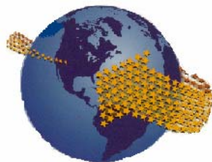

EMERGENCY COMMITTEE FOR AMERICAN TRADE

June 22, 2009

Ms. Marguerite Pridgen
Office of Federal Financial Management
Office of Management and Budget
Executive Office of the President
New Executive Office Building,
Washington, DC 20503

Submitted via www.regulations.gov

Re: Comments on OMB's Interim Final Recovery Act Guidance

Dear Ms. Pridgen:

Please find below comments submitted on behalf of the Emergency Committee for American Trade (ECAT) on OMB's Interim Final Guidance regarding implementation of Section 1605 of the American Recovery and Reinvestment Act (Recovery Act), in accordance with the *Federal Register* notice of April 23, 2009 (74 Fed. Reg. 18,449).

Founded in 1967, ECAT is an organization of the heads of leading U.S. international business enterprises representing all major sectors of the American economy. ECAT member companies have annual worldwide sales of over $2.7 trillion, and they employ more than 6.4 million persons. ECAT is also working with other trade associations and companies that share common interests on this issue.

ECAT strongly supports the objectives of the Recovery Act to promote economic recovery and growth in the United States. However, for the legislation to accomplish its objectives for the benefit of the American economy, workers and businesses, it is vital that Section 1605 of the Recovery Act be implemented in a manner that promotes the overarching goals of the Recovery Act to speed America's economic recovery and promote economic opportunity and growth for America's industries and workers in a closely intertwined international economy.

Respectfully, OMB's proposed extension of the Buy American rules to State and Local procurements in its Interim Final Guidance is unsupported by Congressional intent and contrary to the basic federalism principles embedded within the U.S. Constitution. Furthermore, it undermines the fundamental goal of the Recovery Act, which is to move projects forward quickly and efficaciously and is having severe adverse effects on a great many municipal procurements. The cost to the U.S. economy and workforce of such complications and delays is daunting. Using the House Transportation Committee's methodology for calculating job creation based on such infrastructure investment, every $1 billion *not* spent means 34,779

jobs not sustained or created and $6.2 billion in economic activity lost.[1] In light of the foregoing and as discussed in greater detail below, we urge OMB to withdraw its extension of these rules to sub-Federal procurements/projects. Alternatively (and at a minimum), OMB should limit the scope of these rules so that the Recovery Act's goals can be achieved.

ENSURING THAT THE RECOVERY ACT IS SUCCESSFULLY IMPLEMENTED

The Recovery Act is an extraordinary piece of legislation enacted to address the worst economic crisis in nearly a century. It was enacted quickly so that major U.S. government investments could be made immediately to promote new economic opportunities, create new jobs and stimulate economic growth within the United States. The goals of the Recovery Act, as set forth in section 3(a), include promoting the economic recovery, providing investments needed to increase economic efficiency, and investing in infrastructure that will provide long-term economic benefits. Section 3(b) reiterates the goal of efficiency by directing that expenditures and activities commence "as quickly as possible consistent with prudent management."

The goals of the Recovery Act, while daunting in scope, are necessary Government objectives, given the dire economic challenges facing the country. However, hopes that the Recovery Act would quickly produce new economic opportunities and reverse the massive job losses sustained nation-wide have not yet materialized. A major reason for that delay is OMB's proposal to apply Section 1605 to Recovery Act-funded projects being administered by sub-Federal entities for the reasons explained below.

Unlike Congress and Federal agencies administering their own procurements, most State and Local legislatures and agencies have neither issued, nor implemented complex Buy American-type provisions. Application of Section 1605 to sub-Federal entities, therefore, has created an enormous amount of uncertainty and complication for State and Local procurement officers. As a result, many sub-Federal projects funded by the Recovery Act are not moving forward quickly or efficiently. This has become particularly evident in the clean water and water treatment sector, where monies were expected to flow very quickly after the enactment of the Recovery Act.

- The Recovery Act provided the Environment Protection Agency (EPA) with $6 billion for Water Quality Management Planning Grants and the Drinking Water State Revolving Fund (SRF) programs and the Rural Utilities Service of the U.S. Department of Agriculture with $1.38 billion for water and waste disposal loan and grants program. These infrastructure investments are intended not only to help stimulate the American economy and put workers back to work, but also to improve or create much-needed drinking water and wastewater systems for U.S. communities.
- On March 24, 2009, EPA issued SRF allotments for each State. As of May 15, 2009, EPA had announced $2.2 billion for 48 SRF projects in 33 states.
- While the House Committee on Transportation and Infrastructure projected the creation of 110,000 jobs and $20 billion of economic activity, as of May 15, 2009, only six projects worth $15 million have started construction, creating a mere 17 U.S. jobs.[2]

[1]Committee on Transportation and Infrastructure, U.S. House of Representatives "The American Recovery and Reinvestment Act of 2009 Transportation and Infrastructure Provisions Implementation Status as of May 15, 2009," Report by the Committee on Transportation and Infrastructure Majority Staff at 7 (May 21, 2009).
[2]*Id.* at 5, 26-28.

- This massive delay has resulted despite several attempts by EPA to deal with the Buy American issues that municipalities are facing through nationwide waivers (including an April 1, 2009 waiver for projects in which debt was incurred between Oct. 1, 2009 and Feb. 17, 2009 where Recovery Act funds would be added to existing SRFs) and guidance issued by EPA on April 28, 2009 on how to pursue Buy American waivers.

The problems encountered in the clean water area are just the first of many that are expected in the numerous areas where Recovery Act funds flow from the Federal government to sub-Federal entities.

Federal, State and Local procurement officers are spending substantial time and effort trying to implement the OMB Interim Final Guidance faithfully. However, these time-consuming requirements and extensive administrative burdens, as well as the potential for reprimand (or worse prosecution) if the wrong decision is taken inadvertently, are causing procurement officers to be hesitant and overly-conservative, resulting in delayed projects. Such delays, in turn, mean American construction workers are not being hired and companies producing in the United States are being thwarted in their efforts to provide the highest-quality goods at the best prices to sub-Federal governments. The cost to the U.S. economy and workforce of such complications and delays is daunting. Using the House Transportation Committee's methodology for calculating job creation based on such infrastructure investment, every $1 billion in Recovery Act funding that is delayed postpones the creation or maintenance of 34,779 jobs and delays $6.2 billion in economic activity.[3]

Given that there are virtually no international obligations covering government procurement at the municipal level and that only some State entities are covered by these international obligations,[4] application of the Recovery Act's Buy American rules at the sub-Federal level has the effect of being much more restrictive than at the Federal level. Indeed, many goods that are eligible for Federal procurement under Section 1605 because they are substantially transformed in a covered trade agreement country may be ineligible for municipal-level procurements – where much of the Recovery Act monies are directed – and eligible for only some of the State-level procurements. This asymmetry creates tremendous confusion, causing companies supplying the same products, such as building modernization systems for energy efficient heating/cooling/lighting systems, to follow two (and often three) entirely different sets of onerous rules and certification requirements for bidding on similar projects – Federal, State and Local – that could literally be sitting side-by-side in any U.S. city. Moreover, this differential application of Section 1605 means that sub-Federal agencies spending Recovery Act funds will, in many cases, be forced to pay substantially higher prices for products than those available to Federal agencies, and also to face contracting delays and burdens that are not imposed on their Federal counterparts. All of these effects are directly contrary to Congress' and this Administration's clear directives that Recovery Act funds be disbursed efficiently, cost-effectively, and as quickly as possible. In areas such as energy efficiency, sewage treatment and others, the continued application of these rules to sub-Federal procurement means Recovery Act projects will be delayed and more expensive than consumers and taxpayers expect.

These comments so far have focused on the delay in the *initiation* of projects that results from OMB's application of the Buy American provision to sub-Federal procurement, since that is where the effects currently are being felt – particularly, as discussed above, in connection with water treatment

[3] *Id.* at 7.

[4] Thirty-seven states are subject to the Government Procurement Agreement (GPA) of the World Trade Organization (WTO). Differing numbers of states are subject to commitments in each of the free trade agreements and trade promotion agreements that cover procurement. Additionally, just seven municipalities recognize procurement reciprocity with limited European trading partners, but only in municipal procurements that are open to suppliers from outside such municipalities.

projects. In addition, we anticipate that the application of the Buy American provision by inexperienced State and Local procurement officials is likely to result in a significant incidence of bid protests following awards, providing an additional significant level of delay in the actual expenditure of Recovery Act funds and commencement of work on projects.

OMB's interim guidance for State and Local procurements/projects is also resulting in the loss of export opportunities for U.S. industries and workers, as countries such as Canada, Australia, and Brazil are moving to adopt their own "Buy Local" rules that will shut our industries and workers out of their procurements. Indeed, China is also implementing similar measures. Contrary to the goals of the stimulus to promote America's recovery, the extension of the Buy American rules to sub-Federal entities is limiting economic opportunities for U.S. companies and their workers in the global economy.

In short, OMB's extension of the Buy American rules to sub-Federal procurements has led already to widespread confusion and delay and ultimately will result in fewer projects moving forward and diminished return for U.S. stimulus investment. To illustrate, there are reports that, to avoid these burdens, some municipalities that are otherwise eligible to use Recovery Act funds to update their water and sewage treatment facilities agencies are forgoing stimulus money altogether. This is just the proverbial tip of the iceberg, and there is a strong expectation across other sectors that similar delays are underway.

ECAT looks forward to working with OMB on solutions that will promote the implementation of the Recovery Act in a manner consistent with the Congressional mandate and that will move projects forward quickly, cost-effectively and in a manner that gets Americans back at work and our economy moving forward.

BUY AMERICAN PROVISION WAS NOT INTENDED TO AND SHOULD NOT APPLY TO STATE AND LOCAL PROCUREMENTS

The application of Section 1605 in OMB's Interim Final Guidance to State and Local procurements is not required by the statutory language, is inconsistent with the Congressional intent of Section 1605, may invite challenge that the Guidance violates Constitutional principles of federalism, and is inconsistent with international trade pledges that this Administration has been spearheading with other key governments. Accordingly, we strongly urge OMB to revise its Interim Final Guidance to exempt sub-Federal entities from the requirements of Section 1605.

1. OMB's Application of Section 1605 to State and other Sub-Federal Procurements and Projects Is Not Required by the Statutory Language and Is Not Supported by Legislative History or Precedent

A review of the legislative history of Section 1605 indicates that Congress never intended the Buy American provision to apply beyond sub-Federal-level procurements.

The original Buy American provision in the U.S. House of Representatives' version of the Recovery Act included the following definition of "public building" or "public work".

> (d) Definitions—In this section, the terms 'public building' and 'public work' have the meaning given such terms in section 1 of the Buy American Act (41 U.S.C. 10c) and include airports,

bridges, canals, dams, dikes, pipelines, railroads, multiline mass transit systems, roads, tunnels, harbors, and piers.

The definition of "public building" and "public work" cross-referenced in the House bill is from the Buy American Act of 1933, which defines these terms to mean "public building of, and public work of, the United States, the District of Columbia, Puerto Rico, American Samoa, the Canal Zone, and the Virgin Islands."[5]

By its plain language—and in its actual application—the statutory prescription of the Buy American Act of 1933 is inapplicable to sub-Federal procurements/projects, such as those involving State and Local public buildings and works. Thus, it is clear the House did not intend the Buy American provision of the Recovery Act to apply to sub-Federal procurements.

After the Recovery Act passed in the House, the Senate amended the House bill's Buy American provision in two key ways. First, the Senate added "manufactured goods" to the list of items to which the Buy American restriction would apply (which the House had limited to iron and steel). This expansion of the provision's scope sparked heated debate on the Senate floor and in the public domain. Second, the Senate replaced the "public building" and "public work" definition of Subsection (d) with a new provision stating that: "(d) This section shall be applied in a manner consistent with United States obligations under international agreements."

The change to Subsection (d) was intended to reconcile the impact of the Buy American provision with U.S. international obligations and address the concerns of U.S. trading partners that had voiced strong public opposition to the House "Buy American" provision. These trading partners argued that the House provision violated U.S. commitments in the Government Procurement Agreement (GPA) of the World Trade Organization (WTO) and other bilateral and multilateral trade agreements, and furthermore was contrary to the United States' G-20 pledge not to institute new trade barriers in response to the economic downturn.

Thus, the legislative and public records make it abundantly clear that the Senate revised Subsection (d) in order to *limit* the reach of the House Buy American provision by requiring the United States to honor its international obligations. The legislative record is utterly devoid of any evidence that the Senate, in replacing Subsection (d), intended to reject the House's explicit limitation of the Buy American provision in Section 1605 to Federal procurements. To the contrary, the only reasonable explanation of the statutory language and legislative history is that the Senate dropped the House version of subsection (d) simply because it was viewed as unnecessary – given that the phrase "public building and public work" is already defined in the FAR in a manner that limits it to Federal buildings and works.[6]

This interpretation also finds support in actual procurement practice. Buy American provisions have rarely been applied at the sub-Federal level, a fact of which Congress was presumably aware in enacting Section 1605. Indeed, broadening the scope of Section 1605 to sub-Federal procurements – as the OMB Interim Final Guidance assumes Congress intended – would have constituted a monumental deviation from the House version of the legislation and the existing Buy American framework. It is inconceivable that the Senate would have adopted such an important and even radical expansion of the House version of Section 1605, and existing U.S. procurement preferences, without a single word of debate or commentary on the

[5] 41 U.S.C. § 10c.
[6] *See* 48 C.F.R. 22.401 (FAR 22.401).

subject—of which there is none in the Congressional record. Moreover, nothing in the statutory language requires the extension of Section 1605's Buy American requirements to sub-Federal procurements or overcomes the clear legislative intent to limit these provisions to Federal procurements. Taken together, these reasons strongly reinforce the conclusion that Congress did not intend Section 1605 to apply to sub-Federal procurements.

Limiting Section 1605 to Federal procurements/projects is also consistent with the pre-existing Buy American regime codified in Federal law (*i.e.*, 41 U.S.C. 10a et seq.). There are more than 200 references in the United States Code and Code of Federal Regulations to the terms "public building" and "public work", the vast majority (if not all) of which refer to Federal buildings or works, not to their State or Local counterparts. As repeatedly reiterated by the U.S. Supreme Court, it is a basic rule of statutory construction that when the same term or phrase is used in different statutes, it should be given the same meaning unless a different legislative intent is clearly evident.[7] Given the complete lack of any legislative intent to apply this provision beyond Federal public building or work projects, OMB's Final Guidance should interpret Section 1605 consistently with existing Federal law and the existing FAR definitions and should not apply Section 1605 to sub-Federal procurements.

Further evidence for this conclusion is found in the Recovery Act itself, which provides that the authority to waive Section 1605 resides only at the Federal level. Specifically, the waiver provision only permits the "the head of a Federal department or agency [to] determine that it is necessary to waive the application of [the Buy American restriction of] subsection (a) based on a finding . . . [of the public interest, nonavailability, or unreasonable cost] under subsection (b), [and] the head of the department or agency shall publish in the Federal Register a detailed written justification as to why the provision is being waived." (emphasis added). The only reasonable interpretation of this provision is that Congress provided for only Federal agency waivers because it intended that only Federal agencies would be bound by Section 1605. It strains credibility to believe that Congress – whose overriding goal in implementing the Recovery Act was to inject stimulus money into the U.S. economy as quickly and efficiently as possible – intended to create a regime whereby State, Local, and other sub-Federal Governments were required to comply with Section 1605 but could not administer waivers for projects they were implementing.

In an effort to comply with the OMB's Interim Final Guidance, some Federal agencies have published agency-specific guidance on waivers with processes through which the sub-Federal Government can pass a waiver request up the line to the relevant Federal agency, which has the ultimate authority to grant or deny. Such processes already have proven difficult and time-consuming to administer in practice, as the OMB Interim Final Guidance also contemplates that pre-award waiver requests will be resolved pre-award. However, due to Federal involvement currently necessary on sub-Federal projects, such requests likely often will go unresolved until after award. Such a result will create substantial uncertainty as to the contractor's compliance, and likely will dissuade contractors from pursuing certain projects. Such a result could not have been intended for such an important piece of legislation intended to promote America's economic recovery.

[7] *See* Sullivan v. Stroop, 496 U.S. 478, 484 (1990) ("the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning."); *see also* J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981) (evaluating the competitive injury requirement of one statute in light of analogous interpretations of a different statute)).

In short, in its Final Guidance, OMB should clarify that the Buy American provision is solely applicable to procurements/projects at the Federal level. Such a result is consistent with the statutory text and is compelled by any reasonable interpretation of the legislative history.

2. Mandatory Application of Section 1605 to States and Other Sub-Federal Entity Procurements and Projects Constitutes an Unconstitutional Condition upon the Receipt of Federal Funds

Congress is constitutionally empowered to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[8] Further, it has been recognized by the U.S. Supreme Court that Congress may "further broad policy objectives by conditioning the receipt of Federal moneys upon compliance by the recipient with Federal statutory and administrative directives."[9] The conditioning of Federal monies is, however, limited by principles of federalism. As recently explained by President Obama with respect to the related issue of preemption:

> An understanding of the important role of State governments in our Federal system is reflected in longstanding practices by executive departments and agencies, which have shown respect for the traditional prerogatives of the States. . . . Executive departments and agencies should be mindful that in our Federal system, the citizens of the several States have distinctive circumstances and values, and that in many instances it is appropriate for them to apply to themselves rules and principles that reflect these circumstances and values.[10]

The President's *Memorandum* reaffirmed the directives in Executive Order No. 13132 (1999), which requires "strict adherence to constitutional principles" and that agencies "closely examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and shall carefully assess the necessity for such action."

In South Dakota v. Dole, 483 U.S. 203 (1987), the Supreme Court summarized the five general restrictions on Congress' conditioning the receipt of Federal funds. Specifically, the Court explained as follows:

> The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of the "the general welfare."
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> ***
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> Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . ., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." . . . Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs."
>
> ***
>
> [Fourth], we have noted that other constitutional provisions may be an independent bar to the conditional grant of federal funds.
>
> ***

[8] Art. I, Sec. 8, cl. 1.
[9] Fullilove v. Klutznick, 448 U.S. 448, 474 (1980). This power, however, is not absolute. *See* Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17, and n. 13 (1981).
[10] President Barack Obama, *Memorandum for the Heads of Executive Departments and Agencies*, Subject: Preemption (May 20, 2009)

> [Fifth], [o]ur decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsions."[11]

There are very strong bases to conclude that Section 1605 runs afoul of this test with respect to both the second and fifth restrictions – that is, that Section 1605 constitutes an invalid condition upon State governments' (and other sub-Federal Governments') receipt of Federal funds because the condition attached to the funding was and is ambiguous, and that, in light of the grave economic climate and the magnitude of the Recovery Act, such conditioning of Federal funds amounts to coercion. To avoid these Federalism issues, OMB should revise its guidance to hold that Section 1605 does not apply to sub-Federal procurement.

With respect to the ambiguity issue, two problem areas exist. First, it was not clear from the Recovery Act—either when the Recovery Act was passed by Congress and signed into law by President Obama or when it was in draft form in both the House and Senate – that Section 1605 was intended to apply to the States. As argued above, the most reasonable interpretation of the statutory language and legislative history is that Congress did not intend Section 1605 to apply to sub-Federal procurements. Accordingly, any interpretation of Section 1605 that seeks to extend that provision to States is inherently (and at best) ambiguous. The simple fact is that sub-Federal Governments were unaware of the scope of Section 1605's applicability until after the Recovery Act was adopted. In fact, it was not until OMB informally published its Interim Final Guidance on April 3, 2009, more than six weeks after the Recovery Act became effective, that it became clear that OMB took the position that Section 1605 applied to State and Local procurements.

In light of the foregoing, sub-Federal entities cannot be said to have knowingly made a choice to accept Recovery Act funds with a complete understanding that the Buy American compliance obligation would apply to such funds. Further, during the interim period between the effective date of the Recovery Act (February 17, 2009) and the publication of the OMB Interim Final Guidance in the *Federal Register* (April 23, 2009), many State and Local governments had begun to act in reliance on Recovery Act funds by commencing or continuing with infrastructure projects. Upon the issuance of the OMB's Interim Final Guidance, such projects had to be amended or reevaluated and, therefore, delayed in light of OMB's interpretation of Section 1605.

Another critical ambiguity exists in Section 1605. Specifically, the fact that only Federal agencies dispersing Recovery Act funds may issue waivers (as discussed above) creates an inherently uncertain process, and renders obligations under Section 1605 ambiguous for States and other sub-Federal Governments. Such sub-Federal entities are beholden to the relevant Federal agency, which has unfettered discretion to grant or deny such waivers, and have no guidance or basis on which to predict whether they might receive a waiver. Moreover, they have no standards by which to measure the reasonableness or propriety of the Federal Government's exercise of its discretion. In light of their being subject to such a procedure, sub-Federal entities that accept Recovery Act funds cannot be said to know the consequences or effect of their being subjected to Section 1605. Indeed, such cannot be known until the relevant Federal agency has ruled on a waiver request.

Finally, with respect to financial coercion, the context of the Recovery Act is critical. As this Administration has repeatedly recognized, the Recovery Act was a necessary legislative response to the worst U.S. economic conditions since the Great Depression. President Obama, the House, and the Senate

[11] South Dakota v. Dole, 483 U.S. at 205-211 (internal citations omitted).

spoke with a unified voice concerning the dire need to direct billions of Federal funds to infrastructure and other projects nationwide, all in an effort to stimulate and revitalize the economy. Without such spending, the Federal Government repeatedly said, the recession would deepen, likely setting off a global domino effect.

Given this context, it is unreasonable to suggest that State, Local, and other sub-Federal Governments had or have a meaningful choice not to accept Recovery Act monies. If they do not accept such funds, such sub-Federal entities – according to the Federal Government – put the welfare of their citizens at risk. As interpreted by OMB's initial guidance, however, Section 1605 is an all-or-none proposition. If, for example, a State or Local Government desires not to subject itself to the restrictions contained therein, it would have to reject all Recovery Act funds for infrastructure projects based on the current OMB interim interpretation. Because such sub-Federal entities do not have a meaningful choice, the imposition of Section 1605 at the sub-Federal level constitutes coercion as opposed to the mere conditioning of Federal funding on a Federal legislative agenda point.

In sum, even if it can be argued that Congress intended for Section 1605 to apply beyond the Federal Government, application to sub-Federal Governments is contrary to Constitutional limitations on the conditioning of Federal funds to the States. To avoid any challenges and further delay of projects moving forward, the final OMB guidance should make it clear that sub-Federal entities are not subject to Section 1605.

3. Application of Section 1605 to States and Other Sub-Federal Entities Is Contrary to the United States' Pledge Not to Enact New Trade Barriers

Application of Buy American restrictions to State and Local government projects would also be a significant expansion of the Buy American Act of 1933 and other existing Federally-imposed domestic preference regimes generally, and thus violates the United States' pledge to "refrain from raising new barriers to investment or to trade in goods and services", which the U.S. undertook – along with other G-20 countries – in November 2008. This pledge was reiterated and extended in April 2009, and, in fact, the United States successfully led the effort to secure this global commitment. Application of Section 1605 to State and Local governments, which largely do not have any "Buy Local" requirements, would significantly broaden the scope of existing barriers to U.S. procurement, constituting a new trade barrier contrary to the explicit language of the G-20 pledge.

As noted above, in response to global criticism regarding the inclusion of a foreign-source restriction in the Recovery Act, the Senate version of the bill replaced Subsection (d) of Section 1605 with a requirement that the Buy American restriction "shall be applied in a manner consistent with United States obligations under international agreements." The purpose of this provision was to ensure that certain U.S. trading partners would have an opportunity to participate in the procurement/project opportunities created by the Recovery Act, because the U.S. and those trading partners have, through written agreements, opened procurement markets to each other. However, by flowing-down Section 1605 to sub-Federal procurement, where trade commitments are limited at the State level and effectively non-existent at the Local level, the OMB initial guidance has circumvented the purpose of Subsection (d). The stimulus package was designed by—and is implemented by—the Federal Government, which also established the terms and conditions for the use of stimulus funds by sub-Federal entities. State and Local governments serve only as conduits for such Federal funding and the receipt of Recovery Act funds by awardees. Thus, from a global perspective, the Federal imposition of a "Buy American" requirement at the sub-Federal level, where most U.S. trading partners cannot participate, creates new barriers to trade in violation of the United States' G-20 pledge.

Moreover, the United States cannot expect other countries to abide by the G-20 pledge if State and Local governments in the United States are forced – by virtue of the overly broad application of Section 1605 currently established by OMB – to impose new Buy American barriers. These new trade barriers will undermine the United States' credibility should it seek to challenge protectionist measures adopted by other countries.

Further, U.S. trading partners have initiated protests in light of Section 1605. Canada has taken retaliatory measures by passing Buy Local-type legislation based on reciprocal access to U.S. procurement markets, and other countries, such as Brazil, China and Australia, are considering similar measures. Thus, in addition to undermining U.S. credibility abroad, OMB's overbroad interpretation of Section 1605 already has had the perverse effect of directly harming U.S. manufacturers by reducing their export opportunities.

If more countries emulate the United States by violating their G-20 commitments through the imposition of buy national requirements in their procurements, U.S. companies and workers would continue to suffer and to a greater degree, which is contrary to the legislative intent underlying the Recovery Act. The General Agreement on Tariffs and Trade (GATT)/WTO regime has fostered increased national welfare for all 153 member countries because it promotes open markets and non-discriminatory and transparent trade rules. Continued implementation of such open trade policies – rather than the overly broad, trade-restrictive application of Section 1605's Buy American provision – is critical to promoting world-wide economic recovery.

Finally, Section 1605 potentially violates U.S. international obligations in at least two additional ways. First, GATT Article III:8(a) exempts "government procurement" from the national treatment obligations, which are found in Article III:4 of the GATT and require that all laws and regulations affecting sale, purchase or use must afford to imported products treatment no less favorable than that afforded to like domestic products. However, this exception from the national treatment obligations applies only to government "procurements." A significant portion of the Recovery Act funds are being dispersed via "federal financial assistance" vehicles, such as grants. Under U.S. procurement law, projects funded by "federal financial assistance" do not constitute "procurements." Rather, they are consummated with non-procurement contract agreements, such as grants, cooperative agreements and sometimes Other Transaction instruments, such as Technology Investment Agreements ("TIAs"), but not with traditional "procurement contracts" as the term is defined by Federal statute.[12] Thus, if GATT Article III is read to recognize the distinction between procurement contracts and non-procurement contract contractual vehicles that is recognized under U.S. procurement law, then projects funded by Federal financial assistance, including Recovery Act-funded projects, are subject to the national treatment obligation of Article III:4 of the GATT. While this distinction has never been adjudicated in the GPA, GATT or WTO, it is clear that Section 1605 constitutes a patent violation of U.S. national treatment obligations, contrary also to Section 1605(d)'s express language.

Second, the WTO Agreement on Subsidies and Countervailing Measures (ASCM) imposes additional obligations upon the United States, which apply even where the WTO GPA obligations are inapplicable. Unlike GATT's Article III national treatment obligation (discussed in the preceding paragraph), there is no exclusion of government procurements from the ASCM obligations. ASCM Article 3.1(b) prohibits the granting of subsidies, which the Recovery Act funds constitute, contingent upon the use

[12] *See generally*, The Federal Grant and Cooperative Agreement Act, 31 U.S.C. §§ 6303-6304.

of domestic over imported goods. Contrary to this requirement, however, that is exactly what Section 1605 requires.

IF OMB CONTINUES TO APPLY SECTION 1605 TO STATE AND LOCAL PROCUREMENTS/PROJECTS, OMB SHOULD CLARIFY AND LIMIT THE SCOPE OF ITS GUIDANCE

As set forth above, it is clear that application of Section 1605 to State, Local, and other sub-Federal Governments is contrary to Congressional intent, inconsistent with the constitutional principles of federalism and contrary to America's international obligations and interests. Accordingly, the OMB Final Guidance should exempt State, Local, and other sub-Federal entities from the scope of Section 1605. Alternatively, if the OMB final guidance does not exempt sub-Federal entities from application of Section 1605, then ECAT respectfully urges OMB to adopt the recommendations provided below to clarify and limit the scope of the Buy American restriction to sub-Federal procurements.

Overall, OMB's guidance must be simpler and clearer on where the Section 1605 requirement applies and where it does not. Uncertainty over the application of these rules is causing not only confusion, but also delay. Further, the current application of Section 1605 goes too far and implements the statutory prohibition in a manner that is inconsistent with the central purpose of the Recovery Act and U.S. obligations under trade agreements. Limiting the scope of these provisions, consistent with the language of Section 1605, is vital to prevent this burdensome requirement from delaying and complicating projects as they move forward and spurring the creation of new foreign barriers against U.S. industries and their workers.

1. OMB Should Issue or Direct Involved Agencies to Provide a Public Interest Waiver [13] Exempting Municipal and other sub-State Entities from Section 1605 Restrictions

As explained above, with seven limited exceptions, municipal governments generally have not opted into international government procurement or trade agreements and have not otherwise committed themselves to reciprocity with U.S. trading partners. However, by-and-large, most municipal governments do not maintain or implement Buy American-type restrictions. Under OMB's interim interpretation (*i.e.*, extension of Section 1605 to sub-Federal entities), therefore, municipalities may not – absent grounds under one of the three statutory exceptions—purchase from the many covered trade agreement countries from which the Federal government and several states may purchase. As noted above, the imposition of this onerous requirement upon municipalities, along with their relative inexperience administering a complex

[13] In several places in these comments, ECAT requests that OMB itself directly issue public interest waivers or provide guidance to all involved agencies on issuing such waivers. ECAT strongly believes that the language of Section 1605 is sufficiently flexible for OMB to issue waivers. If OMB finds otherwise, OMB should, as part of its rulemaking on Section 1605, provide detailed guidance to all agencies involved in Recovery Act projects or funding on how such Buy American waivers are to be issued and provide substantive and detailed examples of the potential bases for such waivers, consistent with its other guidance on the application of Buy American provisions. Along these lines, ECAT respectfully requests that OMB incorporate the substantive waiver grounds that ECAT advances in this submission as such examples, in addition to other waiver bases identified by OMB or other commenting parties. ECAT believes that detailed guidance will eliminate guess-work by agencies applying Section 1605 and ensure Government-wide consistency at the Federal, State, and Local levels with respect to the invocation and application of the three statutory bases for waiver set forth in the Recovery Act.

domestic preference regime, have combined to create enormous uncertainty, complications and delays in projects moving forward.

Moreover, OMB's application of the Buy American provision is having the perverse and counterproductive effect of moving our municipalities (and many of our states) from open procurement systems (since they generally have never applied complex Buy American-type provisions in their procurements) to systems that are totally closed to any and all products from our closest allies and trading partners. This runs directly counter to the G-20 pledges made in April 2009 and November 2008 not to raise new trade barriers and sends precisely the wrong signal to other countries, which has prompted Canada, Australia, and Brazil, among others, to move to exclude U.S. goods and services from their procurements. Shutting U.S. products and services out of international procurements will harm significantly U.S. exports, U.S. workers, and economic recovery generally.

Given the reality of these negative and, we believe, unintended consequences of the extension of the Buy American restriction to municipal-level procurements, ECAT urges that OMB issue a public interest waiver (or provide guidance to all involved agencies to issue such a waiver) to exclude municipalities from the coverage of Section 1605. Such a waiver is in the public interest because it would:

- Enable sub-Federal entities to eliminate massive paperwork and administrative delays and confusion, thereby moving forward in a quick and more efficient manner Recovery Act procurements/projects. As a result, such a waiver would produce new economic opportunities and jobs in areas where the projects move forward, which is a primary and explicit goal of the Recovery Act.
- Enable sub-Federal entities to procure more cost-effectively the best products for taxpayers.
- Enable the U.S. Government to argue persuasively with its trading partners that it has taken important steps to keep its own procurement market open, and therefore have the credibility to urge other countries to do the same.

2. OMB Should Require that Sub-Federal Entities Recognize All Federally Recognized "Designated" Countries when Applying Section 1605 to their Procurements

Recognizing that the Recovery Act is an extraordinary Federal undertaking and the need to move projects forward quickly and in a cost-effective manner to promote America's recovery, we urge OMB to provide that sub-Federal entities which are still limited by the Recovery Act's Buy American restrictions (*i.e.*, States, if ECAT's first recommendation is adopted) must be provided the flexibility and benefit of purchasing from all "designated" trade agreement countries from which Federal government agencies can purchase pursuant to the Recovery Act. Such a result is required to fulfill the purposes of the Recovery Act and promote America's economic recovery. Further, it will help put the United States back into compliance with its own G-20 commitments and will provide the U.S. Government the credibility to urge other governments to refrain from adopting similar Buy Local policies that would, if implemented, shut U.S. exporters out of major procurement markets to the detriment of U.S. industry, workers and our economy.

The Recovery Act represents an unprecedented effort by the Federal government to revitalize and stimulate the entire U.S. economy. While monies are flowed down to States and municipalities from the Federal government, the Recovery Act represents – at heart – a Federal undertaking subject to extensive Federal and Congressional oversight and audit.

In the interim guidance, OMB requires that States and other sub-Federal entities that have specifically committed themselves in trade agreements of the Federal Government to reciprocal procurement must—in Recovery Act-funded projects—be permitted to purchase U.S. manufactured goods or manufactured goods from the other country (or countries) to the relevant trade agreement, provided the overall value of the Recovery Act-funded project meets or exceeds $7.443 million. While this rule was intended to comport with U.S. trade agreement obligations, by not extending the benefit of all Federally-recognized "designated" countries to sub-Federal entities, it ignores the United States' broader G-20 commitment and other critical objectives of the Recovery Act.

To illustrate, certain sub-Federal entities have signed onto Federal trade agreements, agreeing to refrain from applying <u>their own</u> Buy-State or Buy-Local (or their own Buy American-type) legislation for the relevant trading partners. In making such a commitment, sub-Federal entities are able to determine which of their components (*e.g.*, which particular State agency) would be covered by the trade agreement, as well as the type of projects to which the trade agreement obligations would apply. In other words, it is a State's (or other sub-Federal entity's) choice to waive *its own* domestic preference regime. The Recovery Act, however, is not a restriction made by the sub-Federal entities. Rather, it is a creature of Congress, which is attached to Federal funding, and, under the current economic circumstances, is essentially forced upon sub-Federal entities receiving Recovery Act infrastructure funds. By any measure, it is a Federal requirement and should be treated as such for the purposes of determining the countries for which the Buy American Act requirement has been waived under the Trade Agreements Act.

Given that Section 1605 is a Federally-imposed requirement (*i.e.*, the sub-Federal entities did not choose to be subject to it, as they did their own domestic preference legislation) and to reconcile the application of new procurement restrictions to sub-Federal entities with U.S. international obligations, sub-Federal entities that are subject to Section 1605 should be directed to treat products produced in "designated" trade agreements countries as equivalent to like products produced in the United States in order to reconcile the application of new procurement restrictions to sub-Federal entities with U.S. international obligations.

As explained above, it is also vital to adopt this approach to address the massive complications in projects that OMB's extension of the Buy American rules to sub-Federal entities has caused. The extensive administrative burden these rules place on all governmental entities is heightened due to the lack of uniform international commitments. Some States have taken no international commitments and under OMB's initial guidance, would not be permitted to purchase any product (unless a waiver were issued) from any foreign country. Thus, for example, no products, unless a waiver is issued, could be purchased by any State (or municipality) from our largest and closest trading partner, Canada. Given the extensive interrelationship of the U.S. and Canadian economies, where component parts cross the border throughout the production life-cycle, the lack of ability to source from Canada (without a waiver) is creating substantial delays and complications. Furthermore, application of these rules at the State and Local level with the limited patchwork of international obligations is causing the perverse result that American companies with American employees – but which source some components and end-products from Canada, various countries within Europe and other "designated" trade agreement countries – are not able to participate in major portions of sub-Federal procurements. A rule that effectively bars such companies from the referenced sub-Federal projects unduly limits competition and prevents the procuring entities from obtaining best value with Recovery Act funds. While, theoretically in some cases, such companies could modify their supply chains to accommodate the new regime, this simply is not a viable option, given the extremely short timeframes set forth in the Recovery Act for the commitment of funds.

Furthermore, the administrative burden for sub-Federal entities, which typically have not imposed such complex domestic preference regimes, is extraordinary and, in many instances, outweighs the projected benefit of the application of Buy American rules to sub-Federal entities. As discussed above, projects are being delayed and will cost more as a consequence of less competition, which translates to fewer successful projects and less job growth – both results are contrary to the primary and express goals of the Recovery Act.

For all of these reasons, we strongly urge OMB to authorize any sub-Federal entity to which it is still extending the Buy American rules to be able to purchase from any "designated" trade agreement country to the same extent as the Federal government can.

3. OMB Should Clarify that Section 1605 Does NOT Apply to Supplies at the Sub-Federal Level

As explained in ECAT's comments on Federal Acquisition Regulation (FAR) Case 2009-008, which implements Section 1605 in the FAR for Federal procurements, ECAT agreed with the Interim FAR Rule's exclusion from its scope the acquisition of "supplies" as distinguished from "construction material." Such exclusion is consistent with normal business practice. Further, it is consistent with the pre-existing FAR implementation of the Buy American Act of 1933, which recognizes the same distinction between "supplies" and "construction material."[14] ECAT urges that the OMB Final Guidance also provide for an exclusion of "supplies" from the application of Section 1605 at the sub-Federal level.

Along the same lines, the Final Guidance should make clear that "manufactured goods" subject to the rule are construction-type items permanently incorporated into the building or work, not merely items used in the building. For example, it seems apparent that software, other information technology products and other certain categories of products do not constitute manufactured goods under the rule, but, to avoid confusion, the Final Guidance should make this clear. Additionally, because the Interim FAR Rule uses the term "construction material" in lieu of "manufactured good," it is clear that a Federal procurement project is only subject to Section 1605 if it is an actual construction project, not a supply acquisition or service acquisition where incidental supplies are furnished. The OMB Final Guidance should provide equal clarity by either making an affirmative statement in the new regulation that the project at issue must be a traditional construction-type project or the OMB should issue guidance in its response to comments making this point clear. Such guidance will do a great deal to diminish uncertainty amongst both government and private parties partnering to accomplish Recovery Act-funded projects and help accelerate the spending of Recovery Act funds and stimulate the U.S. economy.

4. OMB Should Clarify that Section 1605 Does NOT Apply to Grants, Loans, and Cooperative Agreements with Private Entities

In order to promote less confusion in the application of Buy American rules, ECAT also urges OMB to clarify that the Buy American provision does not apply to grants, loans and cooperative agreements in which Recovery Act funds are dispersed directly to private entities. Application of these rules to private entities would be contrary to Congressional intent and the goals of the Recovery Act, inappropriate and not feasible to implement, and would contravene the requirement of Section 1605(d) for consistency with international trade obligations dues to its abrogation of U.S. WTO obligations, both under Article III of GATT and the Agreement on Subsidies and Countervailing Measures.

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[14] *See* FAR 25.003 ("Materials purchased directly by the Government are supplies, not construction material.").

OMB's Interim Final Guidance defines "public building" and "public work" to mean:

> a public building of, and a public work of, a governmental entity (the United States; the District of Columbia; commonwealths, territories, and minor outlying islands of the United States; State and Local governments; and multi-State, regional, or interstate entities which have governmental functions). These buildings and works may include, without limitation, bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals, and the construction, alteration, maintenance, or repair of such buildings and works.[15]

We believe that this language excludes private entity recipients of Recovery Act funds from the Section 1605 rules since projects administered by private entities would not qualify as public buildings or works projects. That said, it would beneficial and eliminate confusion if OMB would clarify this outcome by explicitly stating that Section 1605 does *not* apply to private entity recipients of Recovery Act funds because they are not involved in public buildings or public works as required by the Recovery Act language.

This result is also important from an international legal perspective, as well as for very important policy reasons. Requiring private entities to implement the Buy American rules would not only be unprecedented under existing Buy America/American provisions, it would flatly contravene the requirement of Section 1605(d) for consistency with international trade obligations. Private procurements, even when advantaged by Federal funding programs, are not subject to the general exemption for public procurement contained in the GATT. GATT Article III(8)(a) provides:

> The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by *governmental agencies* of products purchased for governmental purposes and *not with a view to commercial resale or with a view to use in the production of goods for commercial sale*. (Emphasis added.)

It is clear that U.S. private entities that are being provided Recovery Act funds do not qualify as "governmental agencies" eligible for this exception from the national treatment obligations, and that private projects undertaken with Recovery Act financial support constitute commercial activities not eligible for the exception. If the Buy American provision of the Recovery Act were to follow funds into private hands, they would cause discrimination against imported manufactured goods that would constitute a clear violation of the national treatment obligations of Article III of the GATT, as well as a nullification and impairment of tariff bindings. In turn, this would be directly contrary to subsection (d) of Section 1605 that Congress specifically added to ensure that these provisions would not be applied in violation of U.S. international obligations.

From a policy perspective, requiring private entities to manage the complexity of such a Buy American mandate would substantially undermine the ability of such entities to pursue projects in a timely or cost-effective manner, contrary to the purposes of the Recovery Act.

For all of these reasons, it is important for OMB to clarify that the Buy American provision does *not* apply to grants, loans and cooperative arrangements with private entities.

[15] Interim Final Guidance at p. 44.

5. Use of Waiver Authority

In addition to the issuance of a public interest waiver for procurements at the municipal level, ECAT urges OMB to (a) issue the following public interest waivers with respect to Federal financial assistance projects; or (b) provide specific guidance to each involved agency on how to apply the waiver authority specifically outlined by Congress.

a. Waiver for Manufactured Goods Not Primarily Made of Iron and Steel

In order to promote a simple and more efficient and coherent application of Section 1605, ECAT urges that OMB provide for or require agencies to issue an across-the-board waiver of Section 1605 restrictions for all manufactured goods not made primarily of iron and steel, as the Federal Highway Administration did with similar provisions in the transportation sector, starting in 1983 and onward. Such a waiver would ensure that Section 1605 could be implemented in as efficient a manner as possible and not slow the ability of the covered entities to procure.[16] Extending the Recovery Act's Buy American requirements to all manufactured goods would greatly expand the complexity of virtually every procurement, slowing down the ability of agencies to move procurements forward quickly and efficiently, contrary to the public interest and Recovery Act's goals, as well as the need to stimulate the U.S. economy as quickly as possible. ECAT, therefore, urges that the application of Section 1605 be waived with respect to all manufactured goods not made primarily of iron or steel. This outcome is consistent with our request for a similar waiver at the Federal level as well.

b. Waiver for Commercial Items

ECAT requests that OMB issue or provide guidance for all involved agencies to issue a public interest waiver with respect to commercial items. Such a waiver is consistent with Congress' intent to create jobs quickly within the manufacturing base. It is also consistent with efforts in recent years to promote procurement of commercial items as a way to reduce costs and increase efficiency and increase the number of companies willing and able to comply with and compete for government procurements. OMB must limit the use of government-unique terms and conditions for these same reasons. In recently enacted legislation on the requirement to use only domestically melted specialty metals, Congress provided special treatment to ensure that commercial firms and their supply chains would be able to supply the federal government with the products and still remain competitive globally.[17] This would also be consistent with the commercial item provisions of FAR Part 12, as well as Federal statutes, such as the Federal Acquisition Streamlining Act and the Clinger-Cohen Act. Such a public interest waiver is also consistent with business supply chains and other normal business practices.

c. Waiver for Commercial-Off-the-Shelf Information Technology Products

If waivers are not issued for manufactured goods or commercial items generally, OMB's Final Guidance should provide across-the-board waivers or provide specific guidance for each involved agency to issue across-the-board waivers for all existing FAR waivers, such as for commercial off-the-shelf information (COTS) technology (IT) products. The United States has developed the world's most competitive IT sector in significant part through its global sourcing and supply chains. Recognizing this fact, procurements of

[16] *See* 48 Fed. Reg. 1964 (January 17, 1983) *and* 48 Fed. Reg. 53099 (November 25, 1983).
[17] *See* DFARS 225.7002-2(q).

commercial IT products below the GPA threshold have been excluded from U.S. Buy American restrictions from FY 2004 onward. *See, e.g.* Consolidated Appropriations Act, 2004, Section 535(a) of Division F, Title V; FAR 25.104(e); 48 CFR 25.103(e). (64 FR 72419, Dec. 27, 1999, as amended at 70 FR 11742, Mar. 9, 2005; 71 FR 224, Jan. 3, 2006).

To speed the efficiency of procurements and to enhance the ability of the government to procure the highest-quality IT products at competitive prices, ECAT strongly urges that, to the extent that any COTS IT products constitute covered construction materials, they receive the same treatment under the Recovery Act as they do under all other appropriations and be exempt from the Recovery Act Buy American requirements (*see* FAR 25.104(e)). In addition, this exclusion should be expanded to all COTS IT products, regardless of the value of the IT procurement. Given the extraordinary nature of the Recovery Act, the need to promote efficient and simple procurements, and the particularly global nature of IT manufacturing, ECAT believes that such a waiver is clearly in the public interest. This waiver should be extended to all Recovery Act-funded projects, including, as ECAT recommended in its FAR comments, to Federal projects as well.

d. Threshold, Small Project, *De Minimis* and Pre-Existing Project Waivers

WTO and trade agreement thresholds for which non-discriminatory treatment apply are quite high, such as the GPA's approximately $7.443 million threshold for construction. Conversely, many of the projects that are expected to be performed at the sub-Federal level are much smaller, meaning that even flowing down the central level GPA obligations of the United States would still leave sub-Federal entities with extremely high administrative burdens, delays and complications. Where projects are much smaller, of course, any benefit from a Buy American provision is extremely attenuated and far lower than the costs involved in implementing, not only for sub-Federal government agencies, but the myriad of construction and other workers who do not get to go back to work because of significant delays.

To address these issues, ECAT proposes that OMB issue or provide guidance to each involved agency to issue the following public interest waivers:

1) Threshold Waiver. GPA and FTA procurement obligations should apply whether or not the project is above or below the construction threshold for projects to which Buy American restrictions otherwise apply at the sub-Federal level. Thus, assuming that the Federal government's obligations are flowed down to sub-Federal government entities as proposed above (*i.e.*, all Federally-recognized "designated" countries are permitted – and, indeed, are required – to be recognized at the sub-Federal level), sub-Federal entities would have the ability to purchase from a wide spectrum of sources, which will ensure the acquisition of the highest quality products representing the best value to the purchasing entity, which is consistent with the primary goals of the Recovery Act.

2) Small Project Waiver. OMB's Final Guidance should also exempt completely from the Buy American provision small projects for which application of these rules would impose greater costs than produce benefits. Imposing these complicated rules for small projects, those under $1,000,000 for example, would create enormous administrative burdens, increase acquisition costs, while slowing the ability of these small projects to move forward. Energy efficient lighting retrofit projects are an excellent example of the types of small projects that should be exempted. Both the FAR and some States have similarly used a "simplified acquisition threshold" as a floor to determine the applicability of certain contractor obligations. In some instances, the FAR recognizes other clause-unique monetary thresholds to determine the applicability of certain

compliance obligations.[18] A similar threshold should be incorporated into OMB's Final Guidance to eliminate the anomalous result whereby the cost of compliance outweighs the benefit of the opportunity.

3) *De Minimis* Waiver. OMB's Final Guidance should provide for or require agencies to issue a *de minimis* waiver for all Recovery Act projects, such that items costing 10 percent or less of the cost of the entire project should be excluded entirely from the Section 1605 requirements. To avoid creating undue delay, inefficiencies and cost overruns, the final rule should also include a *de minimis* waiver for any construction material that itself costs less than 10 percent of the entire project cost. Such a domestic preference exception has been recognized in other circumstances.[19]

4) Pre-Existing Project Waiver. OMB's Final Guidance should provide for or require agencies to issue waivers for projects that were commenced prior to the passage of the Recovery Act or, alternatively, prior to the issuance of OMB's Interim Guidance. Such projects may have developed quite differently had the government entity been cognizant of the restrictions that would apply. Additionally, many contractors may have spent considerable time and energy pursuing such projects, only to find that, now, they must either abandon these business pursuits or expend significant monies and devote substantial resources to alter their supply-chain strategy/execution. Causing sub-Federal entities' and companies' pre-Recovery Act/Interim Guidance efforts to be wasted is antithetical to the legislative intent underlying the Recovery Act, which includes enhancing business opportunities and promoting industrial efficiency.

Without such waivers, contractors will be forced to go through a disproportionately time-consuming and costly process to identify the origin of hundreds or even thousands of individual products, contrary to the public interest in promoting the expeditious implementation of the Recovery Act consistent with prudent management. Similarly, without such a rule, government contracting officials would be overly burdened in reviewing certifications and other documentation, with little-to-no benefit for American workers. Indeed, providing each of these waivers would help government officials move projects forward more expeditiously, putting more people back to work sooner as sought by Congress and the Administration in enacting the Recovery Act. The small project, *de minimis* and pre-existing waivers should be extended to all Recovery Act-funded projects, including to Federal projects as well.

e. Exclusion or Waiver for Repair and Replacement Parts

In addition to recognizing the supplies/manufactured goods distinction described above, ECAT urges OMB to modify the definition of manufactured good to state explicitly that repair and replacement parts do not constitute manufactured goods for purposes of the rule and, therefore, they need not be Buy American-compliant. A significant portion of the Recovery Act funds are intended to promote repairs for existing public buildings or public works, which were constructed either under the Buy American Act of 1933 requirements or with no Buy American restrictions at the State and Local level. Requiring the use of American repair and

[18] *See e.g.*, FAR 52.203-13, Contractor Code of Business Ethics and Conduct (pursuant to the precatory language at FAR 3.1004(a), the clause is only to be included in contracts valued at more than $5,000,000 and with a performance period of 120 days or more).

[19] *See e.g.*, DFARS 225.7002-2(j) (excepting from Berry Amendment restrictions on clothing and cotton "[a]cquisitions of incidental amounts of cotton, other natural fibers, or wool incorporated in an end product, for which the estimated value of the cotton, other natural fibers, or wool . . . (1) [i]s not more than 10 percent of the total price of the end product; and (2) [d]oes not exceed the simplified acquisition threshold").

replacement parts for items that were originally foreign-sourced would, in many cases, cause enormous complications, void warranties, compromise safety and otherwise undermine the repair objectives of the Recovery Act.

As currently drafted, it is not clear under the OMB Interim Guidance how such parts would be treated. To ensure that repair work can proceed in the highest quality, most appropriate and safest manner, we urge, therefore, that OMB clarify the manufactured good definition to exclude such items.

Alternatively, ECAT urges OMB to provide for or require all agencies to issue an across-the-board waiver for foreign-sourced repair and replacement parts.

6. Waiver Process

Another important objective that OMB should fulfill through its Final Guidance is to facilitate the issuance of appropriate waivers through an effective, efficient, and timely process. ECAT recommends that the Final Guidance establish a strong framework for the issuance of each of the major types of waivers Congress contemplated so that they can be raised and issued in an expeditious manner. Given the speed with which procurements are required to go forward, such a rule is vital to ensure the efficient and prudent management of these procurements. OMB should also establish guidance on the circumstances when waivers are not just appropriate, but warranted, in the interest of promoting America's recovery.

a. **Public Interest Waivers.** OMB should provide specific guidance on the use of public interest waivers, explaining that it is broadly applicable in a number of different circumstances, including when adherence to Section 1605 would:

- Be impracticable. Such an approach would be consistent with the FAR 25.202, which similarly provides for a public interest waiver on impracticability grounds. In particular, an agency finding of impracticability should be counseled where application of the Section 1605 provisions would cost too much to administer, would be impracticable to impose under tight timelines, would create an onerous administrative burden, or would result in the purchase of outdated manufactured goods rather than the best value items. Such waivers would not only be consistent with Congress' grant of authority to issue public interest waivers, but also its stated goals of ensuring that Recovery Act projects move "as quickly as possible consistent with prudent management."

- Undermine Congress' express intent that the Recovery Act expenditures and activities commence "as quickly as possible consistent with prudent financial management." Thus, the Final Guidance should provide that agencies may waive Section 1605 restrictions when not doing so would significantly delay procurements/projects or deny the ability to obtain the highest quality product consistent with principles of prudent financial management.

- Create a sole-source and potentially monopolistic result by eliminating all but one supplier of particular products. Leaving a sole-source supplier would undermine normal competitive processes, potentially setting-up monopolistic situations, contrary to the requirement for prudential financial management of the Recovery Act.

- Create an unlevel playing field for trading partners. Agencies should issue a public interest waiver for products from countries that in fact provide reciprocal access to their own procurement markets for the same type and level of projects.

b. **Unavailability Waivers**. OMB should similarly provide guidance on the appropriateness of waivers for non-availability of products, including across-the-board waivers for all Recovery Act procurements for products:

- Previously determined to be unavailable.
- Determined to be unavailable by any agency in any ongoing procurement.
- That can be produced domestically, but not within the timeframe necessary to be incorporated into the project.
- That does not meet the technical specification sought.

c. **Reciprocal Waivers.** OMB should include within the Final Guidance a mechanism through which Federal agencies can claim the benefit of any waiver issued by another Federal agency, based upon the findings made by the other Federal agency. Such a mechanism would prevent Federal agencies from having to engage in duplicative work to invoke a waiver, the bases for which has already been vetted, published, and adopted by another Federal agency. Such waiver reciprocity would enhance efficiencies, prevent burdensome (and unnecessary) efforts, and further the primary goals of the Recovery Act.

7. Commingling of Recovery Act and Non-Recovery Act Funds

OMB's Interim Final Guidance does not address whether or how Section 1605 will apply to projects that are funded by both Recovery Act and non-Recovery Act funds, which has already been raised as an issue when Recovery Act funds are added to SRFs and other non-Recovery Act funds. ECAT urges that the addition of Recovery Act funds not be used to extend the Section 1605 constraints to other funding mechanisms, as such a result was not required by Congress and to do so would be contrary to the federalism principles discussed above. Adding such Buy American requirements to funds that have previously been or will be appropriated without Buy American constraints is unsupported by Congressional intent. Given the complexity and complications that would be involved in trying to segregate Recovery Act and non-Recovery Act funds use in a particular project, ECAT urges that OMB issue a clarification or public interest waiver (or provide guidance for agencies' public interest waivers), whichever it deems appropriate, to provide that Section 1605 does not apply to projects funded in part by non-Recovery Act funds.

Further, in addition to the complexity and complications that would be involved in a government entity trying to segregate Recovery Act and non-Recovery Act funds use in a particular project, such a system would place undue and unrealistic burdens upon the contractor. ECAT urges OMB not to adopt a two-tier system, whereby a contractor is free to source through normal chains to the extent non-Recovery Act funds are at issue, but only through "designated" countries where Recovery Act funds are at issue. Such a system would be extremely inefficient and would quickly prove unmanageable. Entirely new and complex inventory tracking systems would be required. Further, businesses would have to create new and parallel supply chains for certain goods, which, in addition to increasing the need for administrative support for such business additions, would cause such companies to lose discounts based upon bulk-quantity

purchases and potentially cause products with different qualities/characteristics to be stocked into inventor. Further, all of the expense and energy created by such a requirement—and the new business infrastructure it would result in—would be unnecessary within a matter of just a few years, when the Recovery Act funds have fully dissipated and the Act's requirements no longer apply. In light of this, ECAT requests that OMB issue a clarification or public issue waiver (or provide guidance for agencies' public interest waivers), whichever it deems appropriate, to provide that Section 1605 does not apply to projects funded in part by non-Recovery Act funds.

8. <u>Technical Issues</u>

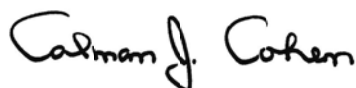
Final guidance should provide for the use of an inventory accounting methodology to determine the origin of fungible goods that are in commingled American and foreign inventories. The NAFTA rules of origin provide for such a methodology, which is particularly important to avoid unfairly disqualifying companies that produce eligible products, but commingle such products in inventories with foreign products. The NAFTA rules provide for the use of a number of accepted inventory accounting methodologies to ensure that this rule does function appropriately.

<u>Conclusion</u>

ECAT appreciates your consideration of these comments. As an organization comprised of leading American manufacturing and service companies, we understand the challenge of developing regulations to ensure that stimulus monies are injected into the economy in the swiftest manner possible, consistent with Congressional intent, the Constitution and U.S. trade obligations. We further appreciate the formidable task of ensuring that the regulations reflect the intent of Congress, while providing a manageable solution for the procurement system that must implement the new law. ECAT believes the comments set forth herein should be adopted to ensure implementation that will achieve the intent and spirit of the Recovery Act.

We are happy to provide any additional information that would be helpful in this process.

Respectfully submitted,



Calman J. Cohen
President