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Qualified Broadband Projects Added to Private Activity Bonds by Jobs Act: Holland & Knight

Highlights

- More than 30 million Americans lack access to reliable high-speed internet service and, as the COVID-19 pandemic has demonstrated during the last two years, the economy has become more dependent on robust and affordable internet access.
- As part of the new Infrastructure Investment and Jobs Act, \$65 billion was allotted for broadband infrastructure, and the legislation added a new qualified broadband projects category for use with the private activity bond (PAB) program.
- PABs, which generally are tax-exempt and used to finance major projects such as airports and commuting facilities, now include projects to provide broadband services to underserved geographic areas based on residential access and minimum data transfer speeds.

More than 30 million Americans still lack access to reliable high-speed internet. The need for reliable and affordable internet access has become increasingly important as the economy becomes more dependent on internet access, particularly during the last two years as remote work and learning became commonplace due to the COVID-19 pandemic.

On Nov. 5, 2021, Congress passed the Infrastructure Investment and Jobs Act (IIJA), a \$1.2 trillion bipartisan infrastructure bill that made a number of changes to federal incentives for infrastructure development. In addition to investing in roads, bridges, airports and other traditional infrastructure assets, the IIJA invests \$65 billion into broadband infrastructure and related government programs aimed at expanding access to affordable and reliable internet services to millions of Americans in rural areas, areas of low-income families and tribal communities.

Private activity bonds (PAB) are bonds that are issued by a governmental entity whose proceeds are used by a nongovernmental, or private, entity. The federal tax code allows state and local governments to issue certain enumerated categories of PABs on a tax-exempt basis for “qualified private activities.” Tax-exempt PABs provide a lower cost of capital for such private entities to finance certain projects. Examples of existing tax-exempt PAB projects include airports, commuting facilities, docks, wharves, and water and sewer facilities. The IIJA added a new category of qualified private activities: qualified broadband projects.

Meeting Project Qualifications

A qualified broadband project is one designed to provide broadband services to underserved geographic areas (Eligible Area) where at least 50 percent of residential households do not have access to broadband service with a speed of at least 25/3 mbps from a non-satellite, non-cellular company that results in such areas receiving certain minimum speeds after the project is complete (Required Results). To meet the Required Results, the PAB applicant must show that 1) after completion of the project, residences, businesses or a combination thereof within the Eligible Area now have access to broadband service of speeds of at least 100/20 mbps, and 2) 90 percent of the

residences and businesses in the Eligible Area who now have access to the 100/20 mbps speeds could not have received access to the previous minimum speeds of 25/3 mbps before the buildout.

The new legislation also requires the issuer of qualified PABs to notify each broadband service provider who delivers services within the area of the project's scope and to request information from such providers regarding the provider's ability to deploy, manage and maintain a broadband network capable of providing internet access to the area meeting the Required Results. Issuers must allow the providers at least 90 days to respond to this notice and request for information.

The federal government limits the amount of tax-exempt bond financing for several categories of qualified PABs that states can issue by setting an annual state volume limit under Section 146 of the Internal Revenue Code known as "volume cap." The volume cap is adjusted each year for inflation; in 2022, the cap is the greater of \$110 per capita or \$335 million. Qualified broadband projects are one such category subject to the state volume cap. An issuer with a qualified broadband project must apply for an allocation of its state volume cap for 25 percent of the principal amount of the bonds; the remaining 75 percent is exempt from the volume cap requirement. The volume cap requirement does not apply to qualified broadband projects that are government-owned and -operated, and no volume cap allocation is required for such projects.

Potential Complications

The benefits of the IIJA's broadband PAB program notwithstanding, there are a few complicating factors. One such complication is the state volume cap. Each state's volume cap is shared among the other categories of tax-exempt bonds and, as such, the volume cap has become scarce in certain states, particularly due to the high demand for tax-exempt housing bonds. On the other hand, the volume cap is advantageous to many smaller states because of the \$335 million floor and allows them to issue relatively more PABs than larger states.

Another complication comes from the requirement that PAB applicants ascertain the existing broadband coverage of potential Eligible Areas. The FCC currently has a map showing what services are currently provided by which providers in each area; however, the utility of the map is somewhat diminished by the fact that the map does not indicate how many residences in the area have access to such services, regardless of whether they are actually provided, which is the metric required to determine the eligibility of a given area for qualified broadband projects. In addition, the FCC depends on providers to report the data contained in the map, and such self-reported data has at times been found to be lacking in accuracy. More complete documentation of coverage areas, both before and after construction, will be key to implementation of the broadband PAB program to properly structure transactions and avoid compliance issues that could impact the tax-exempt status of these bonds.

Conclusion and Considerations

Despite any issues, the broadband PAB program is a valuable tool to begin bridging the "digital divide" that exists for millions of Americans in underserved areas. Not only does the program provide additional financing options for providers in these areas, it will also attract capital and businesses in areas that until now have not been attractive to investment. These provisions are currently effective and apply to all bonds issued after Dec. 31, 2021.

Holland & Knight attorneys have represented numerous issuers, financial institutions, underwriters and private users on PABs throughout the U.S. Please contact the authors of this alert if you have any questions regarding the use of PABs for broadband projects or other types of allowable projects.

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