

June 27, 2009

Executive Summary of IRS Notice 2009-51, Tribal Economic Development Bonds

IRS Notice 2009-51, issued June 23, 2009, solicits applications for allocations of the volume cap on Tribal Economic Development Bonds available to be issued pursuant to 26 U.S.C. §7871(f). This provision was added to the tax code by the American Recovery and Reinvestment Act of 2009. Notice 2009-51 also discusses (1) eligibility requirements for an allocation, (2) the application process, and (3) the criteria to be used in allocating the volume cap among applicants. Additionally, the Notice contains interim guidance on criteria for qualified projects.

Background

New Section 7871(f) “generally allows Indian tribal governments to use tax-exempt bonds under the new \$2 billion volume cap to finance any economic development projects (excluding certain gaming facilities and projects located outside of Indian reservations as provided in § 7871(f)(3)(B)) or other activities for which State or local governments could use tax-exempt bonds under § 103.” New issues permitted under Section 7871(f) fall under three categories:

- certain projects complying with private use limitations;
- certain projects exempt from private use limitations; and
- certain refunding issues (i.e., refinancings of certain outstanding bond issues).

TEDBs are not subject to the “essential governmental function” or “qualified manufacturing facility” restrictions which in the past have frequently limited or prevented the use of tax exempt bond financing for economic development projects sponsored by Indian tribal governments. Furthermore, TEDBs are not subject to many private activity bond limitations.

TEDBs do come with certain limitations, however. Specifically, TEDBs may not be used to finance:

- “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
- any facility located outside the Indian reservation.

The Notice includes interim guidance on how to determine if a proposed building falls within the gaming prohibition.

Application Requirements

An application for a TEDB allocation must be submitted to the IRS by a qualified issuer, which is limited to “Indian tribal governments.” Applications for the initial \$1 Billion allocation are due August 15, 2009. Applications for all volume cap allocations remaining after the initial allocation may be submitted after August 15, 2009 and are due on or before January 1, 2010.

Applications must describe the project in reasonable detail, including planned dates of acquisition, commencement of construction, and “in-service”. All applicable regulatory approvals and the applicants plan to acquire those approvals must be discussed.

There must be a reasonably detailed description of the proposed plan of financing, including all sources and uses of funds. The application must identify all proposed providers of project financing, the anticipated issuance date for the TEDBs, and proposed purchasers of the TEDBs. Plans to repay the TEDBs must be discussed, including the schedule of payments and the collateral securing repayment. The application must specify the aggregate expected face amount of TEDB issuance. Finally, the application must discuss the reasonably expected schedule of spending the proceeds of the TEDB issuance and must demonstrate compliance with IRS requirements for reimbursing amounts paid for a project. Applicants in the second or any subsequent allocation must disclose projects, or related projects, for which prior allocations were received.

Applications include a form of consent to disclosure of awarded allocations, including the name of issuer, type and location of project, and amount of volume cap allocation awarded. The Notice indicates that consent merely requested and is not required for award of an allocation. The notice also indicates that there will be no disclosure if an allocation is not awarded to an applicant or while applications are pending. Applicants with outstanding publicly registered securities (including securities issued by related entities) should consult with securities disclosure counsel before signing and submitting the consent.

Volume Cap Allocations and Methodology

Allocations of the \$2 billion TEDB volume cap will be made in at least two tranches. Each Indian tribal government will be limited to \$30 Million of volume cap in the first allocation. Limits on subsequent tranches will be announced at a later date. Failure to conclude issuance of Tranche 1 allocations by December 31, 2010, or Tranche 2 allocations by December 31, 2011, results in forfeiture of such allocations. Forfeited allocations may be made available by the IRS in future allocation processes.

Tranche 1: The initial \$1 billion of the volume cap will be allocated in connection with the first application deadline, August 15, 2009. Qualified projects will be fully allocated if they do not exceed the amount available in that tranche. If the total requested allocations for qualified projects exceeds amount available for that tranche, actual allocations which would have otherwise been approved will be reduced pro rata so that aggregate allocations do not exceed \$1 billion. If an applicant receives a reduced allocation under this process, it may request the balance of its initial requested allocation in connection with the second application deadline.

Tranche 2: . The second \$1 billion of the volume cap (and any remaining from the initial allocation) will be allocated in connection with second application deadline, January 1, 2010. Qualified projects will be fully allocated if they do not exceed the amount available in that tranche. If the total requested allocations for qualified projects in tranche 2 exceeds amount available for that tranche, actual allocations which would have otherwise been approved will be reduced pro rata so that aggregate allocations do not exceed the amount of volume cap available. If any volume cap remains available after the second allocation, the IRA may make such amounts available for allocation in an allocation process to be announced at a future date.

Joint Projects

Applications may include an Indian tribal government's share of a joint project. Indian tribal governments receiving allocations may designate an "on behalf of issuer", subject to certain restrictions. Additionally, Indian tribal governments may assign allocations to other Indian tribal governments who act as pool bond issuers in certain circumstances. In either case, proceeds issued in one of these structures will be deemed to be proceeds of bonds issued by the Indian tribal government receiving the allocation.

If you have questions regarding these matters, or if you would like to schedule an on-site briefing on Tribal Economic Development Bonds, please contact Russ Brien by telephone at 913.205.7513 or by email at russ@brienlawllc.com.

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