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Infrastructure Investment and Jobs Act: Orrick

In November, the bipartisan Infrastructure Investment and Jobs Act (the "Act") was enacted into law. In addition to reauthorizing existing programs, the Act adds $550 billion in funding for new infrastructure investments, including for transportation, water, power, renewable energy and broadband.

This summary discusses provisions of the Act of particular interest to the municipal finance industry, organized into two parts. First, a summary of provisions related to tax-exempt financing by state and local governments. The Act authorizes two new categories of tax-exempt bonds for broadband projects and carbon capture facilities, and also increases the national volume cap available for tax-exempt bonds issued for certain transportation projects, which are often used for projects involving public-private partnerships ("P3"). And second, a highlight of various provisions that provide funding to state, local and tribal governments for particular types of infrastructure. Since many of these provisions relate to new programs, federal agencies will be working through the rulemaking process to implement these new programs over the coming months.

Tax-Exempt Financing Provisions
The Act adds two new types of "exempt facility" bonds, and increases the federal volume cap for a third type. Most tax-exempt bonds are issued as "governmental" bonds subject to the private activity limitations imposed by Section 141 of the Code, which generally limit the amount of involvement of a private entity in the financed projects (i.e., limitations on private business use of the projects). Exempt facility bonds are a separate category of tax-exempt bonds, which are generally not subject to private business use or other private activity limitations, but can only be used to finance qualifying facilities, such as airports, solid waste, and multifamily housing, and are subject to additional requirements and restrictions, such as TEFRA approval and costs of issuance limitations. Several types of exempt facility bonds, including the new types authorized by the Act, may be issued to finance projects owned by a private entity.

Qualified Broadband Projects. The Act adds a new type of exempt facility bonds for qualified broadband projects. A qualified project must provide access to residential and/or commercial locations at speeds of not less than 100 megabits per second ("mbps") downstream and 20 mbps upstream, and must provide access to locations that are currently underserved by broadband service. The project must be designed to provide service to one or more census block groups where more than 50% of residential households do not currently have access to fixed terrestrial broadband service delivering at least 25 mbps downstream and at least 3 mbps upstream, and at least 90% of the locations (residential or commercial) at which access will be provided are locations where a broadband service provider did not previously provide service of at least 25 mbps downstream and at least 3mbps upstream. In addition, before bonds are issued, the issuer must (i) notify all broadband service providers in the area of the planned project, (ii) request information from them on their ability to provide gigabit capable Internet access (1,000 mbps), and (iii) allow each provider at least 90 days to respond to the notice and request. These requirements have some interpretive questions that may require guidance from Treasury, but in advance of any guidance, it appears that these bonds would work well to finance land-based broadband infrastructure in geographic areas in

which no broadband service is currently available.

Exempt facility bonds are usually subject to state volume cap limitations, but the Act provides for a 75% exemption from volume cap for privately owned broadband projects, such that only 25% of the volume cap is required, and a 100% exemption for governmentally owned projects, such that no volume cap is required.

Qualified Carbon Dioxide Capture Facilities. The Act adds a second new type of exempt facility bonds for qualified carbon dioxide capture facilities. Qualifying facilities can either be (i) components of an industrial carbon dioxide facility, or (ii) a direct air capture facility. The Act has a number of detailed requirements for qualifying facilities, some of which may require guidance from the Treasury Department to interpret.

An industrial carbon dioxide facility means a facility that emits carbon dioxide as a result of combustion, gasification, bioindustrial processes, fermentation, or certain types of manufacturing processes (but not including natural gas extraction and transportation). Eligible components for financing with these bonds include equipment used for the capture, treatment, purification, compression, transportation or storage of produced carbon dioxide, or certain components that are used to convert solid or liquid products made from coal, petroleum residue, biomass or other materials into a synthesis gas composed of primarily carbon dioxide and hydrogen for direct use or a subsequent chemical or physical conversion. The Act generally requires that eligible components of an industrial carbon dioxide facility must be at least 65% efficient in capturing and storing carbon dioxide, and for this purpose, storing carbon dioxide means injection into a facility for geologic storage, or injection into an enhanced oil or gas recovery well followed by geologic storage. To the extent the efficiency is less than 65%, only the corresponding percentage of the costs are eligible for financing (i.e., components that are 40% efficient can only have 40% of the costs financed with these exempt facility bonds).

Direct air capture facilities are defined by reference to Section 45Q(e)(1) of the Internal Revenue Code of 1986, which currently provides for a business income tax credit for certain of such facilities. A direct air capture facility for this purpose is a facility that captures carbon dioxide from the ambient air—not including capturing carbon dioxide deliberately released from subsurface springs and not including facilities that use natural photosynthesis to capture carbon dioxide. To the extent that a facility receives tax-exempt financing for a portion of the eligible costs and is also eligible for the Section 45Q tax credit, the eligible tax credit will be reduced by the proportional amount of tax-exempt financing, but with a cap of a 50% reduction.

Exempt facility bonds for qualified carbon dioxide capture facilities are subject to a 75% exemption from volume cap, such that only 25% of the volume cap amount is required.

Qualified Highway and Surface Freight National Volume Cap Increase. Existing law allowed the issuance of exempt facility bonds for certain transportation projects that receive federal funding, but only with an allocation of volume cap from the Secretary of Transportation. These types of exempt facility bonds were often used for P3 transportation projects, as these bonds are not subject to the private business use or other private activity limitations. The national volume cap limit for these bonds was set at $15 billion in 2005, and as of November 2021, approximately $13.8 billion had been used, and another $934 million has been allocated to projects but not yet issued. The Act increases the national volume cap limitation to $30 billion, providing a significant increase for potential financing of additional P3 transportation projects.

New and Notable Infrastructure Programs

The Act provides an enormous amount of funding for a broad range of infrastructure projects. Below

is a summary of particular provisions, focused by sector, that may be of interest to state and local governments, tribal governments, and other participants in particular infrastructure sectors. This is not comprehensive, but focuses on some of the larger programs that relate to capital infrastructure projects. Numerous other provisions of the Act may be of interest to particular participants in the municipal finance industry, including grant funding for cybersecurity initiatives, brownfield development, energy efficiency assessments, and job training and technical assistance related to climate resilience or infrastructure projects.

Airports. The Act provides $15 billion over the next five years in formula-based grants to airports for the Airport Improvement Program, which generally allows flexibility in funding improvements to runways, taxiways, terminals and other projects. There is also $5 billion available in the Airport Terminal Program for discretionary grants for terminal improvements and other landside projects.

The Act also makes airport-related projects eligible for loans and other credit support pursuant to the Transportation Infrastructure Finance and Innovation Act ("TIFIA"). TIFIA loans have been used as a source of low-interest, long-term funding for various highway and surface transportation projects. In addition to expanding the eligibility to include airport-related projects, the Act further extends the repayment terms on TIFIA loans for up to 75 years for certain infrastructure projects.

Broadband Projects. The Act authorizes a total of $65 billion in funding for broadband infrastructure. This includes $42.45 billion in grant programs for states, territories, and the District of Columbia to develop broadband projects, as well as $2 billion in grant and loan programs to provide broadband service in rural areas. The Act also provides $2.75 billion in new grant programs to promote digital inclusion and equity. An additional $1 billion is available for grants to various entities, including electrical utilities and cooperatives, for "middle mile" infrastructure to expand broadband to unserved areas.

Energy Infrastructure. The Act includes $65 billion for a range of energy infrastructure programs, including $5 billion for a new grant program to make electrical grids more resilient to weather, wildfire and natural disasters, $5 billion for federal assistance for innovative approaches to making transmission, storage, and distribution infrastructure more resilient (plus another $1 billion for remote or rural areas), and $3 billion for a matching grant program for smart grid investments.

The Act creates a $2.5 billion revolving loan fund program for new or upgraded transmission lines, and allows the Department of Energy to acquire a portion of the capacity of the line in order to serve as an "anchor-tenant" for the line to promote economic viability. The Act also authorizes more than $500 million in incentive payments to owners of hydroelectric facilities for capital improvements that improve grid resiliency, improve dam safety, or are environmental improvements.

Ports, Waterways and Ferries. The Act expands the scope of eligible projects for the Department of Transportation's Port Infrastructure Development Program, and provides $2.25 billion over the next five years in funding for competitive grants pursuant to that program. In addition to the types of projects previously authorized, the Act authorizes projects that improve resilience to climate change or reduce greenhouse gas emissions at ports, such as electrification, vehicle charging infrastructure, and equipment replacements or retrofits. The Act also provides additional funding for grants pursuant to the Marine Highways Program, and for grants to reduce truck emissions at ports.

The Act provides $1.25 billion in grants for passenger ferries, and establishes a $1 billion program for ferry service in rural areas, which also allows use of these funds for operating costs.

Public Schools. Although not often thought of as an infrastructure sector, the Act provides $500 million in competitive grants to public schools for energy efficiency improvements, renewable

energy, or alternative fuel infrastructure for vehicles. The Act also provides $5 billion in funding for the replacement of school buses with zero emission or alternative fuel buses, and $200 million in funding for grants to address lead contamination in school drinking water.

Public Transit and Rail. Numerous provisions of the Act provide funding for public transit and rail projects, including $8 billion in grants for new and expanded bus and rail service, $4.75 billion in grants for maintenance, replacement and rehabilitation of buses and rail assets, $5.25 billion in grants for low- and no-emission buses, including supporting facilities and workforce training, and $2 billion in certain grant programs to help make public transit systems more accessible to seniors and persons with disabilities. The Act also includes several programs addressing maintenance backlogs for passenger and freight rail, as well as capital projects that improve intercity passenger rail.

The Act also expands eligibility for TIFIA loans to (i) public infrastructure projects located within walking distance of, and accessible to certain public transit facilities, (ii) economic development projects that incorporate private investment and are physically or functionally related to passenger rail.

Roads and Bridges. The largest area of new spending in the Act is directed towards highways, roads, and bridges. In addition to reauthorizing existing highway programs, the Act provides more than $36 billion in competitive and formula grants for bridge repairs and replacement, as well as $7.5 billion in grants for surface transportation projects of local and/or regional significance, $5 billion for multi-modal, multi-jurisdictional projects of national or regional significance, and a $3.2 billion increase in grant funding for highway and rail projects of national and regional significance. The Act also provides funding for certain specific highway transportation projects, creates a grant program for both formula and competitive grants for transportation resiliency projects, and another grant program for replacing culverts under roads, bridges, railroad tracks, and trails.

Tribal Governments. Indian tribes are eligible recipients for many of the new programs in the Act that are otherwise described in this summary, such as the grants for vehicle charging and alternative fuel infrastructure and grants for electric grid resiliency projects. The Act also expands the eligibility for certain existing programs to include Indian tribes, such as for grants for certain rail projects, and sets aside funds for tribes, such as a 5% set aside in rural public transportation formula grants for public transportation projects on Indian reservations.

Vehicle Charging and Alternative Fuel Infrastructure. This is not exclusive to a particular infrastructure sector, but instead a particular category of projects that affects multiple sectors. The Act provides $7.5 billion in grants to states, local governments, tribes, and territories for publicly accessible electric vehicle charging infrastructure, as well as infrastructure for hydrogen, propane, or natural gas fueled vehicles. The goal of these grants is to create alternative fuel corridors, which can either be corridors designated by the Department of Transportation, or by a state or group of states in certain cases. These grants will be prioritized for rural areas, low and moderate income neighborhoods, and areas with low amounts of private parking or with high-density housing. These funds will be available for up to 80% of the costs of projects, with a maximum grant amount of $15 million, and in order to require private participation, the grants are to be used to contract with a private entity for acquisition and installation of the infrastructure, and the private entity must agree to pay the portion of the project costs not funded with federal grants.

In addition to that particular grant program, there are multiple other provisions in the Act providing funding for electric vehicle or alternative fuel infrastructure, either by expanding the eligibility of such infrastructure for funding from existing programs (e.g., the Surface Transportation Block Grant Program), or as part of new programs targeted at particular sectors as discussed elsewhere in this summary (e.g., schools and ports).

Water and Wastewater. The Act provides $55 billion in new funding for water and wastewater projects, primarily through programs pursuant to the existing Drinking Water and Clean Water State Revolving Loan Funds ("SRFs"). $15 billion will be made available through the Drinking Water SRF for grants, loans, and forgivable loans for lead pipe replacement in service lines, without any state cost-share requirement. $10 billion is being made available through both SRF programs as grants to states and water/wastewater utilities to treat perfluoroalkyl or polyfluoroalkyl substances or other identified contaminants of emerging concern.

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