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Economic Stimulus Act Contains *Buy American* Provision

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (“the Act”), which provides for over \$460 billion in federal spending and over \$300 billion in tax savings. A *Buy American* provision also was included, which states that

[n]one of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.

The Act explains that the *Buy American* provision must be “applied in a manner consistent with our United States obligations under international agreements.” It also allows the head of a federal department or agency to waive the application of the *Buy American* provision upon a finding that (1) the provision would be inconsistent with public interest; (2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) inclusion of iron, steel, and manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

The Act does not define either “produced in the United States” or “public building or public work.” How these provisions are interpreted will affect the scope of products that are covered by the *Buy American* provision.

President Obama is expected to issue an Executive Order that directs the federal departments and agencies to begin implementing the Act. The federal departments and agencies then are likely to provide additional guidance. To the extent terms in the *Buy American* provision of the Act remain undefined (e.g., they are not

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defined in an Executive Order or subsequent legislation), the federal departments and agencies implementing the Act will have the ability to define those terms.

In sum, the interpretation of the *Buy American* provision of the Act remains unclear at this point. There may be opportunities for interested U.S. manufacturers to express their views as to how this provision should be interpreted so as to fulfill the intent of Congress, either in discussions with relevant agencies or possibly in formal rule-making processes.

We understand that some of the departments and agencies intend to provide implementation guidance memoranda as early as next week. The ultimate interpretation (or interpretations by different departments and agencies) could be influenced by the patchwork of existing laws and regulations. Moreover, the interpretation of the *Buy American* provision also may be affected by the regulatory rulemaking process, which (if used) would allow interested parties to submit comments to the federal departments and agencies.

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