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Tribes Look To Gain Ground In Congressional Tax Push

By **Andrew Westney**

Law360, New York (October 10, 2017, 7:48 PM EDT) -- As federal taxes take the spotlight on Capitol Hill, tribes will try to capitalize by convincing lawmakers to incorporate changes to the tax code that put Native American governments on equal footing with state and local governments, while trying to protect the few edges tribes have under current law, experts say.

The overall Republican framework for the tax initiative **introduced Sept. 27** centers on cuts to the corporate tax rate and other business taxes and simplifying the tax code, but advocates for Native American tribes will be looking to jump on board with the campaign in hopes of ushering in long-sought changes they haven't been able to secure in previous Congresses.

Foremost among tribes' aims is to achieve parity with state and local governments in issuing tax-exempt bonds and other tax concerns, seeking to provide clarity to businesses working with tribes and redress imbalances that often make it harder for tribes to stimulate economic development on their lands, experts say.

"There are long-standing issues that have remained a challenge to tribal leadership in Indian Country, and the time is ripe," said Hogan Lovells partner Hilary Tompkins. "I think the tax reform [movement] presents a really great platform to bring these issues to closure."

Tribal tax parity is not only "overdue" but also urgent as Republicans appear determined to move quickly on a tax plan, said Nicole Elliott, a partner at Holland & Knight LLP, which has worked on a pending bill that bundles together a number of tribal tax proposals.

"No one has a crystal ball, but it's certainly a lot of people's intention to get something done very, very soon," Elliott said.

Yet in the rapid press for change, tribes also aim to protect their current tax advantages, such accelerated depreciation for capital investment that would no longer provide an incentive to do business in Indian Country if Congress extends the same benefit to all businesses.

"There's an example where making tax codes simpler undermines us," said Robert Odawi Porter of Odawi Law PLLC, who is also a senior adviser at Dentons.

The National Congress of American Indians laid out an ambitious wish list in a June resolution titled "Equitable Treatment for Tribal Nations in Congressional Tax Reform" that called for tribal governments to be able to create tax revenue without overlapping state

taxes and have access to financing mechanisms.

To back those goals, the NCAI supported passage of the Tribal Tax and Investment Reform Act, H.R. 3138, introduced in June by Rep. Ron Kind, D-Wis., with the support of Lynn Jenkins, R-Kan., and other Democratic and Republican lawmakers.

The bill would allow tribes to issue tax-exempt bonds for private economic development, as state and local governments already do, and no longer have to show they are for "essential government functions."

Among other provisions, the bill would amend the tax code and the Employee Retirement Income Security Act to treat tribal employee benefit and pension plans under tribal law the same way as similar state plans under state law; as it is now, tribes must create separate pension plans for employees of their governments and their businesses.

The NCAI's resolution also goes beyond the elements of the bill, including seeking set-asides for tribal nations in the Low-Income Housing Tax Credit and New Markets Tax Credit programs.

In Oct. 4 testimony before the Senate Committee on Indian Affairs, National Indian Gaming Association Chairman Ernest Stevens Jr. said that those two programs have spurred investment in state and local housing but "fallen far short in Indian Country," making them "glaring examples of the tax code's lack of respect for Indian tribes as governments."

But the Kind bill, which Holland & Knight partner Kathleen M. Nilles and public affairs adviser Kayla N. Gebeck have contributed to, may represent the best chance for tribes to make progress during the current push, as it gathers together provisions that have been road-tested with previous Congresses.

"The Republicans generally don't want to do something that's completely new," Gebeck said. The parity provisions in the bill, which also would put tax credits for those adopting Indian children on par with those for other adoptive parents, are "not something we're really going to create new, but can just add tribes to," she said.

While the provisions of the Tribal Tax and Investment Reform Act identify key changes tribes would like to see in any tax package, largely to give them a better chance to access capital, there are also key tax advantages tribes want to make sure don't get lost in the rush, experts say.

Job creation is a common theme of the "national narrative" around taxes "which Indian Country wants to be a part of," said Porter, "but the challenge is there's no permanent provision of the tax code that supports that in Indian Country."

That's why tribes want to see several provisions either extended or made permanent, including the Indian employment tax credit for tribe members working for private businesses on reservations; a tax credit for tribal coal production; and the accelerated depreciation credit for business property on reservations, which allows investments to be written off more quickly.

A tax proposal cited by the NCAI that would generally allow businesses to immediately write off depreciation "kind of wipes out one of the very minor benefits we already have, which is providing an advantage for tribal lands," Porter said.

Ultimately, the Kind bill provides a "thoughtful, bipartisan starting point" that could lead to multiyear extensions or permanent reauthorization of the tribe-specific tax credits, according to Powers Pyles Sutter & Verville PC partner Paul G. Moorehead.

As tribes seek to establish parity in certain ways while retaining some advantages in others, their frequently high unemployment rates, difficulties attracting economic development and sovereign status justify that approach, attorneys say.

"It is completely within the federal-tribal government relationship for Congress to recognize the unique posture of tribes in their tax policy," Tompkins said.

Keeping those tribe-specific rules "swims a little bit upstream for those interested in tax reform," but those measures must be understood within tribes' desire for a broader policy supporting their economic development efforts, including regulatory changes, Porter said.

"We really don't have that yet," he said. "It would be better if members of Congress could see how tax reform fits into an overarching national tribal economic improvement agenda, rather than unfortunately being perceived as some special interest."

Much is still unknown about the Republican tax proposal, and while the changes tribes are seeking may not be overly controversial, "it could be harder to get the attention of those who are trying to craft legislation that's not industry or sector-specific," said Dorsey & Whitney LLP partner Mary J. Streit.

But since tribes usually aren't able to get tax changes they want enacted unless they're part of a broader legislative effort, they may consider the current push to be "as good an opportunity as they've ever had, when there's some stated commitment at least from Republican leadership that they really want to do tax reform, to get these issues addressed," Streit said.

President Donald Trump is slated to give a speech touting the tax proposal on Wednesday in Harrisburg, Pennsylvania.

--Editing by Brian Baresch and Catherine Sum.

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