

U.S. DEPARTMENT OF THE TREASURY
TREASURY TRIBAL ADVISORY COMMITTEE
PUBLIC MEETING MINUTES

September 16, 2020
1:00 p.m. to 3:00 p.m.

The Treasury Tribal Advisory Committee (TTAC) conducted a public meeting on September 16, 2020. Due to COVID-19 safety measures, the meeting was held via teleconference.

In accordance with the provisions of Public Law 92-463, the meeting was open to the public from 1:00 p.m. to 3:00 p.m.

The following TTAC members were present:

TTAC

Chairman W. Ron Allen
Rebecca Benally
Sharon Edenfield
Lacey Horn, Chair
Patricia “Trish” King
Chief Lynn Malerba
Eugene Magnuson

The following Treasury representatives were present:

Office of Tax Policy

Krishna Vallabhaneni, Tax Legislative Counsel and TTAC Designated Federal Officer (DFO)
Kimberly Koch, Attorney-Advisor, Office of Tax Legislative Counsel

Internal Revenue Service

Margaret Von Lienen, Director, Exempt Organizations and Government Entities
Angela Gartland, Acting Director, IRS/Government Entities
Telly Meier, Manager, Indian Tribal Governments Office
Carmen Zucker, Technical Manager, Indian Tribal Governments Office
Janine Cook, Deputy Associate/Acting Chief Counsel (Exempt Organizations and Employment Taxes), IRS/Office of Chief Counsel (EEE)
Syd Gernstein, Branch Chief, IRS/Office of Chief Counsel
Dan Sheiden, IRS
NaLee Park, Tax Law Specialist, IRS/Office of Chief Counsel
Dave Rifkin, Senior Attorney, IRS/Office of Chief Counsel (EEE)
Andrew Megosh, Senior Tax Law Specialist, IRS/Office of Chief Counsel
Angella Warren, Branch Chief, IRS/Office of Associate Chief Counsel (Income Tax and Accounting)
Lisa Mojiri-Azad, Assistant to the Branch Chief IRS/Office of Associate Chief Counsel (Income Tax and Accounting)

Dominic DiMattio, Associate Attorney, IRS/Office of Chief Counsel

OCC

David Black, Community Development Expert

CDFI Fund

Clint Hastings, Associate Program Manager, Native American Initiatives

CALL TO ORDER

DFO Vallabhaneni called the meeting to order at approximately 1:05 p.m., welcomed the participants and turned it over to Chairperson Lacey Horn.

ROLL CALL

All TTAC members were present. Treasury, IRS, OCC and CDFI Fund attendees were introduced.

TTAC Member Chief Lynn Malerba provided a tribal opening.

DFO Vallabhaneni made a motion to approve the March 31, 2020 TTAC Public Meeting Minutes. Chairwoman Lacey Horn seconded. Motion passed unanimously.

The TTAC members provided general updates. Chairman Allen noted that the coronavirus has impacted the subcommittee's ability to meet in person and have received several calls regarding progress. Tribes have many questions about how the GWE might apply to CARES Act expenditures. Despite recent challenges, the GWE's work continues to move forward.

Rebecca Benally thanked the Subcommittees for their recent work. The Subcommittee is in the seventh edit of its workplan and working towards making recommendations to Treasury. She noted that the December 30, 2020 deadline for meeting CARES Act expenditures is a challenge for Indian Country.

Sharon Edenfield reaffirmed that, despite challenges related to the coronavirus, the GWE Subcommittee has made progress. She noted fire, hurricane and flooding affecting tribes as well as the coronavirus. She noted the importance of public comments in informing their work.

Trish King thanked the Tribal Pensions Subcommittee and confirmed that the pandemic has taken priority and affected the completion of the workplan.

Eugene Magnuson thanked the members of the Tribal Pensions Subcommittee for their work on the tribal pension workplan.

Chief Lynn Malerba highlighted the importance of working with Treasury to help educate and add context on tribal matters, in particular those issues impacted by the pandemic.

Chairperson Horn thanked the Subcommittee and ad hoc members for their work on Subcommittee issues. She emphasized the importance of feedback from Indian Country to

inform their work. She also noted the stringent reporting requirements from Treasury OIG related to CARES Act funding. She stated that the same rules found in the GWE should be applied to CARES Act funding and deference be given to tribes as they make decisions on behalf of their tribes related to spending funds to meet the needs of their members. Chairperson Horn then transitioned into TTAC Subcommittee updates.

GWE Subcommittee co-chair Ron Allen named subcommittee members: Sam Cohen, Santa Ana Chumash tribe; Robert Yoder, Yoder Langford; Wendy Pearson, Hobbs Strauss; Robin Delfino, Pachanga Band of Luiseño Indians; Ken Parson, Holland & Knight; ad hoc member Loren Stafford, Federated Indians of Rancheria; Fatima Abbas, National Congress of American Indians and Emery Realbird, Native American Financial Officers' Association. The Subcommittee approved a work plan in May 2020. The original timeframe for completing the work shifted due to the effects of the pandemic. A virtual forum with tribal leaders was held in August, 2020 to gather feedback on a solicitation letter requesting feedback from tribes on GWE-related definitions and application practices. The letter was revised based on feedback and sent to tribes with a deadline of September 14, 2020 for comments. As of this date, 17 responses have been received. The work now shifts into Phase II, which focuses on analysis of responses and draft proposal on recommendations to the TTAC. Anticipated content includes deference to tribal governments in discretion, expansion of common law as it applies to tribal lands, prospective enforcement of GWE as it applies to tribes and tribal citizens, providing guidance on the term "lavish and extravagant" and use of the "safe harbor" provision. Other programmatic topics reviewed include using "uniform assistance" vs. "per capita" definitions, the use of "minor trusts", substantiating GWE expenses, what constitutes GWE expenses to tribal members, ensuring that "safe harbor" plans adopted by tribes are flexible according to the unique needs of the tribes, compensation for services, how "needs based assistance" affects SSI and other supports. The Native American Financial Officers' Association (NAFOA) and National Congress of American Indians (NCAI) assisting in gathering tribal input. Sharon Edenfield added that no feedback will be attributed to a specific tribe. The survey can be found by contacting Fatima Abbas at NCAI or Emery Realbird at NAFOA. Chief Malerba added that guidance and reporting should not be onerous and should show deference to tribes for how the design and administer their programs. Tribal consultations on the subject should also be held to inform guidance. The meeting was then turned over to Chief Lynn Malerba for an update on the Dual Taxation Subcommittee.

Chief Lynn Malerba thanked the members of the Subcommittee: Henry Cagey, Jean Swift, Michael Willis, Michael Connelly, Derrick Watchman and Rob Porter for their work. Jonathan Dam and Stephanie Conduff from the Department of Interior also participated as ad hoc members of the Subcommittee. The desired outcome is for tribal nations to have the only taxing authority for business and economic activity occurring on the tribal reservation. Chief Malerba pointed out that any taxes paid to outside tax authorities fail to reimburse tribes for economic activity that benefit surrounding communities and take away from the tribe's ability to provide government services to tribal members. The report establishes a framework for how dual taxation affects tribal nations and has developed recommendations for the TTAC to consider. Once the report is accepted by the TTAC, it is recommended that Treasury conducts tribal consultation on the report and recommendations.

Rebecca Benally, co-chair for the Dual Taxation Subcommittee thanked those who have contributed to the Subcommittee work and mentioned that the Subcommittee has taken into consideration different information resources but continues to welcome input from Indian Country on dual taxation matters. Chairman Allen noted that this is an important issue for Indian Country, pointed out variances in how this affects tribes and the need for urgency in addressing this issue. Chairperson Horn turned the discussion to an update from the Tribal Pensions Subcommittee.

Co-chair Eugene Magnuson stated that the Subcommittee has continued their work telephonically and focused on draft guidance plan. The Subcommittee has met with three accounting firms with experience in tribal pensions to inform their work: Moss Adams, REDW LLC and RSM US LLC. The draft guidance plan has been shared with the TTAC and Treasury for informational only purposes. The Subcommittee has developed a survey which will be sent to tribes to gather information on the types of pension plans offered, the legal status of the plans (commercial or governmental), employment data, compliance challenges unique to Indian Country. The survey will be produced by Cal State University San Marcos under Dr. Eric Trevan. The survey will be conducted under research review and ensure that all information submitted by tribes remains anonymous. Data will also be presented to the TTAC in aggregated format. The Subcommittee will be using national organizations such as NAFOA to distribute to tribes and solicit feedback. Information will be collected from October 15 through November 1, 2020 and be used to craft recommendations to the TTAC for presentation to the Secretary of the Treasury. The final guidance plan is anticipated in December, 2020. Nine issues are initially presented for the development of guidance, but the list is not inclusive and it's anticipated that the issues may change based on the progression. The primary issues addressed in the work plan are: definition of essential government function to align parity with other governmental entities, definition of commercial activities vs. governmental activities, the application of control group testing rules to tribal governments, employee sharing; transferring and rehiring activities, domestic relation orders affecting individual benefits, asset tests, audit standards for tribal plans, state-court enforcement actions, and last, perspective enforcement of penalties. Co-chair Magnuson made a motion to accept the plan, Trish King seconded, and the motion passed unanimously. Chairman Allen asked to confirm that the plan is open for review by Indian Country upon request, and Co-chair Magnuson confirmed. The meeting transitioned to Public Comments.

Sharon Edenfield noted that a letter was received from Charles Hill of the San Carlos Apache Public Housing Authority. Mr. Hill joined the meeting and discussed compliance issues related to a Capital Magnet Fund grant awarded to the Housing Authority. Mr. Hill stated that the CDFI Fund has scheduled a conference call with the Housing Authority and Congressional representatives to review the status of the grant. The Housing Authority requests that the TTAC call upon the CDFI Fund to engage with the Housing Authority in a spirit of cooperation. Chairperson Horn stated that she is hopeful that the meeting will work in the Housing Authority's favor. Clint Hastings, CDFI Fund, stated that the Fund is looking forward to working towards a successful resolution in the call.

Vice-Chair Magnuson summarized a letter received from Juan Garza, Chairman of the Kickapoo Traditional Tribe of Texas. The Tribe calls for a clarification in the General Welfare Exclusion (GWE) to align federal needs-based assistance with tribal General Welfare programs. Tribal

members have seen their federal benefits reduced or eliminated because they have received General Welfare assistance from the Tribe. They recommend legislative action to clarify that GWE benefits is eliminated from SSI federal assistance calculations.

Casey Nichols, Citizen Potowami Nation, made comments regarding economic development on tribal lands. The Citizen Potowami Nation is asking that the TTAC support statutory language against attempts by state, county and local governments to tax any economic activity by lessees operating under the Helping Expedite and Advance Responsible Tribal Homeownership (HEARTH). The Tribe also suggests the TTAC support establishing a regulatory structure to enable a secondary market for home mortgages, leaseholder properties and trusts under the HEARTH Act. The TTAC should also support amended legislation to encourage tribal participation in Subchapter S Corporations to promote non-tribal business partnerships. The TTAC was encouraged to maintain support for the New Market Tax Credit (NMTC) program, Community Development Financial Institution's Bond Guarantee Program, and the Low-Income Housing Tax Credit Program, all of which help to attract private funding for economic development.

Michael Chavarria, Governor of Santa Clara Pueblo, commented on the lack of guidance from the IRS on the tax status of tribally-chartered corporations. Tribally-chartered corporations have been ruled to have the same tax status of the tribe and are not subject to federal income tax, regardless of location where revenues are generated. In the past the IRS has issued private letter rulings which affirm this status. Santa Clara Pueblo requested a private letter ruling for its economic development corporation in 2004. Soon after, the IRS ceased issuing private-letter rulings for this matter, leaving the status of the economic development corporation uncertain. Despite holding tribal consultation on the issue, the IRS has not yet released formal guidance on the tax status of tribally-chartered corporations. Santa Clara Pueblo requests that Treasury and IRS issue formal guidance that affirms that tribally-chartered corporations retain the same tax status as the tribe and therefore are exempt from tax on earned income, regardless of the location where the income is earned.

Counselors Jeffrey Gill and Tina Abrams of the Seneca Nation commented on the work of the GWE Subcommittee. The Counselors reminded the TTAC that the GWE guidance needs to be broad and flexible enough to accommodate the customs and traditions of all native Nations. Counselor Gill recommended that the TTAC engage in dialog with the Department of Interiors to better understand the unique situations of tribes. Counselor Abrams noted the negative impacts of the pandemic on tribal nations and difficulties in trying to structure GWE programs to mitigate the impacts and serve tribal members. She emphasized that GWE benefits should not be taxed by the federal government or included in calculations for Social Security benefits, rural housing or other programs. She encouraged the TTAC to advocate for guidance on the GWE. She also asked that the TTAC confirm that the source of income used for GWE should not matter and that GWE guidance should defer to each tribal nation on how they define their own GWE programs.

Michael Willis commented on the Kickapoo Traditional Tribe's GWE program, which was designed based on IRS guidance to preserve and protect tribal culture by assisting in housing its elders so that they could remain on the reservation. The GWE elder housing program was meant to supplement, not replace, other federal assistance, including Social Security benefits. Mr.

Willis advocated support for a legislative amendment to Section 139E, adding a new subsection (d) to section 139E of the Internal Revenue Code that states: “(d) Coordination with Certain Means-tested Federal Programs. For the purposes of title XVI of the Social Security Act, any amount excluded from gross income under this section shall not be treated as income and shall not be taken into consideration when determining resources.” The meeting was then returned to Chairperson Horn.

Sharon Edenfield thanked those making public comments and reaffirmed the importance of issuing guidance on the GWE, and excluding GWE benefits in calculation of federal benefits eligibility.

Ron Allen reiterated that the GWE Subcommittee is still accepting comments and recommendations from tribes on the GWE.

Chief Malerba thanked tribal leaders for their thoughtful comments and encouraged the TTAC and Subcommittees to review the comments as they move forward.

Ron Allen underscored the importance of the TTAC in helping Treasury understand engage with tribes. He also encouraged to Treasury to more broadly interpret the legislate intent of the GWE creating the TTAC.

Chief Malerba encouraged Treasury to use the TTAC’s expertise to help frame tribal issues which can then be elevated to tribal consultation.

Chairperson Horn echoed the comments of Chairman Allen and Chief Malerba and reiterated that she hopes the TTAC can engage with Treasury broadly and in conjunction with tribal consultation, to better help respond to tribal issues.

Janine Cook, Deputy Associate/Acting Chief Counsel (Exempt Organizations and Employment Taxes), IRS/Office of Chief Counsel (EEE) provided an update on the Employee Retention Credit related to CARES Act Section 2301. Ms. Cook provided an overview of actions taken by the IRS to respond to tribes’ ability to use the Employee Retention Credit, including a tribal consultation held in April. Treasury and IRS have worked together to answer many questions on how the Employer Retention Credit applies to all employers and provide answers. FAQs were developed and confirmed that the Employer Retention Credit is available to tribal governments and their entities. FAQs 2, 18 and 21 refer specifically to tribes’ ability to use the credit. FAQ 21’s answer states that “Yes, if a tribe or tribal entity operates a business, the tribe or tribal entity may be an eligible employer for the purposes of the Employer Retention Credit if it otherwise meets the requirement for the Credit.” Additional information is forthcoming. Ms. Cook provided a summary of the purpose of the Employer Retention Credit.

Chairman Horn asked where the IRS might be on the status of the guidance on taxation of tribally-chartered corporations. Acting Associate Chief Counsel Cook responded that the tribal consultations held on the issue were extraordinarily helpful and the IRS has been actively reviewing the best solutions. Technical issues also are being coordinated between the Office of Tax Policy, IRS’s Tax-Exempt Organizations and Governmental Entities and other Counsel and Treasury departments.

Acting Chief Counsel Cook also mentioned that the Employer Retention Credit and the Paycheck Protection Program cannot be used together. The aggregate tribal businesses must be reviewed when applying program rules.

Chairman Allen asked about what constitutes a trade or business for the purposes of applying the Employer Retention Credit and what happens if tribal businesses share an Employer Identification Number (EIN) . Acting Associate Chief Counsel responded that the IRS is looking into this issue and that the CARES Act did not define trade or business. She also discussed the specific rules for tax-exempt organizations and the best interpretation for how it applies to tribal communities. Regarding the EIN, the IRS will look at the number as indicating one employer. However, the application of the credit to employers depends on their eligibility in the aggregate. IRS is considering how these rules apply to tribes with their unique circumstances. Chairman Allen also asked about when guidance is expected to be available and whether IRS anticipates engaging with tribes on these issues. Acting Chief Counsel responded that they aim to release guidance as soon as possible. DFO Vallabhaneni stated that he will consider tribal input in light of the compressed time frame. Chairman Allen suggested a potential workgroup that provides feedback to Treasury and IRS on crafting language for guidance. DFO discussed the challenges of securing tribal input for this task and reiterated that Treasury would take this request into consideration.

Chairperson Horn reminded participants that the next Public Meeting of the TTAC is scheduled for December 9, 2020 and to check the Treasury TTAC website for registration information.

Rebecca Benally provided a tribal closing and the meeting was adjourned by DFO Vallabhaneni at 3:31 p.m.