

Summary of Key Provisions of the Private Activity Bond Enhancement for Public Infrastructure Act

Section 2. Expands eligibility at 26 U.S.C. § 142(a) to new classes of infrastructure projects, including: maritime and inland waterway ports, waterway dredging and navigation improvements, hydroelectric generating facilities beyond environmental enhancements, flood control and stormwater facilities, a broader class of surface transportation facilities, rural broadband service facilities, and environmental remediation costs on Brownfield and Superfund sites. This could enable financing of projects that involve continuous long-term maintenance, such as harbor and channel dredging at the Port of Savannah.

It eliminates the strict government ownership requirement at 26 U.S.C. § 142(b)(1) that currently applies to airports, docks and wharves, mass commuting facilities, environmental enhancements of hydroelectric generating facilities (protection of fish and recreational users).

It also eliminates the requirement at 26 U.S.C. § 142(m)(1)(A) that exempt facility bonds may only be issued for surface transportation projects eligible for federal funding under Title 23 of the U.S. Code, which had the effect of limiting project eligibility to greenfield highway projects. It also repeals the special \$15 billion lifetime volume cap on surface transportation projects at 26 U.S.C. § 142(m)(2)(A) and adds a requirement that an eligible project must receive an investment-grade rating from at least two rating agencies. Eliminating the surface transportation project volume cap could shore up financing for the proposed Maryland I-270 and I-495 managed lane project.

Section 3. Eliminates special volume cap exception for high-speed rail projects at 26 U.S.C. § 146(g)(4). It then expands the general volume cap exception to include all eligible classes of public infrastructure contained in amended 26 U.S.C. § 142(b)(1) provided they meet the public attributes requirement at 26 U.S.C. § 142(b)(2).

Section 4. Exempts public infrastructure projects meeting the 26 U.S.C. § 142(b)(2) requirement from an alternative minimum tax. Permanently eliminating the AMT on PAB interest would increase the general attractiveness of PAB-financed P3s to investors.

PRIVATE ACTIVITY BOND ENHANCEMENT FOR PUBLIC INFRASTRUCTURE ACT DISCUSSION DRAFT

SECTION 1. SHORT TITLE.

- (a) **SHORT TITLE.**—This Act may be cited as the “Private Activity Bond Enhancement for Public Infrastructure Act.”

SECTION 2. EXPAND AND MODIFY ELIGIBLE EXEMPT FACILITY BONDS FOR PUBLIC INFRASTRUCTURE PROJECTS.

- (a) Section 142(a) of the Internal Revenue Code of 1986 is amended to read as follows:

- (a) **GENERAL RULE.**—For purposes of this part, the term “exempt facility” means any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide—

- (1) airports;
- (2) docks, wharves, maritime and inland waterway ports, and waterway infrastructure, including dredging and navigation improvements;
- (3) mass commuting facilities;
- (4) facilities for the furnishing of water;
- (5) sewage facilities;
- (6) solid waste disposal facilities;
- (7) qualified residential rental projects;
- (8) facilities for the local furnishing of electric energy or gas;
- (9) local district heating or cooling facilities;
- (10) qualified hazardous waste facilities;
- (11) high-speed intercity rail facilities;
- (12) hydroelectric generating facilities;
- (13) qualified public educational facilities;
- (14) flood control and stormwater facilities;
- (15) surface transportation facilities;
- (16) rural broadband service facilities;
- (17) environmental remediation costs on Brownfield and Superfund sites.

- (b) Section 142(b) of the Internal Revenue Code of 1986 is amended to read as follows:

- (b) **SPECIAL RULES FOR CERTAIN EXEMPT FACILITIES FOR PUBLIC INFRASTRUCTURE PROJECTS.**—

- (1) **IN GENERAL.**—A facility shall be treated as an exempt facility under paragraph (1), (2), (3), (4), (5), (6), (11), (12), (14), (15), (16), or (17), or (18) of paragraph (a) of this section only if it meets the public attributes requirement in paragraph (b)(2) of this section.

- (2) PUBLIC ATTRIBUTES REQUIREMENT.—A facility meets the public attributes requirement of this paragraph (b)(2) if it meets the requirements of both subparagraphs (A) and (B):
- (A) either (i) the facility is owned by a State or local governmental unit, or (ii) the rates for the use of the facility or the furnishing or sale of the services provided by the facility have been established or approved by a State or local governmental unit or by a public service commission, public utility commission, or other similar regulatory body on behalf of any State or local governmental unit by regulatory action or by contractual agreement; and
 - (B) the facility is available for use by the general public or the services provided by the facility are made available to members of the general public (including electric utility, industrial, agricultural, or commercial users on the same basis as individual members of the general public).
- (3) SAFE HARBOR FOR GOVERNMENTAL OWNERSHIP.—For purposes of the governmental ownership provision under the public attributes requirement in paragraph (b)(2)(A)(i) of this section, as a safe harbor, property leased from a State or local governmental unit to another person shall be treated as owned by such governmental unit if:
- (A) the lease term (as defined in section 168(i)(3)) is no longer than 95 percent of the reasonably expected economic life of the property (as determined under section 147(b));
 - (B) the lessee makes an irrevocable election (binding upon the lessee and all successors in interest under the lease) not to claim depreciation or an investment tax credit with respect to the property; and
 - (C) the lessee has no option to purchase the property other than at fair market value as of the time such option is exercised.

Rules similar to the rules in the preceding sentence shall apply to management contracts and similar types of operating agreements.

- (4) DEFINITION OF A PUBLIC INFRASTRUCTURE PROJECT.—For purposes of this part, the term “public infrastructure project” means any category of exempt facility that is referred to in paragraph (b)(1) of this section and that meets the public attributes requirement in paragraph (b)(2) of this section.

(c) Section 142(j) of the Internal Revenue Code of 1986 is amended to read as follows:

(1) HYDROELECTRIC GENERATING FACILITIES.—IN GENERAL.--For purposes of subsection (a)(12), the term "hydroelectric generating facilities" means facilities used to generate electricity from water (including water impounded through a dam, diverted from a river, or pumped storage) and structures for housing generating equipment, up to, but not including, the stage of electrical transmission, together with “environmental enhancements” (as defined in paragraph (j)(2) of this section) of such facilities.

(2) ENVIRONMENTAL ENHANCEMENTS.--For purposes of this paragraph (j)(2), the term ““environmental enhancements” when used in reference to hydroelectric generating facilities, means—

(A) property the use of which is related to a hydroelectric generating facility; and

(B) which—

(i) protects or promotes fisheries or other wildlife resources, including any fish by-pass facility, fish hatchery, or fisheries enhancement facility; or

(ii) is a recreational facility or other improvement required by the terms and conditions of any Federal licensing permit for the operation of such generating facility.

(3) USE OF PROCEEDS FOR ENVIRONMENTAL ENHANCEMENTS OF HYDROELECTRIC GENERATING FACILITIES.--A bond issued as part of an issue to finance environmental enhancements of hydroelectric generating facilities described in paragraph (j)(2) of this section shall not be considered an exempt facility bond unless at least 80 percent of the net proceeds of the issue of which it is a part are used to finance property described in paragraph (j)(2)(B)(i) of this section.

(d) Section 142(m) of the Internal Revenue Code of 1986 is amended to read as follows:

(m) SURFACE TRANSPORTATION FACILITIES.—For purposes of paragraph (a)(15) of this section, the term “surface transportation facilities” includes any road, bridge, tunnel, passenger railroad, surface freight transfer facility, and any other facility that facilitates surface transportation that has received an investment grade rating from at least 2 rating agencies on senior debt.

(e) Section 142 of the Internal Revenue Code of 1986 is amended to add sections (n), (o), and (p) to read as follows:

(n) FLOOD CONTROL AND STORMWATER FACILITIES.—For purposes of paragraph (a)(14), the term “flood control and stormwater facilities” means any capital assets used to control floodwater or to contain stormwater.

(o) RURAL BROADBAND SERVICE FACILITIES.—

(1) IN GENERAL.--For purposes of paragraph (a)(16) of this section, the term “rural broadband service facilities” means broadband telecommunications assets that provide high-speed internet access for data transmission through wired or wireless networks and that primarily serve any rural area (as defined in paragraph (o)(2) of this section).

(2) RURAL AREA.--For purposes of paragraph (o)(1) of this section, the term “rural area” means any area, as confirmed by the latest decennial census of the Bureau of the Census, which is not located within:

(1) A city, town, or incorporated area that has a population of greater than 20,000 inhabitants; or

(2) An urbanized area contiguous and adjacent to a city or town that has a population of greater than 50,000 inhabitants. For purposes of the definition of rural area, an urbanized area means a densely populated territory as defined in the latest decennial census of the U.S. Census Bureau.

(p) ENVIRONMENTAL REMEDIATION COSTS ON BROWNFIELD AND SUPERFUND SITES.—

(1) **IN GENERAL.** For purposes of paragraph (a)(17) of this section, the definitions in paragraphs (p)(2), (p)(3), and (p)(4) of this section apply.

(2) **ENVIRONMENTAL REMEDIATION COSTS.** The term “environmental remediation costs” means costs chargeable to a capital account that are paid or incurred to control or abate hazardous substances.

(3) **BROWNFIELD SITE.** The term “Brownfield site” means any real property the use of which may be complicated by the presence of or potential presence of a hazardous substance, pollutant, or contaminant.

(4) **SUPERFUND SITE.** The term “Superfund site” means any site designated by the Environmental Protection Agency as a Superfund site on its national priorities list under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

SECTION 3. EXCEPTION TO PRIVATE ACTIVITY BOND VOLUME CAP FOR EXEMPT FACILITY BONDS TO FINANCE PUBLIC INFRASTRUCTURE PROJECTS.

Section 146(g) of the Internal Revenue Code of 1986 is amended to repeal paragraph (4) and to revise paragraph (3) to read as follows:

(3) any exempt facility bond that is issued as part of an issue to finance a public infrastructure project (as defined in section 142(b)(2)).

SECTION 4. EXCEPTION TO ITEMS OF ALTERNATIVE MINIMUM TAX PREFERENCE FOR PRIVATE ACTIVITY BONDS TO FINANCE PUBLIC INFRASTRUCTURE PROJECTS.

Section 57(a)(5)(C) of the Internal Revenue Code of 1986 is amended to add a new clause (vi) to read as follows:

(vi) **EXCEPTION FOR PRIVATE ACTIVITY BONDS FOR PUBLIC INFRASTRUCTURE PROJECTS.—**For purposes of clause (i), the term “private activity bond” shall not include any exempt facility bond that is issued as part of an issue to finance a public infrastructure project (as defined in section 142(b)(2)).

SECTION 5. EFFECTIVE DATE.

The amendments made by this Act shall apply to bonds issued after the date of enactment.

Interstate System Reconstruction and Rehabilitation Pilot Program amendments (23 U.S.C. 129 note)

“(1) Establishment.—

The Secretary shall establish and implement an Interstate System reconstruction and rehabilitation pilot program under which the Secretary, notwithstanding sections 129 and 301 of title 23, United States Code, may permit a State to collect tolls on a highway, bridge, or tunnel on the Interstate System for the purpose of reconstructing and rehabilitating Interstate highway corridors that could not otherwise be adequately maintained or functionally improved without the collection of tolls.

~~“(2) Limitation on number of facilities.—~~

~~The Secretary may permit the collection of tolls under this subsection on 3 facilities on the Interstate System. Each of such facilities shall be located in a different State.~~

“(3 2) Eligibility.—To be eligible to participate in the pilot program, a State shall submit to the Secretary an application that contains, at a minimum, the following:

“(A) An identification of the facility on the Interstate System proposed to be a toll facility, including the age, condition, and intensity of use of the facility.

“(B) In the case of a facility that affects a metropolitan area, an assurance that the metropolitan planning organization established under section 134 of title 23, United States Code, for the area has been consulted concerning the placement and amount of tolls on the facility.

“(C) An analysis demonstrating that the facility could not be maintained or improved to meet current or future needs from the State’s apportionments and allocations made available by this Act [see Tables for classification] (including amendments made by this Act) and from revenues for highways from any other source without toll revenues.

“(D) A facility management plan that includes—

“(i) a plan for implementing the imposition of tolls on the facility;

“(ii) a schedule and finance plan for the reconstruction or rehabilitation of the facility using toll revenues;

“(iii) a description of the public transportation agency that will be responsible for implementation and administration of the pilot program;

“(iv) a description of whether consideration will be given to ~~privatizing the maintenance and operational aspects of the facility-making use of a long-term public-private partnership to design, reconstruct, finance, operate, and maintain, while with the State~~ retaining legal and administrative control of the portion of the Interstate route; and

“(v) such other information as the Secretary may require.

“(4 3) **Selection criteria.**—The Secretary may approve the application of a State under paragraph (3 2) only if the Secretary determines that—

“(A) the State is unable to reconstruct or rehabilitate the proposed toll facility using existing apportionments;

“(B) the facility has a sufficient intensity of use, age, or condition to warrant the collection of tolls;

“(C) the State plan for implementing tolls on the facility takes into account the interests of local, regional, and interstate travelers;

“(D) the State plan for reconstruction or rehabilitation of the facility using toll revenues is reasonable;

“(E) the State has given preference to the use of a public toll agency **or private company** with demonstrated capability to build, operate, and maintain a toll expressway system meeting criteria for the Interstate System; ~~and~~

“(F) the State has the authority required for the project to proceed; ~~and~~

“(G) **the State has in effect a law that authorizes claims for reimbursement for State tax on fuel consumed on the proposed toll facility.**

“(5 4) **Limitations on tolling and use of revenues; audits.**—Before the Secretary may permit a State to participate in the pilot program, the State must enter into an agreement with the Secretary that provides that—

“(A) **the toll facility will use an electronic toll collection system as the method for collecting tolls from vehicle operators for the use of the facility;**

“(B) **tolls will be imposed on a per-mile basis for all vehicle operators engaged in interstate or intrastate travel;**

“(C) **tolls will be imposed in a manner that does not discriminate between interstate and intrastate travel;**

“(D) **the toll facility will be opened to traffic prior to imposing or collecting any tolls for the use of the facility;**

“(A E) all toll revenues received from operation of the toll facility will be used only for—

“(i) debt service;

“(ii) reasonable return on investment of any private person financing the project; ~~and~~

“(iii) any costs necessary for the improvement of and the proper operation and maintenance of the toll facility, including reconstruction, resurfacing, restoration, and rehabilitation of the toll facility; and

~~“(iv) if the public authority certifies annually that the tolled facility is being adequately maintained, a toll-free highway designated as a route on the Interstate System; and~~

~~“(B F) regular audits will be conducted to ensure compliance with subparagraph (A E) and the results of such audits will be transmitted to the Secretary.~~

~~“(6) Requirements for project completion.—~~

~~“(A) General term for expiration of provisional application.—An application provisionally approved by the Secretary under this subsection shall expire 3 years after the date on which the application was provisionally approved if the State has not—~~

~~“(i)~~

~~submitted a complete application to the Secretary that fully satisfies the eligibility criteria under paragraph (3) and the selection criteria under paragraph (4);~~

~~“(ii)~~

~~completed the environmental review and permitting process under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) for the pilot project; and~~

~~“(iii)~~

~~executed a toll agreement with the Secretary.~~

~~“(B) Exceptions to expiration.—Notwithstanding subparagraph (A), the Secretary may extend the provisional approval for not more than 1 additional year if the State demonstrates material progress toward implementation of the project as evidenced by—~~

~~“(i)~~

~~substantial progress in completing the environmental review and permitting process for the pilot project under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.);~~

~~“(ii)~~

~~funding and financing commitments for the pilot project;~~

~~“(iii)~~

~~expressions of support for the pilot project from State and local governments, community interests, and the public; and~~

~~“(iv)~~

~~submission of a facility management plan pursuant to paragraph (3)(D).~~

~~“(C) Conditions for previously provisionally approved applications.—~~

~~A State with a provisionally approved application for a pilot project as of the date of enactment of the FAST Act [Dec. 4, 2015] shall have 1 year after that date of enactment to meet the requirements of subparagraph (A) or receive an extension from the Secretary under subparagraph (B), or the application will expire.~~

~~“(7) Definition.—~~

~~In this subsection, the term ‘provisional approval’ or ‘provisionally approved’ means the approval by the Secretary of a partial application under this subsection, including the reservation of a slot in the pilot program.~~

~~“(8 5) Limitation on use of interstate maintenance funds.—~~

During the term of the pilot program, funds apportioned for Interstate maintenance under [former] section 104(b)(4) of title 23, United States Code, may not be used on a facility for which tolls are being collected under the program.

~~“(9 6) Program term.—~~

The Secretary shall conduct the pilot program under this subsection for a term to be determined by the Secretary, but not less than ~~10-20~~ years.

~~“(10 7) Interstate system defined.—~~

In this subsection, the term ‘Interstate System’ has the meaning such term has under section 101 of title 23, United States Code.”