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United States Senate

WASHINGTON, DC 20510-3005

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The Honorable Steny H. Hoyer
Majority Leader
U.S. House of Representatives
H-107, The Capitol
Washington, DC 20515

Dear Majority Leader:

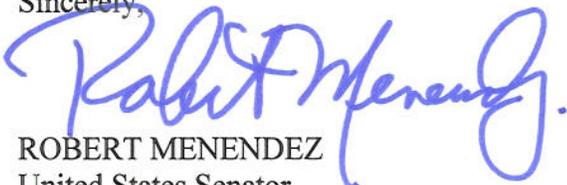
I write to offer my help and to extend my sincere condolences on the Red Line Metro crash Monday. I know it must be a difficult time for you and your constituents, and my thoughts are with the victims of this tragedy.

I also wanted to offer my support in funding improvements to the Washington Metropolitan Area Transit Authority (WMATA) system to help ensure that this accident is not repeated. To that end, I wanted to alert you to legislation I introduced recently called the Close the SILO/LILO Loophole Act (S.1341). I believe this legislation could help protect WMATA and other transit agencies who are being threatened by banks seeking to gain a windfall from the current economic climate while potentially putting transit agencies at risk.

As you know from the letter you received from my esteemed colleague, Senator Grassley, he has expressed concerns that this accident may have been caused by implications from a SILO/LILO transaction and not decades of federal neglect of public transportation and inadequate federal funding of our nation's transit systems. The bottom line is that, in order to help prevent such a tragedy in the future, we must ensure that transit agencies have adequate resources to keep passengers safe. As part of that, I strongly believe that we must protect transit agencies from banks who are seeking to exploit a technicality that would result in agencies having to pay banks millions of dollars that could otherwise be used to shore up equipment and ensure safe operations, even though they have not missed a single payment to the bank. Once we remove this threat, the door will be open to terminating these transactions in a fair and equitable manner.

Please find attached a copy of my legislation as well as a short document explaining how the legislation works. I commend you for rising to the challenge this tragic accident has posed and for marshalling federal resources to protect your constituents and the residents of the District. Do not hesitate to enlist my help in this endeavor.

Sincerely,



ROBERT MENENDEZ
United States Senator

Stop Banks from Collecting Illegal Tax Benefits from Public Agencies

Support the Close the SILO/LILO Loophole Act

The Close the SILO/LILO Loophole Act will protect transit agencies and other local public entities from the risk of having to pay tens of millions of dollars to banks at a time when demand for government services is at an all time high and government budgets are strapped. The technicalities are complicated, but the equities are clear. Congress cannot let banks gain windfalls via tax shelters at the expense of the nation's rural electric coops, transit agencies and other public agencies.

Background

From the 1990's to 2003, public agencies, including transit agencies and rural electric coops, entered into Lease-In/Lease-Out (LILO) and Sale-In/Lease-Out (SILO) transactions with banks and other taxpaying entities. Under the SILO/LILO contracts, the public entity transferred assets (equipment or infrastructure) to the bank while simultaneously entering into a long-term lease with the bank. The public agency paid a AAA-rated entity a fee to make lease payments throughout the term of the lease.

While the leases provided much needed resources for capital intensive projects, Congress viewed them as blatant tax avoidance schemes and they were effectively eliminated in 2003. In 2008 the Internal Revenue Service proposed a settlement of the leases effectively eliminating all future tax benefits although allowing the underlying commercial transaction to remain in place. Although many taxpayers have terminated these transactions, many are still outstanding despite the elimination of tax benefits.

The Problem

Unfortunately, certain banks have attempted to make a windfall. As stated above, local public entities paid a lump sum to a AAA-rated third party institution and that third party would make lease payments to the banks. Because of the financial crisis, these third party institutions, such as AIG, are no longer AAA-rated. Banks are claiming, therefore that the public entities are in technical default. The penalty for such a default is the amount of money the banks were anticipating getting in tax benefits – the very tax benefits that were declared illegal in 2003. Banks are not being harmed – this is truly a technical default since no lease payments have been missed, but the costs to public agencies are real.

This attempt by banks to gain a windfall from public entities is happening at exactly the wrong time. The defaults will be a financial hardship for public institutions that serve our constituents and could cause them to add to the increased expenses our overstretched constituents are already facing. We must take action to prevent imposing more burdens on our constituents.

The Solution

The attached legislation will continue the efforts of Congress and the Internal Revenue Service (IRS), and remove the economic benefits for banks to exploit these technical defaults. The bill would impose a 100 percent excise tax on the windfall proceeds received by banks from the LILO and SILO transactions, and serve to strip their temptation to reap the economic benefits of abusive tax shelters while simultaneously dealing a significant financial blow to public institutions that effectively provide important services to the public. It will also supplement existing Internal Revenue Service and Congressional efforts to eliminate all anticipated tax incentives under LILO and SILO transactions.

111TH CONGRESS
1ST SESSION

S. 1341

To amend the Internal Revenue Code of 1986 to impose an excise tax on certain proceeds received on SILO and LILO transactions.

IN THE SENATE OF THE UNITED STATES

_____ introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To amend the Internal Revenue Code of 1986 to impose an excise tax on certain proceeds received on SILO and LILO transactions.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Close the SILO/LILO
5 Loophole Act of 2009".

6 **SEC. 2. EXCISE TAX ON CERTAIN PROCEEDS RECEIVED ON**
7 **SILO AND LILO TRANSACTIONS.**

8 (a) IN GENERAL.—Subchapter F of chapter 42 of
9 subtitle D of the Internal Revenue Code of 1986 is amend-
10 ed by adding at the end the following new section:

1 **“SEC. 4965A. EXCISE TAX ON CERTAIN PROCEEDS RE-**
2 **CEIVED ON SILO AND LILO TRANSACTIONS.**

3 “(a) IMPOSITION OF TAX.—In the case of any person
4 other than a SILO/LILO lessee that receives any ineligible
5 amount as a party to any SILO transaction or any LILO
6 transaction, such person shall pay a tax for the taxable
7 year in which such ineligible amounts are received.

8 “(b) AMOUNT OF TAX.—The amount of the tax im-
9 posed under subsection (a) with respect to any person
10 shall be an amount equal to the aggregate ineligible
11 amounts received by such person in the taxable year.

12 “(c) DEFINITIONS.—For purposes of this section—

13 “(1) INELIGIBLE AMOUNT.—The term ‘ineli-
14 gible amount’ means, with respect to any SILO
15 transaction or LILO transaction, the excess of—

16 “(A) the aggregate proceeds received by
17 the taxpayer attributable to or arising from any
18 remedial action relating to such transaction, or
19 any consensual termination or rescission of any
20 such transaction (including the value of any
21 property received and any additional amounts
22 purporting to indemnify or reimburse the tax-
23 payer for taxes assessable on any amounts re-
24 ceived), over

25 “(B) the aggregate proceeds described in
26 subparagraph (A) that are received from third

1 parties (other than the SILO/LILO lessee) pur-
2 suant to a payment arrangement (including a
3 defeasance escrow arrangement) entered into at
4 the time of such transaction in which the SILO/
5 LILO lessee's payment obligations were eco-
6 nomically defeased in whole or in part.

7 “(2) SILO TRANSACTION.—The term ‘SILO
8 transaction’ means a purported sale-leaseback ar-
9 rangement which is identified as a listed transaction
10 in Notice 2005-13.

11 “(3) LILO TRANSACTION.—The term ‘LILO
12 transaction’ means a transaction which is a ‘lease-
13 in/lease-out’ transaction described in Revenue Rul-
14 ings 99-14 and 2002-69 and identified as a listed
15 transaction in Notice 2000-15, or which is substan-
16 tially similar to such a transaction.

17 “(4) SILO/LILO LESSEE.—The term ‘SILO/
18 LILO lessee’ means any lessee in a SILO trans-
19 action or a LILO transaction that is—

20 “(A) a tax-exempt entity (within the mean-
21 ing of section 168(h)(2)) or any other coopera-
22 tive, nonprofit, limited dividend, or mutual as-
23 sociation, or

1 “(B) any other person that does not derive
2 a substantial economic benefit from the tax
3 characterization of such transaction.

4 “(d) CERTAIN TRANSFERS DISREGARDED.—If any
5 person who is subject to the tax under subsection (a) is
6 a party to any transaction that results in the transfer of
7 such person’s rights with respect to a SILO transaction
8 or a LILO transaction to any other person who would,
9 but for this subsection, not be subject to the full amount
10 of the tax under subsection (a) with respect to such SILO
11 transaction or LILO transaction, then such transfer shall
12 be disregarded for purposes of this section and the tax-
13 payer shall continue to be treated as the recipient of any
14 ineligible amount.

15 “(e) REGULATORY AUTHORITY.—The Secretary is
16 authorized to promulgate regulations consistent with the
17 purposes of this section, including regulations to prevent
18 the avoidance of such purposes.

19 “(f) COORDINATION WITH OTHER TAXES AND PEN-
20 ALTIES.—The tax imposed by this section is in addition
21 to any other tax, addition to tax, or penalty imposed under
22 this title.”.

23 (b) CLERICAL AMENDMENT.—The table of sections
24 for subchapter F of chapter 42 of subtitle D of the Inter-

1 nal Revenue Code of 1986 is amended by adding at the
2 end the following new item:

“Sec. 4965A. Excise tax on certain proceeds received on SILO and LILO transactions.”.

3 (c) **EFFECTIVE DATE.**—The amendments made by
4 this section shall apply to amounts received after the date
5 of the introduction of this Act, in taxable years ending
6 after such date.

7 **SEC. 3. DENIAL OF DEDUCTION FOR COSTS OF CERTAIN**
8 **ACTIONS RELATING TO SILO AND LILO**
9 **TRANSACTIONS.**

10 (a) **IN GENERAL.**—Part IX of subchapter B of chap-
11 ter 1 of the Internal Revenue Code of 1986 is amended
12 by inserting after section 269B the following new section:

13 **“SEC. 269C. COSTS OF CERTAIN ACTIONS RELATING TO**
14 **SILO AND LILO TRANSACTIONS.**

15 “(a) **GENERAL RULE.**—If any party to a SILO trans-
16 action or a LILO transaction (other than a SILO/LILO
17 lessee) brings a remedial action seeking to recover any in-
18 eligible amount with respect to such transaction, in com-
19 puting taxable income no deduction shall be allowed for
20 any attorney fees or other costs attributable to such ac-
21 tion.

22 “(b) **DEFINITIONS.**—For purposes of this section, the
23 terms ‘SILO transaction’, ‘LILO transaction’, ‘SILO/

1 LILO lessee', and 'ineligible amount' have the meanings
2 given such terms by section 4965A(c).”.

3 (b) CLERICAL AMENDMENT.—The table of sections
4 for part IX of subchapter B of chapter 1 of the Internal
5 Revenue Code of 1986 is amended by inserting after the
6 item relating to section 269B the following new item:

“Sec. 269C. Costs of certain actions relating to SILO and LILO trans-
actions.”.

7 (c) EFFECTIVE DATE.—The amendments made by
8 this section shall apply to costs incurred after the date
9 of the introduction of this Act.