

# HAWKINS ADVISORY

## NEW PRIVATE ACTIVITY BOND PROVISIONS FOR QUALIFIED CARBON DIOXIDE CAPTURE FACILITIES

The Infrastructure Investment and Jobs Act (the “Act”), which was signed into law on November 15, 2021, expanded the categories of tax-exempt private activity bonds enumerated under section 142(a) of the Internal Revenue Code of 1986, as amended (the “Code”), to include qualified carbon dioxide capture facilities. See, Code sections 142(a)(17) and 142(o).

While carbon dioxide occurs in nature, carbon dioxide emissions resulting from human activities, such as burning fossil fuels, have significantly increased levels of carbon dioxide in the atmosphere resulting in serious climate change concerns. Carbon dioxide capture and storage (“CCS”) is a process whereby carbon dioxide is separated from industrial and energy-related sources and transported to a storage location where it is isolated for extended periods of time. CCS is one way of trying to stabilize the atmospheric greenhouse gas concentration.

The Act establishes tax-exempt private activity bonds as a source of funding for certain eligible CCS facilities. Direct air capture facilities (as defined below) and facilities associated with a CCS facility that are integral or functionally related and subordinate to processes which convert recovered materials from an industrial carbon dioxide facility into synthesis gas are also eligible to be financed under these provisions of the Act.

### I. Section 142(o) – Qualified Carbon Dioxide Capture Facilities in General.

Qualified carbon dioxide capture facilities that may be financed with the proceeds of a tax-exempt private activity bond are defined as (a) the eligible components of an industrial carbon dioxide facility, as defined below, and (b) a direct air capture facility, i.e., any facility which uses carbon dioxide capture equipment to capture carbon dioxide from the ambient air, except for a facility that captures carbon dioxide which is deliberately released from naturally occurring subsurface springs or using natural photosynthesis.

### II. Definition of an “Industrial Carbon Dioxide Facility.”

The Act describes an industrial carbon dioxide facility as a facility that emits carbon dioxide as a result of any of the following processes: fuel combustion, gasification, bioindustrial, fermentation, any manufacturing industry relating to chemicals, fertilizers, glass, steel, petroleum residues<sup>1</sup>, forest products, agriculture (including feedlots and dairy operations), and transportation grade liquid fuels. The definition of “industrial carbon dioxide facilities,” however, excludes any geological gas facility<sup>2</sup> or any air separation unit that does not qualify as gasification equipment or is not a necessary component of an oxy-fuel combustion process.

### III. Eligible Components of an Industrial Carbon Dioxide Facility.

#### A. Capture and Storage Percentage.

An eligible component of an industrial carbon dioxide facility is one in which the capture and storage percentage is at least 65 percent. The capture and storage percentage is defined as the percentage derived by dividing (1) the total metric tons of carbon dioxide designed to be annually captured, transported and injected into (a) a facility for geologic storage (i.e., geological formations such as oil and gas fields, unmineable coal beds and deep saline formations) or (b) an enhanced oil or gas recovery well followed by geologic storage, by (2) the total metric tons of carbon dioxide which would otherwise be released into the atmosphere each year as industrial emission of greenhouse gas if the eligible components were not installed in the industrial carbon dioxide facility. If the eligible components are designed to capture carbon dioxide solely from specific sources of emissions (or portions thereof) within an industrial carbon dioxide facility, the capture and storage percentage may be determined based solely on such specific sources of emissions or portions thereof.

<sup>1</sup> Defined as the carbonized by-product of the high-boiling hydrocarbon fractions obtained in petroleum processing.

<sup>2</sup> Defined as a facility that produces a raw product consisting of gas or mixed gas and liquid from a geological formation, transports or removes impurities from such product or separates such product into its constituent parts.

If the capture and source percentage of a facility is less than 65 percent, the applicable provisions limit the percentage of the cost of the eligible components installed in such facility that may be financed with tax-exempt private activity bonds to the actual designed capture and storage percentage.

**B. Definition of an “Eligible Component.”**

An eligible component of an industrial carbon dioxide facility includes any equipment installed in an industrial carbon dioxide facility that is:

- (1) used to capture, treat and purify, compress, transport, or provide on-site storage of carbon dioxide produced by the facility, or
- (2) integral or functionally related and subordinate to a process which converts a solid or a liquid product from coal<sup>3</sup>, petroleum residue, biomass<sup>4</sup>, or other materials which are recovered for their energy or feedstock value into a synthesis gas composed primarily of carbon dioxide and hydrogen for direct use or subsequent chemical or physical conversion.

**IV. Miscellaneous.**

Sales of carbon dioxide produced by governmentally-owned qualified carbon dioxide facilities will not constitute a private business use.

75 percent of a tax-exempt bond issued to finance qualified carbon dioxide capture facilities is exempt from

the volume cap requirement (i.e., volume cap is required for the remaining 25 percent of the bond issue).

The Act coordinates the benefits afforded qualified carbon dioxide capture facilities financed with the proceeds of tax-exempt private activity bonds with the carbon oxide sequestration credit allowed under section 45Q(a) of the Code by reducing such credit by up to one-half.

**V. Effective Date.**

These provisions apply to bonds issued after December 31, 2021.

Any questions regarding the foregoing may be directed to a member of the Hawkins Delafield & Wood LLP Tax Department.

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<sup>3</sup> Defined as anthracite, bituminous coal, sub-bituminous coal, ignite and peat.

<sup>4</sup> Defined as any agricultural or plant waste, byproduct of wood or paper mill operations, including lignin in spent pulping liquors, and other products of forestry maintenance, but not paper which is commonly recycled.

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