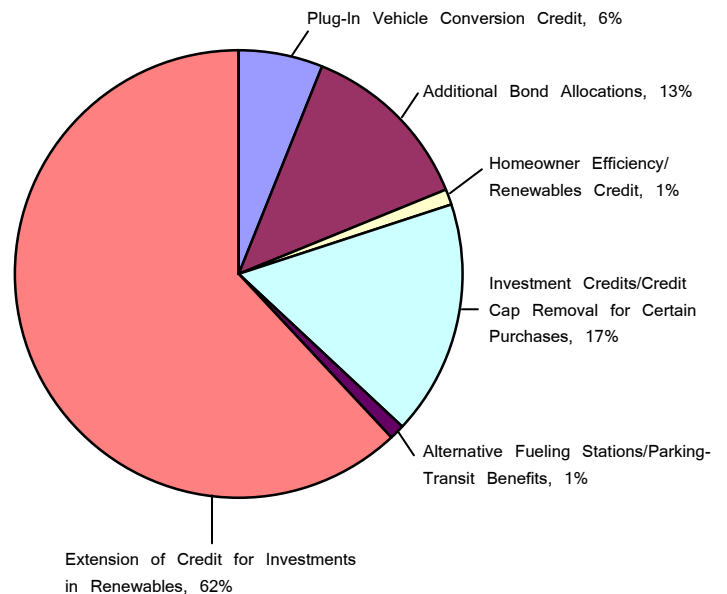
- Temporary Suspension of AHYDO Rules. Pursuant to Code Section 163(e)(5), issuers of applicable high yield discount obligations (“AHYDOs”) are prohibited from deducting a portion of the original issue discount (“OID”) that accrues on such obligations and are subject to certain deferral rules with respect to the remaining OID. Pursuant to the Act, these deduction limitations will not apply to an AHYDO issued (or deemed issued as a result of a substantial modification to a debt instrument) between September 1, 2008 and January 1, 2010 in exchange for another obligation that is not, itself, an AHYDO.

Energy Incentives

- Extension of the Renewable Electricity Production Credit.

Code Section 38 provides taxpayers with a general business credit (the “General Business Credit”), which is comprised of numerous other credits. One of the credits comprising the General Business Credit is the renewable electricity production credit under Code Section 45. The renewable electricity production credit provides a tax credit for certain electricity produced from qualified energy resources at qualified facilities, subject to limitations. The Act extends the dates on which the property producing renewable energy must be placed into service to be eligible for the renewable energy credit. The expiration dates vary based upon the type of facility involved:

Approximate Allocation of \$27 Billion in Tax Benefits to Energy



- Wind Facilities. Property now must be placed in service prior to January 1, 2013 (previously January 1, 2010).
 - Closed-Loop and Open-Loop Biomass, Geothermal, Landfill Gas, Trash, and Qualified Hydropower Facilities. Property now must be placed in service prior to January 1, 2014 (previously January 1, 2011). Solar Facilities remains unchanged and must have been placed in service by January 1, 2006.
 - Marine and Hydrokinetic Renewable Energy Facilities. Property now must be placed in service prior to January 1, 2014 (previously January 1, 2012).

- Expansion of the Energy Credit. A significant credit included within the General Business Credit is the “investment credit” (under Code Section 46). The investment credit is comprised of several credits, including “energy credit” (under Code Section 48), which generally provides a tax credit equal to an applicable percentage of the basis of eligible energy property placed in service during specified years. Pursuant to the Act, taxpayers may elect to treat “qualified investment credit facilities” as property eligible for the energy credit (*i.e.*, instead of taking the production credit under Code Section 45). For this purpose, the definition of “qualified investment credit facilities” includes wind, closed-loop and open-loop biomass, geothermal or solar energy, landfill gas, trash, qualified hydropower, and qualified marine and hydrokinetic renewable energy facilities (all as defined in Code Section 45) placed in service in 2009 through 2013 (or in the case of wind energy facilities, 2009 through 2012). The energy percentage for such facilities is up to 30% percent.

The Act also repeals certain limitations on the current energy credit available for renewable energy property, effective for periods after December 31, 2008. First, any portion of the energy credit attributable to “qualified small wind energy property” is no longer subject to a \$4,000 annual limitation. Second, the basis reduction requirement generally applicable to energy property financed by subsidized energy financing or industrial development bonds no longer applies.

- Department of Energy Grants For Specified Energy Property in Lieu of Tax Credits. The Act establishes a new grant program through the Department of Energy that is available to persons placing specified energy properties in service during 2009 and 2010. The purpose of these grants is to reimburse such persons for a portion of the expense of such properties. The amount of any grant is based on the “applicable percentage” (either 30% or 10%, depending on the type of facility placed in service) of the basis of any such property.

Applications for this grant must be received prior to October 1, 2011, and will be subject to certain recapture requirements if the facility is disposed of or otherwise ceases to qualify for the grant. With respect to any energy property receiving a grant pursuant to the Act, no credit is available under Code Section 45 (*i.e.*, the credit for electricity produced from certain

renewable resources) or Code Section 48 (*i.e.*, the energy credit) for the taxable year in which the grant is made or in any subsequent taxable year.

- *Increased Allocation of Clean Renewable Energy Bonds.* Code Section 54A provides a tax credit to holders of certain “qualified tax credit bonds” based on a specified percentage of the face amount of the bonds. One type of qualified tax credit bond is the “new clean renewable energy bond” (governed by Code Section 54C). The Code currently limits the maximum amount of new clean renewable energy bonds that may be issued in the United States. The Act increases the national limit on the maximum amount of new clean renewable energy bonds under Code Section 54C from \$800 million to \$2.4 billion.
- *Modification of Credit for Nonbusiness Energy Property.* In 2008, individuals were allowed a tax credit under Code Section 25C equal to the sum of the amount of residential energy property expenditures incurred by the taxpayer plus 10% of the amount paid for qualified energy efficiency improvements. For 2009 and 2010, the Act increases the credit to equal 30% of the sum of (i) the amount paid for qualified energy efficiency improvements plus (ii) the amount of residential energy property expenditures incurred by the taxpayer. The maximum annual credit is increased from \$500 to \$1,500. The Act also modifies certain efficiency standards applicable to certain energy property.
- *Modification of Credit for Residential Energy Efficient Property.* In 2008, individual taxpayers were allowed a tax credit under Code Section 25D equal to 30% of their expenditures for (i) qualified solar electric property, (ii) qualified solar water heating property, (iii) qualified fuel cell property, (iv) qualified small wind energy property, and (v) qualified geothermal heat pump property. The amount of the credit was limited depending on the type of expenditure. However, the Act removes all such limitations for tax years beginning after December 31, 2008, other than the limitation for expenditures for qualified fuel cell property. In general, with respect to a credit related to such fuel cell property, there remains a limitation of \$500 with respect to each half kilowatt of capacity of qualified fuel cell property.
- *Temporary Credit Increase for Alternative Fuel Vehicle Refueling Property.* In 2008, taxpayers were allowed a tax credit under Code Section 30C equal to 30% of the cost of any qualified fuel vehicle refueling property placed in service during the taxable year. In 2008, the maximum credit allowed was capped at \$30,000 for depreciable property and \$1,000 for all other property. The Act increases the credit for taxable years beginning in 2009 and 2010 from 30% to 50% of the cost of qualified property. The maximum credit allowed for placing such property in service is increased to \$50,000 for depreciable property (or, with respect to any such property relating to hydrogen, \$200,000) and \$2,000 for all other property.
- *Modification of Carbon Dioxide Sequestration Credit.* The Act amends the credit available under Code Section 45Q for the sequestration of carbon dioxide. With respect to carbon dioxide used as a tertiary injectant that is eligible for the \$10 per metric ton credit, the

carbon dioxide now must also be disposed of in secure geologic storage to qualify for the credit.

- Expansion of Credits Available for Certain Qualified Plug-In Electric Motor Vehicles and Conversion Kits. Code Section 30D allows a tax credit for “new qualified plug-in electric drive motor vehicles.” This credit previously was set to be phased out after 250,000 of such vehicles were sold in the United States. As a result of the Act, the amount of the credit has been increased to \$2,500 (unchanged) plus \$417 for each kilowatt hour of battery capacity in excess of 5 (previously 4) kilowatt hours. The maximum amount of the credit is \$7,500. However, pursuant to the Act, the credit now will begin being phased out after the date on which 200,000 of such vehicles have been sold.

The Act also creates a new credit (under a new Code Section 30B(h)) for conversion kits that are installed on motor vehicles to convert such vehicles to qualified plug-in electric drive motor vehicles. The credit is equal to 10% of the cost of converting the vehicle, with a maximum credit of \$4,000 per converted vehicle. This credit is not available for conversions made after December 31, 2011.

- Expansion of Investment Credit for Advanced Energy Facilities. The Act expands the investment credit under Code Section 46 to include a new “qualifying advanced energy project credit.” New Code Section 48C governs the qualifying advanced energy project credit, which generally will be equal to 30% of the amount invested to re-equip, expand or establish a manufacturing facility that is designed to produce: (i) property that will produce energy from the sun, wind or certain geothermal deposits; (ii) fuel cells, microturbines, or an energy storage system for use with electric or hybrid-electric motor vehicles; (iii) electric grids to support the transmission and storage of intermittent sources of renewable energy; (iv) property that will capture and sequester carbon dioxide emissions; (v) property that will refine or blend renewable fuels or to produce energy conservation technologies (including energy-conserving lighting technologies and smart grid technologies); or (vi) property designed to reduce greenhouse gas emissions. This credit is not allowed for any portion of a project used for the production of property used in the refining or blending of most transportation fuels. The total amount of credits that may be allocated under this provision may not exceed \$2.3 billion.

Opportunities

There will be significant opportunities over the next few years for businesses and individual taxpayers to reduce their federal income tax liability by utilizing the various tax incentives/breaks provided in the Act. The Act makes a number of amendments to the Code that are likely to provide far-reaching benefits to taxpayers across all industries. For example, the Act extends the application of the bonus depreciation rules, as well as the enhanced accelerated deduction rules provided for by Code Section 179. The Act also will permit taxpayers that realize COD as a result of repurchasing their debt at a discount, or modifying the terms of their existing indebtedness, to defer the recognition of such COD.

The industry with the greatest number of targeted benefits and opportunities is the energy industry, particularly the Clean Tech or renewable energy sectors. Among other benefits, the Act provides the industry with a 3-year extension of the production tax credit for electricity produced from wind, water, and certain other renewable sources. The Act also provides for \$2.3 billion worth of investment credits for businesses that establish or expand advanced energy facilities and authorizes certain companies to issue an additional \$1.6 billion of clean renewable energy bonds. Further, businesses that sell energy efficient products are likely to see an increase in business because of the tax credits and incentives that the Act offers to individuals who elect to make certain energy efficient improvements.

Risks

Each of the tax provisions discussed above generally is favorable to taxpayers and should be viewed as an opportunity rather than a risk or a danger. Nevertheless, because of the complex nature of the tax issues described above and their potential impact, each taxpayer should consult with a tax advisor to obtain a complete understanding of how it may be impacted by the Act.

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