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Locke Lord QuickStudy: FHWA Guidance on Implementation of Infrastructure Act Funding Does Not Bode Well for New Capacity Projects

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Following the passage of the [Infrastructure Investment and Jobs Act](#) (“IIJA”) in November, ??2021, there ?was a flurry of optimism related to the new funding and how it might help to support ?various types of ?projects. What was missing was any definitive guidance on how the availability ?of those funds would ?be prioritized among different types of projects. With the release of a [?Federal Highway Administration ??\(“FHWA”\) policy memo on December 16, 2021](#) (“FHWA ?Policy Memo”) some of that guidance began ?to emerge, and it is clear that new and expanded ?capacity projects will not be viewed very favorably in ?light of other identified priorities.?

Recall that the IIJA (also referred to as the “Bipartisan Infrastructure Law”) provided ?funding for a ?myriad of project categories (see the list at the conclusion of this article). While the ?headlines referred ?to the IIJA as providing \$1.2 trillion in available funding, it is important to ?note that only \$550 billion ?constitutes “new” funding. The remaining funds are a re-?authorization of \$650 billion for the ?continuation of programs previously authorized under the ?Fixing America’s Surface Transportation ??(“FAST”) Act and other previous surface transportation ?bills. Nevertheless there was reason to be ?optimistic about \$550 billion (over five years) in ?additional funding for projects of various types.?

The FHWA Policy Memo identifies policy objectives that will guide how funds will be ?prioritized. The ?guidance notes that projects that “align” with the IIJA include those that ?improve the condition and ?safety of roadways, make streets and other transportation facilities ?accessible to all users and ?compliant with the Americans with Disabilities Act, address ?environmental impacts including storm-?water runoff and greenhouse gas emissions, prioritize ?infrastructure that is less vulnerable and more ?resilient to climate change, advance emerging ?technologies like electric vehicle charging stations ?and renewable energy generation, promote ?broadband deployment in transportation rights-of-way, ?and which reconnect communities and ?reflect the inclusion of disadvantaged and under-represented ?groups in the project planning, ?design, and selection process.?

New Capacity Projects

With respect to new capacity projects, the FHWA Policy Memo provides that projects ?that move people ?and freight by “modernizing and increasing the operational efficiency of ?existing roads and ?highways” will be prioritized over projects “that expand the general purpose ?capacity of roads and ?highways.” Further expanding

on this concept, the FHWA Policy Memo ?states (emphasis added):?

Consistent with this Policy, FHWA will implement policies and undertake actions ?to ?encourage—and where permitted by law, require—recipients of Federal highway ?funding to ?select projects that improve the condition and safety of existing ?transportation infrastructure ?within the right-of-way before **advancing projects that ?add new general purpose travel ?lanes serving single occupancy vehicles.?**

Application of this Policy does not prohibit the construction of new general purpose ?capacity ?on highways or bridges, but in most cases Federal-aid highway and ?Federal Lands **funding ?resources made available through the [IIJA] should be ?used to repair and maintain ?existing transportation infrastructure before making ?new investments in highway ?expansions for additional general purpose capacity. ?**

Additionally, within the context of setting forth the policy objectives regarding new capacity, the ??FHWA Policy Memo offers the suggestion that State departments of transportation (“State ?DOTs”) ?should “be mindful of their ability to transfer resources to support transit projects that ?may be more ?consistent with these priorities.” It will be worth examining the receptiveness of ?such a suggestion ?because while the transfer of resources to support transit projects may be ?consistent with current ?FHWA priorities, it has historically not been the priority of many State ?DOTs.?

Environmental Review Process

The policy and preference for other than new and expanded capacity projects is further ?reflected in ?the observations made about the environmental review process for roads and ?highways. The FHWA ?Policy Memo notes that many of the types of projects to be prioritized ?will typically meet the FHWA ?and Council on Environmental Quality criteria for categorical ?exclusions (“CEs”), while those ?requiring “more than a minor amount of right-of-way or that ?would result in any residential or non-?residential displacements” may not be categorized as CEs. ?Recognizing this difference and that a ?more involved NEPA process will take longer than a CE, ?the memo states that metropolitan planning ?organizations, State DOTs, and other decision-?makers will be “encouraged” to consider the timeline ?for delivering projects as they are ?programming funds made available under the IIJA. In other words, ?new and expanded capacity ?projects, which by their very nature require more extensive (and time-?consuming) environmental ?reviews, are not among those that the federal policy will encourage be ?considered by state and ?local decision-makers. ?

Future FHWA Implementation of Policy Objectives

The extent to which FHWA intends to carry-forward the policy objectives articulated in ?the FHWA ?Policy Memo is reflected in the description of future actions anticipated to be taken. ?The memo refers ?to adopting and implementing laws and regulations, including the issuance of ?guidance for “legacy” ?programs impacted by the IIJA. Presumably this could change the criteria ?for existing programs like ?the Transportation Infrastructure Innovation and Finance Act ??(“TIFIA”) which has helped to support a ?number of major new and expanded capacity projects. ?Additionally, FHWA is soliciting stakeholder ?input on implementation of the IIJA through a ?request for information, published in the Federal ?Register on December 1, 2021?.?

Impacts on Texas

While there are clearly funds to be made available for transit and other beneficial projects, the general policy articulated in the FHWA Policy Memo will not be welcome news to many Texas communities. To be clear, the overall transportation funding gap in Texas includes the need for both new capacity and the need to maintain existing infrastructure, and prioritizing the use of IIJA funding for the repair, rehabilitation, reconstruction, replacement, and maintenance of existing transportation infrastructure will help in addressing those needs in Texas. However, Texas continues to be the fastest growing state in the country, and notwithstanding increases in state funding during the past decade, it continues to fall several billion dollars short each year in meeting the aggregate need for new and expanded roadways. Many communities are struggling with the need for congestion relief, including on corridors that are vital to that state and national economies. Those that were hoping the IIJA might solve the funding gap for new capacity may need to continue to look for other funding sources rather than rely on any hoped for support from the IIJA.?

Infrastructure Investment and Jobs Act Funding Categories

- \$110 billion for repair, replacement, and reconstruction of roads and bridges (primary emphasis on bridges)?
- \$66 billion for deferred maintenance for Amtrak, rail improvements in the Northeast Corridor, and improving rail service and safety in other parts of the country
- \$73 billion to protect and improve the power grid, upgrade and modernize power lines, prevent hacking of the power grid, and support clean energy
- \$65 billion for states to implement increased broadband deployment, particularly in rural areas and in low-income communities
- \$55 billion for lead remediation and pipe replacement, chemical cleanup, and clean drinking water in Tribal Nations and disadvantaged communities
- \$50 billion to address flooding, wildfires, coastal erosion, and droughts, funding also provided for cybersecurity and protecting critical infrastructure
- \$39 billion for public transit, including addressing repair backlogs, creating new bus routes, and increasing accessibility for seniors and the disabled
- \$25 billion for upgrades and expansions of U.S. airports, including runways, gates, taxiways, control towers, control systems, terminals, and concessions
- \$21 billion to clean up Superfund and brownfield sites, reclaim abandoned mine land, and cap old and abandoned oil and gas wells
- \$17 billion for port infrastructure and waterways, including coastal infrastructure, inland waterway improvements, and land ports of entry
- \$11 billion for highway and pedestrian safety, including investments in Safe Street programs
- \$7.5 billion to build out a nationwide network of electric vehicle charging stations
- \$7.5 billion for electric school buses, primarily in low-income, rural, and tribal communities
- \$1 billion for reconnecting communities

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