



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

January 24, 2024

via Email

Dear Tribal Leader:

As the Point of Contact for Tribal Consultation for the U.S. Department of the Treasury (Treasury), I invite you to a consultation on the Treasury Tribal Advisory Committee (TTAC) Subcommittee on Parity and Reform's Project Plan and Report on Tribal Pension Issues ([Report](#)). This consultation will be held virtually on March 19, 2024, 1:00 - 3:00 p.m. ET. [You may register for the consultation here.](#)

In 2019, the [TTAC](#) (1) identified policy priorities to address with governmental officials (Implementation of the Tribal General Welfare Exclusion Act of 2014, Dual Taxation, and Tribal Pensions), and (2) organized subcommittees on these topics to provide recommendations on identified issues. In 2023 the Tribal Pensions subcommittee was renamed the Subcommittee on Parity and Reform.¹ On March 14, 2023, the TTAC approved the Report for Tribal consultation.

The Report highlights issues that Tribal employers have raised under the Pension Protection Act of 2006 (PPA '06), including related provisions under section 414(d) of the Internal Revenue Code (Code) and section 3(32) of the Employee Retirement Income Security Act of 1974 (ERISA) and contains proposed recommendations.

Background:

In general, retirement plans are governed by ERISA.² Governmental plans, on the other hand, are excluded from Titles I and IV of ERISA and receive special treatment under the Code. Typically, governmental plans offer employers less burdensome qualification, administration, and filing requirements.

Prior to 2006, a governmental plan, as defined in section 414(d) of the Code, included a plan established and maintained for its employees by the U.S. government, a state government or political subdivision thereof, or by any agency or instrumentality of the foregoing. Section 414(d) did not include plans established and maintained by Indian tribal governments or their subdivisions.³ In recognition of Indian tribal governments as

¹ Passed by motion at the TTAC September 7, 2023 meeting.

² ERISA includes certain retirement plan compliance requirements, such as detailed fiduciary standards and reporting requirements, including filing of Form 5500, filing of reports to the Internal Revenue Service (IRS) and the Department of Labor, as well as annual audited financial statements for plans with over 100 participants. The audited financial statements must also include additional disclosures.²

³ Note: The term "Indian tribal government" is utilized in this letter because the statutory language of the PPA '06 utilizes this phrase to refer to eligible Tribal governments.

“governments,” section 414(d) was amended by the PPA ‘06 to include certain plans of Indian tribal governments and related entities. Specifically, section 906(a)(1) of PPA ‘06 provides that the term “governmental plan” includes a plan which is established and maintained by:

- an Indian tribal government (as defined in section 7701(a)(40)),
- a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or
- an agency or instrumentality of either.

Section 906(a)(1) of PPA ‘06 further requires within these plans that “all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function).”

Put simply, for an Indian tribal governmental entity to maintain a governmental plan within the meaning of section 414(d) of the Code, the PPA ‘06 requires that (1) the plan be established and maintained by an eligible entity; and (2) that substantially all of whose services of employees be in performance of “essential governmental functions” that exclude commercial activities, even where that commercial activity is a government function.

In 2006 and 2007, the IRS issued temporary relief for Indian tribal governments’ pensions plans pending the issuance of guidance under the PPA ‘06 and consultation on the essential government functions and commercial activity tests.

- [Notice 2006-89](#) provides transitional relief under a reasonable good faith standard with respect to compliance with the PPA ‘06 changes to section 414(d) of the Code.
- [Notice 2007-67](#) extends the transitional relief in Notice 2006-89 to “the date that is six months after guidance is issued under section 414(d) of the Code.”

Treasury and the IRS issued an [Advance Notice of Proposed Rulemaking \(ANPRM\)](#) in 2011 and included a draft of proposed regulations. Under the proposed regulations, whether a plan of an Indian tribal government is a commercial plan or a governmental plan within the meaning of section 414(d) is based in part on a determination of (1) which activities are commercial activities and (2) whether employees covered by the plan perform substantial services in commercial activities (commercial employees). Under the first step, the proposed regulations would provide guidance for determining whether an activity operated by an Indian Tribal government is a governmental activity or a commercial activity for purposes of section 414(d). This is achieved by listing

certain specific activities that are deemed to be governmental⁴ or commercial⁵ for purposes of section 414(d).

In addition to listing certain specified activities, the proposed regulations would provide a facts and circumstances test for determining whether an activity is a governmental⁶ or commercial activity.⁷

To date, regulations have not been issued under section 414(d) that further define a governmental plan established and maintained by a Tribal government. Treasury and IRS have been considering proposed rules relating to such a determination.

TTAC Tribal Pensions Project Plan and Report:

The Report provides background on the unique issues faced by Tribal employers who offer retirement benefits for their employees. It also includes an initial outline of proposed guidance recommendations and proposed legislative changes, centered on the following principles:

1. Alignment with the General Welfare Exclusion and TTAC Charter
2. Governmental parity
3. Ambiguity construed in favor of Tribes
4. Raising revenue as an essential government function
5. Public versus private use of funds
6. Consultation and negotiated rulemaking

The Report also contains proposed interim guidance, legislative proposals, and enforcement recommendations that cover the following:

1. Deference to Tribal sovereignty
2. Updated transition relief
3. Guidance before enforcement
4. Legislative elimination of the “Essential Governmental Function” and “Commercial Activity” tests”

⁴ Governmental activities include “(1) Activities that are related to public infrastructure, such as the building and maintaining of public roads and buildings; (2) activities that involve providing criminal protection services to the public (such as police and fire departments) or providing civil or public administrative service (such as providing public housing and operating public schools and hospitals, as well as managing the Indian Tribal government’s civil service system); and (3) activities subject to a treaty or special rules that pertain to trust land ownership and use.”

⁵ Commercial activities include “operations involving a hotel, casino, service station, convenience store, and marina...” These activities were identified as commercial activities in Notices 2006–89 and 2007–67 and the Joint Committee on Taxation’s Technical Explanation to section 906 of PPA '06.

⁶ Governmental Factors: whether 1) “[t]he activity provides a public benefit to members of the Indian tribal government (not treating the generation of profits from commercial acts as providing a public benefit)” and 2) “[t]he absence of one or more of the relevant factors listed for a commercial activity as provided in these proposed regulations.”

⁷ Commercial factors: whether 1) “[t]he activity is a type of activity that is operated to earn a profit;” 2) [t]he activity is a type of activity that is typically performed by private businesses;” and (3) [t]he activity is a type of activity where the customers are substantially from outside of the Indian tribal community, including whether the activity is located or conducted outside of Indian tribal land.”

5. Legislative recognition of Tribal courts and Tribal laws

Further, the Report includes proposed guidance solutions on the following topics:

1. Definition of “Essential Governmental Function”
2. Definition of “Commercial”
3. Control group testing
4. Employee sharing, transfers and rehires
5. Domestic relations orders
6. Combined assets
7. Coordination with CPA audit standards
8. State court enforcement actions
9. Prospective enforcement

The TTAC Subcommittee on Parity and Reform will expand and revise the Report based on consultation feedback. The Report is a work product solely of the TTAC; Treasury and IRS were not involved with the Report.

Consultation Content:

Pursuant to TTAC’s request and [Executive Order 13175](#), President Joseph R. Biden’s Presidential Memorandum for Tribal Consultation and Strengthening Nation to Nation Relationships; the Presidential Memorandum on Uniform Standards for Tribal Consultation; and Treasury’s [Tribal Consultation and Coordination with Tribal Nations Policy](#), Treasury is commencing Tribal consultation on the Report.

Specifically, on behalf of TTAC, Treasury requests the assistance of Tribal leaders in addressing the following topics:

1. The Report highlights challenges Tribal employers experience by maintenance of two plans and seeks feedback from Tribes on these challenges as follows:
 - a. What are some of the retirement plan challenges Tribal employers face when employees move between entities?
 - b. What limitations do Tribal employers encounter when an employee provides services to more than one entity?
 - c. Has the pandemic or other economic downturns impacted Tribes’ maintenance of two pensions plans?
2. What feedback do you have regarding the transition relief that is described above and what further guidance if any, would you recommend?

3. The ANPRM described the rules that Treasury and IRS were considering issuing as proposed regulations relating to whether a plan is a governmental plan.
 - a. Do Tribes recommend Treasury and IRS use the ANPRM as the starting point for drafting guidance?
 - b. Does the ANPRM reflect your Tribe's view on defining governmental activity and commercial activity?
 - c. What challenges might a Tribe face with the proposed facts and circumstances tests centered on assignment of shared employees, location of activity, or "who pays the employee"?
 - d. Do Tribes consider the proposed rules for transition relief to be comprehensive in answering instructions and filings and/or how control group rules and testing should be applied?
 - e. What other questions or comments, if any, do Tribal governments have regarding the ANPRM?
4. The Report contains specific recommendations to inform the development of guidance under PPA '06. For example, the report recommends defining revenue generation as an essential government function because it is for a public, rather than private purpose. Do you support and/or have feedback regarding the report's guidance recommendations?
5. Relatedly, do you have any feedback on section 906(a)(1) of PPA '06 with regard to determining what constitutes substantially "all of whose services of such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function)."
6. The Report requests interim guidance and contains recommendations on enforcement. Do you support and/or have feedback regarding these recommendations?
7. What questions or feedback do you have about any other aspect of the Report that are not covered by the above topics?

[Register here for the consultation.](#)

We respectfully request that each Tribe register one person to participate in the consultation. All others are welcome to register as listen-only participants.

Please note that consultations are off the record and not for press purposes.

We will send out an Agenda and a list of registered speakers before the consultation.

The deadline to submit written comments is Friday, April 19, 2024 at 11:59 p.m. Alaska Time. Written comments should be sent to tribal.consult@treasury.gov.

We look forward to hearing your feedback on the Report to ensure Tribal governments and communities are integrated into the work of our department.

Sincerely,

Chief Lynn Malerba
Treasurer
Point of Contact for Tribal Consultation
U.S. Department of the Treasury