

**PROJECT PLAN AND REPORT OF THE TRIBAL PENSIONS SUBCOMMITTEE  
FOR THE MARCH 14, 2023 TTAC MEETING**

The Treasury Tribal Advisory Committee (TTAC) subcommittee on Tribal Pensions (the “Pensions Subcommittee”) will be seeking input from Tribal governments before making final recommendations to the TTAC on guidance to enhance equal government status for Tribes under the Pension Protection Act (the “PPA”), including related provisions under Internal Revenue Code (the “Code”) Section 414 and Section 3(32) of the Employee Retirement Income Security Act (“ERISA”). This initial report is intended to provide an outline of proposed guidance recommendations and to secure additional input from TTAC members and other stakeholders. This initial report does not reflect final guidance.

The report includes background on the unique issues faced by Tribal employers who offer retirement benefits for their employees and an initial set of core guidance principles for consideration and further input. The report also provides a summary of broader topics and concepts derived from Tribal Pensions Subcommittee deliberations since the first TTAC public meetings in 2019. The Pensions Subcommittee will expand and revise the report as public input and comments are received from Tribal governments and Tribal employers.

The TTAC supports the Pensions Subcommittee seeking additional Tribal input and ensuring continued transparency in the development of guidance related to the government status for Tribes under the Code and ERISA.

**I. Important Background on Tribal Pension Issues**

When ERISA was enacted in 1974, it drew a line between government sector and private sector employers. Private employers were subject to ERISA and a new set of Code requirements and regulations. Government employers were exempt.

The decision to treat governments differently was not an oversight. There were concerns that ERISA would infringe on sovereignty if applied to government employers. It was recognized that governments could raise tax revenues to secure benefit promises, if needed, while private companies could not. Congress understood that government employers were already subject to oversight through the political process and election cycles, while private employers were not. And the “equities” favoring ERISA regulation did not apply. In exchange for the added regulation of ERISA, private sector employers received “benefits” that government sector employers do not need: caps on liability (no punitive damages), limitations on jury trials, protection against conflicting state laws, and tax deductions.

Unfortunately, the original “government” definition under Section 3(32) of ERISA and Section 414(d) of the Code was silent on its treatment of Tribes. For more than 20 years, many Tribal governments throughout the country asserted government status under ERISA and Code Section 414(d). Tribes applied for and routinely received IRS governmental plan determination letters.

on their tax-qualified retirement programs. And while the IRS now takes a more limited view of the scope of retirement plan determination letters, Tribes were comforted by the receipt of these governmental plan determinations for over two decades without challenge. As Tribal gaming grew in the late 1990s and early 2000s, however, Tribes began to get push back from IRS and DOL on whether Tribes were truly “governments” under ERISA and Code Section 414(d).

The federal agency push back on governmental status for Tribes resulted in a legislative effort to clarify once and for all that Tribal governments were “governments” under ERISA and Code Section 414(d). After several Tribal parity bills were introduced in Congress, the Senate passed a bill (S. 1783) in the fall of 2006 that included Tribal parity language. Unfortunately, the companion bill in the House did not include Tribal parity language, and Congress was pressing hard to enact legislation that would become the Pension Protection Act (“PPA”).

The PPA was pulled for a vote before all of the differences between the Senate and House bills were reconciled and before a final conference report was issued. Unfortunately, the draft being circulated within conference at that time included a parenthetical adding the essential government function and commercial activity limitations for Tribal governments and Tribal employers. The language included for Tribes when the PPA was presented for a vote stated that Tribes are entitled to government status for their employee retirement and welfare plans when the participants in those benefit programs are “*employees ... 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)*” (emphasis added). The PPA, with the Tribal provision quoted above, was approved by Congress on the eve of a Congressional recess for a fall election cycle and with no debate or discussion regarding the Tribal provision.

In the final analysis we are left with concepts added during a legislative conference process that was not completed, that are inconsistent with all prior House and Senate efforts on this issue, that received no debate or input from Tribes in the legislative process, have proven unworkable in other areas of taxation, and have now stood for more than 17 years with no substantive guidance from the Departments of Treasury or Labor.

## II. Core Principles for Consideration and Potential Integration into PPA Guidance

The following represent core principles for which the Pensions Subcommittee believes there is a high likelihood of consensus from Tribal stakeholders based on initial public meetings and input, as well as subcommittee deliberations to date. This initial listing of core principles is not intended to be an all-inclusive list as it is anticipated that the list will expand and be modified as additional input is gathered and considered.

The Pensions Subcommittee will take these core principles into account when developing specific guidance. The Pensions Subcommittee will refine and add to these principles as additional input is received and considered.

1. **Governmental Parity:** Guidance must strive for maximum parity between state and Tribal governments to the fullest extent permitted under existing statutes. Currently state

and local governments engage in many of the same activities in which Tribal governments engage, without losing governmental status: e.g., state lotteries; convention centers/hotels; marinas; tourism; golf courses.

2. **Ambiguity Construed in Favor of Tribes:** Guidance should take into account the Tribal canon of statutory construction whereby ambiguity in federal statutes must be construed in favor of Tribal governments.
3. **Raising Revenue as an Essential Government Function:** Guidance should recognize that raising revenue for public purposes is an essential government function. In this regard, there should be recognition that Tribes typically do not have the type of property tax base often used by other governments, and that Tribal sales tax revenues are often limited by issues of state dual taxation and rural geographical locations.
4. **Public Versus Private Use of Funds:** Guidance must take into account the difference between Tribal enterprises that raise revenue for public purposes versus commercial entities that are operated for private gain.
5. **Consultation and Negotiated Rule Making:** Guidance must reflect government-to-government consultation and a cooperative rulemaking process between Tribes and federal agencies, consistent with Executive Order 13175.

### III. Interim Guidance and Legislative Correction

1. **Deference to Tribal Sovereignty:** Unless specifically defined in the Internal Revenue Code, Treasury guidance shall defer to the sovereign authority of Tribes to define the scope, purpose, and function of their governmental activities.
2. **Updated Transition Relief:** While legislative solutions and detailed guidance are being developed, the transition relief in Notice 2007-67 should be updated and expanded. The relief should continue to recognize Tribes' good faith efforts to comply with the PPA, allow Tribes the flexibility to modify the design of retirement plans to fit their employment and fiscal needs, and identify the Code and ERISA compliance requirements that will not apply until guidance is finalized.
3. **Guidance before Enforcement:** Tribal governments should not be subject to PPA enforcement actions, and Tribal government status should not be challenged, until after clear guidance is issued. An enforcement moratorium similar to the General Welfare Exclusion Act audit suspension should be considered. An enforcement moratorium was put in place by federal agencies in the past when similar pension compliance issues were addressed for state and local governments. Sections 29 U.S.C. 1204 and 1136 require the coordination of the Departments of the Treasury and Labor on matters such as pension regulation.
4. **Legislative Elimination of "Essential Governmental Function" and "Commercial Activity" Tests:** In tandem with the guidance projects identified herein, legislative options to permanently eliminate the "essential government function" and "commercial activities" tests, as applied to Tribes, should be pursued.

5. **Legislative Recognition of Tribal Courts and Tribal Laws:** Any legislative efforts should include the recognition of Tribal courts and Tribal laws in the resolution of retirement plan claims.

#### IV. Specific Concepts under Consideration

The following represent specific concepts under consideration for the possible development of guidance. This initial listing is not intended to be an all-inclusive list as it is anticipated that the list will expand and be modified as additional input is gathered and considered.

##### 1. Definition of Essential Governmental Functions:

**Issue:** Essential governmental functions should be defined in a manner that affords Tribal governments parity with other governmental entities and recognizes the fundamental need of Tribes to generate revenue.

**Possible Guidance Solution:** Consider guidance as follows:

- (A) The generation of revenue for public/Tribal purposes must be prioritized over function or activity (regardless of whether the activity engaged in would be considered, itself, an essential governmental function), because Tribes do not have the same revenue generation opportunities as state and local governments.
- (B) Consider the Tribes' public purposes/needs in relation to its exercise of government, governance, and provision of services to its Tribal citizens.
- (C) Specifically address the tax base issues that limit tax revenue for Tribes.

##### 2. Definition of "Commercial":

**Issue:** Whether there is a difference between "commercial" that are engaged in for private interests or those by a government to raise revenues for public purposes.

**Possible Guidance Solution:** Consider guidance as follows:

- (A) Activities engaged in for public purposes are not "commercial" in nature. *For example:* States engage in gaming (lotteries) to raise revenues for public purposes. Cities also routinely operate convention centers and hotels.
- (B) Activities engaged in for private gain may be commercial in nature.
- (C) Regardless of the use of the term "commercial *activities*" in the Code and ERISA, guidance needs to distinguish between activities and purpose. Otherwise, any state or city that performs the same activity as MGM Resorts or Hilton Hotels is performing a "commercial activity."
- (D) Any revenue generating activities conducted to support the overall general welfare of the Tribe, are operated in the best interest of the Tribe and not for the benefit of

shareholders or private interests that are independent of and not directly related to the Tribe. Tribal citizens who are enrolled shareholders (members) of Tribes or Alaskan Native regional and village corporations under ANSCA are not to be considered or treated as entities holding private interests in a Tribe or a Tribe's revenue generation.

### 3. Control Group Testing:

**Issue:** Private sector and ERISA covered employers are subject to certain retirement plan compliance requirements that do not apply to governmental employers. A significant component of the private sector compliance testing is the “control group” rules, which require the employer to treat all related entities as a single employer. The control group rules are intended to, and effectively, make it harder for different entities to have different benefit structures. Tribal governments and their various enterprises often have very different employment bases, needs and revenue flows. The application of control group rules to Tribes or any subset of Tribal employers (“commercial activity” employers) significantly limits Tribal control over employee benefits and the related costs. The practical result of imposing control group requirements on Tribal employers is likely to be the elimination of retirement benefits for a portion of the Tribal employee population.

**Possible Guidance Solution:** Consider guidance as follows:

- (A) Tribes should be afforded the same flexibility to design different employee benefits for their various employment groups that state and local governments enjoy; control group requirements should not apply to Tribes.
- (B) Control group rules under the Code are written in terms of stock ownership and other corporate control concepts. Tribes do not establish and operate enterprises in the same manner as private sector businesses and the interim guidance for Tribes should recognize that the current Code rules do not apply to Tribal employers.

### 4. Employee Sharing, Transfers and Rehires:

**Issue:** Tribes often experience a high level of employee movement among Tribal employers, as well as a high level of rehire activity. Employees also may be shared among Tribal employers for the efficient use of resources and talent, such as HR and IT professionals. Tribal employment functions that may be classified as commercial activities are significantly limited in their ability to accommodate these unique Tribal employment issues, due to private sector and ERISA compliance requirements. Governmental compliance standards for retirement plans allow for flexibility and easily accommodate employee rehires and sharing arrangements.

**Possible Guidance Solution:** Consider guidance as follows:

- (A) Consider a good faith compliance standard for addressing rehires in Tribal retirement plans with regard to the service crediting rules and rehire requirements

under the Code and ERISA. A similar standard has been implemented for governmental employers with regard to minimum required distributions, a similarly complex area of retirement plan compliance.

- (B) Consider guidance that allocates any employee of the Tribal government who provides shared services to a Tribal enterprise to the governmental retirement plan and eliminate the potential need to enroll a single individual in two or more retirement plans at the same time.
- (C) To the extent that Tribal employers are required to maintain separate retirement plans for various Tribal entities and enterprises, consider an exemption from ERISA plan asset requirements that will allow an employee's accumulated retirement plan balance to be transferred between plans maintained by the Tribe, as the employee moves to different positions. The current inability to move an employee's balance between plans when the employee moves has a significant impact on retirement plan loans, hardship withdrawals and administrative costs.

#### 5. Combined Assets:

**Issue:** When a Tribal government is forced to maintain more than one retirement plan for its workforce in order to retain governmental status, they often incur duplicative expenses. Retirement plans are operated and priced on an individual plan, average account balance basis. The plan maintained for a Tribal government workforce may be much smaller than the plan maintained for a Tribal enterprise. Not only will the plans be priced differently and have access to different classes of service providers and services, but the Tribe will also have less bargaining power with divided asset pools.

**Possible Guidance Solution:** Consider guidance as follows:

- (A) Create a mechanism that allows retirement plans to operate with joint trust funds, subdivided as necessary to reflect the assets of each participating retirement plan. The auditing of commercial plan assets must be accommodated in this topic, as well as the certification of assets required for an ERISA limited scope audit.
- (B) Consider similar bargaining power and pricing issues for Tribal health plans that also are subject to the current governmental vs commercial legal structure. Health plans that are divided into governmental plans and commercial plans have smaller risk pools which can mean less security for plan participants.

#### 6. Coordination with Auditing Standards:

**Issues:** Form 5500 filings in many cases require audited financial statements for the retirement plan. The ERISA audit standards developed by the American Institute of Certified Public Accounting (AICPA) do not address the unique issues faced by Tribal plans. This can make the standard ERISA audit process very costly for Tribes and in some cases result in filing delays. There also is no coordination between the ERISA audit standards for commercial plans and the GASB fiduciary fund audit requirements for

Tribes. With regard to some retirement plans, it is possible that a single Tribal retirement plan may need an ERISA audit and GASB compliant financial statements, each prepared under different rules.

**Possible Guidance Solution:** Consider guidance as follows:

- (A) Incorporate good faith compliance standards for Tribal retirement plan audit issues into updated transition guidance under the PPA. Encourage the audit of and reporting on Tribal retirement plans, without the threat of penalties for compliance deficiencies in areas where no guidance has been finalized (such as definitions of PPA standards, application of control group testing).
- (B) Until such time as the audit requirements under ERISA, the AICPA, and GASB are coordinated, provide administrative relief that will eliminate the need for Tribal entities to obtain two audits of retirement plan financial statements for the same time period.

## 7. State Court Enforcement Actions:

**Issue:** ERISA provides for litigation over benefit claims in state or federal court, but many Tribes have their own court systems. If Tribes are treated as “commercial,” Tribal governments may be forced to answer and defend lawsuits in state court.

**Possible Guidance Solution:** Consider guidance as follows:

- (A) Confirm that Tribal court and Tribal law should be given full recognition on par with state court and state laws.
- (B) Incorporate Tribal court exhaustion into any judicial access procedures for federal or state court.

## 8. Prospective Enforcement:

**Issue:** Some Tribes have been subject to Form 5500 penalty assessments and enforcement actions pending guidance under the PPA.

**Possible Guidance Solution:** Consider guidance as follows:

- (A) Consider prospective enforcement and temporary administrative relief that would offer certainty to Tribes pending final guidance.
- (B) Consider parity issues between Tribes that make good faith, but incomplete, Form 5500 filings, and Tribes that are not making annual filings under the current transition guidance.
- (C) Consider prospective effects of all future guidance.