December 20, 2011

Internal Revenue Service
CC:PA:LPD:PR (Announcement 2011-71)
Room 5203
PO Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments on IRS Announcement 2011-71

Ladies and Gentlemen:

Section 7871(f) of the Internal Revenue Code (the "Code"), as added by the American Recovery and Reinvestment Act, allows Indian tribal governments for the first time to issue tax-exempt bonds free of the "essential governmental function" restriction that generally limits tribal tax-exempt financings. Although the statute contains no limitations on the amount of bonds that can be allocated to a single tribe, it contains an overall limitation ("Volume Cap") of $2 billion. Section 7871(f) was intended as a temporary solution to restrictions on tribal financing. While we think it is critical to support and work for a permanent solution to the inequitable tax treatment of tribal issued bonds, we also recognize that it is important to make this interim provision work more efficiently.

This responds to your request, pursuant to IRS Announcement 2011-71 (the "Announcement"), for comments regarding the reallocation of available Volume Cap for tribal economic development bonds (TEDBs), as authorized in section 7871(f) of the Code, to facilitate the issuance of these bonds by Indian tribal governments. The national Volume Cap originally established under section 7871(f) on issuance of TEDBs is $2 Billion.

These comments are submitted jointly by the National Congress of American Indians (NCAI), the Native American Finance Officers Association (NAFOA), and United South and Eastern Tribes Incorporated (USET). NCAI, as the oldest and largest representative of tribal governments and communities, serves the broad interests of tribal governments. NAFOA represents tribal leadership and tribal professionals in economic and fiscal policy matters. USET represents twenty-six federally- recognized Indian tribes from Texas to Maine. These comments reflect the common concerns raised by our respective constituencies who consider broad use of tax-exempt debt a vital component for stimulating tribal economies and governmental parity. We encourage the IRS to consider all comments received from tribal leadership and other affected parties.

Overview of Comments

Our comments strongly support the suggestion made in the Announcement that the reallocation of Volume Cap for TEDBs should be implemented so as to facilitate the issuance of TEDBs by Indian tribal governments. In the Announcement, the IRS estimated that up to 95% or more of the $2 Billion in Volume Cap has not been utilized, and thus may become available for reallocation as of January 1, 2012. We believe that the allocation methodology for TEDBs can and should be improved so that Indian tribal governments may make more effective use of this important interim financing tool until a permanent solution is enacted.

As requested in the Announcement, our comments suggest "appropriate methods to employ and criteria to consider" in reallocating this Volume Cap, based on "facts and circumstances affecting Indian tribal governments" and other "relevant factors." As also requested in the Announcement, our comments address the specific suggestions made in the Announcement to improve the existing methodology for allocating this Volume Cap, set forth in Notice 2009-51 (the Notice). Finally, our comments suggest certain changes to the methodology set forth in the Notice beyond those proposed in the Announcement, with an eye to further enhancing the ability of Indian tribal governments to effectively make use of the remaining Volume Cap for TEDBs.

Our comments are based on the interests of our members, including tribal leadership, tribal members, and tribal finance professionals, and are offered with a view toward the need for the administrability of applicable tax law requirements. We believe that improvements to the existing methodology for allocating TEDB Volume Cap will be very helpful to Indian tribal governments in meeting their financing needs and the needs of their members.

Comments on Specific IRS Proposals

The Announcement proposes and solicits public comment from Indian tribal governments and other interested members of the public on certain proposed improvements to the application process for Volume Cap allocations. These specific proposals and our corresponding comments are set forth below.

(1) Project Cost. The IRS may require that applicants provide information on the costs of a proposed project and how the estimated cost was determined.

Comment: It appears that the purpose of this proposal is to insure that applications be submitted only for projects where an issuer has properly determined the corresponding costs and where the costs appropriately support the amount of the requested allocation. If so, the goals of the proposal are without doubt legitimate. Nevertheless, it should be pointed out that satisfying this requirement may impose administrative burdens both on tribes applying for Volume Cap allocations, as well as the IRS, depending on the level of precision required by the IRS on estimated costs. In the context of a typical construction project, final information on project costs would not normally be available until the time that the actual financing for the project has been secured from lenders or investors, which is when the issuer would enter into a formal construction contract. Prior to that time, the issuer would normally estimate costs based on consultations with its general contractor or other consultants. In connection with an allocation

application, a requirement to provide the IRS with information on project costs raises these questions: (a) What kinds of cost estimates would the IRS require or consider acceptable? (b) Would the nature of the cost estimates depend on the type of project being undertaken? (c) Under what circumstances would an applicant be held accountable for estimates that the IRS found unacceptable? (d) If final costs differ from those presented to the IRS, would the applicant's allocation be jeopardized?

It is important to recognize that the amount of debt financing required for any construction project (and certain other projects) will always be subject to estimates until the actual costs are finally committed to. Recognizing that Volume Cap allocations should be appropriately sized in relation to corresponding project costs, the pertinent question is whether up-front measures to require certainty in estimating costs will achieve a significant purpose. If applicable tax requirements are overly stringent, applicants will face difficulties demonstrating their expected costs and the issuance of TEDBs by Indian tribal governments will not have been facilitated. In addition, such requirements could impose administrative burdens on the IRS in its efforts to review or confirm cost information. On the other hand, if applicable tax requirements are overly flexible, the original objectives of the requirement may not be well served. On balance, assurances that TEDB allocations are granted appropriately can probably be achieved adequately through the applicant's Plan for Financing and its Readiness to Issue, as discussed below.

(2) Plan for Financing. The IRS may require that applicants provide certain additional information with respect to their proposed plans of financing, including the following: (a) the expected schedule for spending the proceeds of the proposed financing, taking into account required permits, engineering studies, architectural plans, etc.; (b) a requirement that applicants state whether the proposed TEDBs are marketable, taking into account the type and location of the project, the creditworthiness of the applicant and other considerations; and (c) whether the applicant can obtain financing from other sources if required for project costs.

Comment: We support the concept that applications should be submitted only for projects that are financially viable. Requirements with respect to both an applicant's Plan for Financing and Readiness to Issue should help satisfy this objective. Nevertheless, we have serious concerns over continuing to use existing allocation methodology, under which existing allocations have been reduced on a pro rata basis (as discussed below) in order to accommodate all applicants for TEDB Volume Cap. These same concerns apply to the corresponding requirement above that other sources of financing be required and their availability demonstrated. We believe that, in general, the effectiveness of the TEDB program may hinge significantly on whether an applicant's financing needs for a qualifying project can successfully be met entirely through an issuance of TEDBs, without the issuer needing to arrange for additional financing from other sources. In fact, under current methodology, in which applicants' existing Volume Cap allocations have been reduced pro rata, the financing objectives of many applicants have been frustrated in significant part because of the difficulties they have faced in attempting to arrange financing from multiple sources. These difficulties include the need to reconcile competing and often conflicting demands from potential financiers, including reconciliation of rights to collateral, priority of payment, etc. In addition, timing and other arrangements potentially need to be coordinated among divergent financing teams,

including associated advisors and legal counsel. This process, at best, is unnecessarily expensive and time-consuming and frequently proves to be infeasible.

(3) Evidence of Readiness to Issue. The IRS may require that applicants demonstrate an ability to use the allocation prior to the forfeiture deadline, including information related to project readiness, marketability of the TEDBs, availability of other required financing, and a demonstration that the proposed TEDBs will satisfy applicable tax law requirements (for example, through a discussion with or preliminary analysis from a recognized public finance attorney or firm). *The IRS seeks specific comments on what should constitute appropriate evidence of readiness and whether documentation should be required.*

Comment: As noted above, we strongly support the concept that applications should be submitted only for projects that are financially viable. Requiring third party verifications may help achieve this objective. Applicants will likely choose to engage a public finance attorney or firm in any event prior to making their IRS submissions, so it is unlikely that providing the corresponding tax analysis as part of an application would impose additional burdens on the applicant. That analysis would need to be undertaken in any event as part of the TEDBs issuance process. Similarly, a letter from a financial institution or financial advisor could also support the applicant's readiness to issue and the financial viability of the project. In any case, readiness to issue should be assessed in relation to the overall allocation process, as discussed below.

(4) Allocation Process. The IRS is considering a two-step allocation process. The first step would be to award written commitments in "the order of priority based on the application submission date and amount requested." Granting the actual allocation would be a second step and would occur a certain number of days prior to closing on the TEDB financing (eg, 60 days). *The IRS seeks specific comments on the number of days an allocation would be "locked in," and the maximum number of days that should be allowed from the date of the IRS commitment to the date of the actual allocation.*

Comment: We support a two-step allocation process, although we recommend that both the commitment stage and the closing stage of the process be governed by timing constraints. Without an overall time limit on the entire process, an applicant could potentially reserve an allocation commitment for an unlimited time period, notwithstanding the proposed 60-day limitation on the closing stage of the process. With respect to the closing stage, we recommend providing applicants with 90 days, rather than 60 days, to close a TEDB transaction once an allocation is actually granted. These recommendations are made in conjunction with our belief that allocation methodology should evolve toward more of a first-come, first-served process, tempered by considerations of financial viability, and with the paramount goal of facilitating the issuance of TEDBs by Indian tribal governments. Part of this methodology should involve limiting the life of Volume Cap allocations to help insure fairness to unsuccessful applicants who, under existing methodology, would have received pro rata reductions in their requested allocations. Under this new methodology, applicants who receive commitments for allocations would be subject to a strict deadline for obtaining their actual allocation awards and then a separate deadline (eg, 90 days) for closing their TEDB financings. If an applicant is not able to meet those time frames, it should be required to return its unused allocation (for use by another

applicant). For good cause, applicants forfeiting allocations should be allowed to re-apply, but should go to the end of the queue.

(5) Reduced Allocations. The IRS is considering awarding allocations in amounts less than requested if the total amount of Volume Cap requested exceeds what is available. Generally, a reduced allocation would not be awarded unless the applicant demonstrates that it has the additional financing resources to complete the project.

Comment: We do not support this concept. For the reasons given above, we believe that the current methodology of making pro rata reductions in allocation awards has had the unintended consequence of jeopardizing the effectiveness of the TEDB program for most applicants. On balance, we believe that the objectives of the TEDB program are better served if the allocation rules insure that successful applicants are able to meet their entire financing needs through TEDBs, without needing other sources of financing. This will insure a more effective use of TEDBs, and facilitate the issuance of TEDBs by Indian tribal governments.

Additional Comments

We believe that, in addition to the improvements discussed above, additional improvements should be considered in attempting to make the allocation process for TEDBs more effective. These include: (a) lifting the existing $30Million cap; and (b) adding flexibility to the existing insubstantial deviation rule.

$30 Million Cap

Currently, under the Notice, individual allocations of Volume Cap are subject to a $30 Million limit per Indian tribal government. This $30 Million cap, together with the existing requirement that allocations be subject to a pro rata reduction, has had the unintended consequence of requiring many potential TEDB issuers to identify and coordinate multiple financing sources in order to meet their financing objectives for a single project. As described above, TEDBs are most effective when they can satisfy the entire financing objectives of an issuer for a single project, without the need for an additional financing source. When the TEDB program requires an issuer to draw on multiple financing sources for a single project, the effectiveness of the TEDB program is diminished.

Recommendation: We recommend that the existing $30 Million cap be lifted. This will help facilitate the issuance of TEDBs by Indian tribal governments. A more appropriate limitation would be $100 Million (5.00% of the original $2 Billion Volume Cap for TEDBs).

Insubstantial Deviations

Currently, under the Notice, allocations of Volume Cap will be valid notwithstanding insubstantial deviations from the information submitted in the application. Procedures are set forth in the Notice for applicants to seek IRS approval of specific insubstantial deviations.

Recommendation: We recommend that the existing insubstantial deviation rule be made more flexible so that TEDBs can be issued for projects even where the details have changed or evolved in a manner that is more than insubstantial; provided, however, that the project to be

financed remains a qualifying project and that the final details of the project are reasonably consistent with the description provided in the issuer's original application. Moreover, applicable tax guidance should give issuers and their tax counsel authority to make the requisite tax determinations. Requiring issuers to obtain IRS approval of project changes adds administrative burdens to the issuance process and does not reasonably serve to facilitate the issuance of TEDBs by Indian tribal governments.

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