

Part IV - Items of General Interest

Tribal Economic Development Bonds - Request for Public Comment on Volume Cap Allocation Process and Optional Extension of Deadline to Issue Bonds

Announcement 2011-71

SECTION 1. BACKGROUND

Section 1402 of Title I of Division B of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009), added § 7871(f) to the Internal Revenue Code (the “Code”). In general, the purpose of § 7871(f) is to give Indian tribal governments greater flexibility to use tax-exempt bonds to finance economic development projects, through the issuance of tribal economic development bonds (“Tribal Economic Development Bonds”), than is allowable under the existing standard of § 7871(c). Section 7871(f)(1) provides that the Treasury Department shall allocate the \$2 billion national bond volume limitation authority (“Volume Cap”) for Tribal Economic Development Bonds among the Indian tribal governments in such manner as the Treasury Department, in consultation with the Secretary of the Interior, determines appropriate.

In Notice 2009-51, 2009-28 I.R.B. 128 (July 13, 2009), the Treasury Department and the IRS addressed administrative procedures for initial allocations of the \$2 billion Volume Cap.

On September 15, 2009, the IRS announced allocations in an aggregate amount of approximately \$1 billion of Volume Cap in the first tranche of allocation (the “First Allocation”) of authority to issue Tribal Economic Development Bonds. Section 7(f) of Notice 2009-51 provided that if bonds were not issued by December 31, 2010, for any or all of the allocation received by an Indian tribal government from the First Allocation,

then such allocation would be treated as forfeited. In Announcement 2010-88, 2010-47 I.R.B. 754 (November 22, 2010), the IRS announced an automatic six-month extension of the administrative deadline to issue bonds under bonding authority from the First Allocation from December 31, 2010, to June 30, 2011, and a process by which Indian tribal governments could receive an additional six-month extension of the administrative deadline to issue bonds under bonding authority from the First Allocation from June 30, 2011, to December 31, 2011. Section 3 of Announcement 2010-88 provides that an allocation received pursuant to the First Allocation shall be treated as forfeited if bonds are not issued by June 30, 2011, for an allocation with respect to which the Indian tribal government does not receive an additional extension as described in the announcement, or by December 31, 2011, for an allocation with respect to which the Indian tribal government receives an additional extension.

On February 9, 2010, the IRS announced allocations in an aggregate amount of approximately \$1 billion of Volume Cap in the second tranche of allocation (the "Second Allocation") of authority to issue Tribal Economic Development Bonds. Section 7(f) of Notice 2009-51 provides that if bonds are not issued by December 31, 2011, for any or all of the allocation received by an Indian tribal government from the Second Allocation, then such allocation will be treated as forfeited.

Both Notice 2009-51 and Announcement 2010-88 provide that any allocation amounts treated as forfeited may be available for allocation by the IRS as part of an allocation process to be announced by the IRS at some future date. The IRS estimates that, as of the date of this Announcement, up to 95% or more of the \$2 billion in Volume

Cap authorized for Tribal Economic Development Bonds may become available for reallocation as of January 1, 2012.

SECTION 2. REQUEST FOR PUBLIC COMMENT ON VOLUME CAP ALLOCATION PROCESS

The IRS seeks public comment regarding the reallocation of available amounts of Volume Cap for Tribal Economic Development Bonds in order to facilitate issuance of such bonds by Indian tribal governments. These available amounts include amounts that were previously allocated and have been, or subsequently are, forfeited under Notice 2009-51 and Announcement 2010-88. The IRS seeks public comment from Indian tribal governments and other interested members of the public regarding appropriate methods to employ and criteria to consider in reallocating this Volume Cap, based on facts and circumstances affecting Indian tribal governments and any other relevant factors. The public comment deadline is December 12, 2011.

On July 12, 2010, the Treasury Department published a notice in the Federal Register (75 Fed. Reg. 39730 (July 12, 2010)) soliciting comments regarding the Tribal Economic Development Bonds provision in § 7871(f) of the Code. The Treasury Department received 27 responses to the notice from various Indian tribal governments, tribal organizations, and individual taxpayers. One question in the notice asked about Volume Cap and specifically referenced the \$2 billion Tribal Economic Development Bonds authorization as an example. The responses presented a wide variety of thoughtful comments and suggestions regarding Volume Cap.

The IRS is considering potential methods of reallocating Volume Cap that would use an application process and criteria similar to those used to allocate Volume Cap

under Notice 2009-51. However, in response to tribal and public input and to facilitate availability of Volume Cap for projects, the IRS is considering improvements to the process and reallocation criteria. The IRS is seeking additional input on the processes and criteria to be included in a method for reallocation. In addition to other processes and criteria, the IRS is considering improvements relating to the following categories of information to increase the likelihood that an allocation will result in issuance of Tribal Economic Development Bonds. The IRS seeks general comments on each of these proposed improvements. Certain additional comments about a proposed improvement are also specifically requested below.

- Project cost. The application process may require information regarding the estimated cost of the project, including the portion to be financed by Tribal Economic Development Bonds and any portion to be financed by other sources, if any, and how the estimated cost was determined.
- Plan for financing. The application process may require information on the plan for financing for the project, including the following: (1) all reasonably expected sources and uses of financing and the expected security and sources of payment for the bonds, (2) the anticipated date of issuance of the Tribal Economic Development Bonds and any other source of financing, (3) the issuer's reasonably expected schedule for spending proceeds of the Tribal Economic Development Bonds and any other financing taking into account such things as required permits, engineering studies,

architectural plans, and other commitments or studies that are required in order for the project to proceed with due diligence, (4) whether amounts to be made available by the Tribal Economic Development Bonds plus other available funds (whether obtained through financing or otherwise) are sufficient to pay for the cost of the project, (5) whether the Tribal Economic Development Bonds are marketable taking into account the type and location of project, the creditworthiness of the applicant, and other considerations, and (6) whether the applicant will be able to obtain financing from other sources if required for project costs. *The IRS seeks specific comments on appropriate evidence to show the applicant's ability to obtain the expected security and sources of payment for the bonds.*

- Evidence of readiness to issue. The application process may require information regarding an allocation recipients' ability to use the allocation to issue Tribal Economic Development Bonds prior to the forfeiture deadline. A recipient's ability to use the allocation to issue Tribal Economic Development Bonds prior to the forfeiture deadline may be indicated by information relating to project cost and readiness, marketability of Tribal Economic Development Bonds, and availability of other required financing. Additionally, the application process may require a demonstration that, assuming receipt of the requested Volume Cap and based on the project and financing structure described in the application (including the

proposed security and source of payment for the bonds), the proposed bonds are expected to satisfy, upon issuance, all applicable requirements for Tribal Economic Development Bonds under federal tax law (for example, this could be demonstrated through discussion with or preliminary tax analysis from a recognized public finance attorney or law firm). *The IRS seeks comments on the appropriate evidence that will ensure that recipients are ready to issue bonds and to use the proceeds of such bonds if an allocation is received. Should the IRS require documentation supporting the readiness of an applicant to issue the bonds and to construct the project? If so, what documents should be required?*

- Allocation process. The IRS is considering a two-step allocation process. The first step would be to provide applicants with written commitments for an allocation award in the order of priority based on the application submission date and amount requested. The second step – the actual allocation – would be made a certain number of days before closing, for instance, 60 days before closing on the loan or issuance of the bonds. *The IRS seeks specific comments on the number of days an allocation would be “locked in” before closing, as well as the maximum number of days from the date of the allocation award commitment letter to the date of the actual allocation.*

- Reduced allocations. The IRS is considering a process to award allocations less than the amount requested if the total amount of Volume Cap requested exceeds the remaining amount of unused and unallocated Volume Cap. Generally, a reduced allocation would not be awarded unless the applicant demonstrates that it has the additional financial resources to complete the project.

Consistent with Executive Order 13175, the IRS expects to hold multiple telephone consultations during the period commencing on the publication of this Announcement and ending December 12, 2011. After the consultations are completed and the comments are received and considered, the IRS expects to provide information about the determined process through published guidance.

SECTION 3. SUBMISSION OF COMMENTS.

Interested persons should send comments by mail to Internal Revenue Service, CC:PA:LPD:PR (Announcement 2011-71), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, D.C. 20044. Alternatively, comments may be hand delivered Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. to Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, D.C. 20224, Attn: CC:PA:LPD:PR (Announcement 2011-71). Comments may also be transmitted electronically via the following e-mail address: Notice.Comments@irsounsel.treas.gov. Please include "Announcement 2011-71" in the subject line of any electronic communication. Written comments should be received by December 12, 2011. All submissions will be available for public inspection and copying.

SECTION 4. OPTIONAL EXTENSION OF ADMINISTRATIVE DEADLINE TO ISSUE BONDS

Except as otherwise provided in this Announcement, an Indian tribal government that received an allocation of volume cap from the First Allocation (if such Indian tribal government received an extension of the administrative deadline to issue bonds pursuant to such allocation to December 31, 2011, pursuant to the process described in Announcement 2010-88) or the Second Allocation may submit a written request for an extension of time of three months from December 31, 2011, to March 31, 2012, to issue Tribal Economic Development Bonds pursuant to those allocations. Indian tribal governments must submit requests for such extensions to the IRS by November 30, 2011. A request for an extension must include: (1) a copy of the allocation letter from the IRS for the allocation to which the request relates; and (2) statements from an official of the Indian tribal government duly authorized to execute legal documents on behalf of the Indian tribal government in making the request, made under penalty of perjury, including (a) a statement explaining the reason for the extension of time, (b) a statement that the Indian tribal government reasonably expects to issue Tribal Economic Development Bonds pursuant to such allocation on or before March 31, 2012, to finance the project described in the Indian tribal government's original application ("Application"), (c) a statement that upon issuance of the bonds, the Indian tribal government will proceed with due diligence to spend the proceeds of the bonds for the qualified project described in the Application, and (d) a statement that such official has knowledge of the relevant facts and circumstances relating to the request and the Application, has examined the request and the Application, and that the information

contained in the request and the Application is true, correct, and complete. The request for an extension must also include documentation that demonstrates the reasonableness of the statements that the bonds are expected to be issued on or before March 31, 2012 and that, subsequent to the bond issuance, the Indian tribal government will proceed with due diligence to expend bond proceeds for the qualified project described in the Application. Extensions are not expected to be granted unless the request demonstrates that there is both a substantial and reasonable basis for the expectation of bond issuance on or before March 31, 2012 and an expectation of proceeding with due diligence to expend the bond proceeds for the project.

A request for an extension must be submitted by mail to the Internal Revenue Service (IRS), SE:T:GE:TEB:CPM, Attention: Mark Helfer, 1122 Town & Country Commons, Chesterfield, Missouri 63017.

A request for an extension should not include an inquiry relating to deviations from information submitted in the Application under Section 8 of Notice 2009-51. Section 8 of Notice 2009-51 provides that an allocation of Volume Cap is valid notwithstanding insubstantial deviations from the information submitted in the Application. Section 8 of Notice 2009-51 also describes criteria applicable to determinations of whether a deviation with respect to the information submitted in the Application is insubstantial, as well as procedures to apply for approval of specific insubstantial deviations.

For requests submitted in compliance with the requirements described in this Announcement for extensions from December 31, 2011, to March 31, 2012, the IRS expects to confirm the extensions by December 31, 2011.

If bonds are not issued by March 31, 2012, for any or all of an allocation of Volume Cap received by an Indian tribal government with respect to which the Indian tribal government receives an extension as described in this section, then any part of such allocation that is not used is treated as forfeited. Any allocation amounts treated as forfeited may be available for reallocation by the IRS as part of an allocation process already announced or to be announced by the IRS at some future date.

SECTION 5. EFFECT ON OTHER TIMING REQUIREMENTS

Except as otherwise provided in this Announcement, this Announcement does not modify any provisions relating to the forfeiture of allocations of Volume Cap received by Indian tribal governments pursuant to the First Allocation or the Second Allocation.

SECTION 6. DRAFTING INFORMATION

The principal authors of this Announcement are Todd Mitchell of the IRS office of Tax Exempt Bonds and Telly Meier of the IRS office of Indian Tribal Governments. However, other personnel from the IRS and Treasury Department participated in its development. For further information regarding this Announcement contact Debbie Cho of the IRS office of Tax Exempt Bonds at (714) 347-9431 (not a toll-free call).