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Biden Charts Future of U.S. Infrastructure in Ambitious American Jobs Plan

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In a televised speech from a union hall in Pittsburgh on March 31, President Biden pitched his $2-trillion-plus infrastructure-focused American Jobs Plan (the “Plan”) as a “once-in-a-generation investment in America.” The Plan is a bold proposal designed to transform the future of infrastructure in the United States. Yet, as members of the Biden Administration have acknowledged, the Plan is a framework and will be subject to significant and perhaps transformative revisions through the legislative process.

This *Alert* addresses highlights of the Plan, the Biden Administration’s proposal for tax increases to pay for its costs and potential market opportunities the Plan would create if enacted.

Scope of the Plan

Broadly speaking, the Plan is divided into four areas of infrastructure that affect the lives of Americans: how we move (transportation infrastructure – $621 billion), how we live at home, at work or school (other physical infrastructure, including water, broadband, electric transmission, housing and schools – $652 billion), how we care for one another (home care services and workforce – $400 billion) and how we manufacture (including research and development, manufacturing and workforce development – $580 billion). The Plan would extend tax credits for renewable energy projects and add a new tax credit for energy storage for 10 years, and make the credits direct pay (i.e., likely a refundable credit). The costs of the Plan are proposed to be covered by raising corporate taxes from 21% to 28%, establishing a 21% minimum tax on U.S. corporate earnings from foreign subsidiaries and eliminating certain foreign tax breaks.

The Plan generally is consistent with President Biden's campaign pledges on energy and infrastructure, most notably his commitment to move the U.S. towards a net-zero emissions economy by 2050 and a carbon-pollution-free power sector by 2035. Infused with numerous climate-related elements, it reflects the Biden Administration's commitments to racial equity in federal decision-making, as outlined in a January Executive Order and a "whole-of-government" approach to addressing President Biden's ambitious infrastructure and climate goals.

The Legislative Process

No single infrastructure bill passed by Congress will contain all of the policies set forth in the Plan. The Biden Administration decided to, in the words of President Biden, "go big." However, the Plan faces opposition from both Republicans, who object to the cost of the Plan and its expansion of the federal government's role, as well as some Democrats, who believe the Plan does not go far enough. The Plan is expected to be heavily negotiated in the House and Senate, and it will be months before the contours of a final bill emerge.

One development to watch closely is the form the legislation will take. Although Democrats control both chambers of Congress by slim margins as well as the White House, they will need to secure enough Republican votes to achieve the 60 votes needed in the Senate to pass most legislation. This could mean that some of the more ambitious provisions of the Plan would need to be watered down or removed for the bill to pass. Budget reconciliation is one option to pass legislation with a simple majority in the Senate and bypass the need for any Republican votes. Congress relied on this process to pass President Biden's $1.9 trillion American Rescue Plan. While budget reconciliation typically is used only once per fiscal year, Senate majority leadership is reportedly exploring options to allow for a second budget reconciliation for the Plan.

Paying for the Plan — Tax Increases and the Made In America Tax Plan

The Plan — or any alternate infrastructure legislation that emerges from the Senate and House — will require significant tax increases to balance the increase in federal spending. President Biden's proposed Made in America Tax Plan would generally accomplish this by reversing certain portions of the 2017 Tax Cuts and Jobs Act (the "TCJA"), with broad-sweeping tax increases, and with elimination of certain oil and gas industry tax preferences. The Biden Administration anticipates raising $2 trillion over 15 years with these changes. The Made in America Tax Plan does not currently address any changes to individual taxes because it was intended to focus on corporate tax reform; however, further individual tax reform is expected to be provided in subsequent legislative proposals by the Biden Administration.

Fundamental tax law changes by the Biden Administration as part of the Made in America Tax Plan may include:

- **Increase in Corporate Tax Rate.** Increasing the maximum federal corporate tax rate to 28% (from the current rate of 21%). While this represents about a 33% increase from current rates, it is still 20% lower than the pre-TCJA maximum corporate tax rate of 35%.
- **Anti-Deferral Rules/Tax on Unrepatriated Earnings.** Tightening existing anti-deferral rules for U.S. corporations with non-U.S. subsidiaries and requiring U.S. corporations to pay a minimum 21% tax on unrepatriated earnings from non-U.S. subsidiaries.
- **Multinational Corporate Minimum Tax.** Seeking a multinational agreement to establish a corporate minimum tax with other industrial jurisdictions.
- **Offshoring Jobs.** Restricting the deduction of expenses from "offshoring jobs" while providing a new tax credit to support "onshoring jobs."
- **R&D Tax Incentives.** Expanding existing research and development tax incentives, but eliminating a TCJA deduction for foreign-derived intangible income.
- **Minimum Corporate Tax.** Imposing a new 15% minimum tax on "book income" (i.e., profits reported to a corporation's shareholders) from large corporations.
- **Eliminating Preferential Rules for Oil and Gas.** Eliminating many or all preferential tax rules that favor the oil and gas industry (likely including the deduction for intangible drilling costs).
- **Enforcement.** Establishing a new IRS enforcement campaign targeting corporations.

Tax Credits and Tax Incentives Featured in the Plan

The Plan focuses on incentivizing certain infrastructure investments through the tax code, with tax credits benefitting renewable energy (including energy storage), carbon sequestration and electric transmission. Tax incentives and credits proposed in the Plan include:

- **Extension of Renewable Energy Tax Credits.** A 10-year extension and phase down of an expanded direct-pay investment tax credit and production tax credit for clean energy generation and storage. Requirements to obtain these credits will be tied to compliance with certain labor standards.
- **Direct Pay for Section 45Q Credit.** Making the Section 45Q credit for carbon oxide sequestration a direct pay credit and further encouraging its use in hard-to-decarbonize industrial applications, direct air capture, and retrofits of existing power plants.
- **ITC for Electric Transmission.** Creating a targeted investment tax credit that incentivizes the buildout of at least 20 gigawatts of high-voltage capacity power lines.
- **Incentives for EVs.** Establishing certain tax incentives to encourage consumers to buy American-made electric vehicles.
- **Investment in Distressed Communities.** Introducing tax credits for next generation industries in distressed communities. The proposal includes an example of pairing an investment in 15 decarbonized hydrogen demonstration projects in distressed communities with a new production tax credit.
- **Affordable Housing.** Utilizing targeted tax credits and other grants to extend affordable housing rental opportunities to underserved communities nationwide, including rural and tribal areas. The Neighborhood Homes Investment Act would provide tax credits over the next five years, resulting in approximately 500,000 homes built or rehabilitated for low and middle-income homebuyers.
- **Child Care Tax Credits.** Creating a new Child Care Tax Credit to encourage businesses to build child care facilities at places of work.

Regulatory Changes, Procurement and Permitting as Tools to Promote Clean Energy and Electric Vehicles

In addition to tax credits, the Plan proposes several policies to increase renewable energy resources and access to cleaner energy as part of the Biden Administration's goal of 100% carbon-free electricity by 2035.

- **Energy Efficiency and Clean Energy Standard and Related Measures.** The Plan reiterates President Biden's previously expressed intention to establish an Energy Efficiency and Clean Electricity Standard ("EECES"). An EECES is a policy that requires a certain percentage of retail electricity sales to come from identified clean electricity sources. Among the various policy levers the Biden Administration is considering, an EECES arguably could have the most significant impact on the nation's generation portfolio and the extent to which that portfolio consists of carbon-free resources. However, at this point, much remains uncertain because the Plan provided only a broad outline of a potential EECES. The Plan indicates that the EECES will seek to incentivize competition in the electricity markets for new infrastructure and more efficient use of current infrastructure. Although few details have been released, the Plan expressly mentions that nuclear and hydropower resources, and carbon capture technologies, would be included in the EECES. As for how the EECES would be created, a senior administration official, speaking to the press on background, stated that the Biden Administration intends to establish the EECES through legislation, rather than by executive action.

- **Federal Procurement of Clean Energy.** The Biden Administration intends to use the federal procurement power to purchase "24/7 clean power" for federal buildings. The Biden Administration could largely achieve that change in federal procurement through executive action, subject to Congressional approval to the extent the federal procurement changes impact the federal budget.
- **Electric Grid Deployment Authority.** The Plan includes two measures designed to increase investment in the electric grid with the objectives of improving grid resilience and providing better access to clean energy. First, the Plan would seek to incentivize at least 20 gigawatts of high-voltage capacity power lines through an investment tax credit as discussed above. Second, the Plan would establish a new Grid Deployment Authority at the Department of Energy ("DOE"), which would support the development of transmission infrastructure by better leveraging existing rights-of-way along roads and railways and supporting new, creative financing tools. With respect to the planned Grid Deployment Authority, it remains to be seen whether it will rely on DOE's limited, existing authority over the siting of interstate transmission lines or whether it will require new legislation. The siting and construction of transmission lines traditionally has been within the jurisdictional purview of the states, not the federal government, with only limited exceptions under existing law.
- **Electrification of the Transportation Sector.** The Plan targets electrification of the transportation industry in both the public and private sectors through a $174 billion investment. In the public sector, the Biden Administration plans to use the federal procurement power to electrify the federal vehicle fleet, including the 230,000-vehicle U.S. Post Office fleet. The Plan also outlines a new Clean Buses for Kids Program, to be administered by the Environmental Protection Agency, with assistance from DOE, that would electrify at least 20% of the yellow school bus fleet. In the private sector, the Biden Administration plans to replace 50,000 diesel transit vehicles and to encourage domestic manufacturing of electric vehicles and batteries. The Plan also repeated President Biden's previously announced promise of 500,000 electric vehicle charging stations through grant and incentive programs for

both private investors and state and local governments. Finally, the Plan would encourage consumers to purchase electric vehicles with rebates and tax incentives.

- **Improved Infrastructure Permitting and Mitigation.** The Plan notes that it will "use smart, coordinated infrastructure permitting to expedite federal decisions while prioritizing stakeholder engagement, community consultation, and maximizing equity, health, and environmental benefits." While the Plan does not offer details on how the Biden Administration would seek to achieve this, it could include, for example, improved permitting for the offshore wind sector, a renewed implementation of the FAST-41 program, or renewed federal policy on compensatory mitigation and a return to some version of the Obama-era "net environmental benefit" requirement.

Climate Policy and Climate-Focused Change

White House officials have emphasized that the Plan's contribution to climate policy is not confined to the elements of the Plan that are expressly directed towards those goals, as made clear by a recent article published by *Time* based in part on interviews with Deputy White House National Climate Advisor Ali Zaidi and White House Climate Advisor Gina McCarthy. Many of the climate-focused policies are discussed in generalities in the Plan but are expected to emerge in more detail in future legislative and regulatory proposals. However, there are certain elements highlighted in the Plan with an express focus on climate or environmental remediation. These include:

- **Weather Resistant and Energy-Efficient Infrastructure.** The resiliency in infrastructure portion of the Plan calls for safeguarding critical infrastructure from extreme weather events, including using more sustainable building materials and designing for increases in severe weather events, and requiring increased protection of natural land and water resources to prevent dangerous wildfires, increase coastal resistance to sea-level rise and hurricanes, and support for agricultural resource management.
- **Green Transportation.** $85 billion to modernize existing transit, which will increase public transit, including buses and rail services. Areas of focus include an expansion of freight rail service and investment in electric vehicles (including a goal of 100% clean buses).
- **Clean Drinking Water.** $45 billion in investments and grants to completely eliminate lead pipes and service lines.
- **Monitor and Remediate Per- and Polyfluoroalkyl Substances ("PFAS") In Drinking Water.** $10 billion in funding for the monitoring and remediation of PFAS in

drinking water (PFAS is an emerging contaminant subject to increasing levels of federal and state regulation).

- **Plugging of Abandoned Oil and Gas Wells, and the Clean Up of Abandoned Mines.** $16 billion remediation package for the plugging and abandonment of orphaned oil and gas wells and the reclamation of abandoned mines. The Plan also discusses how this will result in a reduction in methane emissions, a key goal of the Biden Administration, and hints that the Biden Administration will invest in reducing leaks from other sources like aging pipes and distribution systems, with likely further regulatory efforts on methane reduction.
- **Remediate and Redevelop Brownfields.** $5 billion investment in the remediation and redevelopment of Brownfield and Superfund sites. The stated goal of this remediation is to create new economic hubs and to create jobs.
- **Restore Payments to the Superfund Trust Fund.** Restoring payments by industry to the Superfund Trust Fund. This fund allows for remediation of contaminated sites where no viable potentially responsible parties exist.

Emphasis on Workers and Labor Protections

The Plan addresses worker protections and labor issues with a combination of incentives for employers and strengthening workers' rights. As incentives to employers, the Plan would invest $580 billion in American manufacturing, research and development, and job training efforts. As mentioned above, the Plan would provide incentives for companies to locate and secure local manufacturing jobs in the U.S. The Plan also aims to increase and invest in registered apprenticeships and other labor or labor-management training programs, and an inclusive science and technology workforce.

The Plan would raise wages and increase benefits for essential home care workers. It calls on Congress to pass the Protecting the Right to Organize Act, which focuses on significantly strengthening workers' rights to organize, and to guarantee union and bargaining rights for public service workers. The Plan also places a strong emphasis on creating union-backed jobs. In the workplace, the Plan asks Congress to provide the federal government with resources to ensure employers are providing workers with jobs that include equal and fair pay, safe and healthy workplaces, and workplaces free from gender, racial and other forms of discrimination and harassment. The Plan includes a $10 billion investment toward enforcement and proposes increased penalties for employers who violate workplace safety and health rules.

Looking Ahead — Possible Market Opportunities

The investments proposed by the Plan, if enacted, present significant opportunities for investors in markets targeted by the Plan and those markets that serve the Plan's target markets. The Plan also has the potential to change the dynamics in infrastructure financing, as grants and other forms of government financing potentially may displace, or augment, private sources of funding for these investments, particularly with respect to risk-capital for early stage investments. Among the proposed investments likely to present such opportunities are:

- **Electric Vehicles.** $174 billion of investment to offer rebates and tax incentives to individuals purchasing electric vehicles, build a national network of 500,000 electric vehicle chargers and replace and electrify 50,000 diesel transit vehicles, 20% of school buses and significant portions of the federal vehicle fleet is likely to present significant opportunities to firms in the electric vehicle manufacture and charging space in addition to firms in the electrical generation and transmission markets, which will require significant investment to keep pace with increasing demand as electrification occurs. In making electric vehicle options more accessible and mainstream, this may catalyze the shift to electric vehicles in the personal automotive market, create scale and further reduce the costs associated with batteries and charging infrastructure.
- **Renewable Energy.** The renewable energy industry is expected to receive a significant boost under the Plan, due not only to increased generation demand from electric vehicles over time, but more immediately, because of the extension of federal tax credits, as well as changes in the regulatory framework and federal procurement requirements.
- **Emerging Technologies.** The Plan's $35 billion investment in research and development, with a focus on climate R&D priorities such as utility-scale energy storage, carbon capture and storage, hydrogen, and offshore wind (among others), has the potential to drive development in these industries and unlock the potential for an increase in private sector investment.
- **Highways, Roads and Bridges.** $115 billion of investment to modernize bridges, highways and roads is likely to result in significant growth for firms in the construction materials and engineering services industries, as well as longer-term efficiencies in transportation and commerce.
- **Public Transit.** $85 billion of investment to repair existing public transportation infrastructure and expand bus and rail service is likely to result in opportunities for bus and rail manufacturers in addition to firms providing engineering services and ancillary parts to these markets.

- **Infrastructure Resilience.** $50 billion of investment to improve infrastructure resilience and a newly formed Grid Deployment Authority tasked with better leveraging existing rights-of-way is likely to result in opportunities for electrical transmission providers to upgrade existing infrastructure and add increased transmission capacity, in addition to the opportunities presented for firms that service the construction and improvement of this transmission.
- **High-Speed Broadband.** $100 million dedicated to providing high-speed broadband to 100% of the U.S. is likely to result in opportunities for internet service providers ("ISPs"), including smaller local and regional ISPs seeking to provide services to rural communities.
- **Water.** $45 billion of investment to replace water pipes and lines and an additional $56 billion in grants and low-cost loans to states, tribes, and communities is likely to present opportunities for water service companies, particularly those already active in the municipalities, universities, schools and hospitals (MUSH) market with the significant advantage of established relationships.
- **Affordable Housing.** $213 billion to produce, preserve and retrofit more than two million affordable housing units is likely to result in opportunities for investors in multi-family housing and the firms that serve multi-family housing construction.
- **Public Schools.** $100 billion to upgrade and build new public schools is likely to result in opportunities for firms that serve these markets, including HVAC suppliers and other large building infrastructure providers, in addition to providers of engineering services.
- **Domestic Care.** $400 billion to expand access to home- or community-based care for the aging and those with disabilities is likely to result in significant growth for both companies engaged in providing such care and those that serve them, including medical equipment providers.

Importantly, much remains to be negotiated, and the ultimate winners, losers and market opportunities remain to be seen. However, the Plan outlines the overall direction the infrastructure package is likely to take.

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