
**Report and Recommendations to Congress regarding
Tribal Economic Development Bond provision
under Section 7871 of the Internal Revenue Code**

**Department of the Treasury
December 2011**



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

December 19, 2011

The Honorable Max Baucus
Chairman, Committee on Finance
United States Senate
Washington, DC 20510

Dear Chairman Baucus:

As mandated by Section 1402(b) of Title I of Division B of the American Recovery and Reinvestment Act of 2009 ("ARRA"), the Department of the Treasury has conducted a study of the effects of the Tribal Economic Development Bond provision in Section 7871(f) of the Internal Revenue Code. Section 1402(b) of ARRA directs the Secretary of the Treasury, or the Secretary's designee, to conduct a study of the effects of this tax-exempt bond provision and to report to Congress on the results of this study, including recommendations regarding this tax-exempt bond provision.

Enclosed is our Report and Recommendations to Congress regarding the Tribal Economic Development Bond provision under Section 7871. An identical letter is addressed to Senator Hatch.

Sincerely,

Emily S. McMahon
Acting Assistant Secretary (Tax Policy)

Enclosure



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

December 19, 2011

The Honorable Orrin G. Hatch
Ranking Member, Committee on Finance
United States Senate
Washington, DC 20510

Dear Senator Hatch:

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DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

December 19, 2011

The Honorable Dave Camp
Chairman, Committee on Ways and Means
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Camp:

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DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

December 19, 2011

The Honorable Sander Levin
Ranking Member, Committee on Ways and Means
U.S. House of Representatives
Washington, DC 20515

Dear Representative Levin:

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Enclosed is our Report and Recommendations to Congress regarding the Tribal Economic Development Bond provision under Section 7871. An identical letter is addressed to Representative Dave Camp.

Sincerely,

A handwritten signature in cursive script that reads "Emily S. McMahon".

Emily S. McMahon
Acting Assistant Secretary (Tax Policy)

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U.S. Treasury Department Report and Recommendations to Congress on Tribal Economic Development Bond Provision under Code Section 7871

I. Introduction.

A. In General.

Indian tribal governments have significant basic economic development needs, high poverty, high unemployment, and significant credit constraints that impede their access to the tax-exempt bond market.¹ From 1987 through 2010, Indian tribal governments issued an average of about \$157 million annually in tax-exempt bonds for a total of about \$3.76 billion in 321 total transactions, representing less than one-tenth of one percent of the total \$6.599 trillion in new issues of long-term tax-exempt municipal bonds issued during this period.²

Section 1402 of Title I of Division B of the American Recovery and Reinvestment Act of 2009³ authorized \$2 billion in bond authority for a new category of tax-exempt bonds for Indian tribal governments, known as “Tribal Economic Development Bonds” under Section 7871(f) of the Internal Revenue Code (“Code”),⁴ to promote economic development on tribal lands. This bond provision provides Indian tribal governments with greater flexibility to use tax-exempt bonds for economic development projects than is allowable under an existing more restrictive “essential governmental function” standard for Indian tribal governments under Section 7871(c). This more flexible bond provision generally allows Indian tribal governments to use tax-exempt bonds under standards that are more comparable to those applicable to States and local governments under Section 103 (subject to express targeting restrictions on Tribal Economic Development Bonds that require financed projects to be located on Indian reservations and that prohibit the financing of certain gaming facilities).

Section 1402(b) of ARRA directs the Secretary of the Treasury, or the Secretary’s delegate, to conduct a study of the effects of this bond provision and to report to Congress on the results of the study conducted under this paragraph, including the Secretary’s recommendations regarding this bond provision. The legislative history indicates that Congress seeks recommendations on whether to “eliminate or otherwise modify” the essential governmental function standard for Indian tribal tax-exempt bond financing and a legislative summary indicates that the Treasury Department should study whether to repeal this standard on a

¹ See GAO Testimony, Observations on Some Unique Factors that May Affect Economic Activity on Tribal Lands (GAO-11-543T) (April 7, 2011).

² See Indian tribal governmental tax-exempt bond issuance data in Appendix A to this Report.

³ Pub. L. No. 111-5, 123 Stat. 115 (2009) (“ARRA”).

⁴ Except as noted, Section references in this report are to the Code.

“permanent basis.”⁵ This report focuses primarily on this structural issue regarding the appropriate tax standard for tax-exempt bond financing for Indian tribal governments.⁶

B. Summary of Structural Recommendations.

Set forth below is a brief summary of the Treasury Department’s structural recommendations for the Tribal Economic Development Bond provision:

(1) Core Recommendation to Adopt for Indian Tribal Governments the Comparable State or Local Government Standard for Issuing Tax-exempt Governmental Bonds on a Permanent Basis. For reasons of tax parity, fairness, flexibility, and administrability, the Treasury Department recommends that Congress adopt the State or local government standard for tax-exempt “governmental bonds” (as distinguished from “private activity bonds”) under Section 141, as generally embodied in the limited authorization for Tribal Economic Development Bonds under Section 7871(f) on a permanent basis for purposes of Indian tribal governmental eligibility to issue tax-exempt governmental bonds, without a bond volume cap on such governmental bonds (subject to a project location restriction and a restriction against financing certain gaming facilities).

The Treasury Department recommends repealing the essential governmental function standard for Indian tribal governmental tax-exempt bond financing under Section 7871(c).

(2) Recommendation to Adopt a Comparable Private Activity Bond Standard. For reasons of tax parity, fairness, and flexibility, the Treasury Department further recommends that Congress allow Indian tribal governments to issue tax-exempt private activity bonds for the same types of projects and activities as are allowed for State and local governments under Section 141(e), under a tailored national bond volume cap as described below, subject to the same volume cap exceptions as those for State and local governments (and subject to a project location restriction and a restriction against financing certain gaming facilities).

The Treasury Department recommends a tailored version of a comparable annual tax-exempt private activity bond volume cap for Indian tribal governments. The tailored national Tribal private activity bond volume cap for all Indian tribal governments together as a group would be in an amount equal to the greater of: (i) a total national Indian tribal population-based measure determined under Section 146(d)(1)(A) (applied by using such national Indian tribal population in lieu of State population), or (ii) the minimum small population-based State amount under Section 146(d)(1)(B). For 2012, taking into account inflation adjustments,⁷ each State’s

⁵ See H.R. Conf. Rep. 111-16, 111th Cong. 1st Sess. (February 12, 2009) at Page 694. See also <http://waysandmeans.house.gov/media/pdf/111/arra.pdf> (Ways and Means Committee and Senate Finance Committee summary).

⁶ The Treasury Department delayed the timing of this report in part to accommodate a tribal consultation process and to give the program more opportunity for usage. For further perspective generally on the program, see IRS Advisory Committee on Tax-exempt and Governmental Entity (ACT) Reports on Implementation of Tribal Economic Development Bond Provision, dated June 9, 2010 and June 15, 2011.

⁷ See Rev. Proc. 2011-52, 2011-45 I.R.B. 701 (November 7, 2011).

private activity bond volume cap is equal to the greater of: (1) \$95 multiplied by the State population; or (2) \$284,560,000.

The Treasury Department recommends that Congress delegate to the Treasury Department the responsibility to allocate that national bond volume cap among Indian tribal governments.

(3) Recommendation to Retain and Modify the Project Location Restriction. The Treasury Department agrees that there ought to be some targeting restriction on the location of projects financed with tax-exempt bonds issued or used by Indian tribal governments that is similar to the restriction under Section 7871(f)(3)(B)(ii) which requires financed projects to be located on Indian reservations. The Treasury Department recommends that Congress provide some additional flexibility with respect to the existing project location restriction under Section 7871(f)(3)(B)(ii) to allow Indian tribal governments to issue or use tax-exempt bonds to finance projects that are located on Indian reservations, together with projects that both: (i) are contiguous to, within reasonable proximity of, or have a substantial connection to an Indian reservation; and (ii) provide goods or services to resident populations of Indian reservations.

(4) Recommendation to Retain the Gambling Facility Restriction. For policy reasons, the Treasury Department recommends retaining the existing targeting restriction under Section 7871(f)(3)(B)(i) against financing certain gaming projects for tax-exempt bond financing by Indian tribal governments.

Some Indian tribal governments have emphasized that gaming revenues are an important source of revenues, given their lack of tax-based revenues or other revenues. The Treasury Department points out that, although gaming projects themselves are ineligible to be financed with proceeds of Tribal Economic Development Bonds under the existing provision, gaming revenues may be used as a source of payment or security for tax-exempt bonds that finance eligible types of projects under both the existing Tribal Economic Development Bond provision and the recommended tax framework for Indian tribal governmental tax-exempt bond financing discussed in this report.

C. Comment on Credit Challenges Facing Indian Tribal Governments.

The Treasury Department emphasizes that a more flexible framework for tax-exempt bond financing cannot ameliorate the significant credit challenges facing Indian tribal governments that impede their access to the tax-exempt bond market. The Treasury Department recommends that Congress examine this difficult issue and explore possible ways to improve bond market access for Indian tribal governments, such as possible reserve fund programs, credit enhancement facilities, or other measures, subject to prudent fiscal controls.

Some Indian tribal governments have recommended Federal guarantees to support Indian tribal tax-exempt bond financings. In general, however, Section 149(b) broadly prohibits Federal guarantees of tax-exempt bonds, subject to certain limited exceptions for housing and other specific programs. A policy reason underlying this general prohibition against Federal guarantees of tax-exempt bonds is a concern that such guarantees could have the potential to

produce securities that are more attractive than benchmark U.S. Treasury securities (in that Federally-guaranteed tax-exempt bonds have the full faith and credit backing of the Federal Government as security and they produce more attractive tax-exempt income). In addition, the potential Federal revenue cost of any such guarantee is a significant concern. The Federal Government has a budget policy against Federal guarantees of tax-exempt bonds.⁸

D. Bond Volume Cap Allocation Process and Limited Bond Issuance.

This section provides certain information regarding the bond allocation process and bond issuance for Tribal Economic Development Bonds. Indian tribal governments have shown significant interest in this program. The Treasury Department allocated the full amount of bond authority to interested Indian tribal governments for identified projects. Actual issuance of these bonds through November 2011, however, has been very limited, comprising less than three percent of the total \$2 billion bond authorization. The Treasury Department believes that the reasons for this lack of actual usage relate mainly to credit challenges facing Indian tribal governments rather than deficiencies in the more flexible tax parameters for this program.

Section 7871(f)(1) required the Treasury Department to allocate the \$2 billion national volume cap for Tribal Economic Development Bonds among Indian tribal governments in such manner as the Treasury Department, in consultation with the Secretary of the Interior, determined to be appropriate.

Pursuant to Notice 2009-51,⁹ the Treasury Department solicited applications for allocation of the \$2 billion in bond volume cap of Tribal Economic Development Bonds and provided guidance on the application procedures, deadlines, forms, and methodology for allocating this bond volume cap. The Treasury Department employed a pro rata allocation method to allocate this bond volume cap in two separate \$1 billion phases, subject to specified maximum allocations for any particular Indian tribal government. The two-phased allocation approach aimed to distribute bond-issuing authority promptly to issuers that were ready to proceed with projects for economic stimulus purposes and to try to take into account the needs of other issuers for additional time for applications.

In Internal Revenue Service (“IRS”) News Release 2009-81 (September 15, 2009) and IRS News Release 2010-20 (February 11, 2010), the IRS announced the results of the two phases of Tribal Economic Development Bond allocations. Attached in Appendix A are the results of the allocations of this bond volume cap.¹⁰

⁸ See Office of Management and Budget Circular No. A-129 Revised (November 2000), at Section II entitled “Budget and Legislative Policy for Credit Programs,” Subsection 2 entitled “Form of Assistance,” under Subsections d and e.

⁹ 2009-28 IRB 128 (July 13, 2009).

¹⁰ See <http://www.irs.gov/taxexemptbond/article/0,,id=213053,00.html>.

In IRS Announcement 2010-88,¹¹ the IRS extended the time period for issuing bonds under the first allocation from December 31, 2010 to June 30, 2011 and provided a process for further extensions for bond issuance until December 31, 2011.

In IRS Announcement 2011-71,¹² the IRS solicited public comments regarding reallocation of allocations of bond-issuing authority for Tribal Economic Development Bonds that remain unissued as of December 31, 2011. Absent further legislative changes to this program, the Treasury Department and the IRS expect to implement an ongoing reallocation process for unused bond volume cap under this program.

E. Consultation with Indian Tribal Governments.

Pursuant to Executive Order 13175, the Treasury Department consults with tribal officials in the development of Federal policies that have tribal implications to reinforce United States government-to-government relationships with Indian tribes and to reduce the imposition of unfunded mandates upon Indian tribes. In furtherance of the objectives of Executive Order 13175, the Treasury Department solicited comments on the Tribal Economic Development Bond provision.¹³ The Treasury Department received twenty-seven different comment letters, which it considered carefully and which provided helpful perspective in preparing this report. A brief summary of the comments is attached as Appendix C, and the full list of comments received is publicly available.¹⁴

II. Background on the Structure of Tax-exempt Bond Standards.

A. Governmental Bond and Private Activity Bond Classification.

In general, there are two basic types of tax-exempt bonds for State and local governments: “Governmental Bonds” and “Private Activity Bonds.” Bonds generally are classified as Governmental Bonds if the bond proceeds are used predominantly for State or local governmental use or the bonds are repaid predominantly from State or local governmental sources of funds. The Code does not define Governmental Bonds. Instead, bonds generally are treated as Governmental Bonds if they limit private involvement sufficiently to avoid classification as Private Activity Bonds under Section 141.

Bonds are classified as private activity bonds under a two-pronged test in Section 141(b)(1) and Section 141(b)(2) if private involvement exceeds both of the following thresholds:

¹¹ 2010-47 I.R.B. 754 (November 22, 2010).

¹² 2011-46 I.R.B. 770 (November 14, 2011).

¹³ 75 Fed. Reg. 39730 (July 12, 2010).

¹⁴ See Regulations.gov website (docket number: TREAS-DO-2011-0001) at the following link: [http://www.regulations.gov/#!docketDetail;dct=FR+PR+N+PS;rpp=10;so=ASC;sb=documentType;po=0;D=TREAS-DO-2011-0001](http://www.regulations.gov/#!docketDetail; dct=FR+PR+N+PS;rpp=10;so=ASC;sb=documentType;po=0;D=TREAS-DO-2011-0001).

(1) more than 10 percent of the bond proceeds are used for private business use (the “private business use limitation”); and

(2) the debt service on more than 10 percent of bond proceeds is payable or secured from payments or property used for private business use (the “private payments limitation”).

Bonds also are treated as Private Activity Bonds under various special rules in Sections 141(b)(3)-(5), and Section 141(c). These special rules include restrictions on private business use that is unrelated or disproportionate to governmental use, restrictions on financing of private loans (including private business loans and consumer loans), special restrictions on private business involvement in output facilities (such as electric, gas, or other output generation, transmission, and distribution facilities, but excluding water facilities), and restrictions on private business involvement in larger Governmental Bond issues absent obtaining special volume cap.

Overall, various limitations on tax-exempt Governmental Bonds aim to identify arrangements that have the potential to transfer the benefits of tax-exempt bond financing to persons other than State or local governments and to constrain this potential transfer.

B. Governmental Bonds.

1. In General.

State and local governments are eligible to issue Governmental Bonds for an unspecified wide range of public infrastructure projects and other projects if the bond proceeds are used predominantly for State or local governmental use or the bonds are payable or secured predominantly from State or local governmental sources of payment, such as generally applicable taxes. Here, it should be understood that Governmental Bonds can be used to finance a project that has significant private business use or that has significant private business sources of payment, but not both. Longstanding final 1997 Treasury Regulations under Treas. Reg. § 1.141-1 through § 1.141-15 provide guidance on these private business limitations on tax-exempt governmental bonds.

For the interest on Governmental Bonds to be excluded from the bond holder’s gross income for Federal tax purposes under Section 103, a number of general eligibility requirements must be met. Requirements generally applicable to all tax-exempt bonds include arbitrage restrictions, bond registration and information reporting requirements, a general prohibition on Federal guarantees, advance refunding limitations, restrictions on unduly long spending periods, and pooled financing bond limitations. In general, no volume cap limitations apply to Governmental Bonds.

2. Private Business Use Limitation.

In general, the private business use limitation on Governmental Bonds limits private business use to no more than 10 percent of the proceeds of a tax-exempt bond issue. Private business use generally arises when a private business has legal rights to use bond-financed

property. Thus, private business use arises from ownership, leasing, certain management arrangements, certain research arrangements, certain utility output contract arrangements (e.g., certain electricity purchase contracts under which private utilities receive benefits and burdens of ownership of governmental electric generation facilities), and certain other arrangements that convey special legal rights to use to tax-exempt bond-financed property.

Various exceptions and safe harbors apply with respect to the private business use limitation, which allow limited private business use of property financed by Governmental Bonds in prescribed narrow circumstances. Exceptions to the private business use limitation include exceptions for use in the capacity as the general public, such as use by private businesses of public roads, certain short-term use arrangements, certain de minimis incidental uses, certain uses as agents of State and local governments, and certain uses incidental to financing arrangements (e.g., certain bondholder trustee arrangements). In addition, safe harbors against private business use apply to certain private management and research arrangements. For management contracts, in Rev. Proc. 97-13,¹⁵ the IRS provided safe harbors that allow private businesses to enter into certain qualified management contracts with prescribed terms and compensation arrangements without giving rise to private business use to accommodate public-private partnerships for private management of public facilities. For research contracts, in Rev. Proc. 2007-47,¹⁶ the IRS provided updated safe harbors that allow certain research contract arrangements with private businesses at tax-exempt bond financed research facilities without giving rise to private business use (e.g., certain Federally sponsored research).

Most tax-exempt Governmental Bonds qualify for this type of tax-exempt bond financing based on limiting private business use of the bond-financed projects (as contrasted with limiting private payments).

3. Private Payments Limitation.

Bonds also qualify as tax-exempt Governmental Bonds if, despite significant private business use, the bonds are payable predominantly from State or local governmental sources of payment, such as generally applicable taxes. In general, the private payments limitation on Governmental Bonds requires limiting aggregate private payments to no more than 10 percent of the debt service on a bond issue (on a present value basis). The private payments limitation broadly considers direct and indirect payments from property used by private businesses that represent sources of payment or security for the debt service on a tax-exempt bond issue. For example, if a private business pays rent for its use of the bond-financed property, the rent payments give rise to private payments even if that rent is not pledged formally to secure the bonds. Various limited exceptions apply for purposes of the private payments limitation.

The private payments limitation is more complex than the private business use limitation and is applied less often to achieve tax compliance for Governmental Bonds. Bond issues that qualify as Governmental Bonds based on the absence of significant private payments tend to involve certain structured financings, such as tax increment financings and stadium financings.

¹⁵ 1997-1 C.B. 632.

¹⁶ 2007-29 I.R.B. 108 (July 16, 2007).

C. Private Activity Bonds.

In addition to tax-exempt Governmental Bonds, State and local governments also are eligible to issue tax-exempt Private Activity Bonds under Section 141(e) and related provisions (with permitted private business use and other private involvement) to finance certain specified types of projects and activities, including the following: (1) airports, (2) docks and wharves, (3) mass commuting facilities, (4) facilities for the furnishing of water, (5) sewage facilities, (6) solid waste disposal facilities, (7) qualified low-income residential rental multifamily housing 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) environmental enhancements of hydroelectric generating facilities, (13) qualified public educational facilities, (14) qualified green buildings and sustainable design projects, (15) qualified highway or surface freight transfer facilities, (16) qualified mortgage bonds or qualified veterans mortgage bonds for certain single-family housing mortgage loans, (17) qualified small issue bonds for certain manufacturing facilities, (18) qualified student loan bonds, (19) qualified redevelopment bonds, and (20) qualified Section 501(c)(3) bonds for exempt charitable and educational activities of Section 501(c)(3) nonprofit organizations.

Private Activity Bonds are subject to the same general rules applicable to Governmental Bonds, including the arbitrage investment limitations, registration and information reporting requirements, the Federal guarantee prohibition, restrictions on unduly long spending periods, and pooled financing bond limitations. In addition, most Private Activity Bonds are also subject to a number of additional rules and restrictions, including a bond volume cap as described below, a prohibition on advance refundings, an alternative minimum tax preference, existing property financing restrictions, restrictions on financing land acquisitions, and prohibitions against financing certain types of facilities (including skyboxes or other private luxury boxes in stadiums, health clubs, facilities primarily used for gambling, or liquor stores).

Subject to certain exceptions, Section 146 imposes annual State bond volume caps on most types of tax-exempt Private Activity Bonds, based on measures of State population, with minimum allocations for smaller, less-populous States and adjustments for inflation, and with three-year carry forward periods for unused allocations. For 2012, taking into account inflation adjustments,¹⁷ each State's private activity bond volume cap is equal to the greater of: (1) \$95 multiplied by the State population; or (2) \$284,560,000. Exceptions to the State private activity bond volume caps apply to certain governmentally-owned projects (including airports, docks and wharves, environmental enhancements of hydroelectric generating facilities, high-speed intercity rail facilities, and solid waste disposal facilities), qualified veterans mortgage bonds, and qualified Section 501(c)(3) bonds.

For Indian tribal governments, outside the limited authorization for Tribal Economic Development Bonds, Section 7871(c)(2) generally prohibits Indian tribal governments from issuing Private Activity Bonds for any of the above-described types of projects or purposes for which State and local governments may issue Private Activity Bonds. A limited restrictive exception under Section 7871(c)(3)(B) allows Indian tribal governments to issue Private Activity

¹⁷ See Note 7 *Supra*.

Bonds to finance certain manufacturing facilities upon satisfaction of complex and restrictive employment requirements.

D. Essential Governmental Function Standard for Indian Tribal Governments.

In general, a restrictive existing standard under Section 7871(c) applicable to Indian tribal governments limits their use of tax-exempt bonds to the financing of certain activities that constitute “essential governmental functions.” Further, activities cannot qualify as essential governmental functions under Section 7871(e) unless they are “customarily” performed by State and local governments with general taxing powers. The essential governmental function standard under Section 7871(c) was enacted originally in 1982 as part of the Indian Tribal Government Tax Status Act.¹⁸ The legislative history to this legislation indicated that essential governmental functions for this purpose included activities such as schools, streets, or sewers, but did not include activities financed with private activity bonds or other commercial or industrial activities.¹⁹

In 1987, Section 7871(e) was added to the Code to limit the essential governmental functions standard further to provide that essential governmental functions do not include any functions which are not customarily performed by State and local governments with general taxing powers.²⁰ Further, in the legislative history to this provision, the House Ways and Means Committee criticized 1984 Temporary Treasury Regulations²¹ under section 7871(c) for treating certain commercial and industrial activities eligible for Federal funding as essential governmental functions and indicated that these regulations were invalid to that extent.²²

In 2006, the Treasury Department and the IRS promulgated an Advance Notice of Proposed Rulemaking regarding the essential governmental function standard for Indian tribal tax-exempt bonds under Section 7871.²³ This guidance provided that proposed regulations will treat an activity as an essential governmental function that is customarily performed by State and local governments under Section 7871(c) and Section 7871(e) if: (1) there are numerous State and local governments with general taxing powers that have been conducting the activity and financing it with tax-exempt governmental bonds, (2) State and local governments with general taxing powers have been conducting the activity and financing it with tax-exempt governmental bonds for many years, and (3) the activity is not a commercial or industrial activity. Examples of eligible customary State and local governmental activities under this guidance included public works projects such as roads, schools, and government buildings.

¹⁸ Pub. L. No. 97-473 (1983), 96 Stat. 2605.

¹⁹ See H.R. Rep. No. 97-982, 97th Cong. 2d Sess. 17 (1982); S. Rep. No. 97-646, 97th Cong. 2d. Sess. 13-14 (1982).

²⁰ See The Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330, §10632(a) (1987).

²¹ Temp. Treas. Reg. § 305.7871-1 (1984).

²² See H.R. Rep. No. 100-391, 100th Cong. 1st Sess. at 1139 (1987).

²³ See 71 Fed. Reg. 45474 (August 9, 2006).

E. Tribal Economic Development Bond Provision.

The Tribal Economic Development Bond provision under Section 7871(f) provides Indian tribal governments more flexibility to finance economic development projects than is allowable under the existing essential governmental function standard of Section 7871(c). This more flexible provision generally allows Indian tribal governments to use tax-exempt bonds under a \$2 billion volume cap to finance an unspecified broad range of governmentally-used projects that would qualify for Governmental Bonds under Section 141 and projects that would qualify for Private Activity Bonds under Section 141(e), to the same extent and subject to the same limitations imposed on State and local governments under Section 103.

For this purpose, Federally-chartered corporations organized and controlled by Indian tribal governments under Section 17 of the Indian Reorganization Act of 1934, 25 U.S.C. § 477 (“Section 17 Corporations”) are eligible Indian tribal governmental issuers of tax-exempt bonds under Section 7871 and eligible governmental users of proceeds of tax-exempt bonds for purposes of the private business restrictions on Governmental Bonds under Section 141.²⁴

Section 7871(f)(3)(B) includes certain specific limitations on Tribal Economic Development Bonds that prohibit the use of any proceeds of these bonds to finance either of the following: (1) any portion of a building in which class II or class III gaming (as defined in section 4 of the Indian Gaming Regulatory Act) is conducted or housed or any other property actually used in the conduct of such gaming; or (2) any facility located outside the Indian reservation (as defined in Section 168(j)(6)).

III. Analysis and Recommendations.

A. Governmental Bond Standard.

1. Analysis.

The private business restrictions on tax-exempt Governmental Bonds for State and local governments under Section 141 involve established, well-known, and administrable tax standards. The private business use limitation particularly involves workable tax standards using general tax principles that focus on ownership, leasing, and contractual rights. These standards focus eligibility for Governmental Bonds on the nature of the beneficiaries of the tax-exempt financing (rather than on the nature of the activities financed).

By contrast, the essential governmental function standard under Section 7871(c) focuses on appropriate governmental activities (rather than the actual beneficiaries) and has proven to be a difficult standard to define and administer. The analogous essential governmental function standard under Section 115 is vague. Congress criticized the Treasury Department’s 1984

²⁴ See Treas. Reg. § 1.301.7701-1(a)(3) (Section 17 Corporations are integral parts of Indian tribal governments and are not recognized as separate entities apart from the Indian tribal governments for Federal tax purposes); Rev. Rul. 94-16, 1994-1 C.B. 19 (Section 17 Corporations are not separate taxable entities apart from the controlling Indian tribes and are not subject to Federal income taxation).

regulations on the essential governmental function standard for Indian tribal governments under Section 7871(c) as too flexible.

Moreover, the custom-based limitation on the essential governmental function standard introduced in 1987 under Section 7871(e) has proven to be particularly unworkable, based on difficulties in determining customs, the subjective nature of customs, the evolving nature of customs over time, the differing nature of customs among diverse State and local governmental entities, and the increasing involvement of State and local governments in quasi-commercial activities.

The Indian Tribal Government Tax Status Act sought to provide tax parity between Indian tribal governments and State and local governments. The Treasury Department emphasizes, however, that the existing tax framework for eligibility for tax-exempt bond financing for State and local governments, on one hand, and Indian tribal governments, on the other hand, reflects fundamentally different analytic standards. Application of the different analytic standards has resulted in different outcomes and attendant perceived unfairness.

The Treasury Department believes that tax policy warrants providing parity between Indian tribal governments and State and local governments for tax-exempt Governmental Bond financing eligibility purposes using comparable standards, with certain tailored modifications.

2. Recommendations for Governmental Bonds.

For reasons of tax parity, fairness, flexibility, and administrability, the Treasury Department recommends that Congress adopt the State or local government standard for tax-exempt Governmental Bonds (as distinguished from Private Activity Bonds) under Section 141, as embodied in the limited authorization for Tribal Economic Development Bonds under Section 7871(f) (including a location restriction and a restriction against financing gaming facilities), on a permanent basis for purposes of Indian tribal governmental eligibility to issue tax-exempt Governmental Bonds, without a bond volume cap on such Governmental Bonds (subject to a project location targeting restriction and a gaming facility financing restriction).

The Treasury Department recommends repealing the existing essential governmental function standard for Indian tribal tax-exempt bond financing under Section 7871(c).

B. Private Activity Bond Standard.

1. Analysis.

State and local governments may issue tax-exempt Private Activity Bonds for a wide range of specified types of projects and activities, subject in most cases to an annual State bond volume cap. By contrast, outside the limited authorization for Tribal Economic Development Bonds, Section 7871(c)(2) generally prohibits Indian tribal governments from issuing Private Activity Bonds, except in narrow circumstances to finance manufacturing facilities upon satisfaction of complex and restrictive employment requirements.

The scope of Private Activity Bond eligibility for Indian tribal governments seems unduly restrictive. The Indian Tribal Government Tax Status Act sought to provide tax parity between Indian tribal governments and State and local governments. The disparate scopes of Private Activity Bond authority are inconsistent with this parity goal.

The Treasury Department believes that tax policy warrants providing parity between Indian tribal governments and State and local governments for tax-exempt Private Activity Bond financing eligibility purposes using comparable standards, with certain tailored modifications.

One difficult issue regarding Private Activity Bond eligibility for Indian tribal governments involves how to impose a bond volume cap. In the case of State and local governments, Section 146 imposes an annual State Private Activity Bond volume cap on most types of Private Activity Bonds, based on State populations, with minimum allocations for small, less populous States. The development of a workable comparable Private Activity Bond volume cap for Indian tribal governments that takes into account the diverse characteristics of Indian tribal governments is not a simple task. Factors to consider include the large number of Indian tribal governments (565 Federally recognized Indian tribes), the wide range of tribal populations within a total national Indian tribal population of about two million people (ranging from about 176,000 residents of the Navaho reservation to fewer than 50 residents of other reservations), and the wide range of land holdings (ranging from approximately 3,468 square miles for the Cheyenne River reservation to less than one square mile for some tribal reservations in California).²⁵ These characteristics weigh against an automatic formula-based allocation to each of the individual Indian tribal governments. An aggregate nationally-based bond volume cap allocation method for Indian tribal governments collectively as a group similar to the allocation method for Tribal Economic Development Bonds may be more workable.

2. Recommendations for Private Activity Bonds.

For reasons of tax parity, fairness, and flexibility, the Treasury Department recommends that Congress allow Indian tribal governments to issue tax-exempt Private Activity Bonds for the same types of projects and activities as are allowed for State and local governments under Section 141(e), under a tailored national bond volume cap as described below, subject to the same volume cap exceptions as those for State and local governments (and subject to a project location targeting restriction and a gaming facility financing restriction).

The Treasury Department recommends an annual national tax-exempt Private Activity Bond volume cap for all Indian tribal governments together as a group equal to the greater of: (i) a total national Indian tribal population-based measure determined under Section 146(d)(1)(A) (applied by using such national Indian tribal population in lieu of State population); or (ii) the minimum small population-based State amount under Section 146(d)(1)(B). For 2012, the State numbers for this volume cap are the greater of: (i) \$95 multiplied by the State population; or (ii) \$284,560,000.²⁶

²⁵ See Note 1 *Supra*.

²⁶ See Note 7 *Supra*.

The Treasury Department recommends that Congress delegate to the Treasury Department the responsibility to allocate that national bond volume cap among Indian tribal governments.

C. Project Location Restriction.

1. Analysis.

The Tribal Economic Development Bond provision includes a project location restriction under Section 7871(f)(3)(B)(ii) which requires financed projects to be located on Indian reservations. This restriction aims to target the use of Indian tribal tax-exempt bond financing appropriately to areas of need for Federal borrowing subsidies on Indian reservations. The Treasury Department generally believes that some form of location restriction is necessary and appropriate. In this regard, absent a project location restriction, Indian tribal governments could use this more flexible tax-exempt bond provision to finance projects throughout the country in competition with private businesses.

Some Indian tribal governments have suggested that the project location restriction is unduly restrictive for various reasons associated with the range of configurations of Indian reservation lands. Some Indian reservations have non-contiguous portions or gaps in land areas. In addition, some Indian tribal governments seek to serve their resident reservation populations with projects that are reasonably proximate in location to Indian reservations (e.g., electric or gas utility service projects), but that are not located directly on Indian reservations. The Treasury Department believes that a project location targeting restriction is necessary and that some additional flexibility is warranted for project locations.

2. Recommendation to Modify the Project Location Restriction.

The Treasury Department believes that there ought to be some targeting restriction for the location of projects financed with tax-exempt bonds issued or used by Indian tribal governments.

The Treasury Department recommends that Congress provide some additional flexibility to the existing project location restriction under Section 7871(f)(3)(B)(ii) to allow Indian tribal governments to use tax-exempt bonds to finance projects that are located on Indian reservations, together with projects that both: (i) are contiguous to, within reasonable proximity of, or have a substantial connection to an Indian reservation; and (ii) provide goods or services to resident populations of Indian reservations.

D. Gaming Facility Financing Restriction.

1. Analysis.

For policy reasons, Congress prohibited the use of Tribal Economic Development Bonds to finance certain gaming facilities under Section 7871(f)(3)(B)(i). A similar restriction under Section 141(e) prohibits State and local governments from using any portion of the proceeds of tax-exempt Private Activity Bonds to finance facilities primarily used for gambling.

Some Indian tribal governments have emphasized that, for credit and market access reasons, gaming revenues represent an important source of revenues. The Treasury Department points out that, although gaming projects themselves are ineligible to be financed with proceeds of Tribal Economic Development Bonds, Indian tribal governments may pledge gaming revenues to secure tax-exempt bonds used to finance eligible types of projects under the existing Tribal Economic Development Bond provision and under the recommended tax framework using the two-pronged private business restrictions standard applicable to State and local governments under Section 141. Thus, if an Indian tribal government issues tax-exempt Governmental Bonds to finance a project for Indian tribal governmental use (as contrasted with private business use), it could pledge gaming revenues to secure that financing. Such a pledge of gaming revenues would be similar to a pledge by a State or local government of lottery revenues to secure tax-exempt bonds. In each case, the pledged revenues constitute governmental sources of payment (as contrasted with revenues derived from private business use) under Section 141. Similarly, if an Indian tribal government derived gaming revenues from its own governmental ownership and operation of a gaming facility, it could pledge those gaming revenues to secure tax-exempt Governmental Bond financing for a subsidized privately-used economic development project based on the absence of private payments from the gaming facility.

2. Recommendation to Retain Existing Gaming Facility Restriction.

For policy reasons, the Treasury Department generally concurs with the existing targeting restriction for Tribal Economic Development Bonds under Section 7871(f)(3)(B)(i) which prohibits financing of projects used for certain types of gaming.

E. Credit Challenges Facing Indian Tribal Governments.

The Treasury Department emphasizes that a more flexible tax framework for tax-exempt bond financing cannot ameliorate the significant credit challenges facing Indian tribal governments that impede access to the tax-exempt bond market. Set forth below are certain reasons that contribute to these credit challenges.

In contrast to State and local governments which have tax-based revenue sources, Indian tribal governments generally lack tax-based sources of revenues from income taxes or property taxes. In this regard, tribal lands held in trust by the Federal Government are not subject to property taxes. In addition, States and local governments exercise concurrent jurisdiction over Indian reservation for taxing purposes.

Some Indian tribal governments also lack collateral to pledge as security for financings in part because tribal lands held in trust by the Federal Government cannot be mortgaged. Indian tribal governments also face uncertainties regarding creditors' rights for lenders due to various special aspects of Indian tribal laws.

In addition, the recent recession and problems in the financial markets more generally contributed to the limited use of Tribal Economic Development Bonds. During the recent recession, investor appetite for risk decreased significantly, making it more difficult for most

institutions to issue debt. In general, smaller issuers with weaker credit, infrequent issuers, and issuers of less traditional debt experienced problems in the capital markets more acutely. These credit constraints affected many Indian tribal governments. Most Indian tribal governments do not issue bonds frequently. Limited historical issuances and performance can reduce investor appetite for new issuances. Thus financial market uncertainties likely drove up interest rates and at times limited access to credit at almost any interest rate, making projects more expensive and potentially unaffordable.

Indian tribal governments also face greater transaction costs for accessing the tax-exempt bond market than State or local governments for securities law regulatory reasons. State or local governments have an exemption from the securities law registration requirements for public offerings of their securities under Section 3(a)(2) of the Federal Securities Act of 1933. Indian tribal governments have no comparable exemption. Thus, they either must register their securities with the Securities and Exchange Commission or raise funds in private placements in more limited markets.

Some Indian tribal governments have sought Federal guarantees of Indian tribal tax-exempt bond financings. Subject to certain exceptions for housing programs and certain other programs, however, Section 149(b) generally prohibits Federal guarantees of tax-exempt bonds. A policy reason underlying this prohibition is a concern that such Federal guarantees have the potential to produce securities that are more attractive than benchmark U.S. Treasury securities (in that Federally-guaranteed tax-exempt bonds have the full faith and credit backing of the Federal Government as security and they produce more attractive tax-exempt income). In addition, the potential Federal revenue cost of any such guarantee is a significant concern. The Federal Government has a budget policy against Federal guarantees of tax-exempt bonds.²⁷

The Treasury Department recommends that Congress examine the difficult issue of credit challenges facing Indian tribal governments and explore possible ways to improve bond market access for Indian tribal governments, such as possible reserve fund programs, credit enhancement facilities, or other measures, subject to prudent fiscal controls.

IV. Conclusion.

The Treasury Department believes that the recommendations contained in this report will help Indian tribal governments to access the capital markets more effectively and efficiently. In this regard, the Treasury Department would be willing to provide technical assistance to Congress in developing a better framework for Indian tribal governmental tax-exempt bond financing modeled after the Tribal Economic Development Bond program.

²⁷ See Note 8 *Supra*.

Appendix A
to U.S. Treasury Department Report on Tribal Economic Development Bonds

Historic Data on Indian Tribal Governmental Issuances of Tax-exempt Bonds²⁸

<u>Year</u>	<u>Dollar Volume</u>	<u>Number of Bond Issues</u>
1987-1989	\$ 74,198,889	10
1990	\$ 2,342,500	4
1991	\$ 1,394,766	3
1992	\$ 15,995,579	4
1993	\$ 16,264,300	6
1994	\$ 33,260,669	9
1995	\$ 27,606,263	10
1996	\$ 502,420,372	18
1997	\$ 236,809,502	13
1998	\$ 59,754,766	19
1999	\$ 103,819,035	16
2000	\$ 35,445,360	14
2001	\$ 256,467,447	31
2002	\$ 267,858,617	18
2003	\$ 187,576,494	31
2004	\$ 135,292,601	21
2005	\$ 171,234,371	13
2006	\$ 337,587,227	24
2007	\$ 618,203,075	18
2008	\$ 261,238,662	14
2009 ²	\$ 113,437,702	13
2010 ² ³	\$ 302,082,450	12
Total:	<u>\$3,760,290,647</u>	<u>321 total bond issues</u>
 Annual Average:	 \$156.68 million	 13.4 average number of bond issues annually

Comparison to Total Tax-exempt Bond Market Issuance Data for Same Period ⁴

Total 1987-2010:	\$6.599 trillion	408,557 total bond issues
Annual Average:	\$274.94 billion	17,023 average number of bond issues annually

²⁸ Source: IRS, Statistics of Income Division. Table includes all bonds filed on Form 8038-G, Information Return for Tax-Exempt Governmental Obligations that specifically reference "Tribal or Indian" governments.

² Tax year includes all bonds filed on Form 8038-G, Information Return for Tax-Exempt Governmental Obligations that specifically reference "Tribal or Indian" governments, or "Tribal Economic Development" bonds.

³ Preliminary data as of November 29, 2011, subject to revision.

⁴ Data includes all bonds filed on Form 8038-G, Information Return for Tax-Exempt Governmental Obligations and Form 8038, Information Return for Tax-Exempt Private Activity Bond Issues. Contains preliminary data as of November 29, 2011, subject to revision.

Appendix B
to U.S. Treasury Department Report on Tribal Economic Development Bonds

Results of \$2 Billion Bond Allocation Process

[Chart Attached]

Allocation Schedule of 1st Tranche of Tribal Economic Development Bonds

Name of Applicant/Issuer	State	Type of Project	TEDBs Allocation
Agua Caliente Band of Cahuilla Indians	CA	Refinancing	\$13,162,968.27
Apsaalooke Nation—Crow Tribe of Indians	MT	Commercial Facility and Land Acquisition	\$6,419,391.58
Blackfeet Tribe of the Blackfeet Indian Reservation	MT	Refinancing and Acquisition of Tourism Facility	\$22,565,088.46
Cabazon Band of Mission Indians	CA	Refinancing	\$22,565,088.46
Cedar Band of Paiute Indians of Utah	UT	Retail Facility	\$10,530,374.62
Chemehuevi Indian Tribe of the Chemehuevi Reservation	CA	Tourism Facility and Marina	\$15,795,561.92
Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians	OR	Water Infrastructure	\$1,504,339.23
Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians	OR	Refinancing	\$8,574,733.62
Confederated Tribes of the Umatilla Indian Reservation	OR	Tourism Facility Expansion	\$22,565,088.46
Confederated Tribes of the Warm Springs Reservation of Oregon	OR	Water Infrastructure and Tourism Facility Improvements	\$22,565,088.46
Delaware Tribe of Indians	OK	Acquisition of Businesses and Airpark	\$22,565,088.46
Elk Valley Rancheria, California	CA	Tourism Facility	\$22,565,088.46
Fort Sill Apache Tribe of Oklahoma	OK	Tourism Facility Expansion	\$22,565,088.46
Hopland Band of Pomo Indians of the Hopland Rancheria, California	CA	Tourism Facility	\$22,561,504.38
Ione Band of Miwok Indians	CA	Tourism Facility	\$22,565,088.46
Kaw Nation	OK	Water Infrastructure	\$22,565,088.46
Kickapoo Traditional Tribe of Texas	TX	Refinancing and Tourism Facility	\$22,565,088.46
La Jolla Band of Luiseno Mission Indians	CA	Tourism Facility	\$22,565,088.46
Lac Vieux Desert Band of Lake Superior Chippewa Indians	MI	Refinancing and Building Construction/Remodeling	\$7,521,696.15
Lummi Nation	WA	Environmental and Transportation Infrastructure	\$22,565,088.46
Menominee Indian Tribe of Wisconsin	WI	Tourism Facility and Convention Center Expansion	\$22,565,088.46
Mille Lacs Band of Ojibwe	MN	Education Facility	\$6,279,393.17
Mille Lacs Band of Ojibwe	MN	Education Facility	\$2,632,593.65
Oneida Nation of New York	NY	Refinancing	\$22,565,088.46
Oneida Tribe of Indians of Wisconsin	WI	Retail Facility Improvements	\$902,603.54
Oneida Tribe of Indians of Wisconsin	WI	Recreational Facility Improvements and Refinancing	\$9,402,120.19
Oneida Tribe of Indians of Wisconsin	WI	Refinancing	\$4,889,102.50
Pascua Yaqui Tribe of Arizona	AZ	Tourism Facility	\$22,565,088.46
Pauma Band of Luiseno Mission Indians	CA	Tourism Facility	\$22,565,088.46
Pawnee Nation of Oklahoma	OK	Tourism Facility	\$22,565,088.46
Pit River Tribe	CA	Retail Facility	\$3,760,848.08
Poarch Band of Creek Indians	AL	Refinancing	\$22,565,088.46
Ponca Tribe of Indians of Oklahoma	OK	Tourism Facility	\$22,565,088.46
Pueblo of Acoma	NM	Manufacturing Facility	\$8,273,865.77
Pueblo of Isleta	NM	Tourism Facility	\$22,565,088.46
Quechan Indian Tribe	CA	Refinancing	\$22,565,088.46
Sac & Fox Tribe of the Mississippi in Iowa	IA	Refinancing	\$22,565,088.46
Salt River Pima-Maricopa Indian Community	AZ	Recreational Facility	\$22,565,088.46
San Pasqual Band of Mission Indians	CA	Tourism Facility	\$22,565,088.46
Santa Clara Pueblo	NM	Tourism Facility Expansion and Refinancing	\$22,565,088.46
Santee Sioux Tribe of Nebraska	NE	Health Facility	\$13,539,053.08
Sault Ste. Marie Tribe of Chippewa Indians	MI	Refinancing	\$8,161,040.33

Allocation Schedule of 1st Tranche of Tribal Economic Development Bonds

Name of Applicant/Issuer	State	Type of Project	TEDBs Allocation
Seminole Tribe of Florida	FL	Parking Facility	\$22,565,088.46
Southern Ute Indian Tribe	CO	Refinancing	\$22,565,088.46
Spokane Tribe of Indians	WA	Tourism Facility, Infrastructure, Manufacturing Facility, and Low Income Housing	\$22,565,088.46
Ute Mountain Ute Tribe (Ute Mountain Tribe of the Ute Mountain Reservation)	CO	Tourism Facility	\$22,565,088.46
Viejas Band of Kumeyaay Indians	CA	Tourism Facility	\$22,565,088.46
Winnebago Tribe of Nebraska	NE	Tourism Facility	\$13,539,053.08
Yankton Sioux Tribe	SD	Tourism Facility and Convention Center	\$10,530,374.62
Yankton Sioux Tribe	SD	Corrections Facility	\$4,513,017.69
Yankton Sioux Tribe	SD	Administrative Offices	\$7,521,698.15
Total of 51 Disclosed Applications			\$856,967,985.42
Total of 7 Non-disclosed Applications			\$143,032,014.44
Total of 58 Applications			\$999,999,999.86

Note: This list contains the allocations awarded to those applicants that provided disclosure consent. The seven non-disclosed applicants did not provide a disclosure consent with their applications.

Allocation Schedule of 2nd Tranche of Tribal Economic Development Bonds

Name of Applicant/Issuer	State	Type of Project	TEDBs Allocation
Absentee Shawnee Tribe of Oklahoma	OK	Educational/Commercial Facility	9,981,848.80
Agua Caliente Band of Cahuilla Indians	CA	Renewable Energy Manufacturing Facility	10,934,816.39
Alabama-Coushatta Tribe of Texas	TX	Industrial, Tourism, Housing, Commercial, Educational, and Health Facilities	29,809,847.73
Alturas Indian Rancheria	CA	Supply Distribution Facility	7,289,744.26
Apache Tribe of Oklahoma	OK	Tourism Facility	10,932,879.61
Big Lagoon Indian Rancheria	CA	Manufacturing and Tourism Facilities	21,504,745.58
Cabazon Band of Mission Indians	CA	Refinancing	30,000,000.00
Campo Band of Mission Indians	CA	Renewable Energy, Tourism, and Wastewater Facilities	30,000,000.00
Cedar City Band of Palutes of the Palute Indian Tribe of Utah	UT	Manufacturing Facility	7,289,744.26
Chemehuevi Indian Tribe of the Chemehuevi Reservation	CA	Tourism Facility and Marina	3,280,384.91
Cher-Ae Heights Indian Community of the Trinidad Rancheria, CA	CA	Tourism and Renewable Energy Facilities	10,932,879.61
Chippewa Cree Tribe	MT	Refinancing	4,448,015.02
Comanche Nation, Oklahoma	OK	Tourism, Parking, Convention, and Retail Facilities; and Land Acquisitions	10,570,129.18
Confederated Tribes of the Goshute Reservation	UT	Governmental, Retail, Manufacturing, and Renewable Energy Facilities	10,934,816.39
Confederated Tribes of the Umatilla Indian Reservation	OR	Health Facility	5,330,048.86
Confederated Tribes of the Warm Springs Reservation of Oregon	OR	Water Infrastructure and Tourism Facility Improvements	5,107,649.19
Coyote Valley Band of Pomo Indians	CA	Tourism Facility Expansion	18,147,818.34
Delaware Nation	OK	Retail, Industrial, Tourism, Housing, and Renewable Energy Facilities	27,253,437.90
Elk Valley Rancheria, California	CA	Tourism Facility	2,709,930.18
Ely Shoshone Tribe	NV	Health Facility	2,988,795.13
Fort Bidwell Indian Community Council	CA	Renewable Energy Facilities	10,934,816.39
Fort Peck Assiniboine & Sioux Tribes	MT	Renewable Energy	10,934,816.39
Fort Sill Apache Tribe of Oklahoma	OK	Tourism Facilities	10,934,816.39
Gila River Indian Community	AZ	Retail, Tourism, and Youth Facilities	30,000,000.00
Grindstone Indian Rancheria of Wintun-Wailaki Indians of California	CA	Supply Distribution Facility	5,467,308.19
Iipay Nation of Santa Ysabel	CA	Tourism Facilities	10,932,879.61
Ione Band of Miwok Indians	CA	Tourism and Renewable Energy Facilities	10,934,816.39
Jamul Indian Village of California	CA	Retail Facility	3,848,238.13
Kaw Nation	OK	Renewable Energy Facility	24,056,158.08
La Posta Band of Mission Indians	CA	Retail Facility	6,560,769.84
Lummi Tribe of the Lummi Reservation	WA	Infrastructure and Tourism Facilities	3,848,238.13
Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians	MI	Parking, Water, and Wastewater Infrastructure Facilities	14,943,975.73
Mesa Grande Band of Diegueno Mission Indians	CA	Renewable Energy	10,934,816.39
Mille Lacs Band of Ojibwe	MN	Refinancing and Tourism Facilities	27,670,387.58
Morongo Band of Cahuilla Mission Indians	CA	Tourism, Retail Renewable Energy, and Water Infrastructure Facilities	18,766,411.79

Allocation Schedule of 2nd Tranche of Tribal Economic Development Bonds

Name of Applicant/Issuer	State	Type of Project	TEDBs Allocation
Navajo Nation of Arizona, New Mexico & Utah	AZ	Electric, Gas, Water Infrastructure, Renewable Energy Facilities, and Retail Facilities	30,000,000.00
Ohkay Owingeh	NM	Refinancing, Recreational, Governmental, and Commercial Facilities	22,913,488.65
Oneida Tribe of Indians of Wisconsin	WI	Refinancing and Tourism Facilities	8,154,632.68
Otoe Missouri Tribe of Indians of Oklahoma	OK	Renewable Energy and Water Infrastructure Facilities	18,224,380.85
Pascua Yaqui Tribe of Arizona	AZ	Retail Facility	10,934,616.39
Pauma Band of Luiseno Mission Indians	CA	Tourism Facilities	8,177,238.37
Pawnee Nation of Oklahoma	OK	Tourism Facilities	2,709,930.18
Pinoleville Pomo Nation, California	CA	Tourism Facilities	10,932,879.61
Pit River Tribe	CA	Tourism and Retail Facilities	7,289,744.26
Poarch Band of Creek Indians	AL	Refinancing	24,776,122.55
Pueblo of Acoma	NM	Renewable Energy Facilities	6,925,257.05
Quechan Indian Tribe	CA	Refinancing	7,120,225.63
Rosebud Sioux Tribe	SD	Manufacturing, Retail, Commercial, and Housing Facilities	5,472,775.50
Round Valley Indian Tribes	CA	Renewable Energy Facilities	10,934,616.39
Sac & Fox Tribe of the Mississippi in Iowa	IA	Retail, Commercial, and Tourism Facility	6,187,170.43
Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California	CA	Tourism, Community, and Housing Facilities	24,776,122.55
Seminole Tribe of Florida	FL	Parking Facility	14,821,840.27
Skokomish Indian Tribe	WA	Refinancing	1,822,436.05
Southern Ute Indian Tribe	CO	Refinancing	18,779,138.25
Spokane Tribe of Indians	WA	Tourism Facilities	10,934,616.39
Stockbridge-Munsee Community	WI	Museum Facility	3,644,872.12
Tohono O'odham Nation	AZ	Retail and Commercial Facilities	1,822,436.05
Tomes Martinez Desert Cahulla Indian Tribe	CA	Governmental Facilities	2,770,102.80
Tule River Indian Tribe	CA	Commercial, Tourism, and Housing Facilities	10,934,616.39
Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria	CA	Tourism Facilities	14,579,488.53
United Keetoowah Band of Cherokee Indians	OK	Water Infrastructure Facility	15,598,026.16
Ute Indian Tribe of the Uintah and Ouray Reservation	UT	Refinancing and Housing Facilities	30,000,000.00
Ute Mountain Ute Tribe	CO	Tourism Facilities	6,143,079.87
Viejas Band of Kumeyaay Indians	CA	Tourism Facilities	4,009,359.34
Yankton Sioux Tribe	SD	Retail, Farming, Renewable Energy, Tourism, and Governmental Facilities	10,934,616.39
Yurok Tribe of the Yurok Reservation, California	CA	Retail, Tourism, and Manufacturing Facilities	10,934,616.39
Total of 66 Disclosed Applicants			<u>821,271,002.24</u>
Total of 10 Non-Disclosed Applicants			<u>183,242,015.14</u>
Total of 76 Applicants			<u>1,004,513,017.38</u>

Note: This list contains the allocations awarded to those applicants that provided disclosure consent. The 10 non-disclosed applicants did not provide a disclosure consent with their applications.

Appendix C
to U.S. Treasury Department Report on Tribal Economic Development Bonds

Summary of Comments Received in Response to Public Solicitation of Comments

The following summary is a broad aggregation of all comments submitted in response to the public solicitation of comments from Indian tribal governments and other members of the public regarding the Tribal Economic Development Bond provision pursuant to a Notice published in the Federal Register at 75 Fed. Reg. 39730 (July 12, 2010) (the “FR Notice”).

In their comments, Indian tribal governments advocated for the removal of the essential government function test and for tax law parity with state and local governments. They believe that the essential government function test places burdens on Indian tribal governments that are not placed on State and local governments and is therefore inequitable. It was recommended that this test be removed to open up the capital markets to tribal governments. Some argued that many economic development projects must go unfunded because the debt service on taxable financing is too expensive for most tribal governments. At a minimum, most tribes want parity with state and local governments in terms of qualification requirements for tax-exempt financing because tribal governments must provide the same types of economic development and other services as State and local governments.

One tribe noted that the essential government function test is difficult to administer because the IRS does not define an essential government function while the legislative history indicates only that such a function is “customarily performed” by state and local governments. Another tribe noted that tribal governments may need to directly engage in commercial and industrial enterprises to create jobs and tribal income due to the absence of other private sector activity. (FR Notice Question 1).

When asked whether the focus should be shifted from the essential government function test to the tribal governmental *use* of tax-exempt bond financed facilities under the standard that applies to state and local governments, tribes generally agreed that there should be at least parity with the standards applied to State and local governments. For some tribes, this meant that the State and local government standard described in the question would be a sufficient standard, but other comments indicated that that the State and local government standard would not go far enough in providing adequate consideration of the tribes’ unique roles and responsibilities in the provision of essential services. At least seven other tribes commented that the State and local government standard does not provide sufficient flexibility for Indian tribal governments and that special consideration should be made of the tribes’ unique circumstances beyond that which is made for State and local governments. Thirteen other tribes either said that they would support the same standards as applicable to State and local governments or that they opposed any special standards for Indian tribal governments. The tribes agreed that no standard applied to tribes should be more restrictive than those applied to State and local governments (FR Notice Question 2).

In general, Indian tribal governments oppose any restrictions on the use of their revenue streams as security or sources of payment for Indian tribal tax-exempt bond financing. Tribes indicated that they are often forced to use alternate revenue streams because they do not have adequate tax

bases comparable to those of State and local governments. Most notably, tribal land is held in trust and not subject to property taxes. When tribes try to levy business taxes, it is often perceived as “double taxation” because the state and local governments may also levy taxes on economic activities in the same area when those activities involve non-Native persons. The alternate revenue streams that tribes draw from were identified as income from lands held in trust, oil, gas and other natural resources, and gaming. Many tribes said that limiting qualified sources of tribal revenue further limits tribes’ already restricted access to credit markets. One tribe said that the sole determinant of the eligibility for tax-exempt bond financing should be the nature of the project undertaken. Another said that it is unlikely that tribes can meet the 90 percent governmental use or governmental payment requirement without including revenue streams unique to Indian tribal governments. In general, the tribes believe that special consideration should be given to special sources of revenue for Indian tribal governments because they do not have the same taxing abilities as State and local governments (FR Notice Question 3).

There is a consensus among tribes that current law should be modified permanently to authorize tribal governments to use qualified tax-exempt private activity bonds for the same types of projects as State and local governments. Additionally, some noted that qualified small issue manufacturing bonds (as allowed for State and local governments) would be more useful than the existing limited form of tax-exempt private activity bonds for manufacturing facilities under restrictive parameters currently authorized for tribal governments (FR Notice Question 4).

In response to the question of whether there are additional projects that Indian tribal governments should be allowed to finance using qualified tax-exempt private activity bonds, tribes generally said that Indian tribal governments should be allowed to finance commercial projects and corporations that produce revenues for tribal government services. Additionally, four tribes said that they only sought parity with State and local governments while five tribes asserted that there should be a “presumption” that all projects undertaken by tribal governments are eligible for tax-exempt bond financing. Most other tribes gave specific types of projects for which they believed tribal governments should be authorized to use private activity bonds. Suggestions included commercial projects with economic, environmental, and other social value, elderly housing projects, residential assisted living projects, recycling facilities, fire stations, renewable energy projects, and grocery stores. Some argued that tribal governments should be authorized to use private activity bonds for other types of projects beyond those allowed for State and local governments, including projects that would address the unique housing needs of tribes. Indian tribal governments also sought to use private activity bonds for tourism and recreational facilities and travel centers. Many tribes noted that Section 17 corporations should be able to issue tax-exempt private activity bonds (FR Notice Question 5).

Responses were varied on the question of what the nature of a bond volume cap should be if the government was to impose one. A few tribes said that a bond volume cap, if used, should be identical to the one used for State and local governments. The majority of tribes submitting comments said that they opposed the use of any bond volume cap for the use of private activity bonds for tribal governments. Proposed structures in the event of a bond volume cap include a minimum allocation for each tribe, and additional allocations based on several factors including

on- and off-reservation population, location, land base, and other unique circumstances (FR Notice Question 6).

There is a general consensus among Indian tribal governments that the restriction on the use of Tribal Economic Development Bonds outside of Indian reservations should be lifted. The opinions on whether this should be replaced with a standard for proximity of the project to a reservation are more mixed. Some tribes believe that projects within a “reasonable” proximity should be eligible for tax-exempt bonds, while other tribes believe that this subjective standard should be avoided by allowing the use of tax-exempt bonds on all types of land owned by tribal governments. Overall, the sentiment is that the limitation on use of Tribal Economic Development Bonds outside of Indian reservations should be eliminated because of the exceptionally complex mix of land tenure in Indian country. One specific suggestion was the use of the “substantial connection” or “nexus” test to determine whether there is a “direct, material benefit to the issuing jurisdiction.” This tribe suggests that this nexus test would provide parity with State and local governments (FR Notice Question 7).

The large majority of Indian tribal governments submitting comments also agree that the prohibition on the use of Tribal Economic Development Bonds for gaming facilities should be eliminated because many tribes rely on gaming revenues in the absence of an adequate tax base to support a significant amount of their governmental and social services (FR Notice Question 8).

Other general comments were that the ability of tribal communities to utilize tax-exempt bond financing should be at least equal to the ability of State and local governments, the unique position and responsibility of tribes requires much more flexibility than is currently offered, and what may be considered only a customary government function for a state or local government is often essential for tribes to carry out their responsibilities. Many tribes emphasized the extremely limited access to credit markets that hinders tribal economic development, and noted that special needs and unique circumstances of tribal governments should be considered when making tax laws (FR Notice Question 9).

A Note on Section 17 Corporations

In recognition of sovereign status, previous federal law has acknowledged the authority of tribes to establish unique corporate forms (Section 17 corporations). Many tribes believe that Section 17 corporations should be eligible for Tribal Economic Development Bonds and widely eligible to issue tax-exempt bonds because they are not technically for-profit entities. These corporations are wholly owned by Indian tribal governments and many tribes believe that these corporations should be afforded the same treatment as the Indian tribal governments that control them.