Stimulus Funds: Should We or Shouldn't We?

Virtually every sector of the U.S. economy is targeted in the American Recovery and Reinvestment Act of 2009 ("ARRA"). Indeed, ARRA represents the largest one-time domestic spending program in U.S. history. This massive, $575 billion, new spending program will be accomplished via grants and contracts, much of it through states and cities, but also through colleges and universities, nonprofits, and for-profit corporations, large and small.

Too good to be true? Perhaps. As the banks are beginning to find out in the context of the Toxic Asset Relief Program ("TARP"), these federal funds come with substantial "strings" attached and often yield unintended—or unexpected—consequences. Clients seeking ARRA funds will need to understand not only what it takes to receive an award, but also what it takes to comply with the authorizing statute, including the numerous accounting and reporting requirements.

This Client Memorandum provides a brief overview of ARRA's general provisions, includes examples of targeted sectors and associated funding amounts, and highlights the significant reporting requirements as well as the costs and potential risks associated with accepting ARRA funds.

General Provisions of ARRA

- Establishes temporary funding, intended principally to preserve and create jobs and to make investments in infrastructure, energy and sciences, unemployment assistance, and state and local stabilization.
- Calls for substantial upgrade to the oversight by the various agency Inspectors General and the Government Accountability Office.
- Creates a new Executive Branch-level board to manage and oversee funding and spending.
- Mandates that federal agencies develop expenditure strategies and plans prior to obligating funds.
- Provides for billions of dollars to be awarded directly by federal agencies, with additional billions to be allocated via federal formula directly to states and cities.
- Establishes broad and detailed reporting requirements to insure greater transparency and accountability.
- Mandates application of the Davis-Bacon Act's "prevailing wage" requirements for all projects funded, in whole or in part, under ARRA.

Targeted Sectors and Funding Amounts

Transportation

- $150 million to fund Public Transportation Security Assistance and Railroad Security Assistance under the 9/11 Commission Act of 2007, awarded by the Federal Emergency Management Agency.
- $27.5 billion to State Departments of Transportation and Metropolitan Planning Organizations (which will make the awards in their respective regions) for restoration, repair and construction under the Surface Transportation Program, as well as passenger and freight rail and port infrastructure projects.
- $100 million to provide supplemental grounds for assistance to qualified shipyards, awarded by the Maritime Administration.
- $1.5 billion to states, local governments and transit agencies for capital investments in surface transportation infrastructure; $8 billion to states for intercity passenger service capital projects and congestion grants, with priority given to high-speed passenger rail service; and $100 million to public transit agencies for the Transit Investments for Greenhouse Gas and Energy Reduction (TIGGER) program for capital projects that reduce energy consumption and/or reduce greenhouse gas emissions. These funds are awarded by the Secretary of Transportation.

Energy

- $2.4 billion to support the next-generation electric vehicles with a goal of one million plug-in hybrid vehicles on the road by 2015: (i) $1.5 billion for highly efficient batteries and components (applications due May 19, 2009); (ii) $500 million to produce components for electric vehicles, such as electric motors (applications due May 13, 2009); and (iii) $400 million to demonstrate plug-in hybrids and other electric infrastructure concepts (e.g., truck stop charging stations, electric rail and training for technicians to build and repair electric vehicles) (applications due May 13, 2009). These funds will be awarded by the Office of Energy Efficiency and Renewable Energy.
- $6.0 billion in subsidy appropriations that could support approximately $60 billion in loan guarantees for (i) renewable energy systems that generate electricity or thermal energy, and facilities that manufacture related components; (ii) electric power transmission systems, including upgrading and reconductoring projects; and (iii) leading-edge biofuel projects that will use technologies performing at the pilot or demonstration scale as well as those that the DOE determines are likely to become commercial technologies and will produce transportation fuels that substantially reduce life-cycle greenhouse gas emissions compared to other transportation fuels. These funds will be awarded by the Department of Energy's Loan Guarantee Office.
- $4.5 billion to purchase demand response equipment; to enhance energy infrastructure security and reliability; for energy storage research, development, demonstration and deployment; to facilitate recovery from energy supply disruptions; and for implantation of programs authorized under Title XIII – Smart Grid of the Energy Independence and Security Act of 2007. These funds will be awarded by the Office of Electricity Delivery and Energy Reliability.
- $400 million to improve energy efficiency in the transportation, building and other sectors for retrofits, transportation conservation, building codes, energy distribution technologies, landfill gas capture, etc., awarded by the Office of Energy Efficiency and

Renewable Energy.

Infrastructure

- $600 million to fund construction and repair to the National Oceanic and Atmospheric Administration ("NOAA") facilities, ships and equipment to improve weather forecasting and to support satellite development, awarded by NOAA.
- $4.24 billion to provide funding for facility sustainment, restoration and modernization associated with maintaining the physical structure at Department of Defense posts, camps and stations, awarded by the various Services.
- $5.55 billion for federal buildings and U.S. courthouses, border stations and land ports of entry, and to convert GSA facilities to High Performance Green Buildings, awarded by the GSA.
- $875 million for military construction projects (e.g., troop housing, child development centers, energy conservation and alternate energy projects, and family housing), awarded by the Military branches.

Health

- $2 billion for the development and implementation of a nationwide health information technology ("HIT") infrastructure, awarded by the Office of the National Coordinator for Health Information Technology.
- $50 million to improve health information technology security at Health and Human Services ("HHS"), awarded by the HHS Secretary.
- $85 million for telehealth services development and related infrastructure, facility construction projects, deferred maintenance and improvement projects, sanitation projects and the purchase of equipment, awarded by the director of the Indian Health Services.

Telecommunications

- $4.7 billion for the Broadband Technology Opportunities Program (TOP) to provide access to broadband service in unserved and underserved areas and to acquire equipment, instrumentation, network capability, hardware, software, digital network technology and infrastructure for broadband services, awarded by the National Telecommunications and Information Administration.
- $2.5 billion for distance learning, telemedicine and broadband programs, awarded by the Department of Agriculture's Rural Utilities Service.
- $160 million for procurement and deployment for non-intrusive inspection systems and tactical communications equipment and radios, awarded by U.S. Customs and Border Protection.

Environment

- $100 million to provide supplemental funding for projects authorized by the Comprehensive Environmental Response, Compensation, and Liability Act, awarded by the Environmental Protection Agency's ("EPA") Office of Brownfields and Land

Revitalization, and Office of Solid Waste and Emergency Response.
- $300 million to provide supplemental funding for projects and activities authorized under Diesel Emission Reduction Act ("DERA"), awarded by the EPA's Office of Air and Radiation.

Reporting Requirements, Costs and Associated Risks

- Requires quarterly reporting on how the funds create or preserve jobs, and aid the economic recovery. These are in addition to the existing Federal Acquisition Regulation ("FAR") requirements and other established federal reporting requirements.
- Mandates civil and criminal liability under the False Claims Act for false reporting of spending of ARRA funds. Funding recipient liability as high as treble damages, plus the government's cost to bring the action.
- Establishes the Recovery Act Transparency Board with broad powers to oversee ARRA funding and spending.
- Authorizes the Office of Inspector General ("OIG") to review concerns raised by the general public about use of funds, and to audit government contracts records and interview contractor employees. Includes a "Whistle Blower" provision to protect those who submit complaints about misspent ARRA funds.
- Increases the budgets and power of the OIG (e.g., $250 million additional funding for OIG's oversight activities and subpoena power).

Final Thoughts

There is no road map for this massive federal funding process, but a few things are clear:

- The timetable is short and the agencies are moving quickly to complete the required expenditure strategies and regulating processes that will govern the competitive awards. **Some applications are due in May!** Prospective applicants for ARRA funds need to be actively monitoring the agency's regulatory process and understand the rules.
- Companies that have not previously operated as government contractors, laden with FAR requirements, will need to understand the significant regulatory and reporting obligations that come with ARRA funds, and have a plan for carefully accounting for all funds received and spent. Appreciating the administrative costs (and legal exposure) of accounting accurately for ARRA funds must be part of each applicant's evaluation process.

Thompson Coburn LLP's ARRA Application/Compliance Counseling Services

- We can assist clients who wish to understand the federal authorization and compliance processes for particular pools of ARRA funds.
- We can help clients track the state and city "formula" funds award processes and evaluate suitability.
- We can assist clients in preparing timely and complete applications for ARRA funds.
- We can assist clients in developing reporting plans and processes in order to comply

with the ARRA reporting and accounting requirements.
- We can assist clients in responding to agency or OIG requests for clarification, supplementary reports or investigations.
- We can help clients in complying with ethics and Lobbying Disclosure Act issues.

For more information, please contact:

Jeff Craven
(202) 585 6958
jcraven@thompsoncoburn.com

Ray Stewart
(202) 585 6910
rstewart@thompsoncoburn.com

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