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U.S. Department of Energy Releases Report on Securing America's Clean Energy Supply Chain

DEPARTMENT OF ENERGY PROPOSES SEVERAL POLICY ACTIONS TO OVERCOME ENERGY SUPPLY CHAIN CHALLENGES AND TRANSITION TO CLEAN ENERGY

This is the second in a series of client alerts that will be published in the near future regarding intensive assessments of six key supply chains that President Biden ordered last year pursuant to the Executive Order on America's Supply Chains ("E.O. 14017"). As we previously reported, E.O. 14017 required relevant agencies to conduct comprehensive, "whole-of-government" reviews of identified critical supply chains. These reviews were to be undertaken in two steps. The first step required an immediate analysis (within 100 days of the executive order) concerning four key supply chains. The second step required more intensive, sectoral-specific supply chain assessments to be completed within one year of E.O. 14017. Pursuant to the second step, the Department of Energy ("DOE") issued a report on February 24, 2022 entitled "America's Strategy to Secure the Supply Chain for a Robust Clean Energy Transition" ("DOE Report").

In reviewing the energy supply chain, the DOE identified "immense" challenges facing the United States, such as manufacturing capacity, dependence on foreign supply, worker training, and global trade practices, among others. According to the DOE Report, these challenges "will require a sweeping set of diverse policy actions" and will also present significant "opportunities for action" to secure the energy supply chain and support the transition to clean energy. The DOE Report focused on seven "strategic opportunities" for action:

- "Increase domestic raw material availability;"
- "Expand domestic manufacturing capabilities;"
- "Invest and support the formation of diverse and reliable foreign supply chains to meet global climate ambitions;"

- "Increase the adoption and deployment of clean energy;"
- "Improve end-of-life waste management;"
- "Attract and support a skilled U.S. workforce for the clean energy transition;" and
- "Augment supply chain knowledge and decision-making"

The DOE Report found that foreign governments around the world have implemented "strategies and industrial policies to advance and unlock significant investment in key supply chain segments." For example, the report explains how the Government of China's intensive "investment in domestic cobalt production and processing" have "enabled China to corner a significant market share in cobalt processing." The current realities of the marketplace for clean energy products therefore drive the DOE's recommended "strategy to rapidly secure the critical supply chains necessary to meet economic, national security, and climate goals." To that end, the DOE also identifies several proposals for consideration by the Executive Branch and Congress to implement this strategy.

The DOE Report proposes four categories of policy actions: cross-cutting Executive Branch actions regarding the strategic opportunities highlighted above; Executive Branch actions for specific technologies; recommended Congressional actions for the seven strategic opportunities; and Congressional actions for specific technologies. The DOE Report recommends 62 distinct actions for the Executive Branch and Congress, many of which consist of additional potential sub-actions to pursue. Selected recommended policy actions are summarized below.

1. "Expand Domestic Manufacturing Capabilities" Through Targeted Investment And Increased Interagency Coordination

According to the DOE Report, "strategic policies and investment" are required to "build strong domestic supply chains needed to support the clean energy transition and create jobs for American families[.]" Key proposals and recommendations include the following:

- ***"Raise awareness, coordinate, and expand manufacturing programs needed to support clean energy transition."*** Proposing to collaborate with the Department of Defense, Small Business Administration, and other agencies, the DOE plans to "leverage and raise awareness of existing energy manufacturing programs and expand support for manufacturing of machine tools and technologies needed for the clean energy transition." Specific actions include the following:
    - Increase funding for (1) research, development, and demonstration ("RD&D") for domestic clean energy manufacturing and bring about process innovations (*e.g.*, for heavy industrial sectors), and (2) "workforce development" in the manufacturing sector (*e.g.*, apprenticeships and resources for schools and universities).
    - Expand grants, loans, and loan guarantees to "support domestic manufacturing capabilities and job creation," particularly in key areas that "build on U.S. capabilities and developing markets." These areas may include electric vehicles, batteries, semiconductors, and "other advanced materials and chemicals key to energy."
- ***"Enhance coordination of trade policy throughout the U.S. Government to support fair conditions for the U.S. clean energy industries and its workers."*** The DOE proposes collaborating with the Department of Commerce and U.S. Trade Representative to ensure that the U.S. Government continues to "provide the trade remedies that U.S. firms are entitled to under U.S. law[.]" The DOE also plans to work with other agencies to review how trade policies affect U.S. manufacturers with the goal of leveling the playing field throughout the energy supply chain.

2. "Attract And Support A Skilled U.S. Workforce For Clean Energy"

The DOE Report proposes two actions for attracting and supporting a skilled U.S. workforce to implement the clean energy goals of the United States:

- ***"Convene multiple agencies and workforce stakeholders to advance energy workforce development."*** The DOE proposes that the Department of Labor and Department of Education coordinate to "develop targeted sector-based plans." This effort will require collaboration with all levels of government, labor unions, trading partners, and non-governmental organizations "to advance skill-adjacent training and registered apprenticeships that will support the large-scale training needs of energy workers and employers."
- ***"Embed strong labor standards and support for organized labor in Federal funding for the Energy Sector Industrial Base."*** The DOE Report defines the Energy Sector Industrial Base ("ESIB") as "the energy sector and associated supply chains that include all industries, companies and stakeholders directly and indirectly involved in the energy sector." According to the DOE Report, interagency coordination is needed to support the ESIB workforce, including the following:
    - Use "Federal and state policy and procurement levers to support unionized, family-sustaining employment in the manufacturing sector."
    - Strengthen the workforce by "requiring or incentivizing job creation and job quality commitments by manufacturing firms working on projects funded with public dollars."
    - Engage in "outreach to communities that identify effective methods to retrain displaced workers who are interested in transitioning to new clean energy careers."

3. Congressional Actions, Including Tax Incentives, Development Funding, And Amendments To The Buy American Act, To Stimulate Domestic Production Capacity

The DOE Report also suggests several actions that Congress should take to secure the energy supply chain and achieve clean energy goals. These actions include the following:

- ***"Enact legislation to provide tax incentives to support domestic clean energy manufacturing and deployment, including incentives for building new facilities and for the ongoing operation of those facilities."*** According to the DOE Report, tax incentives "are needed to provide a clear demand signal and help U.S. manufacturers build and maintain a competitive edge" in various clean energy technologies. The DOE recommends that Congress establish, extend, expand, and revise multiple tax incentives to achieve these goals.
    - For example, the DOE recommends extending, expanding, and revising eligibility for the Section 48C Advanced Manufacturing Tax Credit to include "material processing facilities" such as for battery materials processing, manufacturing of rare earth element separation and processing, as well as "manufacturing equipment/machines" for solar polysilicon, wafers, cells, and modules, among other products. The DOE also recommends extending and revising the Production Tax Credit and Investment Tax Credit "for both clean energy deployment and continued operation of clean energy assets to provide stronger incentives for clean energy projects[.]"
- ***"Appropriate additional RD&D funding to DOE to further accelerate domestic manufacturing in a way that addresses supply chain vulnerabilities and promotes resilience for clean energy domestic manufacturing."*** Among other actions, the DOE Report recommends that Congress pass legislation to fund

RD&D for industrial decarbonization, advanced materials and their supply chains, and clean energy manufacturing.

- ***"Amend Buy American Act to support clean energy technologies by extending the purchasing mandate to the equipment generating the electricity and storing the energy for new facilities."*** The DOE recommends that Congress enact new amendments to the Buy American Act and "maximize Buy American Act benefits" for clean energy technologies. Specifically, the DOE Report recommends "extending the purchasing mandate" under the Buy American Act "to the equipment generating the electricity and storing energy (to include hardware, software, and virtual platforms) supplied to the U.S. Government under any utility service contract or power purchase agreement."

The DOE's recommendation with respect to Buy American enhancements complements ongoing actions taken by the Biden Administration with respect to how new Buy America preferences under the Infrastructure Investment and Jobs Act will be applied to clean energy facilities. On April 18, 2022, the Office of Management and Budget ("OMB") issued a memorandum to provide implementation guidance to Federal agencies with respect to the Buy America preferences in the new law. The guidance applies to all Federal financial assistance whether or not funded through the new law, where the funds are appropriated or otherwise made available and used for a project for infrastructure. The guidance confirms that agencies "should treat structures, facilities, and equipment that generate, transport, and distribute energy – including electric vehicle (EV) charging – as infrastructure." The memorandum suggests that OMB will require agencies to seek guidance from OMB when determining whether a program has "infrastructure" expenditures and that OMB intends to broadly interpret the term.

KEY TAKEAWAYS

The DOE Report describes several challenges that the United States faces in securing its energy supply chain and transitioning to clean energy. The DOE Report recognizes, however, that many of these challenges present strategic opportunities for the Executive Branch and Congress to implement policy actions to achieve energy, economic, and national security goals. These actions and strategies have the potential of impacting companies and workers from a range of sectors and will necessarily involve formal and informal opportunities for stakeholders to actively collaborate with the Executive Branch and Congress on these issues. For these reasons, stakeholders should closely follow these developments and participate in the policy-making processes to strengthen the supply chain, address unique challenges, and secure commercial benefits.