



National
Congress of
American
Indians

Include Tribal Tax Parity in the Tax Cuts and Jobs Act Conference:

**Tribal Tax Parity Provisions Are Germane and
Congress Has A Constitutional Responsibility to Include Tribes**

December 8, 2017

Over the last month, Congress has moved quickly toward enacting historic reforms to the Internal Revenue Code. These will be the most significant reforms in thirty years, and they will fundamentally change our tax system and affect every individual and governmental or business entity in this country.

Indian Country has been virtually left out of the reform effort, despite our education efforts over the last several years and our repeated outreach to staff and members in both the House and Senate during the past few months.

As you know, the federal government has a responsibility to Indian tribes and tribal members because the federal government's direct relationship with tribal governments. This responsibility stems from the Constitution. There is still time for Congress to uphold its obligation to Indian Country, but it must act now.

Congress should ensure that tribes benefit from tax reform by including tribal tax parity provisions related to provisions in the House or Senate bill during conference. Conferees have significant flexibility to shape the final legislation—even where provisions could be considered new material. According to CRS, a conference report must be within “the scope of the differences” between the House and Senate versions of a bill, meaning conferees can choose either version of the bill or some compromise between the two. CRS further points out that the rules are less stringent than they appear, as “the House often waives its rules that restrict the authority of conferees . . . [and Senate precedents and practice] allow the inclusion of new matter as long as it is reasonably related to the matter sent to conference.”¹ Moreover, the conferees enjoy the most flexibility to address the content of the legislation when—as is the case here—“they are in conference with a bill from one house and a single amendment from the other house that proposes to replace the entire text of the bill.”²

Accordingly, there is a clear avenue for Congress to uphold its treaty and trust responsibilities to Indian Country.

¹ CRS Report RS22733, Senate Rules Restricting the Content of Conference Report, Elizabeth Rybicki, p. 1, November 27, 2017.

² *Id.*

We have been informed, however, that additions to the final bill must be scored by the Joint Committee on Taxation. Unfortunately, JCT has only provided a score with respect to tax-exempt bond parity, not the comprehensive package of tribal tax reform priorities. This is disappointing because Representatives Kind and Jenkins formally requested scores for each of the provisions in the Tribal Tax and Investment Reform Act on August 23, 2017. Therefore, we request the Joint Committee on Taxation to provide scores for the provisions described below, and we urge all members of Congress to weigh in with the Committee to act expeditiously.

Tribal communities face significant challenges with high poverty rates, significant unemployment, and considerable infrastructure needs. Indian Country needs Congress to step up and provide tribal governments the tools to overcome these challenges through tax reform. Tax reform is a once in a generation opportunity to make economic progress, and we highlight the following provisions for inclusion during conference:

- *Parity for Tax-Exempt Bonds.*

Providing tax-exempt bond parity is within the scope of the differences. The House and Senate bills each include various provisions dealing with tax-exempt bonds. Sections 3601-3604 of the House bill deal with bond reform. Specifically, these provisions would terminate private activity bonds, repeal advance refunding bonds, repeal tax credit bonds, and prohibit tax-exempt bond financing for professional sports stadiums. Section 13532 of the Senate amendment would also repeal advance refunding bonds. Not only are these provisions a significant overhaul of the federal tax code's treatment of tax-exempt bonds, several of the provisions directly or indirectly affect section 7871 of the tax code, which governs tribal bonding authority.

Currently, tribes are the only governments that are limited to using tax-exempt bond financing for "essential government functions." The IRS has interpreted this standard to exclude tribal economic development activities even though state and local governments routinely use tax-exempt financing for development projects. This limitation on tribes greatly inhibits infrastructure deployment and economic growth. In addition, tribes are not permitted to issue private activity bonds, except to construct on-reservation manufacturing facilities with a certain ratio of employees-to-capital and under the Tribal Economic Development Bond program in Section 7871(f).

Including tribal government authority to issue and utilize tax-exempt bonds to the same degree as state and local governments is reasonably related to the matters sent to conference. The Tribal Economic Assistance Act (S. 2012) and the Tribal Tax and Investment Reform Act (H.R. 3138 & S. 1935) contain provisions addressing this issue. Additionally, Senator Hoeven is continuing to work on this issue, and has obtained a JCT score for a specific proposal that repeals the essential governmental function test that applies to tribal government bonds.

- *Parity for Indian Adoption Tax Credit.*

Providing a technical fix to the adoption tax credit that would provide parity to tribal governments is within the scope of the differences. The House has sought to reform tax policy related to adoption throughout the legislative process. The introduced version of the House bill included a repeal of the adoption tax credit. After further consideration, the repeal provision was eliminated. However,

section 1406 of the House bill still repeals the income and FICA tax exclusion for adoption assistance programs. As such, federal tax policy related to adoption is still being debated in conference.

Tribes need adoption tax credit parity. Currently, families that adopt special needs children in tribal court are ineligible for tax benefits available to families that adopt special needs children in state court. Native adoptive children and their families should have the same access to tax benefits as everyone else.

Including a technical fix to provide tribes adoption tax credit parity is reasonably related to the matters sent to conference. The Tribal Tax and Investment Reform Act (H.R. 3138 & S. 1935) and the Tribal Adoption Parity Act (H.R. 2035 & S. 876) contain language addressing this issue

- *Parity for Excise Tax Exemptions.*

Providing a technical fix to ensure tribes have the same access to excise tax exemptions is within the scope of the differences. The House and Senate bills include significant reforms to excise taxes, both domestically and internationally. For instance, section 3802 of the House bill and section 13602 of the Senate amendment would impose an excise tax on tax-exempt organization executive compensation. Both the House and Senate would also increase the excise tax rate for stock compensation of insiders in expatriated corporations. Additionally, although not exactly the same, section 5103 of the House bill and section 13701 of the Senate amendment would impose an excise tax on private endowments of education institutions.

The House bill includes several more excise tax provisions. Section 4303 would impose an excise tax on specified amounts paid by a U.S. payor to related foreign recipients to the extent the amounts are deductible by the U.S. payor. Section 4402 addresses rum excise taxes to Puerto Rico and the Virgin Islands. Section 5101 would simplify excise tax based on private foundation investment income. Given the expansive treatment of excise taxes and the differences between the House and Senate excise tax proposals, excise tax amendments are within the scope of conference.

Currently, tribal governments do not receive the same excise tax exemptions as state governments because the test to determine the availability of the exemptions is different for tribes and states. This disparity diverts badly needed resources that would be used by tribes to provide government services to their citizens. Addressing this disparity requires only a minor technical fix and does not create any new excise tax exemptions.

Including a technical fix to provide tribes excise tax parity is reasonably related to the matters sent to conference. The Tribal Tax and Investment Reform Act (H.R. 3138 & S. 1935) includes language making this technical correction.

- *Parity for Indian Health Service (IHS) Health Professionals.*

Providing parity for the recruitment and retention of IHS health professionals is within the scope of conference. Section 1203 of the House bill specifically addresses one aspect of fixing the current disparity. This section would exclude from gross income payments made under the Indian Health

Service loan repayment program.

Currently, IHS student loan repayment benefits are not tax-exempt even though the same benefits if offered by any other public sector health service provider would be tax-exempt. This disparity puts IHS at a disadvantage, which negatively affects health care services in tribal communities. Tribes are appreciative that this provision was included in the House version, and urge its continued inclusion in the conference. Indian Country further urges Congress to expand on the current provision in the House bill to include the IHS scholarship program as well.

- *Increase Low-Income Housing Tax Credits Deployment in Indian Country.*

Amending the Low-Income Housing Tax Credit (LIHTC) program to increase its deployment in Indian Country is within the scope of the differences. Sections 13411 and 13412 of the Senate amendment would modify the LIHTC program with respect to veterans and rural housing. Given that the Senate bill already amends the LIHTC program, additional amendments to the program would be within the scope of conference.

The LIHTC program could provide much needed private investment in affordable housing in tribal communities. As such, Indian Country urges Congress to treat tribes as states for LIHTC allocations, establish a tribal set-aside, and adjust the tax code to make Indian areas eligible for enhanced credits. The Affordable Housing Credit Improvement Act (S. 548) includes language making Indian areas eligible for enhanced credits.

- *Parity for Qualified Opportunity Zones and Other New Tax Code Provisions.*

In general, tribal tax reform priorities are technical fixes that are necessary because tribes were overlooked or made subject to unique standards when Congress created new federal tax policy. Indian Country urges Congress not to make the same mistake again.

Section 13823 of the Senate amendment would create a whole new subchapter of the tax code authorizing states, through their governors, to nominate tracts of land to be designated as opportunity zones. Although such opportunity zones are intended to be the selected based on the same criteria that applies to the low-income community designation under the New Markets Tax Credit, the provision contains no recognition that Indian tribal leaders, like state elected officials, should have a voice in the selection of such zones. Tribes should be treated as equal partners with states for purposes of this section and any other provision creating new federal tax policy aimed at providing tax incentives to spur investment in economically distressed and high-unemployment communities or areas.

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No one in Congress intended that a \$1.5 trillion tax bill would exclude the needs of tribal governments. Tribal governments have the responsibility to provide services in their communities like education, health care, public safety, and infrastructure, and it is vital that Indian Country continues to move forward with the rest of the Country. Therefore, we urge that tribes be included in tax reform. Thank you for your consideration, and as always, we stand ready to help you in any way that we can.