

New Economic Stimulus Bonds for U.S. Indian Tribes

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I. New Tax Favored Financing Opportunities for Tribal Governments

- A. The U.S. Economic Stimulus legislation known as the American Recovery and Reinvestment Act of 2009 enacted in February contains a number of groundbreaking provisions that benefit Indian country.
- B. The most significant new financing opportunity for tribes as it relates to the gaming industry is the new authority for tribes to issue tax-exempt bonds or tax credit bonds known as Tribal Economic Development Bonds.

II. Prior Law

- A. Prior to the passage of the Stimulus Act, Indian Tribes could only issue bonds for issue tax exempt bonds for projects that provide an "essential government function" as defined in the Internal Revenue Code.
- B. The question of what constitutes "an essential government function" has been a subject of longstanding dispute between tribes and the IRS, with enforcement actions on tribal economic development financings focusing primarily on whether tribal governments can issue tax exempt bonds to finance tribally owned casinos and other related tourism facilities such as golf courses, hotels and convention centers.
- C. The IRS interprets "essential government function" narrowly to exclude any project alleged to be commercial. Public projects such as schools, roads, water and sewer facilities and government buildings qualified, but economic development projects relating to casino related development were challenged by the IRS on the theory that such activities are not customarily undertaken by state and local units of government.

III. New Law

- A. For 2009 and 2010, Indian tribal governments may issue tax exempt tribal economic development bonds to finance any tribally owned project that could be financed by a state or local unit of government with tax exempt bonds under existing federal tax law, subject to three qualifications:
- 1) The Project has to be located on the tribe's reservation.
 - 2) Bonds cannot be used to finance any property used in gaming or any portion of a building in which gaming is conducted or housed. So no casino facilities.
 - 3) The Tribe must receive volume cap allocation from the US Dept of Treasury.
- B. Examples of projects that were previously ineligible but can now qualify (subject to compliance with rules applicable to all tax exempt bonds):
- 1) Hotels, convention centers, golf courses and other resort enhancements.
 - 2) Energy development and transmission facilities.
 - 3) Refinancing of more expensive outstanding taxable debt that was used to finance qualifying facilities.
- C. This is not free money. Tribal Projects need to be creditworthy and make economic sense. The bonds provide a lower cost of financing. In the current investment climate, tribal projects with proven revenue sources and investment grade credit ratings will benefit, but startup projects or projects with less than investment grade credit will continue to struggle to access the capital markets.
- D. \$2,000,000,000 National Volume Cap Limitation
- 1) Congress has placed a ceiling on the amount of Tribal Economic Development Bonds that Indian tribes may issue. That limit, known as volume cap, is \$2 billion.
 - 2) The Secretary of the Treasury will allocate the \$2,000,000,000 national tribal economic bond limitation among Indian tribal governments.

- 3) So far the allocation process has not been determined. The IRS recently sought public comment on two possible allocation options:
 - (1) Project based method among individual projects based on specified criteria, such as first come, first serve, job creation and other economic development criteria.
 - (2) Formula based method would allocate among Indian tribal governments based on objective criteria, such as reservation population.
 - (3) Guidance is expected soon on the method for sharing allocation. As soon as the allocation process is determined, a line will form.

E. Secretary of the Treasury also required to make a report to Congress within one year as to whether the "essential governmental function" requirement should be modified or amended.

IV. Build America Bonds

- A. New type of tax credit bond that tribes may elect to use instead of issuing tax exempt bonds.
 - 1) Any bond that is eligible for tax exempt bonding (either as an essential government function or as a Tribal Economic Development Bond) may instead be financed using Build America tax credit bonds.
 - 2) Tribe may elect to give the tax credit to the lender, presumable in exchange for zero percent interest, or keep the tax credit and have the federal government cover 35% of the interest cost that the tribe pays.
 - 3) Expectation is that the Build America Bond tax credit provisions will be more attractive than traditional tax exempt bonds, at least for larger financings. This is a brand new program so market is developing.
 - 4) Build America Bonds can only be issued in 2009 and 2010, and are only available for new money projects (not refinancings). They also cannot be used for private activity bonds.