Problems Arising from Application of "Buy American" Requirements to Information and Communications Technology Industry

The following explains the problems that would arise from a restrictive application of the American Recovery and Reinvestment Act of 2009's ("ARRA's") "Buy American" provision ("ARRA-BAP") to the information and communications technology ("ICT") industry. We first explain that the National Telecommunications and Information Administration ("NTIA") has the authority to waive application of ARRA-BAP to all Broadband Technology Opportunities Program ("BTOP") projects. We then explain why such a waiver must be adopted to support the ARRA's goals of broadband deployment and job creation.

1. The ARRA-BAP Permits Waiver for BTOP-Funded Projects.

As an initial matter, the Office of Management and Budget ("OMB") recently issued guidance that limits the potential scope of the ARRA-BAP to projects of "governmental entities." As demonstrated below, however, NTIA should exercise its authority to ensure that the ARRA-BAP does not foreclose governmental entities from pursuing BTOP projects.

Section 1605(a) of the ARRA – the ARRA-BAP – requires that "all of the iron, steel, and manufactured goods used in" any "project for the construction, alteration, maintenance, or repair of a public building or public work" that is funded by the statute must be "produced in the United States." Section 1605(b) of the statute allows an agency head to waive the ARRA-BAP based on public interest grounds, limited availability of U.S-produced materials of the needed quality, or a 25% or greater increase in project cost. In addition, Section 1605(d) requires that the ARRA-BAP be applied in a manner consistent with U.S. international treaty obligations.

OMB has defined "public building or work" as used in Section 1605(a) to mean project of "a governmental entity," thereby clarifying that ARRA-BAP will not apply to projects awarded to non-governmental entities. NTIA should, however, use the authority found in Section 1605(b) to waive application of the ARRA-BAP to all BTOP projects.

Waiver under Section 1605(b) is not only in the public interest but is necessary to ensure adequate availability of the parts and sub-systems necessary for broadband communications network deployment.

A broad ICT exemption from Buy American requirements already exists for U.S. Government procurement and a similar policy should be adopted for the ARRA-BAP. Indeed, recent appropriations bills have contained an exception to the Buy American Act for U.S. Government procurement for foreign, commercial-off-the-shelf ("COTS") information technology.[1] These statutory exceptions to the Buy American Act have been implemented in the Federal Acquisition Regulation ("FAR"), which provides that that

[1] Pub. L. No. 108-447 § 517; Pub. L. No. 108-199 § 535(a).

Act's "restriction on purchasing foreign end products does not apply to the acquisition of information technology that is a commercial item,"[2] and makes clear that these terms include the equipment used and produced by the ICT industry.[3]

Finally, an ICT exemption would reduce the possibility of other nations imposing similar measures against U.S. products in their stimulus measures.

2. Waiver is Necessary.

It is essential that NTIA ensure that ARRA-BAP does not apply to ICT projects, regardless of whether the funded entity is non-governmental or governmental. Reflexive application of "Buy American" requirements to ICT deployments would dramatically undercut ARRA's goals of job creation and broadband deployment alike by sharply limiting the technologies and products that could be utilized in ARRA-funded broadband projects. Moreover, to the extent governmental entities could complete these ICT projects at all under a restrictive reading, the projects will be significantly delayed, further undermining the goals of the ARRA. And a regime that applies ARRA-BAP to governmental but not private projects would effectively disfavor many projects serving public purposes such as public safety, education, and health care.

As an initial matter, it is critical to point out that the vast majority of stimulus dollars devoted to broadband will be committed to labor costs for deployment – not ICT equipment. Specifically, roughly 70 percent to 95 percent of the investment in next-generation broadband projects would be directed to the labor element of deployment, providing immediate job stimulus for construction workers and technicians regardless of the source location of the ICT equipment. These percentages vary depending on the rural, suburban, or urban nature of the deployment, as well as the broadband technology to be deployed, but the market reality remains constant: broadband deployment dollars are primarily directed at labor, not equipment.

The ICT equipment market, possibly more than any other, relies on a thoroughly globalized supply chain, in which components produced in diverse parts of the world are assembled to create next-generation networks and electronics that, in turn, create jobs and drive economic growth in numerous other sectors. These components generally are *not* all produced in the United States. Thus, companies in the ICT sector – including both those based in the United States and those headquartered elsewhere – necessarily rely on materials and components obtained from foreign sources.

Components available exclusively or principally from non-U.S. sources include advanced semiconductors, Application Specific Integrated Circuits ("ASICs"), memory chips and digital storage devices, advanced programmable logic arrays, digital signal

[2] 48 C.F.R. § 25.103(e).

[3] *See* 48 C.F.R. § 2.101 ("Information technology means any equipment, or interconnected system(s) or subsystem(s) of equipment, that is used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the agency.").

processors, optical circuits and amplifiers, assembled printed circuit boards, radio power amplifiers, etc. used in next-generation broadband network elements and sub-systems such as DSLAMs, IP core routers, IP edge routers, Gigabit optical equipment, VoIP switches, gateways and related equipment, IP backhaul equipment, radio access networks, radio network controllers, radio base stations, IP-base station routers, multiplexers, fiber-optic transmission and switching equipment, IP-Gateways, AAA Network Servers, Application Servers, etc. Moreover, end-user devices that are integral to the delivery of broadband services, such as cell phones, PDAs and laptops, are dominated by components available exclusively or principally from non-U.S. sources. Indeed, such innovations as the Apple iPhone and in-home routers like the Linksys WiFi router are completely dependent on the modern global supply chain that supports ICT today.

The components listed above form the heart of the modern IP Broadband communications infrastructure. Providers lacking access to parts and sub-systems manufactured abroad would be unable to deploy next-generation networks: They could build neither "wired" ultra-high speed IP fiber-optic networks nor wireless networks relying on LTE or WiMAX broadband IP technologies. Indeed, the most advanced commercial networks in use today, such as Verizon Communications' "FiOS" system and AT&T's "U-verse" system, could not be constructed under strict "Buy American" requirements. Of special importance, today's public safety communications – and all the plans developed to date for a nationwide interoperable public safety broadband – are completely reliant on access to parts and sub-systems manufactured abroad.

Critically, the global supply chain characterizes not only "foreign" companies but "American" companies as well. In today's highly competitive ICT market, *virtually all* manufacturers must search the world for high-quality, low-cost components if they are to survive and expand. Thus, companies in the ICT space, foreign and domestic alike, routinely secure components and sub-systems internationally. Vendors relying extensively on components manufactured abroad include all of the most prominent companies in the industry. Moreover it is simply not possible now to create new manufacturing capabilities in the United States in light of the timing goals of the stimulus and the relative size of the fund.

Under these circumstances, application of a "Buy American" requirement with respect to ICT projects by governmental entities would be inimical to the goals underlying the ARRA. With respect to monies appropriated to NTIA and RUS for broadband build-out, the ARRA's chief goals are infrastructure deployment and job creation. An aggressive "Buy American" requirement would undermine both. First, such a requirement would effectively foreclose any chance of governmental entities using ARRA funds to construct high-quality next-generation networks to serve the American people. Put simply, network providers cannot deploy such infrastructures if they cannot rely on components including parts and sub-systems manufactured abroad. Second, a requirement that forecloses deployment will undermine job creation. Leading vendors, whether American or "foreign," employ thousands of American workers who perform jobs in the United States. To the extent their products can be used in ARRA-funded broadband projects, these companies will likely employ still more American workers as

demand increases. In addition, far more jobs will be created for those who design, engineer, maintain and operate the networks, dig the trenches, lay the conduit, string the wires, and so forth – jobs that would not arise if foreign components and sub-systems were prohibited, precluding deployment of ARRA-funded broadband networks.

Such a restrictive approach would also effectively undermine the goals of NTIA and the RUS in implementing the broadband components of the ARRA. Absent access to the full array of ICT products, the cost of any broadband that does occur will go up substantially and investments will be significantly delayed. We are at a critical juncture in broadband deployment in the United States as we continue to lag behind the world in connecting our citizens. Eight years after 9/11 our first responders still do not have the benefit of interoperable broadband communications. President Obama made closing these gaps a significant component of his campaign for the Presidency. Now Congress has taken a first step towards achieving these goals through passage of the ARRA. It would be a significant step backwards if government missed this opportunity to build the world's most advanced networks reaching our first responders and critical unserved and underserved populations because of a restrictive approach to the ARRA-BAP. The components of these critical networks simply cannot be obtained domestically and the goals of the broadband program are simply too important to risk through a restrictive reading of the ARRA-BAP.

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In short, the global nature of the ICT supply chain renders strict application of a "Buy American" requirement infeasible and contrary to the ARRA's goals. For these reasons, NTIA should utilize its authority to waive application of ARRA-BAP to all BTOP projects, including those by governmental entities.