

# Legal Update

## Progress for America's Infrastructure under the Infrastructure Investment and Jobs Act

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act, H.R. 3684, as amended (the "Infrastructure Act"). The Infrastructure Act is based on the framework agreed on between the Biden administration and a bipartisan group of US senators (the "Framework"); it previously was approved by the Senate on August 10, 2021 and by the House of Representatives on November 5, 2021.

The Infrastructure Act will provide over \$840 billion in federal investment in infrastructure, including \$550 billion in new spending over 5 years for various projects such as roads and bridges, rail, public transit, ports and waterways, airports, and broadband. This investment includes a \$382.9 billion, 5-year surface transportation authorization that is \$89.9 billion over baseline and includes funding for highways as well as rail, mass transit, and other transportation. The stability of this multi-year authorization and commitment to additional spending is likely to provide significant incentives for the private sector to invest in infrastructure.

In addition to the overall incentive provided by the general increase in programs and funding, the Infrastructure Act includes a number of new provisions intended to encourage public-private partnerships ("P3s") and private sector investment in infrastructure, including new initiatives related to electric vehicles and carbon capture that are likely to interest private investors. This Legal Update provides a summary of these key provisions.

Congress also continues to consider additional infrastructure spending under the Build Back Better Act, H.R. 5376 (the "Build Back Better Act"), which may provide additional opportunities for private investment in infrastructure. The current version of the Build Back Better Act includes investments in high-speed rail, affordable housing, and the reduction of transportation-related greenhouse gas emission. Additional information regarding certain key programs proposed under the Build Back Better Act are described at the end of this Legal Update.

### **A. Key Provisions Relating to Private Sector Investment and P3s**

The Infrastructure Act includes provisions likely to encourage private sector investment to assist in accomplishing key infrastructure initiatives. As further described below, these include expansion of private activity bonds ("PABs") authorization, expansion of Transportation Infrastructure Finance and

Innovation Act (“TIFIA”) and Railroad Rehabilitation and Improvement Financing (“RRIF”) program eligibility, technical assistance for asset recycling, and a value for money study requirement for major infrastructure projects. These provisions could strengthen opportunities for P3s to play a critical role in the development, financing, and operation of US infrastructure.

## EXPANDED PABS AUTHORITY

**Increase of PABs Authority for Surface Transportation Projects.** Section 80403 of the Infrastructure Act increases the cap on surface transportation PABs from \$15 billion to \$30 billion. Without this increase, nearly all of the current cap has been committed. Doubling this limit will allow many more state and local governments to take advantage of this lower-cost financing tool for surface transportation P3 projects.

**Additional Projects Eligible for PABs.** The Infrastructure Act expands the scope of allowable uses for PABs to include certain broadband projects and carbon capture projects:

- *Broadband:* Section 80401 of the Infrastructure Act adds the financing of qualified broadband projects to the list of allowable uses for exempt facility bonds under Section 142(a) of the Internal Revenue Code. Qualified projects are defined as projects that cover census block groups where more than 50% of the residential households do not have access to broadband service; specific metrics are included for improved service. Additionally, 75% of any exempt facility bond issued for a qualified broadband project does not count toward the required allocation of state PAB volume cap, and if all of the property to be financed by net proceeds of the bonds is owned by a governmental unit, state volume cap is not required.
- *Carbon Capture:* Section 80402 of the Infrastructure Act adds financing for qualified carbon dioxide capture facilities to the list of allowable uses for exempt facility bonds under Section 142(a) of the Internal Revenue Code. Qualified carbon dioxide capture facilities are defined to include both the eligible components of industrial carbon dioxide facilities (e.g., those that emit carbon dioxide) as well as direct air capture facilities (as defined in 45Q(e)(1) of the Internal Revenue Code). Eligible components include any equipment installed in an industrial carbon dioxide facility that is used for the purpose of capture, treatment, transportation, or storage of carbon dioxide produced by the facility or that is integral or functionally related and subordinate to a process that converts materials (e.g., coal product, petroleum residue, biomass) recovered for their energy or feedstock value into a synthesis gas composed primarily of carbon dioxide and hydrogen. These eligible components generally overlap with, but are not identical to, facilities eligible for the related tax credit available under Section 45Q of the Internal Revenue Code. If the eligible components of an industrial carbon dioxide facility are designed with a capture and storage percentage that is less than 65%, the percentage of the cost of the eligible components installed in such facility that may be financed with these tax-exempt PABs may not be greater than the designed capture and storage percentage. State PAB volume cap is required, but 75% of any exempt facility bond issued for a qualified carbon dioxide capture facility does not count toward the required allocation of volume cap. Further, if a facility is financed with these PABs, the related tax credit available under Section 45Q of the Internal Revenue Code will be reduced by up to 50% of the otherwise available credit. The Framework acknowledged that the price of building facilities for these technologies can involve significant costs and states an intention for private investment through PABs to encourage commercial deployment to reduce such costs and achieve scale.

## CHANGES TO TIFIA

**Asset Class Expansion.** Section 12001 of the Infrastructure Act authorizes the expansion of projects eligible for the TIFIA program. Notably, this includes authorization for airport-related projects, expanded transit-oriented development projects, and wildlife conservation projects. The TIFIA program provides key credit assistance to major infrastructure projects through secured loans, loan guarantees, and standby lines of credit with low interest rates and flexible repayment terms. Currently, however, eligible projects are limited to surface transportation projects, including highway, transit, railroad, intermodal freight, and port access projects. Making airport projects eligible will encourage greater investment in US airports, which will be particularly useful as the air travel industry continues to recover from the COVID-19 pandemic. Section 12001 also adds transit-oriented development projects as eligible for the TIFIA program. Residential, commercial, and related infrastructure activities that are physically or functionally related to passenger rail stations or multimodal facilities that include rail service that incorporate private investment may qualify for the TIFIA program. Finally, Section 12001 adds as eligible wildlife conservation projects that mitigate the environmental impacts of otherwise TIFIA-eligible transportation infrastructure projects.

**Other Amendments:** Section 12001 also makes various other notable changes to the TIFIA program. These include:

- *Credit Ratings:* Raises the bar for when an investment-grade rating is required from two rating agencies as opposed to one from \$75 million to \$150 million.
- *Bonding:* Requires that TIFIA ensure that there is appropriate payment and performance security for any project financed by TIFIA regardless of any requirements by the applicable state and local government.
- *Processing Timelines:* Requires that the Build America Bureau provide an applicant with a specific timeline for approval of an application, but in no case will it be later than 150 days.
- *Streamlined Approval Process:* Requires that projects that meet certain criteria be approved or denied not later than 180 days after the applicant is notified that creditworthiness review has begun. These criteria include projects where the TIFIA program share of eligible project costs is 33% or less, that are A-rated, that have terms that substantially conform to conventional terms established by the National Surface Transportation Innovative Finance Bureau, where the contract for the project can be entered into within 90 days after the date a federal credit instrument is obligated under the program, and that have the requisite federal environmental approvals.
- *Maturity Date:* Expands the final maturity date from 35 years to up to 75 years for assets with an estimated life of more than 50 years.
- *Transparency:* Requires that TIFIA application status reports be posted on the internet monthly and quarterly.

## CHANGES TO RRIF

**Repayment of Credit Risk Premium:** Section 21301 of the Infrastructure Act provides for the return of credit risk premiums paid, including accrued interest, to the original source when all obligations of the loan or loan guarantee have been satisfied. The Infrastructure Act appropriates \$50 million each fiscal year of 2022 through 2026 and \$70 million for payment of credit risk premium. RRIF funding may be used to acquire, improve, or rehabilitate intermodal or rail equipment or facilities and to

develop new intermodal or railroad facilities. RRIF funding may also be used to reimburse expenses and refinance outstanding debt obligations relating to these activities.

**Other Amendments:** Section 21301 also makes various other notable changes to the RRIF program. These include:

- *Extended Term:* Allows for up to a 75-year loan term following substantial completion of a project.
- *Streamlined Procedures:* Requires the Secretary of Transportation (the “Secretary”) to develop a streamlined 90-day application and approval procedure for loans not exceeding \$150 million.
- *Transparency:* Requires the Secretary to disclose details regarding the loan approval process, including a description of key rating factors used by the Secretary to determine credit risk.
- *Non-Federal Share:* Clarifies that if the loan is repaid with non-federal funds, the loan will count as the non-federal share portion for purposes of receiving other federal grant money.

## TECHNICAL ASSISTANCE FOR ASSET CONCESSIONS

The Infrastructure Act creates a new program that will distribute \$100 million over 5 years for the purpose of making technical assistance grants for communities engaging in P3s under Section 71001. The program, which will be administered by the US Department of Transportation (“DOT”), will fund technical assistance expert services grants to state, tribal, and local governments “to facilitate access to expert services” and “to enhance the technical capacity of eligible entities to facilitate and evaluate public-private partnerships in which the private sector partner could assume a greater role in project planning, development, financing, construction, maintenance, and operation, including by assisting eligible entities in entering into asset concessions.” Asset concessions are defined by the Infrastructure Act as long-term lease agreements where the concessionaire agrees to provide 1 or more asset concession payments and to maintain or exceed the condition, performance, and service level of the infrastructure asset. These grants will only be used for projects eligible under TIFIA (including airports subject to the new authorization described above) and that meet certain other eligibility requirements. Maximum distribution amounts are set at \$2 million for technical assistance grants and \$2 million for expert services retained by an eligible entity, and there is a statewide maximum of no more than \$4 million during any 3-year period for the eligible entities within each state.

The Infrastructure Act imposes the following requirements as conditions to receiving such grant for any asset concession for which the grant provides direct assistance:

- The asset concession may not prohibit, discourage, or make it more difficult for the relevant public entity to construct new infrastructure, to provide or expand transportation services, or to manage associated infrastructure in publicly beneficial ways along a transportation corridor or in the proximity of a transportation facility that was part of the asset concession;
- The relevant public entity must have adopted binding rules to publish all major business terms of the proposed asset concession not later than 30 days before entering into such concession to enable public review;
- The asset concession may not result in displacement, job loss, or wage reduction for the existing workforce of the relevant public entity or other public entities;
- The relevant public entity or the concessionaire must carry out a value for money analysis to compare the aggregate costs and benefits to the relevant public entity of the asset concession

against alternative options to determine whether the asset concession generates additional public benefits and serves the public interest;

- The full amount of any asset concession payment received by the relevant public entity, less any amount paid for related transaction costs, must be used to pay infrastructure costs of the public entity; and
- The terms of the asset concession may not result in any increase in costs under the asset concession being shifted to taxpayers with an annual household income of less than \$400,000 per year, including through taxes, user fees, tolls, or any other measure for use of an approved infrastructure asset.

It is anticipated that further guidance regarding the expectations for these requirements will be provided through regulations.

## VALUE FOR MONEY ANALYSIS

Section 70701 of the Infrastructure Act includes language that will require applicants for TIFIA and RRIF loans with projects over \$750 million to conduct a value for money analysis to evaluate a P3 financing option. The analysis must include the life-cycle cost and project delivery schedule, the costs of using public funding versus private financing, a description of the key assumptions made in developing the analysis, and a forecast of user fees and other revenues expected to be generated by the project, if applicable.

Section 11508 of the Infrastructure Act also requires that a value for money or similar competitive analysis be conducted for transportation projects carried out through P3s more generally. Section 11508 applies to projects partially or totally funded using federal financial assistance and that have an estimated total cost of \$100 million or more. This section also requires the public partner of a P3 project to, within 3 years after the date the project is opened to traffic, conduct a review of the project, including a review of the compliance of the private partner with the terms of the P3 agreement and to certify to or notify the Secretary and make publicly available as to whether the private partner is meeting the terms of the agreement.

The Framework noted that the P3 model is often underutilized because of its complexity and states an intention that requiring a value for money analysis will help public entities give the P3 model “a fair shot.” Requiring this analysis for major projects will introduce the P3 model to many communities that may not have otherwise considered private investment, which in turn will likely lead to a greater use of P3s throughout the country. Using the TIFIA and RRIF programs for this analysis also will allow the US Department of Transportation to report to Congress on the use of the P3s, which may be helpful in future legislative initiatives to expand P3s.

## OTHER KEY PROVISIONS

- **Congestion Relief and Interstate Tolling:** Section 11404 of the Infrastructure Act establishes a congestion relief program and enables interstate tolling for certain eligible interstate highway projects so long as tolling is permitted under state/local law and the rates meet certain requirements under the law. Projects must meet a minimum grant size of \$10 million and the federal share must not exceed 80% of the total project cost.
- **Alternative Contracting Methods:** Section 11305 of the Infrastructure Act enables the Secretary to utilize alternative contracting methodology—including design-build contracting, long-term concession agreements, and any other method (tested, or that could be tested, under an

experimental contracting program carried out by the Secretary)—permitted by a state under Title 23, on behalf of any federal land management agency that receives funding under Sections 203, 204, or 308.

- **Build America Bureau Rural and Tribal Assistance Pilot Program:** Section 21205 of the Infrastructure Act provides over \$12 million for the first 5 years to establish the Rural and Tribal Assistance Pilot Program. The program will provide pre-development financial, technical, and legal assistance, as well as assistance with development-phase activities to state, local, and tribal governments for alternative delivery and P3 infrastructure projects in non-urbanized areas of 150,000 people or less. Section 21205 also allows the Build America Bureau to retain the services of expert firms, including legal counsel, in the field of municipal and project finance to assist in providing financial, technical, and legal assistance to eligible entities under the pilot program. Eligible entities will also be able to retain these advisors directly and separately (at their own cost) without conflict to the Build America Bureau. The pilot program sunsets 5 years after the date of enactment of the Infrastructure Act.
- **National Infrastructure Investments:** Division J, Title VIII of the Infrastructure Act includes emergency appropriations over 5 years for multimodal infrastructure, including \$5 billion for Rebuilding American Infrastructure with Sustainability and Equity (“RAISE”) grants (formerly “BUILD” or “TIGER” grants) and \$7.5 billion for projects that will have a significant local or regional impact.
- **Intercity Passenger Rail Grants:** Division J, Title VIII also includes an appropriation of \$36 billion for a new “Federal-State Partnership for Intercity Passenger Rail Grants” program to support the development and improvement of intercity passenger rail. Up to \$24 billion of that amount may be used for Northeast Corridor projects.
- **Broadband Expansion:** Section 60102 of the Infrastructure Act allocates \$100 million to each state to provide grants for broadband deployment in historically underserved areas. Additionally, Section 60401 authorizes \$1 billion for fiscal years 2022 through 2026 to fund the construction, improvement, or acquisition of middle mile broadband infrastructure. The newly created middle mile grant program prioritizes connecting middle mile infrastructure to last mile networks that provide or plan to provide broadband service to households in unserved areas, connecting non-contiguous trust lands, and the offering of wholesale broadband service at reasonable rates on a carrier-neutral basis.
- **Bridge Investment Program:** Section 11118 of the Infrastructure Act creates a new Bridge Investment Program, which provides \$40 billion to replace, rehabilitate, preserve, and protect bridges. Funding will be provided through both a competitive grant program (approximately \$13 billion) and a formula grant program (\$27.5 billion). At least half of the competitive grant program must be used for large projects costing over \$100 million. Large project grants may cover up to 50% of project costs, while grants for smaller projects may cover up to 80% of project costs, and grants for off-system bridges may cover up to 90% of project costs. The Infrastructure Act specifically contemplates bridge bundling within the definition of eligible projects for such grants. The formula grant program will distribute \$5.5 billion to the states each year for 5 years. After a 3% set-aside for tribal bridge projects, the formula funds will be distributed to states in the following manner: 75% based on each state’s proportional cost of replacing all its bridges classified as being in poor condition versus the cost of replacing all bridges in poor condition nationally and 25% based on each state’s proportional cost of rehabilitating all bridges classified in fair condition. Each state is entitled to a minimum distribution of \$45 million each year and must set aside 15% of amounts received for off-system bridges.

- **Rural Surface Transportation Grant Program:** Section 11132 of the Infrastructure Act establishes a rural surface transportation grant program that will provide \$2 billion in grants over 5 years beginning in fiscal year 2022 to state and local governments to improve and expand the surface transportation infrastructure in non-urbanized areas of less than 200,000 people. Eligible project costs include actual construction and land acquisition costs in addition to costs for development-phase planning and preconstruction activities. To receive funding, a project must be expected to begin construction within 18 months after the date of obligation of the funding and must involve either a highway, bridge, or tunnel; tribal transportation projects; certain highway freight projects; highway safety improvement projects; or projects that can help develop or maintain an integrated mobility management system. Grants may not be less than \$25 million, except for small projects for which the Secretary is required to set aside 10% of the amounts made available for the program in each fiscal year, and the federal share of the project cost cannot exceed 80%.
- **Reconnecting Communities Pilot Program:** Section 11509 of the Infrastructure Act provides \$500 million each year for fiscal years 2022 through 2025 in order to restore community connectivity. Each year, \$100 million is available for planning grants and \$400 million is available for capital construction. Eligible facilities under this section include highways or other transportation facilities that create barriers to mobility, access, or economic development due to high speeds, grade separations, or other design factors.

## B. Electric Vehicles and Electric Vehicle Infrastructure

The Infrastructure Act includes an unprecedented level of federal investment in electric vehicles (“EVs”) and electric vehicle charging infrastructure (“EV Charging Infrastructure”) through the creation of new programs and grants and the expansion of existing programs. These measures are a significant step toward achieving the goal of making half of all new vehicles sold in 2030 zero-emissions vehicles, as outlined in Executive Order 14037.

### NATIONAL ELECTRIC VEHICLE FORMULA PROGRAM

Under Division J, Title VIII of the Infrastructure Act, \$5 billion is allocated over a 5-year period, beginning in 2022, to carry out a National Electric Vehicle Formula Program (the “EV Program”), which will provide states with funding for the implementation of EV Charging Infrastructure and the creation of an interconnected network to facilitate data collection, access, and reliability. Funds provided by the DOT under the EV Program are to be used primarily for costs associated with the acquisition, installation, network connection, data sharing, and operation and maintenance of eligible EV Charging Infrastructure (funding for operation and maintenance costs will only be provided for 5 years). Funds will be provided to the states on a proportionate basis calculated in the same manner as is used for allocation of other federal highway formula funds to the states, with 80% of the cost of each project that is funded under the EV Program being covered by such funding and the remaining 20% by the recipient state. States are permitted to use the funds provided under the EV Program to contract with a private entity for the acquisition and installation of EV Charging Infrastructure, and the private entity is permitted to pay the applicable state’s share of the cost of a project funded under the EV Program.

Projects eligible for funding under the EV Program must be (1) directly related to the charging of a vehicle, (2) used only for EV Charging Infrastructure that is accessible to the general public or to authorized commercial motor vehicle operators from more than one company, and (3) located along a designated alternative fuel corridor. If it is determined that the designated alternative fuel corridors

in a state are fully built out, then the state may use EV Program funds for EV Charging Infrastructure on any public road or in other publicly accessible locations, such as parking facilities at public buildings, schools, and parks or in publicly accessible parking facilities owned or managed by a private entity.

The Secretary, in coordination with the secretary of Energy (and in consultation with relevant stakeholders), must, within 180 days after the Infrastructure Act is enacted, develop minimum standards and requirements related to, among other things, the installation, operation, or maintenance of EV Charging Infrastructure.

The Infrastructure Act does not affect the regulatory authority of the states to determine which businesses are allowed to own and operate direct, point-of-charge EV charging facilities. In some states, there are few regulatory restrictions or exclusive electric franchise considerations applicable to EV charging; in other states, the retail sale of electricity to the general public is a business activity in which only an authorized or franchised utility can engage. State laws governing the subject vary widely.

## **GRANTS FOR CHARGING AND FUELING INFRASTRUCTURE**

Section 11401 of the Infrastructure Act establishes a \$2.5 billion 5-year grant program beginning in 2022 for the deployment of publicly accessible alternative fuel charging infrastructure including, among others, EV Charging Infrastructure to be installed along designated alternative fuel corridors and in certain publicly accessible locations (the “AF Corridor Program”). The AF Corridor Program will be administered by the DOT and will be available to states, metropolitan planning organizations, local governments, and other public-sector entities.

Funds provided under the AF Corridor Program are to be used to contract with private entities for the acquisition and installation of EV, hydrogen fueling, propane fueling, or natural gas fueling infrastructure that is directly related to the charging or fueling of a vehicle. Eligible projects must be publicly accessible and must be located along a designated alternative fuel corridor. Funds can also be used to procure operating services from a private entity for the first 5 years of operation of an eligible project. An eligible entity that receives a grant under the AF Corridor Program is permitted to enter into a cost-sharing agreement with a private entity; however, the eligible entity must use its share of the revenues derived from such agreement for eligible projects under the AF Corridor Program. The maximum grant amount is \$15 million.

## **COMMUNITY GRANTS**

Under Section 11401, 50% of the amount made available under the AF Corridor Program in each year is reserved for community grants (not to exceed \$15 million each). Unlike other grants provided under the AF Corridor Program, projects funded by community grants are not required to be located along a designated alternative fuel corridor and can instead be located on any public road; in publicly accessible locations, such as public buildings; or in publicly accessible parking facilities owned or managed by private entities. An eligible entity that receives a community grant is permitted to contract with a private entity for the acquisition, construction, installation, maintenance, or operation of the project; however, the private entity will be required to pay the eligible entity’s share of the total project cost. The grant recipient may use 5% of the funds provided to fund educational and community engagement programs about the use of zero-emission vehicles through partnerships with schools, community organizations, and vehicle dealerships. The DOT is also permitted to use a

maximum of 1% of the allocated funds to provide technical assistance to eligible entities. Rural areas, low- to moderate-income neighborhoods, and communities with a low ratio of private parking spaces to households or a high ratio of multiunit buildings to single family homes will be prioritized in the provision of community grants.

Neither the AF Corridor Program nor community grants are proposed to be available to support “captive” EV charging facilities that are not accessible to the general public.

### **PORT INFRASTRUCTURE DEVELOPMENT PROGRAM**

Under Section 802 of the Infrastructure Act, \$2.25 billion is allocated to the Port Infrastructure Development Program administered by the DOT. Eligible projects under the program would be expanded to include projects that reduce or eliminate port-related criteria pollutant or greenhouse gas emissions, including projects for EV charge or hydrogen refueling infrastructure for drayage, and medium- or heavy-duty trucks and locomotives that service the port and related grid upgrades. Most recently, grants under this program were authorized by the National Defense Authorization Act for Fiscal Year 2021 and the Consolidated Appropriations Act, 2021. These acts authorized and appropriated \$230 million for the 2021 Port Infrastructure Development Program to make grants to improve facilities within, or outside of and directly related to operations or an intermodal connection of, coastal seaports, inland river ports, and Great Lakes ports. At least \$205 million of the appropriated funds must be for grants to coastal seaports or Great Lakes ports. These grants are awarded as discretionary grants on a competitive basis for projects that will improve the safety, efficiency, or reliability of the movement of goods into, out of, around, or within a port.

### **CLEAN SCHOOL BUS PROGRAM**

Section 71101 of the Infrastructure Act introduces a \$5 billion 5-year program administered by the Environmental Protection Agency (“EPA”) to replace existing school buses, in part, with zero-emission school buses. Under the program, grants and rebates would be provided to award contracts to eligible contractors to provide rebates for the replacement of existing school buses with zero-emission school buses. The program would allocate 50% of its funds to the replacement of existing school buses with zero-emission school buses and the other 50% to the replacement of existing school buses with clean and zero-emission school buses. The amount received by all eligible entities in a state under the program may not exceed 10% of the available funds.

### **STATE EV IMPLEMENTATION**

In addition to the programs discussed above, Section 40104 the Infrastructure Act amends the Public Utility Regulatory Policies Act of 1978 (“PURPA”) to require states to consider measures to promote increased electrification of transportation, including through establishing rates that (1) promote affordability and accessibility to EV charging options, (2) improve the customer experience with EV charging, (3) accelerate third-party investment in EV charging, and (4) recover (presumably through charges to EV owners and/or in the rates of utilities that provide an EV charging service or that energize non-utility EV charging stations) the marginal costs of delivering electricity to EVs and EV Charging Infrastructure. In those states that limit the ownership or control of EV Charging Infrastructure to franchised utilities or regulated power providers, state legislative or rulemaking activity to implement the Infrastructure Act may be necessary, although the Infrastructure Act’s PURPA directives require only state consideration and do not dictate the EV power sales results that a state might adopt. Other states, such as California, do not treat EV charging as a regulated utility

activity, and those states might not find it necessary to reconsider their utility regulatory structure as a result of the Infrastructure Act.

## C. Storing CO<sub>2</sub> and Lowering Emissions

The Infrastructure Act also incorporates provisions that support the buildout of transport and storage infrastructure for carbon dioxide ("CO<sub>2</sub>") and are premised on the view that carbon capture, use, and sequestration ("CCUS") technologies are key to reducing carbon emissions from the industrial sector, including by direct air capture, and must be deployed at large-scale to meet climate goals. The Infrastructure Act recognizes that CO<sub>2</sub> transport and storage infrastructure is vital to enable CCUS deployment at scale by connecting storage sites and emitters, realizing economies of scale, and creating a carbon management market.

### CO<sub>2</sub> INFRASTRUCTURE FINANCE AND INNOVATION ACT ("CIFIA") PROGRAM

The CIFIA program in Section 40304 of the Infrastructure Act makes available to the Department of Energy ("DOE") \$600 million in each of the fiscal years 2022 and 2023 and \$300 million in each of the fiscal years 2024 through 2026 to establish and administer a program to provide low-interest loans, loan guarantees, and grants to CO<sub>2</sub> transportation projects. To be eligible for loans or loan guarantees, projects must be creditworthy and demonstrate a reasonable prospect of repayment. While this "reasonable prospect of repayment" is a different standard from the creditworthiness requirements adopted under TIFIA and the Water Infrastructure Finance and Innovation Act program (which provide similar federal credit assistance for transportation and water infrastructure projects, respectively), the DOE may still look to the tools for creditworthiness evaluation that have been used by these other programs when evaluating projects under CIFIA. These tools include ratings for senior debt and/or the federal credit instrument; appropriate security features, such as coverage ratios, rate covenants and reserves; an in-depth credit analysis of the revenues identified to repay the federal credit instrument and other project obligations (including third-party studies); and an in-depth credit review of the project sponsors/borrowers. Projects are required to have anticipated project costs equal to or greater than \$100 million, and the program will prioritize large-capacity common carrier infrastructure projects that have demonstrated demand, enable geographic diversity of carbon capture projects, and are sited within or near existing pipeline corridors so as to minimize environmental disturbance. Loans can be used for eligible project costs, including development-phase activities; construction and procurement activities, including acquisition of real property; capitalized interests; and associated transaction costs. Secured loans are available up to 80% of anticipated eligible project costs at an interest rate not less than the interest rate of similar term US Treasury securities and for a term of 35 years after substantial completion or, if earlier, the end of the useful life of the project.

In addition to loans and loan guarantees, the program establishes grants to cover the cost of constructing new transportation pipelines and related infrastructure with capacity in excess of initial demand in order to facilitate growth of the industry. The grants are available to cover the difference in cost of constructing such pipelines at an increased flow rate sufficient to meet capacity in excess of initial demonstrated demand provided that the excess capacity is reasonably expected to be used at some point during the 20-year period beginning at substantial completion.

The program also includes \$100 million for front-end engineering and design studies for the development of CO<sub>2</sub> transportation technologies and projects.

## EXPANSION OF THE DOE CARBONSAFE PROGRAM

Section 40305 of the Infrastructure Act expands the DOE CarbonSAFE program, which was set up to focus on the development of geologic storage sites for captured and processed CO<sub>2</sub>. The program is tasked with "evaluating the quantity, location, and timing of geologic carbon storage deployment that may be needed, and developing strategies and resources to enable deployment" and establishing a commercialization program for sequestration projects and associated transportation infrastructure. The expansion of this program provides cost-sharing mechanisms for large-scale saline geologic CO<sub>2</sub> storage projects by giving priority to those projects that will serve as hubs for storing CO<sub>2</sub> from multiple sources. The budget provided for the CarbonSAFE program is \$2.5 billion for the period of fiscal years 2022 through 2026.

## INCREASED FUNDING TO THE EPA FOR CO<sub>2</sub> STORAGE WELL PERMITTING

Also under Section 40305, an additional \$5 million in funding is provided to the EPA for each of the fiscal years 2022 through 2026 for the permitting of Class VI wells. Class VI wells are wells used to inject CO<sub>2</sub> for long-term geologic sequestration. (Class II wells are used to inject CO<sub>2</sub> for enhanced oil recovery and storage.) States can elect to run their own well permitting programs in accordance with federal regulations, and there is \$50 million appropriated for the period of fiscal years 2022 through 2026 for grants to states that run their own underground injection control program for permitting Class VI wells. This is intended to ensure rigorous and efficient CO<sub>2</sub> storage permitting in saline geologic formations.

## STATE AND LOCAL GOVERNMENT GRANTS FOR PROCURING CO<sub>2</sub> UTILIZATION PRODUCTS

Section 40302 of the Infrastructure Act provides for grants to state and local governments to be used for the procurement of products made from captured CO<sub>2</sub>. The Secretary of Energy is tasked with establishing standards and certifications to facilitate commercialization of such products. There is between \$41 million and \$69,387,656 appropriated for such purpose each fiscal year from 2022 through 2026.

## D. Additional Infrastructure Support Under Consideration in Build Back Better Act

Congress is considering additional aspects of the Biden administration's priorities under the Build Back Better Act. The Build Back Better Act, if enacted, would include additional support for infrastructure, including the following:

- \$10 billion for high-speed rail projects.
- \$10 billion for improving transit access to low-income communities and affordable housing.
- \$4 billion to support neighborhood equity, safety, and affordable transportation access. This includes funding for grants to reconnect communities divided by existing infrastructure barriers, including highways; mitigate negative impacts of transportation facilities or construction projects on disadvantaged or underserved communities; and support equitable transportation planning and community engagement activities.
- \$4 billion to reduce greenhouse gas emissions from transportation, of which \$950 million is reserved for incentive grants to states that make significant progress in reducing emissions or that

adopt strategies to achieve net-zero surface transportation emissions by 2050 and \$3 billion is reserved for non-state entities for projects to reduce carbon emissions.

- Extension and expansion of the Section 45Q carbon capture tax credit.<sup>1</sup> The credit would be extended to facilities that begin construction prior to 2032, and the credit amount would be increased for projects that begin construction after December 31, 2021, depending on the type of facilities and other requirements (including new prevailing wage and apprenticeship requirements). The highest amount would go to direct air capture facilities that dispose of carbon oxide in secure geological storage (rather than utilizing the carbon oxide), for which the credit amount would be \$180/metric ton. The minimum carbon capture thresholds for different types of facilities would be significantly reduced, although electricity generating facilities would need to capture at least 75% of the carbon oxide they would otherwise emit. This credit also would be made refundable, subject to a phased-in domestic production requirement.
- While not currently contemplated in the version under consideration in the House Rules Committee, the version reported to the House Rules Committee included additional changes to PABs authority. These included (i) adding the financing of zero-emission vehicle infrastructure (defined to relate to charging facilities) to the list of allowable uses for exempt facility bonds under Section 142(a) of the Internal Revenue Code; (ii) an exemption for PABs for certain water and sewage facilities from a state's PABs volume cap; and (iii) a new Davis-Bacon compliance requirement for PABs related to water and sewage facilities, highway and surface freight transfer facilities, and the proposed zero-emission vehicle infrastructure.

Unlike the Infrastructure Act, however, the Build Back Better Act has not been passed by either chamber in Congress, so it is possible that these provisions may not be adopted or could change significantly before a final version is agreed on.

---

*For more information about the topics raised in this Legal Update, please contact any of the following lawyers.*

**Stephanie D. Wagner**

+1 312 701 8475

[swagner@mayerbrown.com](mailto:swagner@mayerbrown.com)

**Joseph Seliga**

+1 312 701 8818

[jseliga@mayerbrown.com](mailto:jseliga@mayerbrown.com)

**Nicholas R. Vallorano**

+1 312 701 7612

[nvallorano@mayerbrown.com](mailto:nvallorano@mayerbrown.com)

**Nadav C. Klugman**

+1 312 701 8433

[nklugman@mayerbrown.com](mailto:nklugman@mayerbrown.com)

*For more information in relation to private sector investment or public-private partnerships, please contact any of the following lawyers.*

**Stephanie D. Wagner**

+1 312 701 8475

[swagner@mayerbrown.com](mailto:swagner@mayerbrown.com)

**Joseph Seliga**

+1 312 701 8818

[jseliga@mayerbrown.com](mailto:jseliga@mayerbrown.com)

**Mitchell D. Holzrichter**

+1 312 701 8212

[mholzrichter@mayerbrown.com](mailto:mholzrichter@mayerbrown.com)

**David Narefsky**

+1 312 701 7303

[dnarefsky@mayerbrown.com](mailto:dnarefsky@mayerbrown.com)

**Nicholas R. Vallorano**

+1 312 701 7612

[nvallorano@mayerbrown.com](mailto:nvallorano@mayerbrown.com)

*For more information in relation to status of the Build Back Better Act and implementing regulations under the Infrastructure Investment and Jobs Act, please contact any of the following lawyers.*

**Andrew Olmem**

+1 202 263 3006

[aolmem@mayerbrown.com](mailto:aolmem@mayerbrown.com)

**Jonathan H. Becker**

+1 202 263 3122

[jbecker@mayerbrown.com](mailto:jbecker@mayerbrown.com)

**Warren S. Payne**

+1 202 263 3831

[wpayne@mayerbrown.com](mailto:wpayne@mayerbrown.com)

*For more information in relation to electric vehicles or electric vehicle infrastructure, please contact any of the following lawyers.*

**Nadav C. Klugman**

+1 312 701 8433

[nklugman@mayerbrown.com](mailto:nklugman@mayerbrown.com)

**Mark C. Williams**

1 202 263 3070

[markwilliams@mayerbrown.com](mailto:markwilliams@mayerbrown.com)

**Morenikeji R. Akinade**

+1 312 701 8053

[kakinade@mayerbrown.com](mailto:kakinade@mayerbrown.com)

*For more information in relation to storing CO<sub>2</sub> or lowering emissions, please contact any of the following lawyers.*

**Nadav C. Klugman**

+1 312 701 8433

[nklugman@mayerbrown.com](mailto:nklugman@mayerbrown.com)

**J. Paul Forrester**

+1 312 701 7366

[jforrester@mayerbrown.com](mailto:jforrester@mayerbrown.com)

**Eric R. Pogue**

+1 212 506 2418

[epogue@mayerbrown.com](mailto:epogue@mayerbrown.com)

**Jarrett J. Doe**

+1 312 701 7415

[jdoe@mayerbrown.com](mailto:jdoe@mayerbrown.com)

---

## Endnotes

<sup>1</sup> For further information, see the November 10, 2021, Mayer Brown Legal Update "[US House Rules Committee Modifies the 'Build Back Better Act.'](#)"

Mayer Brown is a distinctively global law firm, uniquely positioned to advise the world's leading companies and financial institutions on their most complex deals and disputes. With extensive reach across four continents, we are the only integrated law firm in the world with approximately 200 lawyers in each of the world's three largest financial centers—New York, London and Hong Kong—the backbone of the global economy. We have deep experience in high-stakes litigation and complex transactions across industry sectors, including our signature strength, the global financial services industry. Our diverse teams of lawyers are recognized by our clients as strategic partners with deep commercial instincts and a commitment to creatively anticipating their needs and delivering excellence in everything we do. Our “one-firm” culture—seamless and integrated across all practices and regions—ensures that our clients receive the best of our knowledge and experience.

Please visit [mayerbrown.com](http://mayerbrown.com) for comprehensive contact information for all Mayer Brown offices.

Any tax advice expressed above by Mayer Brown LLP was not intended or written to be used, and cannot be used, by any taxpayer to avoid U.S. federal tax penalties. If such advice was written or used to support the promotion or marketing of the matter addressed above, then each offeree should seek advice from an independent tax advisor.

This Mayer Brown publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek legal advice before taking any action with respect to the matters discussed herein.

Mayer Brown is a global services provider comprising associated legal practices that are separate entities, including Mayer Brown LLP (Illinois, USA), Mayer Brown International LLP (England), Mayer Brown (a Hong Kong partnership) and Tauil & Chequer Advogados (a Brazilian law partnership) (collectively the “Mayer Brown Practices”) and non-legal service providers, which provide consultancy services (the “Mayer Brown Consultancies”). The Mayer Brown Practices and Mayer Brown Consultancies are established in various jurisdictions and may be a legal person or a partnership. Details of the individual Mayer Brown Practices and Mayer Brown Consultancies can be found in the Legal Notices section of our website.

“Mayer Brown” and the Mayer Brown logo are the trademarks of Mayer Brown.

© 2021 Mayer Brown. All rights reserved.