



Tribal Consultation Summary

Treasury Tribal Advisory Committee Subcommittee on Parity and Reform's Project Plan and Report on Tribal Pensions Issues

Introduction

On March 19, 2024, the U.S. Department of the Treasury (Treasury) held a consultation on the Treasury Tribal Advisory Committee (TTAC) Subcommittee on Parity and Reform's [Project Plan and Report on Tribal Pensions Issues](#) (Report). Details about the topics of conversation for the consultation can be found in the [Dear Tribal Leader Letter](#) that was published on January 24, 2024. The consultation was held virtually to maximize Tribal participation across Indian Country. Over 85 attendees joined the consultation, and 16 letters were received. The comment period ended on April 19, 2024.

The TTAC advises the Secretary on matters related to Tribal tax, the training of Internal Revenue Service field agents, and the provisions of training and technical assistance to Native American financial officers. 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. On March 14, 2023, the TTAC approved the Report for Tribal consultation.

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 legislative changes, as well as proposed interim guidance, legislative proposals, and enforcement recommendations. The Report is a work product solely of the TTAC; Treasury and IRS were not involved with the Report.

Pursuant to Treasury's Tribal [consultation policy](#), below is a summary of the feedback received in Tribal consultation.

Broad Feedback

1. Understanding the Condition of Tribal Economies and the Federal Trust Responsibility

The majority of commenters explained that Tribes have a unique status with the federal government. As a result, Commenters requested that any guidance issued by the Treasury and IRS should incorporate the federal trust responsibility towards Tribes and citizens, which includes the long-established federal policy, expressed through various congressional and executive actions, to promote Tribal self-determination and economic development. Commenters also shared that many Tribal communities face high poverty and explained that Tribes, generally have little or no ability to levy taxes. Due to these barriers, commenters explained that Tribes rely on commercial entities to generate governmental revenue to support their self-determination and governance. Further, commenters explained that federal policy encouraged the creation of Tribal businesses to generate revenue to foster self-determination and to raise the socio-economic status of Tribal citizens. One commenter noted in their letter that the Indian Gaming Regulatory Act's explicit purpose is to promote "tribal economic development, self-sufficiency, and strong tribal governments." Commenters expressed in letters that denying government status to tribal activities because activities, including gaming, generate revenue needed for self-determination contravenes United States policy.

Commenters requested that Treasury and IRS keep this context in mind, as it is materially different than the revenue sources to fund states and local governments.



2. Tribal Self-Governance in Implementing Guidance

Commenters emphasized that Treasury and IRS should recognize Tribal self-governance when issuing guidance regarding pensions. Consistent with federal policy, commenters requested that Treasury’s guidance recognize Tribal sovereign authority, the right to self-govern and a Tribe’s ability to provide for its citizens. Commenters expressed that Tribes should at a minimum be on parity with federal, state, and local governments, who regularly engage in business activities to fund citizen programs and services (such as marinas and ports, municipal golf courses, convention facilities, and the like) which are not subject to tax.

3. Support for the Subcommittee on Parity and Reform’s Project Plan and Report on Tribal Pensions Issues

The majority of commenters support the Subcommittee on Parity and Reform’s Report. In particular, commenters support applying the Indian canons of construction¹ (Canons). In short, these Canons require that (1) treaties be interpreted as the Indians would have understood them; (2) treaties are liberally construed in favor of the Indians with all ambiguities resolved in their favor; and (3) abrogation of tribal sovereignty or property rights be expressed by Congress clearly and unambiguously.

Commenters shared their belief that when Section 906 of the Pension Protection Act of 2006 (PPA), Public Law P.L. 109-280, amended the Code and ERISA, the new PPA definition created ambiguities and two sets of rules for Tribal employers. As noted in comment letters, under the PPA, the definition of “governmental plan” in IRC Section 414(d) now includes a plan established and maintained by an Indian tribal government, a tribal subdivision, or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function).

Further, in letters submitted, commenters explained their understanding that the PPA definition now limits Tribal plans for employees performing “essential government functions” and another for employees engaging in “commercial activities.”

Commenters agree with the Report’s recommendation that Tribes should not be subject to enforcement actions until clear guidance is issued. Additionally, the majority of commenters agree with the Report that in tandem with guidance, Tribal leaders should seek congressional action through legislative options to permanently eliminate the “essential government functions” and “commercial activities” tests. Internal Revenue Code section 7871(e) states that the term “essential governmental function” shall not include any function which is not customarily performed by State and local governments with general taxing powers.

Tribal Responses to Consultation Questions

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?

Commenters recommended that public policy should encourage pension plans to provide for employees when they retire. Commenters shared during the consultation that Tribes often have high turnover, as well as rehire activity and shared employees. These circumstances make it challenging to track when managing two separate retirement plans. Commenters noted administrative costs and burdens increase for any Tribe that has two plans – one for government employees and another for “commercial employees.” Commenters shared that

¹ Worcester v. Georgia, 31 U.S. 515, 557 (1832)

these costs result in Tribes offering a less favorable commercial plan compared to the benefit of participating in a government plan for purposes of providing benefits to their employees. Further, commenters expressed that commercial plans unnecessarily subject Tribes to many provisions that do not apply to other government plans, such as participation standards, nondiscrimination testing, vesting and accrual rules, and minimum funding standards. Commenters unanimously agreed that two sets of rules for Tribes create unnecessary burden and parity issues when compared to other governments who also engage in the same activities and are allowed to use a government plan to deliver benefits.

b. What limitations do Tribal employers encounter when an employee provides services to more than one entity?

Commenters shared that to reduce the administrative burden of managing two plans when an employee provides services to more than one entity, Tribes often elect a commercial plan although it has added compliance requirements. The commenters explained that the extra cost and added complexity of maintaining more than one pension plan, especially when employees work in both areas, whether separate or at the same time, discourages Tribal governments from sponsoring pension plans. A commentator added that simplification is needed and a focus on parity should be pursued.

c. Has the pandemic or other economic downturns impacted Tribes' maintenance of two pensions plans?

A commenter shared that during the intervening years of transitional relief without guidance, Tribes have had to endure significant economic downturns. Despite these constraints, Tribes expressed that they were disadvantaged by restrictions on governmental plan reductions contained in the transitional guidance which have limited their decision-making options.

2. What feedback do you have regarding the transition relief that is described above and what further guidance if any, would you recommend?

Commenters described their understanding that the original transition relief for Tribal plans under the PPA, Notice 2006-89, initially contemplated that Tribes would have sufficient guidance to make plan changes by September 30, 2007. When it became clear that guidance would take much longer than that, transitional relief was extended in Notice 2007-67. The 2007 extension contained the following amendment:

“This extension is conditioned on the plans involved not being amended, for periods before the extended date, to reduce benefits unless the reduction: (i) does not vary based upon whether the participant is a governmental ITG employee or a commercial ITG employee, or (ii) is made to the plan for commercial ITG employees and is the minimum reduction necessary to satisfy the requirements of the Code. If a reduction occurs that does not meet either of these conditions, the extension provided under this notice ends on the date the reduction goes into effect.”

Commenters stressed there is no justification for the amendment restrictions on Tribal plans and recommended that Treasury and IRS consider eliminating. Commenters perceived the amendment to be more limiting for Tribes than for any other government employer. They also expressed their belief that the amendment is more limiting than the rules that apply to private sector employers. Commenters noted that private sector employers that are subject to all of the anti-discrimination rules are free to amend and design different plans for different groups or entities, so long as they do not have the effect of impermissible discrimination in favor of highly compensated employees. A commenter shared their opinion that if Tribes elected to provide a different Tribal plan for government workers than for business employees, the decision should be up to the Tribe and not up to a federal agency.

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?

Commenters urged Treasury and IRS to withdraw the proposed guidance, consult with Indian tribes, and issue updated proposed regulations.

b. Does the ANPRM reflect your Tribe’s view on defining governmental activity and commercial activity?

Commenters expressed their view that the ANPRM is flawed because it starts from the premise that taxes are the only valid source of government revenue. Commenters noted that state, local and Tribal governments all generate revenue from sources other than taxation. Commenters shared that generation of revenue supports Tribal operations and programs, which is itself an essential government function for tribal governments.

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”?

Commenters recommended that unless defined in the Internal Revenue Code, that guidance regarding the facts and circumstances test should defer to the sovereign authority of Tribes to define governmental activities. A commenter proposed an alternative that if any activity is performed by a state, local, or Tribal government, the employee’s role is therefore considered a governmental function instead of an activity that is performed by a private business.

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?

Commenters requested that as guidance be developed, consideration of eliminating the control group rule be considered. Commenters in consultation described their understanding that control group rules and testing were intended not for governments but rather corporate structures to prevent discrimination between highly compensated employees and other employees with a lesser plan or no plan at all. Commenters also requested that Tribes be afforded flexibility to design their benefit plans to improve employee participation, retain employees, and especially have different benefit structures depending on the employment base.

e. What other questions or comments, if any, do Tribal governments have regarding the ANPRM?

Commenters recommended that Treasury and IRS be consistent with applying the Indian canons of construction to recognize Tribal sovereign authority on their governmental activities.

Commenters stressed continuing the spirit of consultation and the new era of Tribal self-determination.

Commenters noted that Executive Order 14112, “Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination” provides:

“Now is the time to build upon this foundation by ushering in the next era of self-determination policies and our unique Nation-to-Nation relationships, during which we will better acknowledge and engage with Tribal Nations as respected and vital self-governing sovereigns. As we continue to support Tribal Nations, we must respect their sovereignty by better ensuring that they are able to make their own decisions about where and how to meet the needs of their communities. No less than for any other sovereign, Tribal self-governance is about the fundamental right of a people to determine their own destiny and to prosper and flourish on their own terms.”

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?

Commenters expressed the final rule should minimize the differences between Tribal and state governments by expressly recognizing government treatment for revenue generating activities on par with those performed by state and local governments. Commenters noted their opinion that it is reasonable to construe the term “essential government function” as including any activity that is carried on to preserve or to promote Tribal self-determination, health, education, and welfare, including the maintenance of culture and tradition. Commenters further provided an example that commercial activities could be read to prohibit only the activities that are carried on for private rather than public interests, and (for parity) not to exclude any revenue generating activity similar in scope, purpose or result to those carried on by state and local governments.

Some commenters also provided that Section III (4) should not only indicate that the “essential government function” and the “commercial activities” tests be eliminated but should also state that Section 414(d) be amended to state that any plan maintained by an Indian Tribal Government for Indian Tribal Government employees will, in all circumstances, be a governmental plan. Further, this section should recommend that the last sentence of Section 414(d) be amended to read as follows:

The term “governmental plan” shall, under all circumstances, include 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.

Commenters provided different solutions if Section 141(d) definition of a “government plan” cannot be changed to always treat an Indian Tribal Government plan as a governmental plan. A commenter offered a proposed solution to have a bright line test administered every five years and applied to the subsequent four years after an administered year to test if more than 50% of an Indian Tribal Government plan is composed of participants who work in essential government function roles.

Commenters mentioned that the Code Section 414(b) and (c) controlled group rules should not apply to ITG plans. The subsection does not mention the affiliated service group (“ASG”) rules of Code Section 414(m) that have similar consequences as the controlled group rules. Accordingly, the subsection should discuss whether the ASG rules apply to ITG plans and, if they do apply, indicate that neither the controlled group nor ASG rules should apply to an Indian Tribal Government plan(s).

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).”

Commenters uniformly asked that final guidance eliminate references to commercial activity tests. A commenter provided an example of a Tribal government that owns a port or marina would be subject to the commercial activity test yet a local government that owns and operates a marina would not be and that the treatment is inconsistent. A commenter shared that the classification of marinas as commercial activities also disregards the reality that many Tribes are located in remote areas that are not accessible by roads and highways. The commenter further noted that those Tribes cannot exist or thrive without significant shipping activity conducted through ports and marinas. The example provided in the comment letter further explains that under the ANPRM commercial activity test, a Tribe's building and roads employees would meet the performance of an essential governmental function but the same Tribe's building and maintenance department at the marina and port would be considered in performance of a commercial activity.

6. The Report requests interim guidance and contains recommendations on enforcement. Do you support and/or have feedback regarding these recommendations?

Commenters urged the withdrawal of the ANPRM, and that Treasury and IRS should restart from the beginning. Commenters suggested the restart should begin with targeted consultations. Commenters strongly recommended that enforcement by the IRS and the Department of Labor be paused until the rulemaking process is done.

7. What questions or feedback do you have about any other aspect of the Report that are not covered by the above topics?

Commenters referenced Section 339(a) of the SECURE 2.0 Act of 2022 amended Code Section 414(p)(l)(B) to treat Tribal court (issued pursuant to Tribal law domestic relation laws) in the same manner as state court orders (issued pursuant to state law domestic relation laws). Commenters expressed their understanding and opinion that the recent amendment of the Code to treat Tribal court decisions the same as state court decisions should be listed in subsection IV (7) as an additional reason why ERISA should be amended to indicate that Tribal court orders on benefit claims should be treated the same as state court orders on benefit claims.