

Reporting and Compliance Requirements Imposed by the Recovery Act

By PENNY PITTMAN COBEY



*Timeo Danaos et dona ferentes.*¹

The American Recovery and Reinvestment Act, Pub. L. No. 111-5 (ARRA or the Recovery Act), is a staggering counterpunch to a staggering blow. As this article goes to press, Americans find themselves under economic stress almost unimaginable even two years ago: national

unemployment in excess of 10 percent (and up to 20 percent in some states)—only the second time since record keeping began in 1948 that the jobless rate has topped 10 percent. If the jobless category is expanded to include people who have stopped actively seeking work, as well as those who are working part-time because they can't find full-time work, then national unemployment now exceeds 17.5 percent. Over seven million private sector jobs have been lost since the recession officially began in December 2007, and even the most optimistic forecasters now expect job losses to continue well into 2010. Faced with such a crisis, unparalleled since the 1930s, Congress in February 2009 enacted the Recovery Act, a spending and tax relief package valued at \$787 billion. Drafted hastily and approved by both houses with relatively limited debate, considering its size and budgetary implications, the stimulus package promised \$144 billion in state and local fiscal relief, \$111 billion for infrastructure and scientific research, \$59 billion for health care, \$43 billion to energy, and on and on. The question is not, "What's in the stimulus for me?" There's something for almost everybody. The question is, "What are the strings attached to all this federal largesse?" There are many.

Reporting on Use of ARRA Funds (Recovery Act, § 1512)

No later than 10 days after the end of each calendar quarter (beginning October 1, 2009), each "prime recipient" of ARRA funds must submit a report to the funding agency using www.Federalreporting.gov, the central recipient reporting portal. All data contained in each quarterly report must be cumulative in order to capture the total impact of stimulus funds to date. No "paper" reporting will be accepted. "Prime recipients" are nonfederal entities that receive ARRA funding in the form of grants, loans, or cooperative agreements directly from the federal government. In the

world of the Recovery Act, the most likely prime recipient of ARRA funds is a state.

Those receiving payouts of ARRA funds from prime recipients fall into two categories. The first category, "subrecipients," consists of nonfederal entities that are awarded ARRA funding through a legal instrument (such as a grant or contract) from a prime recipient. Prime recipients may, and undoubtedly will, delegate most ARRA reporting responsibilities to subrecipients. However, this delegation must be timely made so as to allow the subrecipient to meet the relevant reporting deadlines. The second category, "vendors," consists of dealers, distributors, merchants, or other sellers providing goods or services that are required for the conduct of a federal program. ARRA reporting responsibilities may not be delegated to vendors.

Detailed reporting requirements were initially set forth in an interim rule in Federal Acquisition Regulation (FAR) Case 2009-009, published in the *Federal Register* on March 31, 2009, at page 14,639. The rule established new FAR clause 52.204-11, to be included in all new contracts using Recovery Act funds and inserted into all existing contracts to which Recovery Act funds will be applied (classified contracts excepted). The specific data elements to be reported may be viewed in the 52-page *Recipient Reporting Data Model* prepared by the Office of Management and Budget (OMB) and available online at www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-21-suppl2.pdf. The most noteworthy elements are (1) the required descriptions of employment impact of the ARRA funds and (2) the mandatory disclosure of executive compensation. All information reported will be available for public inspection on the Recovery Act database, www.recovery.gov.

Reporting the Employment Impact of ARRA Funds

Reporting entities must provide a narrative description of the impact of ARRA-funded contracts on the contractor's own workforce. This description shall include, at a minimum, a brief description of the *types* of jobs created and retained in the United States (and certain outlying areas such as Guam, the Virgin Islands, and Puerto Rico) as a result of the stimulus funding, as well as the estimated *numbers* of jobs created and jobs retained. Numbers are to be expressed as full-time equivalents (FTEs). A "job created" according to OMB is a new position created and filled, or an existing unfilled position that is filled as a result of the Recovery Act. A "job retained" is an existing position that would not have continued to be filled, but for the Recovery Act. Employees not directly charged to Recovery Act-supported projects or activities are not counted as jobs created or retained, even though their support role may be critical.

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What is the purpose of such reporting? As has been noted, no one in the federal bureaucracy—not the Labor Department, nor the Treasury Department, nor the Bureau of Labor Statistics—has ever been tasked with measuring “jobs saved.”² In a March hearing of the Senate Finance Committee, a member of the president’s own party, Max Baucus (D-Mont.), noted skeptically to Treasury Secretary Timothy Geithner:

You created a situation where you cannot be wrong. If the economy loses two million jobs over the next few years, you can say yes, but it would’ve lost 5.5 million jobs. If we create a million jobs, you can say, well, it would have lost 2.5 million jobs. You’ve given yourself complete leverage where you cannot be wrong, because you can take any scenario and make yourself look correct.³

President Obama promised in 2009 that his recovery plan would save or create three to four million jobs over the next two years. It is not clear what will happen if the self-reporting required by the Recovery Act does not support this figure. What is clear is that, with only the most minimal guidance as to the meaning of “jobs saved” (for how long? at what salary?) and “jobs retained,” nonspecialist contractors laboring over the vast range of the stimulus landscape—infrastructure, education, health care, energy generation—will be taking on data collection responsibilities in the area of labor and employment never before attempted by statisticians in the federal government. Any conclusions drawn from such data should be evaluated with these limitations in mind.

The first jobs created/jobs saved reports, based on October 2009 filings, immediately roused disbelief. Purportedly more than 640,000 jobs were created or saved (the reports made no distinction between the two categories). “A review of those reports shows that some are simply wrong,” according to the *New York Times*, “while others contain apparently subjective estimates” (November 5, 2009, at A16). The *Times* noted, for example, a Kentucky shoe store’s report that it had created nine jobs with an \$890 order for work boots. Further, well over half the jobs claimed were in the public sector, most of them jobs of teachers who, it was claimed, were kept on the job thanks to stimulus aid; some school districts then conceded that they might not have actually laid off the teachers, even if stimulus funds had failed to appear. It appeared undeniable to most observers that the stimulus program, based on these reports, was failing to achieve its stated objective of creating a large number of private sector jobs. However, administration officials continued to claim that in the end, 90 percent of the jobs created would be in the private sector.

Disclosing the Names and Total Compensation of the Reporting Entity’s Five Most Highly Compensated Officers

The stimulus funding recipients tasked with reporting this information are the entities with contractual responsibilities under stimulus-funded grants or contracts. Frequently

they will be subsidiaries of large public companies, or they will be privately owned. In any case, they must report the names and total compensation of each of their five most highly compensated officers for the calendar year in which the contract is awarded, if in each case they received in the preceding fiscal year: (1) 80 percent or more of annual gross revenues in federal awards (contracts, subcontracts, loans, grants, subgrants, operating agreements); and (2) \$25 million or more in annual gross revenue from federal awards.

Contractors filing periodic reports under sections 13(a) or 15(d) of the Exchange Act of 1934 (the ‘34 Act), or section 6104 of the Internal Revenue Code, that include information about the compensation of senior executives are exempt from this filing requirement. The meaninglessness of this exception, however, will be immediately evident to those familiar with filings under the ‘34 Act. Public companies making their required ‘34 Act filings almost never report the compensation of the most highly paid officers of their subsidiaries. For practical purposes, this exception is almost useless. Indeed, the federal government has estimated that at most 5 percent of contractors will be exempt from filing based on reliance on ‘34 Act or section 6104 filings.⁴

“Total compensation” to be reported has clearly been defined in reliance on analogous securities law standards, and means the cash and noncash dollar value of the following, as earned by the executive during the contractor’s past fiscal year: (1) salary and bonus; (2) awards of stock, stock options, and stock appreciation rights; (3) earnings for services under nonequity incentive plans (excluding nondiscriminatory benefit plans available to all salaried employees); (4) change in pension value (change in present value of defined benefit and actuarial pension plans); (5) above-market earnings on deferred compensation that is not tax-qualified; and (6) other compensation (such as severance, termination payments, value of life insurance paid on behalf of the employee, and perquisites or property if the value for the executive exceeds \$10,000).

Clearly, as to “other compensation,” the intention is to cast the government’s net as widely as possible. Consider, for example, the use of corporate planes and helicopters by senior executives for personal travel—a hot-button issue for shareholder activists. Many companies do not charge executives for such personal travel on corporate aircraft; instead, they estimate the cost of each such trip and add that cost to the executive’s compensation reported to the Internal Revenue Service. Under Recovery Act rules, these additions to compensation will need to be broken down and identified, allowing shareholders and government officials to determine at a glance whether the amounts in question exceed the median reported value of a chief executive’s personal travel (\$141,477 in 2008).⁵

One of the more controversial portions of these requirements mandates that for any first-tier subcontract valued at over \$25,000 (unless the subcontractor in the previous year had gross income under \$300,000), the prime must require the sub to provide similar information as to the compensation of the sub’s five most highly compensated officers,

subject to the exceptions noted earlier. This, of course, puts the prime in the role of policeman over the sub, as was noted in a number of the public comments addressing the interim rule that first established these requirements in detail.⁶ Commentators urged that subs be required to self-report such information. Revised guidance in response to these comments has not yet been issued.

It should be emphasized again that all this information, once filed, will be available for public inspection on www.recovery.gov. The public policy rationale for this unprecedented demand for compensation-related data from private companies has not been clearly enunciated. What is very clear, however, is that every private company, or subsidiary of a public company, that considers doing business as a prime recipient or subrecipient of Recovery Act funds should do a case-by-case, cost-benefit analysis, weighing the economic benefits of the proposed contract against the potential consequences, inside and outside the company, of making public such detailed compensation information.

Two other useful bits of information to keep in mind about Recovery Act reporting: (1) don't even consider asking for a waiver; according to OMB's written guidance, no waivers will be granted;⁷ and (2) in the event of failure to comply, the awarding federal agency may use any customary remedial actions necessary to ensure compliance, including withholding funds, termination, or suspension and debarment.

New Authority Conferred on GAO and Agency Inspectors General (Recovery Act, §§ 902, 1514, 1515)

The Recovery Act confers new authority on the Government Accountability Office (GAO) and agency inspectors general (IGs). They are authorized not only to audit prime contracts and subcontracts, but to interview prime contractor personnel. GAO's authority goes even further: that office is also authorized to interview subcontractor personnel. No such interviewing authority has been included previously in the FAR.

Public Audits and the RAT Board (Recovery Act, §§ 902, 1514, 1515)

The Recovery Act provides \$84 million for the creation of a new Recovery Act Accountability and Transparency Board, which was immediately tagged the "RAT Board." Its mission is to prevent fraud, waste, and abuse in the greatest wave of federal largesse in United States history. The RAT Board consists of 10 agency IGs and any others designated by the president. It is chaired by Earl Devaney, who retired from the Secret Service as head of the fraud division, and most recently served as IG for the Department of the Interior, where he uncovered tabloid-friendly evidence of drug abuse, sexual promiscuity, and corruption at the Materials Management Service. Devaney also headed Interior's influence-peddling investigation of lobbyist Jack Abramoff and his offers to obtain favors for Indian tribes from Interior officials who oversaw gaming on Indian land. One of Devaney's immediate upcoming responsibilities, it appears, will be defending the \$18 million contract awarded by the

General Services Administration to a small firm in Maryland for redesigning www.recovery.gov.

The RAT Board has been given the same powers (including audit and subpoena powers) as those granted to agency IGs, and may hold public hearings. The board has been tasked with producing flash reports, quarterly reports, and annual reports, all to be posted on www.recovery.gov for public inspection. The Web site will also include summaries of all Recovery Act-funded contracts valued over \$500,000; the goal is to achieve an unprecedented level of transparency in the expenditure of public funds.

Periodic audits are already required of federal grantees. The Recovery Act requires that any agency awarding ARRA funds must now perform a risk analysis of programs and ask OMB to designate any high-risk programs as "single audit" major programs to be tested in a designated year. Beginning with fiscal years ending September 30, 2009, all single audit reports will be made public through www.recovery.gov. This raises a major problem for contractors: making sure that personally identifiable information (PII) normally protected in federal audits is not inadvertently posted on the Internet. As of mid-July 2009, there was still no plan as to how the Federal Audit Clearinghouse (FAC) would respond, for example, to a Freedom of Information Act request for the entire database of reports and ensure that PII is not disclosed.

Whistle-blower Protections (Recovery Act, § 1553)

Whistle-blower rights are protected and expanded under the Recovery Act and codified at FAR 3.907, which prescribes a new clause at FAR 52.203-15.⁸ All employees of nonfederal employers receiving ARRA funds are protected from reprisals (discharge, demotion, discrimination) if they "reasonably believe" that they are reporting "covered information," which is defined to include: (1) evidence of gross mismanagement (undefined) of the contract or subcontract related to ARRA funds; (2) evidence of gross waste (undefined) of ARRA funds; (3) a substantial and specific danger to public health or safety related to use of ARRA funds; (4) an abuse of authority (undefined) related to use of ARRA funds; and (5) a violation of law or regulation related to an agency contract (including competition for or negotiation of such a contract) using ARRA funds.

Disclosure of such "covered information" is protected as long as it is made to one or more of the following: the RAT Board; the agency IG; the comptroller general; a member of Congress; a state or federal law enforcement or regulatory agency; a supervisor or other employee with investigative authority; a court or grand jury; the head of a federal agency; or a representative of any of the above.

Each ARRA contractor must post a notice of ARRA whistleblower rights and remedies in the workplace. Employees alleging reprisals for reporting "covered information" will have access to the funding agency IG's investigative file on the contractor. The head of the funding agency must make a determination as to the whistleblower's complaints no later than 30 days after receiving the related

IG report. Available redress includes reinstatement, back pay (including benefits), compensatory damages, and costs and attorneys' fees. If the agency head does not act within 210 days (seven months) after the date on which a whistleblower's complaint is submitted, the whistle-blower will be deemed to have exhausted administrative remedies and may file an action in federal court.

It should be emphasized that the Recovery Act also protects statements made "in the ordinary course of an employee's duties," thus effectively reversing, for ARRA-funded grants and contracts, the Supreme Court's controversial 5-4 antiwhistle-blower decision in *Garcetti v. Cebalos*, 547 U.S. 410 (2006) (because whistle-blower's statements were made pursuant to his position as a public employee—an attorney—rather than as a private citizen, his speech had no First Amendment protection) (Stevens, Souter, Ginsberg and Breyer, JJ., dissenting).

The Buy American Requirements (Recovery Act, § 1605)

On March 31, 2009, the Obama administration published an interim rule within the FAR to implement the well-publicized Buy American restriction in § 1605 of the Recovery Act.⁹ The interim rule prohibits the use of Recovery Act funds for any project for the construction, alteration, maintenance, or repair of a public building or a public work unless all of the iron, steel, and manufactured goods used in the project (except for iron and steel used as components of other manufactured construction material) are produced in the United States. The rule also revealed that for Recovery Act purposes, Buy American requirements would be broadened by incorporating the definition of "public work" at FAR 22.401—that is to say, the Buy American requirements for stimulus-funded projects would apply not merely to federal projects, but to federally *funded* public building and public works projects designed to serve the interest of the general public, regardless of whether title to the project was held by a federal agency.¹⁰ As Recovery Act funds gain wider distribution, the extension of Buy American restrictions to state and local projects has aroused a firestorm of opposition. Key U.S. trading partners, including Canada, have threatened to institute their own "Buy Local" requirements. One can expect energetic lobbying to result in the withdrawal of these requirements insofar as they apply to state and local projects funded with ARRA funds.

ARRA requires that the Buy American restriction be applied in a manner consistent with U.S. obligations under international agreements, including the Free Trade Agreements, e.g., the North American Free Trade Agreement (NAFTA) and the World Trade Organization Government Procurement Agreement (WTO GPA). These types of agreements require the United States to waive Buy American restrictions and to treat products from signatory countries as if they were domestic, *provided* that the prime contract has an estimated value of \$7,443,000 or more. Federal contractors can purchase iron, steel, and manufactured goods from countries with which the United States has

a free trade agreement (e.g., Canada, Mexico, Australia); countries that are members of the WTO GPA (e.g., European Union members, Japan, and Korea); or designated "least developed" countries (e.g., Afghanistan, Bangladesh, much of Africa). For subcontractors, the agreement with the prime contractor should include a FAR clause identifying whether the Buy American restriction is waived due to an international agreement.

Notably, the United States does not have a trade agreement with Brazil, China, or India. Iron, steel, and manufactured goods from those countries cannot be used in a stimulus-funded contract subject to the Buy American restriction unless one of the other three statutory exceptions applies, as follows: (1) nonavailability, where iron, steel, or manufactured goods are not produced in the United States in sufficient quantity or quality; (2) unreasonable cost, where inclusion of U.S.-produced manufactured material would raise the *entire* contract price more than 25 percent (a provision unique to the Recovery Act; typically the calculation would be based only on the comparative cost of the materials at issue), or U.S.-produced unmanufactured material exceeds the cost of foreign material by 6 percent; or (3) where application of the Buy American restriction would be inconsistent with the public interest.

Many U.S. states must also comply with certain trade agreements and accordingly waive the Buy American restriction. Each state, however, differs with respect to which of the international agreements applies (if any), and which state entities must follow applicable agreements. The April 3, 2009, OMB guidance, at 157-169, reproduces the appendix to Subpart B of 2 C.F.R. Part 176, which identifies the rules that apply to each state. State and local contractors should also be aware that U.S. obligations under international agreements do not apply to mass transit and highway projects funded with federal funds provided to states. These projects cannot use iron, steel, or manufactured goods from another country unless a specific waiver is granted.

In keeping with the Recovery Act emphasis on transparency, where Buy American waivers are granted on any of the above grounds, the agency must publish a detailed written justification in the *Federal Register*. If the decision is made post-award, the justification must explain why the need for waiver was not reasonably foreseeable before award.¹¹ If a contractor or subcontractor is found to have used prohibited foreign material without authorization, penalties may include removal and replacement of the material, at the contractor's expense; termination; suspension; debarment; or criminal sanctions.

The Davis-Bacon Wage Rate Requirements (Recovery Act, § 1606)

The Davis-Bacon Act, 40 U.S.C. §§ 3141 *et seq.*, provides that "locally prevailing" (typically union-equivalent) wages and fringe benefits must be paid, at least weekly, to laborers and mechanics employed on federally funded contracts exceeding \$2,000 that involve construction, alteration, or repair of public buildings and public works. Section 1606

of the Recovery Act brings ARRA-funded projects involving construction, alteration, or repair under Davis-Bacon jurisdiction. Guidance from the Department of Labor has clarified that all programs or activities funded by ARRA and meeting Davis-Bacon criteria will be subject to the requirements of Davis-Bacon.¹² The awarding agency must include the following provision in issuing grant announcements or requesting applications:

Section 1606 of the Recovery Act requires that all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to the Recovery Act shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code. Pursuant to Reorganization Plan No. 14 and the Copeland Act, 40 U.S.C. 3145, the Department of Labor has issued regulations at 29 CFR parts 1, 3, and 5 to implement the Davis-Bacon and related Acts. Regulations in 29 CFR 5.5 instruct agencies concerning application of the standard Davis-Bacon contract clauses set forth in that section. Federal agencies providing grants, cooperative agreements, and loans under the Recovery Act shall ensure that the standard Davis-Bacon contract clauses found in 29 CFR 5.5(a) are incorporated in any resultant covered contracts that are in excess of \$2,000 for construction, alteration or repair (including painting and decorating).¹³

The Recovery Act provision noted above substantially expands the scope of Davis-Bacon, as illustrated in the chart below.

Opponents of this significant expansion in coverage argued that the Davis-Bacon wage rates would artificially inflate labor costs, and therefore make ARRA-funded projects more expensive for communities. However, there was substantial support for expanding this Depression-era legislation in the new Democratic Congress. The broad language of the application clause—which sweeps into Davis-Bacon jurisdiction all projects “funded in whole or in part” by ARRA—will make it almost impossible for

fund recipients to employ such time-honored avoidance strategies as subgranting federal funds to nonprofit corporations.¹⁴

With this expanded scope of Davis-Bacon comes a new agency imperative to bulk up enforcement. According to the official Department of Labor Recovery Plan posted on www.recovery.gov, the Department’s Wage and Hour Division (WHD) expects Davis-Bacon complaint-driven investigations to double over the next two years, from 400 to 800.¹⁵ Further, directed investigations will increase from 90 per year to 250, or approximately five per district office, focusing on the largest ARRA-funded projects. The result: a projected 2,000+ investigations over two years beginning October 1, 2009. The budget for this enforcement effort is approximately \$17.3 million (including 106 FTE employees), much of it ARRA-funded.

This expanded Davis-Bacon coverage will be most meaningful, of course, for stimulus-funded projects in states with limited or no prevailing wage or “little Davis-Bacon” laws. In those states, wage rates for stimulus-funded projects may be triple the customary rate, or more. The legislative debate earlier this year in Nevada is instructive in this regard. Lawmakers there agreed that Davis-Bacon conditions attached to the acceptance of stimulus funding would require them to pay the prevailing union wage—\$46 to \$57 an hour—to construction workers employed to make buildings more energy efficient.¹⁶ That led to discussion of whether the state should pay equally high wages to workers hired for the same tasks under a locally funded weatherization program where \$15 an hour was the typical wage.

Traps for the Unwary

Trap #1: It will not always be easy to determine whether a grant or contract includes federal stimulus funds. To help with this determination, OMB’s June 22, 2009, guidance includes, as Supplement 1, a list of federal agency programs subject to recipient reporting. This list will be updated continually. However, as OMB helpfully notes, “[i]f a program has been inadvertently omitted, the omission does not relieve the recipient of the reporting requirements under the Act.”

Davis-Bacon Requirements	Recovery Act Requirements
Apply to contracts “to which the Federal Government or the District of Columbia is a party.”	Apply to “projects funded directly by or assisted in whole or in part by and through the Federal Government”—including projects assisted through ARRA grants, loans, guarantees, and insurance.
Apply to workers “employed directly upon the site of the work.”	No such requirement.
Apply to work conducted on “public buildings or public works of the United States or the District of Columbia.”	No such limitation. Projects must be located within the United States.
“Maintenance” work not included in scope of activities to which Davis-Bacon applies.	“Maintenance” included per OMB April 3, 2009, guidance, at 169.

Trap #2: Absolutely all Recovery Act funds must be segregated in the contractor's accounting and reporting at all times to enhance auditing and transparency.

Trap #3: All contracts to be awarded as other than competitive, fixed-price contracts must be described as such when first posted in www.fedbizopps.gov, along with a rationale for the deviation from fixed-price contracting. Once awarded, all such contracts must be summarized and posted on www.recovery.gov by the funding agency, along with a justification for the deviation. Unfortunately, this emphasis on fixed-price contracting flies in the face of the government's announced goal of getting the stimulus dollars out the door as fast as possible. As Professor Ralph Nash has

pointed out, “[i]f you want a snapshot of what is wrong with the Government procurement process and the fact that the Congress doesn't have a clue, look at [sections 1554 and 1602 of the Recovery Act].”¹⁷ He goes on to observe that speedy commitment of funding and fixed-price contracting are two worthy ideas, diametrically opposed to each other:

The only rational way to use fixed-price contracts is to define the work with sufficient specificity that it can be priced with a significant degree of accuracy. But that takes time. The major problem with Government procurement in the last decade is that agencies have not been willing to devote the time or the resources necessary to prepare specifications and work statements that allow for the use of fixed-price contracts.

Professor Nash predicts that agencies will be left with three choices: “(1) spend the funds quickly, using cost-reimbursement or time-and-materials contracts, (2) delay the spending of the funds until the requirement is well defined, permitting the use of fixed-price contracts, or (3) force fixed-price contracts on contractors without an adequate definition of the work.” We leave it to the reader to conjecture as to which of these outcomes is most likely.

Trap #4: Mandatory Disclosure Rule. The text of the Recovery Act does not contain a mandatory disclosure rule. However, the April 3 OMB guidance, at 5.9 and 7.4, imposes such a requirement on all ARRA grantees, subgrantees, and loan recipients, based on the rule made applicable to federal contractors and subcontractors (but not grantees) in 2008.¹⁸ Each prime and first-tier subcontractor receiving ARRA funds must promptly refer to the appropriate IG any evidence that any project participant has submitted a false claim under the False Claims Act or violated laws related to fraud, conflict of interest, bribery, gratuities, or similar misconduct regarding ARRA funds. Compliance with this requirement is a condition for receiving ARRA funds. The implication is that the information included in mandatory contractor reporting thus falls within the definition of a statement made in support of a claim for payment against the government—and thus is subject to the False Claims Act. If this is the case, then the reporting entity's liability for a false or fraudulent claim, or a statement in support of such a claim, could include treble damages, penalties, and the government's costs of bringing suit. Compliance costs related to this rule will not be insubstantial and should be part of any cost-benefit assessment prior to taking on ARRA-funded work.

Trap #5: It should always be kept in mind that a specific agency may have further reporting requirements or ARRA-related rules in addition to the statutory Recovery Act requirements, the FAR, and applicable OMB guidance. The Department of Transportation, for example, has additional job reporting requirements. Program and agency-specific requirements must always be checked.

Trap #6. Agencies are obligated to review reported data before they are finalized within www.Federalreporting.gov, the recipient reporting Web site, but recipients remain

Key Sources of Guidance on Reporting and Compliance


- OMB Memorandum M-09-10, dated 2/18/2009: “Initial Implementing Guidance for [ARRA],” at www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-10.pdf
- President's Memorandum dated 3/4/2009 (restrictions on lobbying), with OMB Memorandum M-09-16 dated 4/7/2009: *revision forthcoming*
- 74 Fed. Reg. 60, 14,633, 14,639, 14,646 (March 31, 2009)—interim DOD, GSA, NASA rules amending the FAR
- OMB Memorandum M-09-15, dated 4/3/2009: “Updating Implementing Guidance for [ARRA],” at www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-15.pdf
- OMB Circulars A-102 and A-110 still apply
- OMB Memorandum M-09-21, dated June 22, 2009: “Implementing Guidance for the Reports on Use of Funds Pursuant to [ARRA],” at www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-21.pdf; contains detailed guidance for the following in fulfilling their ARRA reporting requirements beginning in October 2009:
 - * recipients of grants, loans, tribal agreements, cooperative agreements and other forms of assistance
 - * recipients of subawards and other payments made by recipients of federal assistance, including awards or payments made in the form of a contract (i.e., contracts made by an entity other than the U.S. government)
- The June 22, 2009, OMB guidance does not apply to recipients of federal contract awards directly from the federal government
- Additional guidance for federal government contractors will be forthcoming
- Until this guidance is published, federal government contractors should rely on FAR 52.204-11

fully responsible for the accuracy and completeness of their reporting.

Trap #7. Determining whether ARRA-funded work will be covered by Davis-Bacon can be a tedious, fact-intensive inquiry, but the dollars at risk will be substantial. Recipients of Recovery Act funds—which will include all awardees of contracts on ARRA-funded construction project—will be up against aggressive enforcement efforts by the Department of Labor. It will be critical to allocate time and resources to a careful analysis of Davis-Bacon’s applicability to a given scope of work.

Conclusion

The text of the Recovery Act reads as though it was thrown onto a wall from a moving train. Much remains to be filled in by agency interpretation and guidance, and by regulation, litigation, and judicial ruling. Consequently, we should perhaps be grateful that only 11 percent of the Recovery Act funds will be “out the door” by the end of 2009. It is clear already that a great deal of the \$787 billion package went to transfer payments to initiatives such as Medicaid and jobless benefits that, while protecting vulnerable populations, did little or nothing for jobs and economic growth.¹⁹ In selling the gargantuan stimulus bill to a reluctant Congress, the president’s team claimed that it would keep the unemployment rate below 8 percent; that forecast was so clearly wrong that it has cast doubt on the very concept of federal stimulus as a way out of the “Great Recession.” It is frequently noted that stimulus spending on infrastructure, the most obvious source of new jobs, amounts to less than 10 percent of the total Recovery Act package, and a second stimulus package, focused sharply on infrastructure and job creation, is already being called for. But whether a second stimulus arrives or not, and whether the existing stimulus jolts the American economy back into health or not, careful study of the Recovery Act’s reporting and compliance requirements leads inexorably to at least one conclusion. In its effort to extend a helping hand to the U.S. economy, Congress has set into motion a data-gathering machine previously unimagined in the Western democracies, except perhaps by George Orwell.²⁰ Are there not more than a few of us who hear Big Brother in the closing of Earl Devaney’s first “Chairman’s Corner” posting on www.recovery.gov?

Think of [Recovery.gov](http://www.recovery.gov) as a “New Dawn” in transparency and accountability. To my way of thinking, the government will have to follow this model in future spending. The public will not accept any less, and you shouldn’t. Consider the Recovery Board your partner in the quest for more government openness and accountability. 

Endnotes

1. “I fear the Greeks, even when they bring gifts.” Virgil, *Aeneid*, II, 49 (translated by the author).
2. William McGurn, *The Media Fall for Phony “Jobs” Claims: The Obama Numbers Are Pure Fiction*, WALL ST. J., June 10, 2009.
3. Quoted by McGurn, *id.*

4. 74 Fed. Reg. 14,639, 14,643 (Mar. 31, 2009).
5. John Emshwiller and Dionne Searcey, *Divorce Puts Light on United Technologies Jet Use*, WALL ST. J., July 14, 2009.
6. 74 Fed. Reg. 14,639, 14,641-42 (Mar. 31, 2009).
7. Office of Management and Budget, Memorandum M-09-21, Implementing Guidance for the Reports on Use of Funds Pursuant to the American Recovery and Reinvestment Act of 2009, June 22, 2009, at 13.
8. Existing FAR whistle-blower procedures at FAR 3.901-3.906 do not apply to ARRA funds. Existing contracts that receive ARRA funds in future will be subject to ARRA whistle-blower rules.
9. 74 Fed. Reg. 14,623 (Mar. 31, 2009). See also FAR Subpart 25.6; FAR 52.225-21 through 52.225-24.
10. 74 Fed. Reg. 14,623, 14,624 (Mar. 31, 2009).
11. The contribution of my colleague Mary Ellen Fraser to the discussion of Buy American requirements is gratefully acknowledged.
12. U.S. Department of Labor, All Agency Memorandum No. 207, May 29, 2009, at www.dol.gov/esa/whd/recovery/AAM207.pdf.
13. Office of Management and Budget, Memorandum M-09-15, Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009, April 3, 2009, at 169-70.
14. In addition, Division B of the Recovery Act requires application of Davis-Bacon prevailing wage requirements to projects financed with certain tax-favored bonds. The Department of Labor has promised guidance on these requirements, but it had not yet been issued as of the date this article was submitted for publication.
15. The plan is posted at www.recovery.gov/?q=content/program-plan&program_id=7705.
16. The Department of Labor has since opined to this effect. See Advisory Letter to Mr. Matthew Rogers, Senior Advisor for Recovery Act Implementation, U.S. Department of Energy, dated June 1, 2009, at www.dol.gov/esa/whd/recovery/AdvisoryLetterDOE.pdf.
17. *The Nash & Cibinic Report*, vol. 23, no. 4, April 2009.
18. See 73 Fed. Reg. 67,054 (Nov. 12, 2008).
19. See David Brooks, *Liberal Suicide March*, N.Y. TIMES, July 21, 2009: “You would have thought that a stimulus package would be designed to fight unemployment and stimulate the economy during a recession. But Congressional Democrats used it as a pretext to pay for \$787 billion worth of pet programs with borrowed money.”
20. Or, alternatively, by Thoreau: “If I knew for a certainty that a man was coming to my house with the conscious design of doing me good, I should run for my life.” *Walden* (1854), in THE WRITINGS OF HENRY DAVID THOREAU, vol. 2, 152, Houghton Mifflin (1906).

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