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Written Testimony to the House Committee on Ways and Means  
Friday, May 10 2024 – Salt River Pima Maricopa Indian Community

Chairman Smith, Vice Ranking Member Chu, and Members of the W&M Committee, thank you for taking the time to hold a field hearing in Indian Country and for inviting me to testify. As the elected chairman of the Santa Ynez Band of Chumash Indians, I am here today to ask the Committee to be mindful of the challenges facing Indian Country when developing tax policy.

In conversations with tribal leaders across Indian Country, a recurring concern emerges: the necessity of ensuring parity for tribal governments alongside state and municipal counterparts. All share the common objective of fostering economic activity to bolster services and employment for their constituents. In this context, I extend appreciation to Congresswoman Gwen Moore and Congressman David Schweikert for championing tax parity for tribes through the introduction of the Tribal Tax and Investment Reform Act of 2024.

As I previously presented to this Committee in 2020, tribal governments lack a fundamental tool available to state and municipal counterparts: full access to tax-exempt bond financing. From 1987 to 2010, Indian tribal governments issued an average of approximately \$157 million annually in tax-exempt bonds, totaling about \$3.76 billion across 321 transactions. Although this appears substantial, it accounts for less than one-tenth of one percent of the total \$6.6 trillion in tax-exempt municipal bonds issued during this period.

What explains this significant difference? Unlike state and local governments, Tribal governments are governed by the Essential Government Function test (EGF). The EGF was initially introduced in 1982 as part of the Indian Tribal Government Tax Status Act, which included provisions for tax-exempt bonds, aiming to address concerns about tax parity for tribes. While this legislation represented progress, it fell short of achieving full equality with states and local governments. Private activity bonds, except for those relating to manufacturing plants on Indian lands, were not permitted.

In 1987, Congress further defined the EGF in the statute, limiting the use of tax-exempt bonds to functions typically undertaken by states and local governments. In practice, this constrained the use of tax-exempt bonds to specific functions, such as schools, streets, or sewers, which typically do not generate revenue. In contrast, state and local governments have greater flexibility, being able to utilize tax-exempt bonds for a wider array of projects that generate revenue, such as convention centers or commercial buildings.

Practically, this disparity translates to substantially higher financing costs for projects on tribal land compared to identical endeavors undertaken by state and municipal governments. Tribal governments' lack of access to tax-exempt financing inflates borrowing costs by approximately 25% than those of state and municipal governments, dissuading investment in tribal communities. I would also ask the Committee to consider the recently published report from

the Federal Reserve Bank of Minneapolis entitled “[Tax code constraints limit tribal tax-exempt bonding](#)”.

I urge the Committee to take action to lift the restrictions imposed by the Essential Government Function test on tribal governments, as outlined in the Tribal Tax and Investment Reform Act.

Congress recognized the shortcomings of the EGF in 2009 by temporarily addressing the disparity through the Tribal Economic Development Bond program. This initiative authorized tribal governments to issue a combined \$2 billion in tax-exempt bonds for eligible projects located on tribal land, excluding gaming facilities, with each allocation requiring Treasury approval.

Although the program demonstrated a strong demand for economic development in Indian Country, it had limitations. The \$2 billion cap on tax-exempt bonds has been reached, limiting usage to tribes with approved projects over the past decade instead of benefiting all tribal governments. Moreover, initial regulations were overly prescriptive, hindering many tribes with shovel-ready projects from seizing the opportunity. Additionally, the issue of whether bonds maintained tax-exempt status when refinanced was unaddressed, jeopardizing project viability. Despite these challenges, the popularity of the program underscores the necessity for long-term access to tax-exempt financing in Indian Country. This sentiment is echoed by entities beyond Congress, including the Treasury Department, Government Accountability Office, and Joint Committee on Taxation, which identified the EGF as a barrier to tribal economic development.

While each of the provisions found in the Tribal Tax and Investment Reform Act of 2024 deserves attention by the Committee, I want to bring Sections 8, 10 and 13 of the bill to your attention. Section 8 of the bill creates a New Markets Tax Credit tribal set aside, which would encourage needed private investment into tribal areas. This provision, along with the tax-exempt bond provision, would be a game changer for economic growth in tribal areas and benefit the local, regional, and national economies.

Section 13 of the bill will provide for exclusion from gross income for payments under Indian health service loan repayment program and Indian health professions scholarships program. This section will make health professionals at the Indian Health Service eligible for recruitment and retention tax incentives available to other public sector health professionals. Under current law, the National Health Service Corps (NHSC) Loan Repayment Program offers loan repayment assistance to primary care medical, dental, and mental/behavioral health providers who commit to serving in Health Professional Shortage Areas (HPSAs) for a specified period. Benefits offered through this program are exempt from federal taxation. However, the benefits provided by Indian Health Service (IHS) Loan Repayment Program do not enjoy such an exclusion from federal taxation. This disparity in treatment of similar programs makes Indian Country a less desirable location to practice and further exacerbates health disparities found on most reservations.

Lastly, Section 10 of the bill clarifies that Tribal General Welfare Benefits (GWB) are not categorized as income related to Supplemental Social Income eligibility or benefit amounts. Championed by then Congressman Devin Nunes, the Tribal General Welfare Exclusion Act (TGWEA) excludes from gross income, for income tax purposes, the value of a tribal general welfare benefit. Unfortunately, ambiguity remains around this portion of the law. For example, various need-based programs like the Supplemental Social Income are defined by the Social Security Administration to include GWB as resources. Section 10 clarifies that these benefits from Supplemental Social Income eligibility and benefit amount determinations.

Thank you for your attention and consideration of these critical matters affecting tribal communities.

# Tax code constraints limit tribal tax-exempt bonding

Legal barriers may contribute to tribal governments' lower usage of tax-exempt bonds

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## Article Highlights

- › Tribal citizen per capita tax-exempt bond proceeds fall below U.S. residents as a whole
- › Legal constraints to issuing bonds and raising government revenue likely contribute to gap
- › Further analysis requires more complete tribal bond data

Tax-exempt municipal<sup>1</sup> bonds play an important role in financing the construction of public purpose projects and supporting private development across the country. For a given level of risk, tax-exempt debt can offer a lower cost of capital than financing the same project using taxable debt.<sup>2</sup> Tribal governments, however, face both legal and debt service barriers to using this important financing mechanism available to state and local governments. These barriers can create challenges for tribes seeking to access the [half-trillion-dollar](#) annual tax-exempt municipal bond market for low-cost capital financing.

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As part of our mission to advance the economic self-determination and prosperity of Native nations and Indigenous communities, the Center for Indian Country Development provides research and analysis on factors influencing access to capital in Native communities. To shed light on the barriers to tribes using tax-exempt bonding, we review the legal framework governing tribal tax-exempt bonding authority. We also provide an analysis of per capita tax-exempt bond financing. Our analysis spans 2003–2010—the most recent years for which both tribal-specific bond data are publicly available from the U.S. Department of the Treasury (Treasury) and annual municipal bond data are available from the Internal Revenue Service (IRS).

After accounting for differences in the target populations of both tribal governments and municipalities, we find that from 2003–2010, tribal governments' use of tax-exempt bonds falls below that of state and local governments. We also explore tribal-specific factors that may explain why we observe this large capital gap. More tribal tax-exempt bond data are needed to extend this analysis to recent years.

## Tribal governments' disparate access to tax-exempt bonding dates back to the 1980s

Prior to 1983, federally recognized tribes (hereafter referred to as *tribes*) were not included as governmental entities eligible to issue tax-exempt bonds under [Section 103](#) of the Internal Revenue Code (hereafter referred to simply as *tax code*). However, in 1983, Congress passed the [Indian Tribal Governmental Tax Status Act](#), authorizing tribes to temporarily issue tax-exempt bonds under a

newly added [Section 7871](#). While many of the provisions were set to sunset in 1985, this tribal authority was later [made permanent](#) in 1984. Despite the act's initial purpose of creating tax parity between tribal and state governments, tribal organizations have [questioned](#) the act's final text for failing to establish tax parity between tribal governments and other governments.

Section 7871 imposes two substantial restrictions on tribal tax-exempt bonding authority inapplicable to state and local governments: (1) tribal governments cannot issue tax-exempt qualified private activity bonds, with one narrow exception;<sup>3</sup> and (2) substantially all tribal [governmental bond](#) proceeds must finance an "essential government function." The [qualified private activity bond](#) restriction renders tribes ineligible to issue [exempt facility bonds](#) (the proceeds of which can be used to finance solid waste disposal and waste recycling facilities), [small issue bonds](#) (the proceeds of which can be used for manufacturing facilities and farm property), and [redevelopment bonds](#) (the proceeds of which can be used to improve blighted areas).<sup>4</sup>

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The rationale for the "essential government function" restriction on tribal governmental bonding authority is explained in a 1982 [Senate Finance Committee report](#) often cited by the IRS. As articulated in this report, "These provisions do not permit an Indian tribal government (or subdivision) to issue tax-exempt bonds under circumstances where a corresponding issue by a State (or political subdivision) would not be tax-exempt."

In other words, the law prevented tribes from exploiting two tax exemptions—tax exemptions associated with bond financing as well as federal and state tax exemptions for project income—for a single project unless states could also do the same. To achieve tribal tax-exemption parity with states, Congress included the "essential government function" language appearing in [Section 115](#) of the tax code. Section 115 exempts income derived from utilities or exercises of any "essential government function" performed by state and local governments from taxable gross income. In this way, Congress addressed the tax-exemption concern by limiting projects eligible for tribal tax-exempt bond financing to the class of projects capable of generating tax-exempt income for states.

Imposing an "essential government function" requirement for tribal bonds to ensure tribes cannot exploit tax exemptions unavailable to states achieves this outcome only if "essential government function" possesses the same meaning under Section 7871 as under Section 115. Consistent with the Senate Finance Committee report, the IRS initially interpreted "essential government function" under Section 7871 in line with Section 115 of the tax code. The IRS interpreted "essential government function" under Section 115 [broadly](#) to include income generated from essentially all government enterprises supporting government operations. The IRS' reconciliation of "essential government function" for both tribes and states was, however, short-lived.

In 1987, Congress [amended Section 7871](#) to define "essential government function" as not including "any function which is not customarily performed by State and local governments with general taxing powers." Congress did not provide guidance as to the meaning of "customarily." Following the 1987 change, the IRS adopted a [narrower view](#) of "essential government function," interpreting "customarily" to exclude tax-exempt financing for all commercial or industrial activities.

In 2006, the IRS initiated a [proposed rulemaking](#) to recommend a three-pronged analysis for determining whether an "essential government function" was customarily performed: (1) the activity is not commercial or industrial, (2) numerous state and local governments have conducted and financed the activity with tax-exempt bonds, and (3) these governments have financed the activity for many years. The rule was never finalized, but the IRS adopted this standard in subsequent [technical advice memos](#). This three-pronged analysis remains the standard by which the IRS evaluates the tax-exempt status of tribal bonds.

The evolution of the IRS' interpretation of "essential government function" under Section 7871 after 1987 departs from its interpretation of the same phrase under Section 115 of the tax code. This departure restricts the class of tribal projects eligible for tax-exempt financing while simultaneously maintaining the broad scope of the *state* income tax exemption. Removal of commercial and industrial [activities](#) from the meaning of "customarily" for the tribal-specific definition of "essential government function" eliminates an array of projects financeable with tax-exempt bonds in the state and local government context. These include, for example, hotels and convention centers, sports stadiums, golf courses, and other common economic development initiatives. State and local governments finance these projects to support economic development by directly generating revenue for the municipality, attracting private business activity, and supporting growth of a sustainable tax base.

The Great Recession drew attention to the need for less restrictive bonding authority for tribal governments. Responding to the economic crisis, Congress—as part of the American Recovery and Reinvestment Act—[amended Section 7871](#) to pilot a special class of tribal tax-exempt bonds called [Tribal Economic Development \(TED\) bonds](#). TED bonds were not subject to the prohibition against qualified private activity bonds or the "essential government function" test. Many tribes used these bonds to refinance taxable bonds,

finance tourism activities, and fund economic development projects similar to those of state and local governments. TED bonds were subject to a \$2 billion volume cap, without increase or renewal. Although the volume cap has been reached, [recent policy discussions](#) reflect tribes' ongoing interest in tax-exempt economic development financing.

## Measuring impacts of tribal tax-exempt bond restrictions

From 1987–2010, 17 percent of the 565 federally recognized tribes at the time<sup>5</sup> collectively issued an annual average of \$159 million in tax-exempt governmental bonds for a total of roughly \$3.81 billion, according to a [2013 Treasury analysis](#). Tribal participation in the overall tax-exempt bond market rarely surpassed *one-fifth of 1 percent* in any given year—well below what we would expect from a self-reported American Indian and Alaskan Native (AIAN) population of [1.5 percent](#) of the U.S. population at that time.<sup>6</sup>

Recognizing challenges to quantifying the economic impacts of legal barriers to tribal bonding—including the lack of public data, inaccurate measures of tribal populations, and unique capital needs of tribes—the 2013 Treasury analysis shows the disparity in overall bond issuances between tribal and other governments. Recent research indicates this gap [persists](#). While we would expect to see less use of bond financing by tribal governments than state and local governments given differences in the sizes of their service populations, the difference is better assessed on a per capita basis.

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Our per capita analysis explores tribal and municipal bond data from 2003–2010. Specifically, we examine the per capita dollar value of [long-term tax-exempt governmental bond issuances](#) by all U.S. governments (the vast majority of which are state and local governments) and compare that to the per capita dollar value of long-term tribal tax-exempt bond issuances. Since tribal government services do not target a specific population, we define their target population as either (1) the overall AIAN population or (2) enrolled citizens of federally recognized tribes.<sup>7</sup> While there's no precise way to measure or compare the individual benefits of tax-exempt bonds, our analysis provides a way of thinking about an individual's share of the total dollar value of annual tax-exempt bond proceeds. Framing the disparity in terms of per capita investment allows for a more uniform comparison between tribal governments and municipalities.

We do not consider the per capita proceeds of tax-exempt qualified private activity bonds by state and local governments because tribes are unable, with one narrow exception,<sup>8</sup> to issue these bonds. Tribal access to the tax-exempt qualified private activity bond market could be meaningful to tribal economies. For context, the total proceeds of long-term tax-exempt qualified private activity bonds—which tribal governments cannot issue—exceeded [\\$58 billion](#) in 2020.

We focus our analysis on new [long-term](#) bond issuances because these figures generally exclude refinanced debt and, as a result, primarily represent new investment. The IRS designates long-term bond issuances to finance new projects as new tax-exempt bonds.

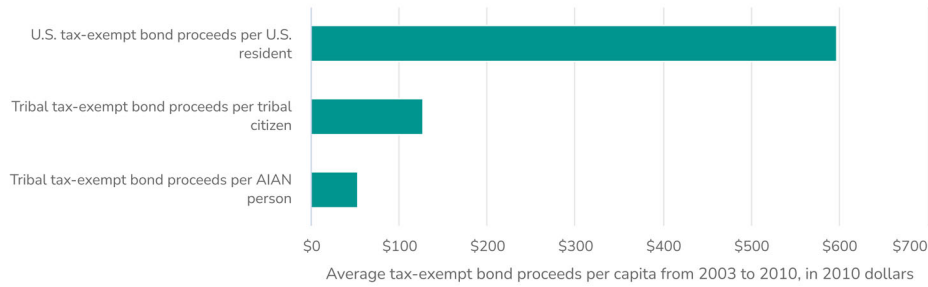
As shown in Figure 1, per capita tax-exempt bond proceeds are lower for tribal citizens and AIAN individuals than for U.S. residents as a whole.<sup>9</sup> Based on data from 2003–2010,<sup>10</sup> average per capita annual tax-exempt bond investments ranged from \$127 in tribal bond proceeds per tribal citizen to \$54 per AIAN individual. Over the same period, average per capita annual tax-exempt bond investments by all state and local governments were \$597 per U.S. resident. This means that on average, annual per capita tax-exempt bond proceeds by state and local governments were roughly five times higher than annual per capita tax-exempt bond proceeds by tribal governments for tribal citizens.<sup>11</sup> While state and local government tax-exempt bond financing can create spillover benefits for AIAN individuals living within their jurisdictions, and tribal bond financing can create spillover benefits for non-tribal citizens in those areas, our analysis illuminates overarching differences in the usage of tax-exempt bond financing between tribal and municipal governments.

## Potential reasons for the per capita tax-exempt bond disparity

The large gap in tribal and municipal governments' usage of tax-exempt bond financing is likely explained by, among other things, the legal constraints on tribal tax-exempt bonding authority.

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## Native Americans have lower per capita share of tax-exempt bond proceeds



Sources: Authors' calculations. Tax-exempt bond amounts are from the U.S. Department of Treasury's [Indian Tribal Government Access to Tax-Exempt Bond Financing](#) (Table 3) and the IRS' [New Money Long-term Tax-Exempt Governmental Bonds, by State of Issue and Bond Purpose](#) (Table 5). Population counts for AIAN individuals and the United States as a whole are from the 2000 Decennial Census. Tribal enrollment count is based on the U.S. Department of Housing and Urban Development's Indian Housing Block Grant Program's [Needs and Allocation](#) estimate for fiscal year 2000.

The “essential government function” test is likely one of the more significant reasons for the discrepancy due to its limitations on the scope of tribal activities eligible for tax-exempt financing. The test’s prohibition on commercial or industrial activity renders ineligible a class of projects capable of servicing debt with project-generated revenue. State and local governments will often issue tax-exempt revenue bonds—that is, bonds for which debt service is covered by revenue of the financed project—to finance commercial, industrial, or other projects outside the scope of an “essential government function” under Section 7871. For example, a municipality could use a tax-exempt revenue bond to help support the construction of a multifamily housing development with some units reserved for lower-income households, but the “essential government function” test prohibits a tribe from funding this type of project with the same financing mechanism.

Because these project-specific revenue bonds can be unavailable to tribes, tribes have limited access to what can be an efficient way to service debt since the projects pay for themselves. Tribes can still issue taxable revenue bonds for projects outside the scope of the “essential government function” test. However, taxable revenue bonds with the same credit rating of tax-exempt revenue bonds demand a higher interest rate which increases the cost of capital<sup>12</sup>—potentially rendering a project prohibitively expensive.

The “essential government function” test may also indirectly create disparities in tax-exempt bond usage by amplifying differences in the tax base and tax authority between tribes and municipalities. In the absence of project-generated revenue, state and local governments rely on tax revenue to service tax-exempt bond debt. Tribes, however, cannot pledge property taxes, sales taxes, or other sources of government revenues in the same fashion. Instead, tribes must rely on existing sources of revenue—often from commercial enterprises—to service debt. Tribes could, in theory, finance utility projects such as sewage systems that generate revenue via customer fees, but many tribes do not charge their citizens fees. Likewise, many tribal communities do not possess sizable populations necessary to generate adequate fees to repay a large bond. In this way, the “essential government function” test limits the universe of eligible tax-exempt projects available to tribes. As a result, even when projects are eligible, differences in tax bases make it more difficult for tribes to service tax-exempt bond debt.

### Considering tribal access to tax-exempt bonding

Expanding tribal tax-exempt bonding authority could increase access to capital in tribal communities, enhance tribal governments’ ability to accelerate economic prosperity, and grow their private sectors. What might this cost? According to the Congressional Budget Office, increasing tax-exempt bond access for tribes would reduce federal tax revenue by an estimated [\\$77 million over 10 years](#).<sup>13</sup> In comparison, the estimated total cost of the federal tax exemption for municipal bonds was [\\$27 billion](#) in fiscal year 2022.

Tribal organizations and Treasury have raised possibilities for increasing tribal tax-exempt bond parity. Possibilities for increasing tribal governmental bonding authority include (1) amending Section 7871 of the tax code to remove the “essential government function” test, or (2) removing the provision that financed projects be “customarily performed” by states and local governments and adding a provision defining “essential government function” under Section 7871 in line with Section 115. In a [2011 report](#), Treasury recommended granting tribes qualified private activity bonding authority with an accompanying volume cap similar to the cap imposed on states. Some tribal organizations have also recommended renewing or increasing the TED bond volume cap as a temporary solution.

## Better data could inform policymaking

Policymakers and tribes need access to accurate, reliable, and robust data and research to render informed policy decisions regarding tribal governments' treatment in the tax-exempt bond arena. Our per capita analysis ends at 2010 due to a lack of available data for subsequent years. Although some more recent tribal tax-exempt bond data are available for publicly offered tribal bonds, such data represent a small portion of tribal bond issuances given that most occur in private markets. Analysis of tribal bonding data from 2011 to present would provide valuable information for understanding the economic impact of current tribal bonding policy.

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### Endnotes

**1** References to “municipal” and “municipalities” throughout this article include state and local governments. Although states are not municipalities in the typical sense, “municipal bonds” are a class of government debt obligation generally understood within the finance industry to encompass bonds issued by both state and local governments.

**2** Tax-exempt bonds bear the moniker “tax-exempt” because interest earned on the bonds is excluded from the bondholder’s gross income for purposes of federal income tax and, in some cases, state income tax. The income tax exemption attracts investors to purchase lower-interest tax-exempt bonds because investors receive the same after-tax interest income as from bonds paying higher interest rates. The income tax exemption enables municipalities to reduce their capital costs since they pay interest at lower rates to finance infrastructure and development projects. In this way, the federal government supports infrastructure and development by foregoing the tax revenue that would otherwise have been payable absent the tax exemption.

**3** The sole exception to the exclusion from tax exemption of tribal private activity bonds is for issuances where 95 percent or more of the net proceeds are to be used for the acquisition, construction, reconstruction, or improvement of certain manufacturing facilities subject to minimum employment requirements. 26 U.S.C. §7871(c)(3).

**4** Interest on state and local bonds is generally excluded from the bondholder’s gross income for federal income tax purposes. If a state or local bond is a private activity bond (PAB), however, the tax exemption does not apply unless the PAB is a qualified PAB (QPAB). The Internal Revenue Code’s provisions defining PABs and QPABs are relatively complex. At a high level, PABs are bonds passing prescribed tests that measure the extent to which bond proceeds benefit nongovernmental persons. QPABs are PABs that meet certain requirements including that they be issued for qualifying purposes that create specific public benefits including qualified redevelopment bonds and 501(c)(3) bond issuances. See 26 U.S.C. §§141–145. Of note, while all states can issue qualified PABs, not all states choose to issue qualified PABs.

**5** [As of 2010](#), there were 575 federally recognized tribes. [As of 2024](#), this number is 574.

**6** The U.S. population in the [2000 Decennial Census](#) was 281,421,906. The population identifying as AIAN alone or in combination with other races was 4,119,301.

**7** We distinguish between the AIAN population and enrolled citizens of federally recognized tribes because they represent fundamentally different populations. We use U.S. Census data for the AIAN population. The U.S. Census Bureau relies on self-reported responses, and census respondents who self-identify as AIAN may not be citizens of tribal nations. Therefore, census data likely include individuals ineligible for tribal government services. For these reasons, census data for AIAN individuals represent the upper bound of the population benefitting from projects funded with tribal tax-exempt bonds. For a lower-bound population proxy, we rely on U.S. Department of Housing and Urban Development Indian Housing Block Grant Program (IHBG) tribal enrollment data. Federally recognized tribes report enrollment numbers to receive IHBG funds, but not all tribes receive IHBG funding and some tribes underreport tribal enrollment. Therefore, IHBG data represent a conservative estimate of the population benefitting from projects funded with tribal tax-exempt bonds.

**8** As noted earlier, the sole exception to the exclusion from tax exemption of tribal private activity bonds is for issuances where 95 percent or more of the net proceeds are to be used for the acquisition, construction, reconstruction, or improvement of certain manufacturing facilities subject to minimum employment requirements. 26 U.S.C. §7871(c)(3).

**9** AIAN individuals in our analysis include individuals self-identifying as AIAN alone or in combination with other races in the 2000 Decennial Census.

**10** Data on tribal governmental tax-exempt bond issuances from 2003–2010 are available from IRS Form 8038-G, as reported in [New Money Long-term Tax-Exempt Governmental Bonds, by State of Issue and Bond Purpose](#) (Table 5).

**11** Based on the same data, from 2003–2010 average annual per capita tax-exempt bond proceeds from state and local governments were two to nine times greater than annual tax-exempt tribal bond proceeds per tribal citizen. U.S. bond data include local, state, and tribal governments, although tribal government issuances represent a small fraction of these data.



[12 Numerous variables](#) influence bond yields and interest rates at any given time, but tax-exempt bond yields have been consistently lower than taxable bond yields over the last 10 years. For example, over a 10-year period beginning in February 2014, the [average yield to maturity](#) for tax-exempt A-rated bonds was 3.27 percent compared to 4.08 percent for taxable A-rated bonds, a difference of .86 percent percentage points (or 86 basis points). The yield spread concerning tribal taxable and tax-exempt bonds might differ, but even a small interest rate reduction could result in material savings over the life of a long-term bond.

[13](#) The Congressional Budget Office (CBO) evaluated the cost of tribal tax-exempt bond parity in 2022. Tribal bond parity provisions were included in the [Build Back Better Act](#). These provisions were removed before the law was eventually passed as the Inflation Reduction Act, but not before receiving a [budget score](#) from the CBO. The relevant tab within the score book is “Subtitle E. Infra. Financing”; the score for the tribal bond provisions of Section 13501 is under Part 3.



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