

TO RETURN UNUSED OR RECLAIMED FUNDS MADE AVAILABLE FOR  
BROADBAND AWARDS IN THE AMERICAN RECOVERY AND REINVEST-  
MENT ACT OF 2009 TO THE TREASURY OF THE UNITED STATES

SEPTEMBER 29, 2011.—Committed to the Committee of the Whole House on the  
State of the Union and ordered to be printed

Mr. UPTON, from the Committee on Energy and Commerce,  
submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 1343]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred  
the bill (H.R. 1343) to return unused or reclaimed funds made  
available for broadband awards in the American Recovery and Re-  
investment Act of 2009 to the Treasury of the United States, hav-  
ing considered the same, report favorably thereon with an amend-  
ment and recommend that the bill as amended do pass.

CONTENTS

	Page
Legislation .....	2
Purpose and Summary .....	3
Background and Need for Legislation .....	4
Hearings .....	10
Committee Consideration .....	10
Committee Votes .....	10
Committee Oversight Findings .....	10
Statement of General Performance Goals and Objectives .....	10
New Budget Authority, Entitlement Authority, and Tax Expenditures .....	10
Earmarks .....	11
Committee Cost Estimate .....	11
Congressional Budget Office Estimate .....	11
Federal Mandates Statement .....	12
Advisory Committee Statement .....	12
Applicability to Legislative Branch .....	12
Section-by-Section Analysis of the Legislation .....	12
Changes in Existing Law Made by the Bill, as Reported .....	13
Additional Views .....	14

## LEGISLATION

The amendment is as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. ACCOUNTABILITY FOR BROADBAND STIMULUS FUNDS.**

(a) **IN GENERAL.**—Notwithstanding any other provision of law, the Administrator of the Rural Utilities Service or the Assistant Secretary of Commerce for Communications and Information shall take prompt and appropriate action to terminate for cause any award made under the Broadband Initiatives Program or the Broadband Technology Opportunities Program, respectively, established pursuant to the American Recovery and Reinvestment Act of 2009, if the Administrator or Assistant Secretary determines that cause exists to terminate the award. Such cause may include an insufficient level of performance, wasteful spending, or fraudulent spending.

(b) **DEOBLIGATION AND RETURN OF FUNDS TO TREASURY.**—

(1) **DEOBLIGATION.**—Upon terminating an award under subsection (a), the Administrator or the Assistant Secretary shall immediately deobligate an amount equivalent to such award, less allowable costs, to the extent funds with respect to such award are available in the account relating to the Broadband Initiatives Program or the Broadband Technology Opportunities Program, respectively. If the Administrator or the Assistant Secretary subsequently recovers any additional amounts from such award, the Administrator or the Assistant Secretary shall deobligate such additional amounts immediately upon receipt.

(2) **RETURN TO TREASURY.**—Not later than 30 days after deobligating an amount under paragraph (1), the Administrator or the Assistant Secretary shall, without exception, return such amount to the general fund of the Treasury of the United States.

(3) **NO EXPENDITURES DURING TERMINATION PROCESS.**—The Administrator or the Assistant Secretary shall promptly pursue available corrective measures to ensure that funds received through an award terminated under subsection (a) are not expended during the termination process.

(4) **ACCOUNTING BY AWARD RECIPIENT.**—The Administrator or the Assistant Secretary shall direct the recipient of an award terminated under subsection (a) to provide to the Administrator or the Assistant Secretary a complete and accurate accounting, which may include an independent accounting, for any award funds that, as of the date of termination, the recipient has received but has not expended on allowable costs.

**SEC. 2. DISPOSITION OF UNUSED FUNDS.**

The Administrator of the Rural Utilities Service or the Assistant Secretary of Commerce for Communications and Information shall return to the general fund of the Treasury of the United States an amount equivalent to any award, less allowable costs, made under the Broadband Initiatives Program or the Broadband Technology Opportunities Program, respectively, established pursuant to the American Recovery and Reinvestment Act of 2009, if such award has been returned to the Administrator or Assistant Secretary or disclaimed by the award recipient at any time after the date of enactment of such Act.

**SEC. 3. OVERSIGHT AND REPORTING REQUIREMENTS.**

(a) **ACTION ON INFORMATION FROM OIG OR GAO.**—If the Administrator of the Rural Utilities Service or the Assistant Secretary of Commerce for Communications and Information receives information from an official described in subsection (b) with respect to an award made under the Broadband Initiatives Program or the Broadband Technology Opportunities Program, respectively, established pursuant to the American Recovery and Reinvestment Act of 2009, and such information pertains to material noncompliance with the award terms or provisions or improper usage of award funds, the Administrator or the Assistant Secretary shall—

(1) immediately review such information; and

(2) not later than 30 days after receiving such information, determine whether cause exists to terminate such award under section 1(a), unless the official who provided such information recommends that the Administrator or the Assistant Secretary limit or not make such a determination.

(b) **OFFICIALS DESCRIBED.**—The officials described in this subsection are the following:

(1) With respect to the Broadband Initiatives Program, the Inspector General of the Department of Agriculture.

(2) With respect to the Broadband Technology Opportunities Program, the Inspector General of the Department of Commerce.

(3) The Comptroller General of the United States.

## (c) CONGRESSIONAL NOTIFICATION.—

(1) IN GENERAL.—Not later than 3 days after making a determination described in subsection (a)(2), the Administrator or the Assistant Secretary shall provide a notification of such determination to—

(A) the Committee on Agriculture of the House of Representatives and the Committee on Agriculture of the Senate or the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate, respectively; and

(B) the official who provided the information described in subsection (a).

(2) CONTENTS OF NOTIFICATION.—The notification required by paragraph (1) shall include an explanation of—

(A) the determination described in subsection (a)(2); and

(B) any action taken as a result of the determination or why no action was necessary.

(3) CONFIDENTIAL NOTIFICATION UNDER CERTAIN CIRCUMSTANCES.—In the case of a determination by the Administrator or the Assistant Secretary under subsection (a)(2) that cause does not exist to terminate the award, the Administrator or the Assistant Secretary may make the congressional notification required by paragraph (1)(A) on a confidential basis, if the Administrator or the Assistant Secretary determines, after consultation with the official who provided the information described in subsection (a), that—

(A) there is no merit to such information; and

(B) notification on a public basis would cause irreparable harm to any person the information is regarding.

**SEC. 4. CONFORMING AMENDMENTS.**

Section 6001(i)(4) of the American Recovery and Reinvestment Act of 2009 (47 U.S.C. 1305(i)(4)) is amended—

(1) by striking “may” and inserting “shall”; and

(2) by striking “, and award these funds competitively to new or existing applicants consistent with this section”.

**SEC. 5. AWARD DEFINED.**

In this Act, the term “award” includes grants and loans.

**PURPOSE AND SUMMARY**

H.R. 1343 clarifies the responsibility of the National Telecommunications and Information Administration (NTIA) in the U.S. Department of Commerce and the Rural Utility Service (RUS) in the U.S. Department of Agriculture to terminate failed or failing grants and loans awarded from the \$7.2 billion the American Recovery and Reinvestment Act of 2009 (ARRA) allocated for broadband subsidies and mapping grants, and to return to the U.S. Treasury any rescinded or relinquished funds. The bill also improves oversight of the broadband programs. Specifically, the bill requires:

- The NTIA and RUS to determine whether to terminate an award within 30 days of receiving information from their respective inspectors general or the comptroller general regarding material noncompliance with award terms. The NTIA and RUS must also explain to Congress what action they took or why they took no action, and do so within three days of their determination. The NTIA and RUS may notify Congress confidentially if they determine after consultation with the comptroller general or inspectors general that the information they received has no merit and that public release would irreparably harm an individual;
- The NTIA and RUS to terminate an award if they find cause—including waste, fraud, or insufficient performance;
- The NTIA and RUS to deobligate and return to the Treasury funds from terminated awards, as well as to return unused funds from any relinquished awards; and

- Recipients of awards to provide an accounting of funds received but not yet expended, if the NTIA or RUS terminate the awards.

#### BACKGROUND AND NEED FOR LEGISLATION

The ARRA allocated \$7.2 billion for the NTIA and RUS to use for broadband-related grants and loans. In particular, it tasked the NTIA with overseeing a \$4.7 billion Broadband Technology Opportunities Program and tasked the RUS with overseeing another \$2.5 billion project later named the Broadband Initiatives Program. See Pub. L. No. 111-5, 123 Stat. 115, 118-19, 128, 512-16 (2009) (ARRA).

According to the ARRA, the BTOP was designed to promote access to consumers currently unserved or underserved by broadband; to provide broadband education, training, access, equipment, and support to schools, libraries, healthcare providers, and organizations and agencies that facilitate broadband use by low-income, unemployed, aged, and otherwise vulnerable populations; to improve access and use by public safety agencies; and to stimulate the demand for broadband, economic growth, and job creation. *Id.* at 512-13. An area is deemed “unserved” if at least 90 percent of the households lack access to facilities-based, fixed or mobile, terrestrial broadband service that provides at least 768 kilobits per second downstream and at least 200 kilobits upstream. An area is deemed “underserved” if no more than 50 percent of households have access to facilities-based, terrestrial broadband service that provides at least 768 kilobits per second downstream and at least 200 kilobits upstream; no fixed or mobile broadband service provider advertises speeds of at least 3 megabits per second downstream; or 40 percent of households or less subscribe to broadband service that provides at least 768 kilobits per second downstream and at least 200 kilobits upstream. See Broadband Initiatives Program and Broadband Technology Opportunities Program Notice of Funds Availability, 74 Fed. Reg. 33104, 33130-31 (July 9, 2009) (NOFA I).

The ARRA authorized the RUS to use its \$2.5 billion for grants, loans and loan guarantees for broadband infrastructure, so long as at least 75 percent of the project area was rural and lacked “sufficient access to high speed broadband service to facilitate rural economic development.” ARRA, 123 Stat. at 118. The RUS was to prioritize awards to projects that would provide consumers a choice of more than one service provider and to projects that would provide service to the highest proportion of rural residents that do not have access to broadband service. *Id.* No area of a project funded under the RUS program was allowed to receive funding to provide broadband service under the NTIA program. See *id.* at 119.

For the first round of awards, the NTIA and RUS created a single application for both programs. An applicant was required to apply for RUS money if 75 percent of the applicant’s proposed service area was “rural,” and the NTIA would not award a grant to such a project unless the RUS refused to do so. See NOFA I, 74 Fed. Reg. at 33105. To qualify for 100 percent funding under the RUS program, a project was required to serve an area that was not only rural, but also “remote,” which the RUS defined as an unserved area at least 50 miles from a non-rural area. See *id.* at

33106, 33109. Because few projects could meet the remote criterion, most projects were only eligible for RUS funding if they provided at least 50 percent in matching funds. That was more than the 20 percent matching requirement for the NTIA program. See *id.* at 33112.

Based on the experience gained and applicant feedback from round one, the NTIA and RUS made a number of changes for round two. Round two applicants were required to file separate applications for the NTIA and RUS programs. See Broadband Technology Opportunities Program Notice of Funds Availability, 75 Fed. Reg. 3792, 3794 (Jan. 22, 2010) (BTOP NOFA II). The NTIA announced it would take a “comprehensive communities approach” for infrastructure projects, which focused on “middle mile” broadband projects that connect anchor institutions such as libraries, hospitals, community colleges, universities, and public safety institutions. See *id.* The NTIA also eliminated the requirement that infrastructure projects target unserved or underserved areas, although whether a proposed project would reach such areas was still a factor in deciding whether to grant an application. See *id.* at 3795. Similarly, the RUS eliminated the last mile “remote” project designation for awards. See Broadband Initiatives Program Notice of Funds Availability, 75 Fed. Reg. 3820, 3822 (Jan. 22, 2010).

From the \$4.7 billion allocated to the BTOP, the ARRA directed that up to \$350 million be spent on grants to help map the availability of broadband among the states. ARRA, 123 Stat. at 128. From that \$350 million, the NTIA awarded \$293 million to 56 recipients—one each from the 50 states, five territories, and the District of Columbia—to gather the data, see NTIA, U.S. Dept. of Commerce, Broadband Technology Opportunities Program Quarterly Program Status Report 1 (Feb. 2011) (Eighth Quarterly Report), available at <http://go.usa.gov/OG9>, and \$18.65 million to the FCC to assemble the map, see FCC, Program-Specific Recovery Act Plan for the FCC’s Efforts on the Broadband Technology Opportunities Program 1 (June 1, 2010 Update) (FCC June 2010 Update), available at <http://go.usa.gov/0cH>. As of Dec. 31, 2010, 52 of the recipients had spent a total of \$179 million of that money. Eighth Quarterly Report, at 5.

Of the \$4.39 billion in non-mapping BTOP funding (\$4.7 billion, less \$293 million in mapping grants and \$18.65 million for the FCC), the NTIA awarded 233 broadband grants worth approximately \$4 billion. See *id.* at 1. Approximately \$116 million was used for administrative expenses. Ten million dollars was provided to the inspector general of the U.S. Department of Commerce for oversight. ARRA, 123 Stat. at 128. The NTIA transferred \$20 million to the FCC for creation of a national broadband plan. See *id.*; FCC June 2010 Update, at 1. Approximately \$300 million was reallocated for other purposes by a spending bill passed in 2010. See Pub. L. No. 111–226, 124 Stat. 2389, 2404.

Of the \$4 billion in non-mapping NTIA broadband grants, recipients had spent approximately \$138 million as of December 31, 2010. Eighth Quarterly Report at 5. Three of the 233 awards worth a total of \$38.7 million have been declined or returned. The State of Wisconsin Department of Administration returned its \$23 million grant and Education Networks of America in Indiana returned its \$14 million grant. See letter from NTIA Administrator Law-

rence E. Strickling to Congressmen Upton and Walden, March 30, 2011. Additionally, the Leech Lake Reservation Business Committee Inc. in Minnesota declined its \$1.7 million award on the grounds that it would not be able to meet its grant requirements. Eighth Quarterly Report at 5 n.7.

Of the \$2.5 billion the ARRA allocated to the RUS, the RUS used \$2.3 billion for grants and leveraged \$87 million of it to back loans worth \$1.2 billion. See ARRA Broadband Spending: Hearing Before the Subcomm. on Communications and Technology of the House Energy and Commerce Committee, 112th Cong., Written Testimony of Mark L. Goldstein, GAO, at 2–3 (Feb. 10, 2011), available at <http://go.usa.gov/Omt>. Approximately \$100 million had actually been spent by the end of March according to RUS. All told, the RUS issued 320 awards. Ten “last mile” awards had been returned as of April, worth more than \$55 million altogether in grants and loans: \$5.05 million in grants for Lifestream Holdings LLC (FL); \$397,224 in grants and \$397,224 in loans for DigitalBridge Communications Corp. (IN); \$1.97 million in grants and \$657,833 in loans for Digital Bridge Communications Corp. (MS); \$7.73 million in grants and \$3.3 million in loans for Norlight, Inc (IL); \$3.47 million in grants for Mid-Hudson Cablevision Inc. (MA); \$435,500 in grants for Dell Telephone Cooperative, Inc. (NM); \$2.45 million in grants for Five Area Telephone Cooperative, Inc. (TX); \$634,000 in grants for Telecom Cable, LLC (TX); \$9.19 million in grants for South Central Utah Telephone Association, Inc. (UT); and \$14.16 million in grants and \$6.13 million in loans for Lenowisco Planning District (VA).

Under the statute, all awards were to be made by September 30, 2010. The nationwide broadband map, however, was not launched until February 17, 2011. Some observers expressed concern that this placed “the cart before the horse,” and that allocating funds before maps of unserved areas were in place almost guaranteed that the money would not be used effectively. Some cable and phone companies believe awards have been issued for projects that substantially duplicate their existing service areas. NTIA and RUS disagree, noting that the agencies carefully reviewed applications and surveyed local communities to ensure that networks were funded in areas with a need for additional broadband services.

Although there has been ongoing debate from the outset over the wisdom of creating the BTOP and BIP programs, as well as over whether the money should have been better targeted to households completely unserved by broadband, there is general consensus regarding the importance of oversight. The number of NTIA and RUS awards that have already been returned, and the fact that more than 90 percent of the money the ARRA allocated for broadband still remains obligated but unspent, makes effective oversight all the more important, especially since the Department of Commerce Inspector General, the Department of Agriculture Inspector General, and the Government Accountability Office have already flagged concerns with the programs.

The Department of Agriculture Inspector General last audited existing RUS broadband programs in March 2009 before enactment of the ARRA. See Office of Inspector General, U.S. Dep’t of Agric., Audit Report: Rural Utilities Service Broadband Loan and Loan Guarantee Program (March 2009), available at <http://go.usa.gov/>

0cF. That report found that the RUS had yet to implement eight of the Inspector General's 14 recommendations from its September 2005 report. See Office of Inspector General, U.S. Dep't of Agric., Audit Report: Rural Utilities Service Broadband Grant and Loan Program (Sept. 2009), available at <http://go.usa.gov/0cL>. Although the RUS proposed rule changes to address two of the Inspector General's recommendations, it continued to make loans to providers in areas with existing service while waiting on the enactment of the 2008 Farm Bill. The Agriculture Inspector General expressed concern that a majority of the "program funds have not been utilized in expanding broadband service to rural areas where no prior service exists." When the GAO commenced oversight of the ARRA grant and loan programs, the Inspector General deferred to the GAO to avoid duplication of effort.

Because the Department of Agriculture has many existing grant programs, including those administered by the RUS, it has substantial infrastructure and personnel to manage its programs and conduct oversight of its grantees. The RUS also used ARRA money to fully fund a contract with ICF International to provide BIP program support through 2014. The NTIA, on the other hand, does not have similar infrastructure to administer such a large and complex grant program. It therefore paid the National Oceanic and Atmospheric Administration \$4.15 million to administer grants pursuant to a memorandum of understanding and paid the National Institute of Standards and Technology \$2.23 million to provide management services pursuant to a service level agreement. Those agreements lasted through September 30, 2010.

The Commerce Inspector General issued a November 2010 report on the BTOP. See U.S. Department of Commerce, Office of Inspector General, Broadband Program Faces Uncertain Funding, and NTIA Needs to Strengthen Its Post-Award Operations (Final Report 2010), available at <http://go.usa.gov/0g8>. The report highlighted that because the ARRA did not authorize use of any funds beyond September 30, 2010, uncertain funding posed a risk to management and oversight of the program. The Commerce Inspector General recommended that the NTIA develop alternative approaches to monitoring and oversight in anticipation of a lack of funding. The report also highlighted the progress the NTIA made to establish administration, management, and oversight systems, but recommended additional strengthening of its post-award monitoring and oversight, including vendor management oversight and monitoring of grant recipients. The Commerce Inspector General is also affected by the funding uncertainty, since the Commerce Inspector General anticipates it will need to continue oversight of the NTIA's management until as late as 2015.

Since the report, Congress passed the Continuing Appropriations and Surface Transportation Extension Act of 2011 (P.L. 111-322), which funded the Federal government through March 4, 2011, including a \$20 million addition to the NTIA Salaries and Expenses account which could be used for BTOP oversight. In the 112th Congress, the Department of Defense and Continuing Appropriations Act of 2011 (P.L. 112-10) included the \$20 million in additional funds for NTIA to use for oversight for the rest of FY 2011.

The GAO last issued a report in August 2010 reviewing both the NTIA and RUS broadband stimulus programs. See GAO, Recovery

Act: Further Opportunities Exist to Strengthen Oversight of Broadband Stimulus Programs, available at <http://go.usa.gov/0cM>. Although most second-round awards had not yet been made at the time, the August 2010 report highlighted the need to strengthen oversight of both the NITA and RUS programs. Specifically, the report concluded that both the NTIA and RUS will face challenges overseeing dramatically larger, more numerous, and more diverse projects than they have ever managed. Like the Commerce Inspector General, the GAO noted the uncertain funding the NTIA faces.

The inspectors general and the GAO reiterated these points at the Communications and Technology Subcommittee's February 10, 2011, hearing. See ARRA Broadband Spending: Hearing Before the Subcomm. on Communications and Technology of the House Energy and Commerce Committee, 112th Cong. (Feb. 10, 2011) (testimony and webcast of hearing available at <http://go.usa.gov/0yZ>). The size of the programs, the short timeframe the statute provided the NTIA and the RUS to evaluate submissions and issue awards, and the inexperience of many of the award recipients led Commerce Department Inspector General Zinser to testify during the hearing that the programs were "high risk":

The large dollar amounts involved, the number of grants, the mix of grant recipients which include government, not for profit, for-profit entities, higher education, and Native American tribes, all with different levels of experience with federal grants, the technical nature of many of the grants, and the relative inexperience of the agency and its staff in administering such a large grant program all contribute to making this the most complex grant program NTIA has ever administered and the highest risk Recovery Act program for the Department of Commerce.

USDA Inspector General Fong's written testimony highlighted ongoing concerns with the RUS administration of previous broadband programs:

Since 2001, RUS has been responsible for administering USDA's broadband grant and loan programs . . . In 2005, we completed our first review of RUS' administration of those programs. Of the \$895 million in grants and loans RUS issued from 2001 to 2005, we reviewed \$599 million and questioned the expenditure of \$340 million for reasons including loans that were approved despite incomplete applications, loans that defaulted, and grant funds used for inappropriate purposes. We further found that RUS had not maintained its focus on rural communities lacking pre-existing broadband service . . . RUS used a definition of rural communities that was too broad to distinguish between rural areas and areas that were close to major metropolitan centers. As a result, the agency issued \$103.4 million of its \$895 million in grants and loans (12 percent) to 64 communities near large cities, including \$45.6 million in loans to 19 suburban subdivisions within a few miles of downtown Houston, Texas.



Mark Goldstein, Director for Physical Infrastructure Issues for the GAO, described concerns in his written testimony regarding both programs:

[T]he agencies awarded funds to many large projects, which may pose a greater risk for misuse of federal funds than smaller projects . . . Adding to these challenges, NTIA and RUS must ensure that the recipient constructs the infrastructure project in the entire project area, not just the area where it may be most profitable for the company to provide service. For example, the Recovery Act mandates that RUS fund projects where at least 75 percent of the funded area is in a rural area that lacks sufficient access to high-speed broadband service to facilitate rural economic development; these are often rural areas with limited demand, and the high cost of providing service to these areas make them less profitable for broadband providers.

A number of statutory shortcomings further demonstrate the need for this legislation.

First, existing law leaves the NTIA and the RUS too much discretion in deciding whether to deobligate and return funds from failed or failing awards. Section 6001(i)(4) of ARRA establishing the BTOP stipulates only that the Assistant Secretary “may” deobligate awards in cases of waste, fraud, or insufficient performance. The statutory language provides even less guidance to the RUS on the BIP, remaining silent on the issue of deobligation and return of funds. Chairman Walden asked at the February 10, 2011, hearing whether the statute left the decision to deobligate entirely within the discretion of the NTIA and RUS. Agriculture Inspector General Fong testified: “That is my understanding.” Commerce Inspector General Zinser answered: “Yes, I believe it is discretionary, sir.” When Commerce Assistant Secretary Strickling testified before the Subcommittee April 1, 2011, Chairman Walden asked: “Doesn’t section 6001(i)(4) of the ARRA state you may deobligate funds?” The Assistant Secretary replied: “You are correct.” Although the Assistant Secretary said he is relying on the current guidance of the Department of Commerce on whether and when to deobligate funds, Chairman Walden asked whether this legislation would “put certainty in the statute because the guidance out of the department could change in another Administration or even in this one, could it not?” The Assistant Secretary replied: “I would agree with that.”

Second, rescission provisions added to the ARRA by the Dodd-Frank Wall Street Reform and Consumer Protection Act are not only similarly discretionary, but also unclear both in their meaning and application. Section 1306 of Dodd-Frank added a new section 1613 into the Recovery Act that states: “if the head of any executive agency withdraws or recaptures” ARRA funds, such funds shall be rescinded and returned to the Treasury. The word “if” still leaves to the NTIA and RUS administrators the discretion whether to “withdraw or recapture” funds from failed or failing programs. Moreover, it is unclear whether the terms “withdraw” and “recapture” have the same meaning as “deobligate” in section 6001 of the

ARRA, leaving unclear how the Dodd-Frank provision would be interpreted and applied to the broadband grants.

#### HEARINGS

The Subcommittee on Communications and Technology held an oversight hearing February 10, 2011, on American Recovery and Reinvestment Act broadband spending. Witnesses included representatives from the Department of Commerce, the Department of Agriculture, the Government Accountability Office, Eagle Communications, and Merit Network, Inc.

The Subcommittee held a second hearing April 1, 2011, on a Committee Print to return to the U.S. Treasury unused or reclaimed funds made available for broadband awards in the American Recovery and Reinvestment Act of 2009, and to improve oversight of the grant programs. On the same day, the Subcommittee met in open markup session and favorably reported the Committee Print to the Full Committee, without amendment, by a voice vote. Mr. Bass introduced the Committee Print on April 4, 2011, as H.R. 1343.

#### COMMITTEE CONSIDERATION

On April 5, 2011, the Committee on Energy and Commerce met in open markup session and ordered H.R. 1343 favorably reported to the House, as amended, by a voice vote.

#### COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. There were no record votes taken in connection with ordering H.R. 1343. A motion by Mr. Upton to order H.R. 1343 reported to the House, as amended, was agreed to by a voice vote.

#### COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee held legislative and oversight hearings and made findings that are reflected in this report.

#### STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

The goals and objectives of H.R. 1343 are to ensure that the NTIA and RUS terminate failed or failing broadband grants and loans and rescind any remaining funds, return to the U.S. Treasury any rescinded or relinquished funds, and improve oversight.

#### NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.R. 1343 would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

## EARMARKS

In compliance with clause 9(e), 9(f), and 9(g) of rule XXI, the Committee finds that H.R. 1343 contains no earmarks.

## COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

## CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

*H.R. 1343—A bill to return unused or reclaimed funds made available for broadband awards in the American Recovery and Reinvestment Act of 2009 to the Treasury of the United States*

H.R. 1343 would require the National Telecommunications Information Administration (NTIA) and the Rural Utilities Service (RUS) to promptly terminate certain grant awards if the agency determines that award recipients are engaged in wasteful or fraudulent activities or have not met performance expectations. The bill also would require each agency, upon receiving notification of material noncompliance with award terms or improper usage of award funds, to determine whether the award should be terminated and to notify the Congress of any terminated awards.

The American Recovery and Reinvestment Act of 2009 (ARRA) established two programs to promote the development of broadband services. The NTIA awarded \$4.4 billion in grants to public and private entities to develop a map of broadband availability nationwide and to encourage construction and use of broadband networks. The RUS awarded \$2.3 billion in grants and \$1.2 billion in federal loans to fund the deployment and construction of broadband infrastructure in rural areas.

Both agencies are required under current law to promptly terminate grants for wasteful or fraudulent spending or for failure to meet specific performance milestones. In addition, the Pay-it-Back Act (Public Act 111–203) requires agencies to promptly return to the Treasury any funds awarded under ARRA that are terminated. Thus, restating those requirements, as provided in H.R. 1343, would not affect federal spending or revenues.

Based on information from the agencies, CBO estimates that implementing the new reporting requirements in H.R. 1343 would have no significant effect on spending subject to appropriation. Enacting H.R. 1343 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 1343 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contacts for this estimate are Susan Willie (for NTIA) and Daniel Hoople (for RUS). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

## FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

## ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

## APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

## SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1(a) requires the NTIA and RUS to terminate an award if the Assistant Secretary or Administrator finds cause—including waste, fraud, or insufficient performance.

Section 1(b) requires the NTIA and RUS to deobligate funds from awards they have terminated. Specifically, they must deobligate the entire amount of the award, less allowable costs that were legally disbursed and spent. The funds shall be returned to the U.S. Treasury within 30 days of deobligation. Should the NTIA or RUS subsequently recover additional amounts from an award—such as through administrative or legal action—any additional amount received shall immediately be deobligated. The recipients must provide an accounting of funds received but not yet expended.

Section 2 requires unused funds that are returned or disclaimed to be returned to the U.S. Treasury.

Section 3 requires the Assistant Secretary and Administrator to determine, within 30 days of receiving information regarding an award from their respective Department's Inspectors General or Comptroller General, and such information pertains to material noncompliance with award terms or provisions, or improper use of the funds, whether cause exists to terminate the award. The Administrator and Assistant Secretary, upon making a determination, shall provide notification within three days to Congress and the official who provided the information. The notification shall include an explanation of the determination made and what action they took or why no action was taken. In certain circumstances where the Administrator or Assistant Secretary determines cause does not exist to terminate the award, the required notification to Congress may be made on a confidential basis, but only if the Administrator or Assistant Secretary determines, after consultation with the official who provided the information that was the basis for a determination, that there is no merit to the information and a public notification would cause irreparable harm to any person the information is regarding should that person's identity be made public.

Section 4 provides conforming amendments to Section 6001 of the ARRA to make explicit that BTOP funds for awards that are

terminated because of insufficient performance, waste, or fraud shall be deobligated.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

**AMERICAN RECOVERY AND REINVESTMENT ACT OF  
2009**

\* \* \* \* \*

**DIVISION B—TAX, UNEMPLOYMENT,  
HEALTH, STATE FISCAL RELIEF, AND  
OTHER PROVISIONS**

\* \* \* \* \*

**TITLE VI—BROADBAND TECHNOLOGY  
OPPORTUNITIES PROGRAM**

\* \* \* \* \*

**SEC. 6001. BROADBAND TECHNOLOGY OPPORTUNITIES PROGRAM.**

(a) \* \* \*

\* \* \* \* \*

(i) The Assistant Secretary—

(1) \* \* \*

\* \* \* \* \*

(4) **may** *shall*, in addition to other authority under applicable law, deobligate awards to grantees that demonstrate an insufficient level of performance, or wasteful or fraudulent spending, as defined in advance by the Assistant Secretary**],** and award these funds competitively to new or existing applicants consistent with this section**];** and

\* \* \* \* \*

## ADDITIONAL VIEWS

H.R. 1343 requires the Assistant Secretary of the National Telecommunications and Information Administration (NTIA) and the Administrator of the Rural Utility Service (RUS) to deobligate and return to the U.S. Treasury any grant or award made under the Broadband Technology Opportunities Program (BTOP) or Broadband Initiatives Program (BIP) if either agency determines that the recipient of such grant or award has “demonstrated an insufficient level of performance or wasteful or fraudulent spending.” This is a worthy goal that has broad, bipartisan support. Existing law and agency policy, however, already accomplish this. Accordingly, although H.R. 1343 does not undermine or hinder ongoing oversight efforts by NTIA and RUS, the legislation is unnecessary and of limited utility.

Specifically, funds available for BTOP/BIP awards expired on September 30, 2010.<sup>1</sup> NTIA’s statutory authority to make new grants or re-award existing grants for BTOP also expired on September 30, 2010.<sup>2</sup> Therefore, the provisions of H.R. 1343 that restrict agency discretion to deobligate awards in cases of waste, fraud or insufficient performance apply to an already expired provision of ARRA that is no longer in effect. Changing the statute from “may” to “shall” in this instance has no effect because the provision is no longer operable. Simply put, even if funds for an award become deobligated, NTIA and RUS are not authorized to make new grants or re-award existing grants with these monies. According to appropriations law and existing agency practices, the deobligated funds should be returned to the Treasury.<sup>3</sup>

Pursuant to provisions of the Pay It Back Act, which was enacted into law on July 21, 2010, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), all deobligated or returned funds must be transferred promptly to the General Fund of the U.S. Treasury. The Dodd-Frank Act specifies that if the head of any executive agency “withdraws or recaptures for any reason funds appropriated or otherwise made available” under the Recovery Act, such recaptured funds must be rescinded and deposited in the General Fund of the Treasury “dedicated for the sole purpose of deficit reduction” and “prohibited from use as an offset for other spending increases or revenue reductions.”<sup>4</sup> The

<sup>1</sup> The American Recovery and Reinvestment Act (ARRA), Pub. L. No. 111–5, at Sec. 1603.

<sup>2</sup> In light of this expired authorization, it is not clear why Section 4 of the discussion draft, which provides conforming amendments to the Recovery Act provisions authorizing the BTOP program, is necessary. See *id.*, at Section 6001(d)(2).

<sup>3</sup> 31 U.S.C. 1552.

Dodd-Frank Act also requires that any discretionary appropriations made available in the Recovery Act that have not been obligated as of December 31, 2012, be rescinded and returned to the Treasury.<sup>5</sup>

It is unclear why new legislation is necessary to ensure that this policy continues. H.R. 1343 does not increase the prospects for federal recovery of ARRA funds. As the Congressional Budget Office (CBO) noted in its cost estimate of the bill, since existing law already requires agencies to promptly return to the Treasury any funds awarded under ARRA that are terminated, “restating those requirements, as provided in H.R. 1343, would not affect federal spending or revenues.”<sup>6</sup>

Proponents of H.R. 1343 have asserted that there are ambiguities in existing law concerning whether the NTIA and the RUS are actually required to return deobligated funds to the U.S. Treasury. During the legislative hearing on the draft bill held on Friday, April 1, 2011, however, both NTIA Assistant Secretary Lawrence E. Strickling and RUS Administrator Jonathan Adelstein testified that the agencies do not see any ambiguity on this point. They emphasized that their actions to date—promptly returning any deobligated funds to the U.S. Treasury—demonstrated that existing law covers this contingency and that the legislation is consistent with the standard process already in place.

Mr. Strickling and Mr. Adelstein nevertheless both emphasized that they shared the concerns raised by the draft bill and were willing to work with the Committee to enhance oversight of these programs as well as to ensure that the legislation does not inadvertently complicate the ability of the agencies to oversee projects effectively. Similarly, despite questions about the necessity of this legislation, Democratic members agreed to work with the Republican sponsors to incorporate changes that ensure the legislation does not hinder the ability of the agencies to oversee these programs.

Toward this end, we appreciate that the Manager’s Amendment adopted during full Committee markup of the bill incorporated several changes suggested by the Administration and Democratic members to address these concerns.

---

<sup>4</sup>Pay It Back Act, Title XXIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 1306 (Repayment of Unobligated ARRA Funds) (July 21, 2010).

<sup>5</sup>Id.

Vigorous oversight to guard against waste, fraud, and abuse were core elements of the Recovery Act as passed during the 111th Congress. Nevertheless, Democrats and Republicans agree that the agencies managing the broadband programs will be challenged by the scope and breadth of these groundbreaking projects and oversight must be enhanced wherever possible. Although we have confidence that NTIA and RUS will continue to emphasize accountability and oversight, we support the very modest enhancements that would be implemented if H.R. 1343 becomes law.

HENRY A. WAXMAN.  
JAY INSLEE.  
JAN SCHAKOWSKY.  
G.K. BUTTERFIELD.  
DIANA DEGETTE.  
TAMMY BALDWIN.  
LOIS CAPPS.  
JOHN D. DINGELL.  
ANNA G. ESHOO.  
BOBBY L. RUSH.  
ELIOT L. ENGEL.  
EDWARD J. MARKEY.  
MIKE DOYLE.  
FRANK PALLONE, Jr.  
DORIS O. MATSUI.

