

the Improving Long-term Care Choices Act of 2005, introduced in the 109th Congress.

Research shows that the elderly population will nearly double by 2030. By 2050, the population of those aged 85 and older will have grown by more than 300 percent. Research also shows that the average age at which individuals need long-term care services, such as home health care or a private room at a nursing home, is 75. Currently, the average annual cost for a private room at a nursing home is more than \$75,000. This cost is expected to be in excess of \$140,000 by 2030.

Based on these facts, we can see that our nation needs to prepare its citizens for the challenges they may face in old age. One way to prepare for these challenges is by encouraging more Americans to obtain long-term care insurance coverage. To date, only 10 percent of seniors have long-term care insurance policies, and only 7 percent of all private-sector employees are offered long-term care insurance as a voluntary benefit.

Under current law, employees may pay for certain health-related benefits, which may include health insurance premiums, co-pays, and disability or life insurance, on a pre-tax basis under cafeteria plans and flexible spending arrangements, FSAs. Essentially, an employee may elect to reduce his or her annual salary to pay for these benefits, and the employee doesn't pay taxes on the amounts used to pay these costs. Employees, however, are explicitly prohibited from paying for the cost of long-term care insurance coverage tax-free.

Our bill would allow employers, for the first time, to offer qualified long-term care insurance to employees under FSAs and cafeteria plans. This means employees would be permitted to pay for qualified long-term care insurance premiums on a tax-free basis. This would make it easier for employees to purchase long-term care insurance, which many find unaffordable. This should also encourage younger individuals to purchase long-term care insurance. The younger the person is at the time the long-care insurance contract is purchased, the lower the insurance premium.

Our bill also allows an individual taxpayer to deduct the cost of their long-term care insurance policy. In other words, the individual can reduce their gross income by the premiums that they pay for a long-term care policy, and therefore, pay less in taxes. This tax benefit for long-term care insurance should encourage more individuals to purchase these policies. It certainly makes a policy more affordable, especially for younger individuals. This would allow a middle-aged taxpayer to start planning for the future now.

Finally a provision that is included in our bill that I am really pleased with is one that provides a tax credit to long-term caregivers. Long-term caregivers could include the taxpayer

him- or herself. Senator KERRY and I recognize that these taxpayers—who have long-term care needs, yet are taking care of themselves—should be provided extra assistance. Also, taxpayers taking care of a family member with long-term care needs would also be eligible for the tax credit. These taxpayers should be given a helping hand. As our population continues to age, the least that we can do is provide a tax benefit for these struggling individuals.

By Mr. SPECTER (for himself, Mr. GRAHAM, Mr. LEAHY, Mr. WYDEN, Mr. CRAPO, Mr. MARTINEZ, and Ms. LANDRIEU):

S. 437. A bill to amend the Internal Revenue Code of 1986 to allow the deduction of attorney-advanced expenses and court costs in contingency fee cases; to the Committee on Finance.

Mr. SPECTER. Mr. President, I seek recognition to introduce legislation to amend Section 162 of the Internal Revenue Code to permit attorneys to deduct expenses and court costs incurred on behalf of contingency fee clients as an ordinary and necessary business expense in the year such expenses are sustained. I introduced the same legislation in the 110th Congress, and the bill attracted bipartisan support. My bill simply clarifies the law to make certain that attorneys who take on contingency fee cases are able to enjoy the same tax benefits as virtually every other small business in the country.

Contingency agreements between attorneys and clients are very common in personal injury, medical malpractice, product liability, Social Security disability, workers compensation, civil liberties, and employment cases. Under these agreements, an attorney pays all out-of-pocket costs associated with a case before any conclusion to the case. Such expenses include costs for expert witnesses, depositions, medical records, and court fees. Contingency agreements have numerous benefits to clients; in particular, indigent individuals who might otherwise be unable to afford legal services.

The obvious benefit to clients of contingency fee arrangements is that they do not have to incur out-of-pocket expenses for attorneys' fees. This may be particularly valuable to clients who do not have the ability to pay attorneys by the hour to advance their case. The arrangement also benefits the client by effectively spreading the risk of litigation. An hourly-rate payment agreement requires the client to assume all of the risk because the attorneys' fees are a sunk cost. However, under a contingent-fee arrangement, the attorney shares that risk and is only paid a fee if he wins the case or obtains a settlement.

Currently, the Internal Revenue Service, IRS, treats expenses and court costs on behalf of contingency clients as loans to the client. As a result, the IRS does not permit any deduction by

the attorney until the litigation is resolved, sometimes many years after the attorney has incurred the expenses on behalf of their client. The IRS treats the expenses and court costs as a loan despite the fact that no interest is charged and the lawyer only recoups costs if the case is won or settled. Not only is the IRS's position illogical, but it is contrary to a ruling by the United States Court of Appeals for the 9th Circuit.

In *Boccardo v. Commissioner*, 56 F.3d 1016, 9th Cir. 1995, the 9th Circuit held that because the firm had a "gross fee" contract with the client, the firm incurred ordinary and necessary business expenses in the payment of costs and charges in connection with its clients' litigation. Consequently, litigation costs such as filing fees, witness fees, travel expenses, and medical consultation fees were deductible as ordinary and necessary business expenses in the year the costs were incurred on behalf of the clients. In a "gross fee" contract, the client is only obligated to pay their attorney a percentage of the amount recovered and is not expressly responsible for specific repayment of costs. While the *Boccardo* court contrasted "gross fee" contracts with "net fee" contracts, such a distinction is trivial for tax purposes. In both agreements, the attorney takes a considerable business risk to incur significant costs on behalf of a client and only recoups the expenses if a recovery is won.

Despite the *Boccardo* court's ruling in favor of attorneys, the IRS continues to treat the out-of-pocket costs related to contingency fee cases as loans. Lawyers who make the decision to deduct these costs are exposed to potential audit and litigation. Over the past 13 years, taxpayers have had to proceed at their own peril—Ninth Circuit taxpayers risk a conflict with the IRS on this matter despite the case law, and taxpayers outside of the Ninth Circuit have no guidance at all since they cannot directly rely on *Boccardo*.

My bill reverses an unfair IRS position by treating these businesses the same as all other small businesses. It does so by allowing attorneys with contingency fee clients to deduct their expenses and costs in the year that they are paid. My legislation does not give attorneys anything above and beyond that which is currently enjoyed by virtually every other small business in our country.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the text of the bill was ordered to be printed in the RECORD, as follows:

S. 437

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. DEDUCTION OF ATTORNEY-ADVANCED EXPENSES AND COURT COSTS IN CONTINGENCY FEE CASES.**

(a) IN GENERAL.—Section 162 of the Internal Revenue Code of 1986 (relating to trade or business expenses) is amended by redesignating subsection (q) as subsection (r) and by

inserting after subsection (p) the following new subsection:

“(q) **ATTORNEY-ADVANCED EXPENSES AND COURT COSTS IN CONTINGENCY FEE CASES.**—There shall be allowed as a deduction under this section any expenses and court costs paid or incurred by an attorney the repayment of which is contingent on a recovery by judgment or settlement in the action to which such expenses and costs relate. Such deduction shall be allowed in the taxable year in which such expenses and costs are paid or incurred by the taxpayer.”.

(b) **EFFECTIVE DATE.**—The amendments made by this section shall apply to expenses and costs paid or incurred after the date of the enactment of this Act, in taxable years beginning after such date.

By Mr. INOUE:

S. 439. A bill to provide for and promote the economic development of Indian tribes by furnishing the necessary capital, financial services, and technical assistance to Indian-owned business enterprises, to stimulate the development of the private sector of Indian tribal economies, and for other purposes; to the Committee on Indian Affairs.

Mr. INOUE. Mr. President, I rise today to introduce a bill to establish an Indian Development Finance Corporation as an independent, Federally-chartered corporation that is modeled after the family of Development Banks established by the World Bank in lesser-developed countries around the world.

Mr. President, in my more than 30 years of service on the U.S. Senate Committee on Indian Affairs, I have visited many Indian communities and Alaska Native villages, and I have seen that in many parts of Indian country, there are economic and social conditions that are as dire as those conditions found in the so-called “lesser developed countries” around the world. And although we have seen some economic success in recent years across Native America as a result of the Indian Gaming Regulatory Act, most Indian tribes and Native villages are not engaged in the conduct of gaming, nor have tribal governments found the means to overcome the challenges associated with their remote locations from populations centers and market places that serve the commercially-successful tribal gambling operations.

In those rurally-isolated areas, there is real potential to succeed in developing viable local economies based on agricultural and fishery resources, and the development of the vast energy resources that are located on Indian lands. What these Native communities need is the type of development financing services that the World Bank has successfully established—institutions empowered to make small, leveraged capital investments and economic infrastructure development to support tailored industrial programs, internet-based communication services, national and international trade agreements, and economic research capabilities. An Indian Development Finance Corporation could provide these kinds

of services through a network of centers that would be based in Indian Country.

Under this bill, the Corporation would be authorized to issue 500,000 shares of common stock at \$50 per share to every Tribal Nation in Indian Country and Alaska. The Corporation would be managed by a Board elected by the Tribal shareholders and the Board would be charged with hiring a President and a team of managers as well as set operating policies. Seed capital would be injected into the Indian Development Finance Corporation (IDFC) by the U.S. Treasury in exchange for the issuance of capital stock. Initially, \$20 million in start-up funds would be invested and after the majority of common stock was purchased by tribes, another \$80 million would be authorized.

I believe that the IDFC can take advantage of opportunities to integrate the economic stimulus activities soon to be created by the American Recovery and Reinvestment Act, and. I am confident that there will be support forthcoming from those tribal governments and Alaska Native corporations that have the resources to invest in the economic infrastructure initiatives that will be established by the IDFC in this period of our greatest need.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the text of the bill was ordered to be printed in the RECORD, as follows:

S. 439

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

(a) **SHORT TITLE.**—This Act may be cited as the “Indian Development Finance Corporation Act”.

(b) **TABLE OF CONTENTS.**—The table of contents of this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Findings and policy.
- Sec. 3. Definitions.

**TITLE I—INDIAN DEVELOPMENT FINANCE CORPORATION**

- Sec. 101. Establishment of Corporation.
- Sec. 102. Duties and powers.
- Sec. 103. Loans and obligations.
- Sec. 104. Board of Directors.
- Sec. 105. President of Corporation.
- Sec. 106. Annual shareholder meetings.
- Sec. 107. Annual reports; development plan.

**TITLE II—CAPITALIZATION**

- Sec. 201. Issuance of stock.
- Sec. 202. Borrowing authority.

**TITLE III—AUTHORIZATION OF APPROPRIATIONS**

- Sec. 301. Authorization of appropriations.

**SEC. 2. FINDINGS AND POLICY.**

(a) **FINDINGS.**—Congress finds that—

(1) a special relationship has existed between the United States and Indian tribes, which is recognized in clause 3 of section 8 of article I of the Constitution of the United States;

(2) pursuant to laws, treaties, and administrative authority, Congress has implemented activities to fulfill the responsibility of the United States for the protection and preservation of Indian tribes and tribal resources;

(3) despite the availability of abundant natural resources on Indian land and a rich cultural legacy that places great value on self-determination, self-reliance, and independence, Indians and Alaska Natives experience poverty and unemployment, together with associated incidences of social pathology, to an extent unequaled by any other group in the United States;

(4)(A) the reasons for that poverty and unemployment have been widely studied and documented by Congress, the Government Accountability Office, the Department of the Interior, private academic institutions, and Indian tribes; and

(B) the studies described in subparagraph (A) have consistently identified as fundamental obstacles to balanced economic growth and progress by Indians and Alaska Natives—

(i) the very limited availability of long-term development capital and sources of financial credit necessary to support in Indian country the development of a private sector economy comprised of Indian-owned business enterprises;

(ii) the lack of effective control by Indians over their own land and resources; and

(iii) the scarcity of experienced Indian managers and technicians;

(5) previous efforts by the Federal Government directed at stimulating Indian economic development through the provision of grants, direct loans, loan guarantees, and interest subsidies have fallen far short of objectives due to—

(A) inadequate funds;

(B) lack of coordination;

(C) arbitrary project selection criteria;

(D) politicization of the delivery system; and

(E) other inefficiencies characteristic of a system of publicly administered financial intermediation; and

(6) the experience acquired by multilateral lending institutions among “lesser-developed countries” has demonstrated the value and necessity of development financial institutions in achieving economic growth in underdeveloped economies and societies that are strikingly similar to Indian and Alaska Native communities in relation to matters such as—

(A) control over natural resource management;

(B) the absence of experienced, indigenous managers and technicians; and

(C) the availability of long-term development capital and private sources of financial credit.

(b) **POLICY.**—It is the policy of the United States that, in fulfillment of the special and long-standing responsibility of the United States to Indian tribes, the United States should provide assistance to Indians in efforts to break free from the devastating effects of extreme poverty and unemployment and achieve lasting economic self-sufficiency through the development of the private sector of tribal economies by establishing a federally chartered, mixed-ownership development financing institution to provide a broad range of financial intermediary services (including working capital, direct loans, loan guarantees, and project development assistance) using the proven efficiencies of the private market mode of operation.

**SEC. 3. DEFINITIONS.**

In this Act:

(1) **BOARD.**—The term “Board” means the Board of Directors of the Corporation.

(2) **CORPORATION.**—The term “Corporation” means the Indian Development Finance Corporation established by section 101(a).

(3) **INDIAN.**—The term “Indian” means an individual who is a member of an Indian tribe.