

The Tribal Tax and Investment Reform Act of 2017: Why the Time to Act is Now

H.R. 3138, the Tribal Tax and Investment Reform Act of 2017, was introduced on June 29, 2017 by Congressman Ron Kind (D-WI), Congressman Lynn Jenkins (R-KS), Congresswoman Suzan DelBene (D-WA), Congressman David Reichert (R-WA), Congressman Tom Cole (R-CA), Congressman Doug LaMalfa (R-CA), and Congresswoman Norma Torres (D-CA). On October 5, 2017, Senator Jerry Moran (R-KS) introduced its Senate companion, S. 1935.

H.R. 3138/S. 1935 amends the Internal Revenue Code in order to treat Indian tribal governments in the same manner as state governments for federal tax purposes. Under current law, there are several instances in which more restrictive and often unworkable rules have been applied to tribes; in other cases, the tax treatment of tribal governments has simply been overlooked. Corrective legislation is important to complete the work that Congress originally undertook when it passed the Indian Tribal Governmental Tax Status Act in 1982. Such corrections will further reinforce the governmental status of tribes and facilitate equal access to both financial capital and tax benefits that state and local governments already enjoy.

Sec. 1. Short Title:

Designates the title of the bill as the "Tribal Tax and Investment Reform Act of 2017."

Sec. 2. Findings:

Recites findings that emphasize the need for parity in the Code's treatment of state, local and tribal governments. This includes the consistent recognition of tribes as governments in the Constitution; federal jurisprudence and longstanding administrative policy that Indian tribes are governments; that tribes have responsibilities to provide governmental programs and services to tribal citizens; and the historic disadvantages faced by Indian tribal governments in accessing capital for economic development and self-determination.

Sec. 3. Treatment of Tribes as States with Respect to Bond Issuances and Excise Taxes:

Addresses the lack of equal treatment under current law Code rules applicable to tax-exempt financings by tribal governments.

SUBSECTION (A) The subsection establishes private activity bond volume cap rules to enable tribal governments, like states, to issue limited quantities of private activity bonds for economic development purposes, such as rental housing and other "private" uses.

SUBSECTION (B) amends Section 7871 by eliminating the "essential governmental function" test and subjecting tribes to the same federal tax standards and requirements as states for governmental tax-exempt bond issuances. Under these standards, there would be no restrictions on the type or location of bond-financed facilities so long as they are owned and operated by a federally recognized tribe. This section also puts tribes on a more level playing field with respect to certain governmental

excise taxes by repealing the essential governmental function test imposed under current law as an "additional" requirement on tribal governments seeking to claim governmental excise tax exemptions.

The changes would be effective transactions after, and debt obligations issued in calendar years beginning after, the date of enactment.

Sec. 4. Treatment of Pension and Employee Benefit Plans Maintained by Tribal Governments:

SUBSECTION (A) amends various provisions of the Internal Revenue Code to treat tribal government plans like state government plans, including with respect to the following:

- Adding the same distribution rights for tribal and state public safety employees
- Removing the "essential governmental function" and "commercial" activity tests that currently apply to tribal plans, but not to state and local government plans
- Confirming that pension plans may honor tribal court domestic relations orders that meet the same standards applied to state court orders
- Grandfathering tribal "457" plans that otherwise comply with the Code and were established when it was not clear what plans tribes could adopt
- Applying the same employment tax rules for tribal deferred compensation plans that apply to state and local plans

SUBSECTION (B) amends the Employee Retirement Income Security Act (ERISA) provisions of federal law relating to governmental plans so that tribal plans will be treated as governmental plans regardless of whether the employees covered are engaged in commercial or governmental activity. By removing tribal governmental plans from ERISA, the Department of Labor will no longer have jurisdiction to audit tribal plans for compliance with rules designed for private pension and benefit plans.

The common theme of all of these amendments is to provide government fairness between Indian tribal plans and other government plans.

Sec. 5. Treatment of Tribal Foundations and Charities like Charities Funded and Controlled by Other Governmental Funders and Sponsors:

The inadvertent lack of parity between tribes and other governments under the public charity classification rules makes it difficult for Indian tribes to form and fund separate nonprofit organizations for charitable purposes without risking classification as a private foundation.

SUBSECTION (A) treats tribal funding as public support for purposes of Code section 170(b)(1)(A)(vi) (*i.e.*, the public charity classification test that is satisfied on the basis of how much support a charity derives from "public" sources).

SUBSECTION (B) treats charitable organizations formed to support Indian tribal governments the same as organizations formed to support state and local governments for purposes of Section 509(a)(3).

Sec. 6. Improving Effectiveness of Tribal Child Support Enforcement Agencies by Parity of Access to the Federal Parent Locator Service and Federal Tax Refund Offsets:

SUBSECTION (A) of the bill amends Section 453(e) of the Social Security Act (SSA) to child support enforcement agencies of Indian tribes and tribal organizations to access the same parent locator database available to State child support agencies.

SUBSECTION (B) of the bill amends the SSA and the Code in order to permit tribal child support enforcement agencies to offset tax refunds for past due payments if necessary.

Sec. 7. Recognizing Indian Tribal Governments For Purposes of Determining Under the Adoption Tax Credit Whether a Child has "Special Needs:"

Amends Section 23(d)(3) of the Code to allow the Adoption Tax Credit where an Indian tribal government (or a tribal social service agency) has made a determination that a child eligible for adoption has "special needs." Under current law, only State government agency determinations of special needs are taken into account for adoption tax credit purposes, even though Tribal governments have jurisdiction over Indian adoptions.

For more information about the topics discussed in this explanation, please feel free to contact Kayla Gebeck at (202) 469-5372 or kayla.gebeck@hklaw.com or any other member of Holland & Knight's Native American Law Group.