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UNITED STATES SENATE  
COMMITTEE ON INDIAN AFFAIRS

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Oversight Hearing on -

“NEW TAX BURDENS ON TRIBAL SELF-DETERMINATION”

Thursday, June 14, 2012  
2:15 PM - SD - 628”

*Written Testimony of*

NAFOA

NAFOA serves Indian Country by developing tribal financial capacity and building the essential partnerships necessary to advance tribal economic development. In addition, NAFOA serves tribal leadership and practitioners by supporting sound tax, finance, investment, banking, and economic policy. We are pleased to present testimony on one of the leading concerns of Indian Country – the federal government utilizing administrative tax policy to deter tribal self-determination and cultural preservation.

In particular, our testimony will focus on the principal concerns that directly impact self-determination. The concern is how the Internal Revenue Service (IRS) is applying the General Welfare Doctrine as it applies to tribal governments, in sharp contrast to the principals of tribal sovereignty and self-determination and long-standing federal Indian policy; and, the concern that the IRS has shifted policy to begin taxing distributions from tribal trust assets and settlements.

While guidance from the IRS is currently in progress, there is valid concern from tribal leadership based on direct agency contact with tribes and their members that the IRS may not move to fully support the unique status of tribes and the government-to-government relationship that exists between tribes and the federal government. If that status is not respected, it will impede the federal government's trust responsibility, hard-fought treaty rights, and over a century of judicial, administrative, and congressional federal Indian policy, not to mention, the current Administration's objectives of ensuring fairness in tax policy and application. NAFOA is requesting the Committee, in its oversight role:

1. Place a moratorium on any examinations of tribal general welfare programs until clear and consistent guidance or legislation is enacted.
2. Ensure sovereignty and federal policy, including self-determination, is upheld and supported in the creation of a general welfare doctrine for tribes.
3. Ensure tribal leader input, advisory committee input, and congressional intent be incorporated into the guidance document.
4. Ensure tribal leadership has the ample opportunity to review any formal or informal guidance prior to implementation and have meaningful input in this and other IRS policy that directly affects tribes.
5. End the abrupt change in IRS policy to begin taxing trust and settlement distributions to individuals.
6. Be prepared to step in with statutory language should the IRS' final guidance fail to uphold the core tenants of federal Indian policy.

### **The General Welfare Doctrine**

The IRS generally begins with the presumption under Section 61 of the Internal Revenue Code which provides that, except as otherwise provided by law, gross income means all income from whatever source derived. Furthermore, the agency assumes that tribal income, not otherwise exempt, is includable in the gross income of the Indian tribal citizen when distributed or constructively received, unless excluded by a specific statute or treaty.

Although the IRS Code under Section 61 is very broad, the IRS does exclude certain government services, payments, and benefits. At the start, a broad array of government services are typically excluded from income, including education, public safety, court system, social services, public works, health services, housing authority, parks and recreation, cultural resources, and museums. In addition, payments made by federal, state, local, and Indian tribal governments under a legislatively-provided social benefit program for promotion of the general welfare receive a particular administrative exception to the general rule of broad income inclusion and would fall under the General Welfare Doctrine (GWD) or General Welfare Exclusion (GWE).

This is a seemingly broad statement of exclusion for government payments that promote the general welfare of a government's citizens. However, the IRS has further refined the circumstances to which the doctrine is limited. The IRS generally focuses on the following three factors when considering whether a payment is excluded pursuant to the General Welfare Doctrine: (1) was it made by a governmental unit?, (2) was it for the promotion of general welfare?, (3) were services rendered for such payment?

The second requirement - that the payment be made to promote the general welfare - has received the most attention. In the past, the IRS has found a large variety of government programs to be for the promotion of general welfare. Programs that meet health needs, educational needs, job training needs, economic development needs, and several other needs were determined to be for the promotion of general welfare. For example, the IRS ruled that government provided health care benefits for the elderly, commonly known as Medicare benefits, were not taxable to recipients because the Medicare program furthered the social welfare objectives of the federal government.

### **Disparate Treatment**

While the IRS strives to treat all governments the same, a review of the IRS's 2011 Work Plans indicates that some notable differences remain. The IRS's 2011 Indian Tribal Government Work Plan states that one of its primary focus areas is reviewing the taxability of tribal member distributions. Yet, in the IRS's 2011 Work Plan for Federal, State and Local Governments, the taxability of benefits provided by state and local governments is not even mentioned.

Indian Tribal Governments may assert different priorities on values such as cultural preservation and use a different model for delivering their services, but the services provided

are not any more numerous or altogether unlike in their overall objectives than those programs and services provided by state and local governments.

What is different, however, is how the IRS has interpreted the validity of tribal programs and how they have aggressively enforced, and therefore, deterred the establishment or expansion of tribal programs; and as a result, tribal self-determination. And even more alarming, from a tribal perspective, is that the IRS is making these determinations without the full understanding, or at very least integrating, federal Indian policy into their determinations. This has the effect of placing tribal well-being, culture, and values in the hands of field agents who routinely make these determinations instead of with duly elected tribal leadership, Congress and the Administration.

Two examples (among others received) illustrate this concern. First, when a tribe funded a trip for their elders to cultural and historic sites, including to an historic battlefield involving the ancestors of the tribal elders, an IRS agent determined the value of the trip to be taxable to the elders. A second example shows the intent of the IRS to focus on the source of the revenue rather than the program. An IRS agent ruled that the tribal members who benefitted from government programs should be taxed on the part of the revenue that was generated from gaming proceeds with the same benefits derived from other revenue considered exempt. In addition, the agent ruled that the tribe should have withheld taxes.

The Indian Gaming and Regulatory Act (IGRA) requires withholding only when payments are made per capita from net gaming revenue and as approved by the Department of Interior in a filed Revenue Allocation Plan. In addition IGRA is clear that any other typical government or charitable use is allowable, including specifically authorizing net revenues from Class II and III gaming activities conducted by Indian tribes: (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies.

This interpretation that the source of revenue is suspect would be dismissed if it were only one agent's interpretation that the revenue source of tribal governments is the determinant of taxability and withholding requirements. However, national and inter-tribal organizations have heard from enough tribal leaders to make an informed conclusion that tribes are being targeted for examinations at an extremely high and disproportionate rate.

It appears the IRS Commissioner has taken a similar inequitable view that tribal government revenue is somehow more suspect than state revenue derived from the same source and used for similar purposes of general welfare.

Five years ago Steven Miller, when testifying in front of the Committee on Finance stated, “To reduce the tax consequences to tribal members, some tribes have created mechanisms to classify what should be taxable per capita payments as general welfare program payments, excludible from income, often through liberal interpretations of what constitutes a needs-based program. Others have created or invested in purported income deferral programs....

To address this problem we have engaged in educational and enforcement activities. We also initiated 139 examinations during the past two years that focused specifically on the use of net gaming revenues.”

This statement clearly expresses the IRS view that federal Indian policy and tribal self-determination are nothing more than “liberal interpretations of what constitutes a needs-based” program and something to be shut down. And, possibly more troubling, a clear effort on behalf of the IRS to use significant agency resources to enforce this view and deter tribes from utilizing tribal revenue for the benefit of their citizens by conducting 139 examinations in two years. At that rate and at that time, the IRS was on track to examine every tribal government in the lower 48 to ensure their view of federal Indian policy was carried out.

It is worth noting states that conduct gaming activities to benefit schools, roads and shore up or augment general funds have not received the same scrutiny.

The IRS and Treasury are quick to point out that these activities may still be carried out; they will just be subject to taxation. But the true deterrent lies in the entirety of the enforcement effort and the uncertainty of what IRS may consider a taxable trigger – uncertainty even surrounds programs that have been carried out in some form for generations such as funeral ceremonies and language preservation.

The fact that tribes are being examined at a disproportionate and alarming rate is not a simple matter for tribes to deal with. An examination costs a tribe significant time and resources, especially when the agent’s objectives are unclear and open ended. More costly for a tribe is a ruling that a government should have withheld taxes. This action costs significant sums of money because penalties are proportionate to the number of beneficiaries.

In addition to the costs associated with the agency’s actions, there are a number of other apprehensions about the IRS approach and wisdom of using taxation as a deterrent for tribal governments to advance the quality of life of their citizens and within their communities that should cause concern for Congress and the Administration.

First, tribal programs are making up for the prior adverse effects of centuries of attempted cultural assimilation and failed federal policies. Second, it is difficult to imagine the revenue benefit to the IRS (as an agent of the federal government) outweighing the harm done to tribal

governments through the creation of greater uncertainty, increased expenses on already strained governments, and the possible loss of cultural practices. And, finally, given the extensive need in Indian Country for education, health care, housing, and other basic services, along with years of unmet and unfulfilled federal obligations, it stands to reason that the federal government should be doing all it can to support and incent these programs and not deter them through taxation and through the administrative expenses required to implement and comply with new and undefined IRS standards.

### **Congressional Intent**

It is the last concern that caused this very Committee to use its oversight role to ensure federal Indian policy was considered valid criteria for carrying out the General Welfare Doctrine.

The Committee on Indian Affairs held an oversight hearing during the previous Congress in September of 2009. Shortly after, in an affirmation of support for tribal general welfare programs, Congress acted to support the exclusion from income the value of health care benefits provided by tribal governments to their citizens under the Affordable Care Act. In addition to actively addressing the issue in the Affordable Care Act, this Committee, during this Congress, moved to place language in the Early and Secondary Education Act draft that would exclude from income the value of education and cultural programs and services provided by tribal governments to its members.

During the 2009 Committee on Indian Affairs hearing entitled “Oversight Hearing to Examine the Federal Tax Treatment of Health Care Benefits Provided by Tribal Governments to their Citizens,” tribal leaders expressed offense at the idea that the federal government would provide a disincentive for tribes to provide health benefits to their members since they were providing a service that the federal government failed to deliver. In addition, taxing health benefits was also counter-intuitive at best for the federal government since tribes relieved the federal government of an expense and obligation when participants were removed from an already strained Indian Health Services (IHS) system.

During the same hearing, leadership voiced their concern that excluding health care benefits may lead to the IRS incorrectly concluding that all other general welfare programs specifically not excluded by law would then be open to challenge. To remedy the IRS from taking an aggressive approach of targeting other general welfare benefits, tribal leaders recommended that Congress include “no inference” language in the law and in report language, and that Congress continue to insert its oversight role.

Although no inference language was included in the law, it did little to dissuade IRS field agents from examining - through audits and information requests - general welfare programs implemented by tribes formally through legislatively established programs or informally

through traditional practices. Tribal leaders' concerns were well justified, and in hindsight, they may have underestimated how aggressively the IRS would pursue tribal general welfare programs relative to other state and local government programs during the period since the hearing.

Since the passage of the tribal health care exclusion in the Affordable Care Act, most tribes still struggle to navigate the federal health care system administered through IHS. And, those few tribes that have experienced continued economic success have continued to administer their own programs to improve the quality of life for their citizens. There has not been a rush by tribal governments to provide health care benefits after the legislation was passed. This is because tribal leaders, vested with responsibility of making sound long-term decisions, have weighed the legacy costs and economic factors in the same manner as other government leaders and have made determinations that fit their respective tribe's priorities and long-term obligations.

This practical experience should have gone a long way in informing the Internal Revenue Service decision to subsequently focus on other general welfare benefits provided by tribal leadership.

As mentioned before, Congress, in the Indian Gaming Regulatory Act (IGRA), provided clear intent that any distributions made from net gaming revenues on an approved per capita basis would be subject to federal taxation with tribes carrying the responsibility of reporting. Conversely, Congress was silent on taxing net revenue retained for clearly governmental or social purposes including net revenue used: (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies.

### **IRS Outreach & IRS Opportunity for Tribal Inclusion**

NAFOA is requesting that prior congressional intent and the attributes of two recent works developed from IRS outreach be considered in the development of guidance. The first is the joint comments provided by the Tribal Tax Working Group in response to IRS Notice 2011-94 which called for input for the development of guidance on the general welfare exclusion as it applies to Indian tribal governments and their social welfare programs benefitting tribal members. The second is from the Advisory Committee on Tax Exempt and Government Entities (ACT) report entitled "Indian Tribal Governments: Report on the General Welfare Doctrine as Applied to Indian Tribal Governments and Their Members."

The IRS announced, in IRS Notice 2011-94, the formal request for comments on the General Welfare Doctrine as it applies to tribal government programs on November 15, 2011. Shortly

after, the IRS hosted its first consultation on the issue on November 30, 2011. The consultation coincided with the President's tribal leader meeting. Subsequently, the IRS hosted a second consultation, also in Washington, DC in March and just a few weeks ago hosted a phone consultation that was heavily attended. The initial deadline for comments was extended from February 13, 2012 to March 14, 2012. However, the IRS continued to encourage comments after the deadline leading up to the phone consultation. Almost ninety comments were received on the issue.

Joint comments were developed in response to IRS Notice 2011-94 which called for input for the development of guidance on the general welfare exclusion as it applies to Indian tribal governments and their social welfare programs benefitting tribal members. These comments were developed by the Tribal Tax Working Group. (*The Tribal Tax Working Group includes the broad-reaching coalition of NAFOA, the National Congress of American Indians (NCAI), United South and Eastern Tribes (USET), California Association of Tribal Governments (CATG), and the Affiliated Tribes of the Northwest (ATNI) among others formed to address what tribal leaders are calling one of the most recent and one of the more serious affronts to tribal sovereignty, taxation issues.*)

While NAFOA and the Tribal Tax Working Group do not represent all tribes, the following are what we consider common tribal considerations learned from the consultations, input, and outreach on the issue.

- *[Please see attached Joint Comments for Notice 2011-94 for the complete comments]*
- *[Please see the report in its entirety at [http://www.irs.gov/pub/irs-tege/tege\\_act\\_rpt11.pdf](http://www.irs.gov/pub/irs-tege/tege_act_rpt11.pdf)].*

The joint comments emphasized: Deference to tribal leadership and self-governance in carrying out tribal programs based on their respective community need and values; The inclusion of federal Indian policy; consistency in terms, concepts, and process; Needs should be based on tribal considerations; Exclusion of any program that supplements federal trust responsibility; and, Privacy of information.

These constructive comments, carefully weighed by tribal leadership, carry forward the current expectations of self-determination, federal policy, and the roots of protecting sovereignty.

In addition to the tribally-generated comments, the Advisory Committee on Tax Exempt and Government Entities (ACT), submitted its annual report and presented its findings last week on June 6, 2012. The ACT consists of three appointed members charged with engaging with and reporting to the IRS on a timely issue that is important to the IRS and their respective constituents. This year the issue was to add insight into whether payments made by the tribal

government to its members under a tribal program designed to promote the general welfare of the tribal citizens is includable in the income of those recipients.

The ACT report is a comprehensive assessment that includes the history of the general welfare doctrine, the doctrine's exclusions, the doctrine's prior application for tribes, tribal views on the doctrine, and two very significant findings. The first finding is that there is a clear case for modifying the general welfare exception. The second finding specifically calls for clear methods for greater deference to tribal governments along with greater tribal involvement.

Both tribal leadership, in their comments, and the advisors in the IRS ACT report reached substantially similar conclusions in regard to taxation of tribal benefits used to advance general welfare. However, the Act Report calls for much more substantial tribal inclusion in the decision-making process. This inclusion calls for consultation, even in informal decisions that result in a policy change, a high-level appointment in Treasury to serve as a resource and ensure federal Indian policy is considered, and the formation of an external advisory group.

Both the joint comments and the ACT Report findings are summarized in the Appendix.

While Congress should do its best to immediately remedy the impacts of recent IRS actions regarding the General Welfare Doctrine as it applies to tribal governments; the Committee should also work toward fulfilling the longer-term recommendations made in the ACT Report. Having an advisory committee in place, a high-level appointee, or carrying out consultation when the agency's decisions impact tribes would have likely negated the latest IRS efforts to begin taxing revenue derived from tribal trust assets such as timber and other resources.

### **Taxation of Tribal Trust and Settlements**

In addition to deterring self-determination, the IRS has embarked on a disquieting effort to tax per capita payments made to tribal members from trust funds. Per capita payments from tribal trust funds are specifically excluded from both federal and state taxes under the Per Capita Act of 1983. Long before 1983, this tax exclusion existed in federal law because it is derived from Indian treaties and the federal trust responsibility.

Besides being supported by federal treaties and law, the Administration, through the Department of Interior, at least since the 1950's, has made per capita payments from tribal trust funds and has not reported them as income for federal tax purposes. They have also vigorously defended their tax exempt status. The Interior regulations at 25 C.F.R. 115 were revised in 2000 and continued to provide procedures for making these payments without provision for tax reporting.

The Obama Administration is currently engaged in a historic effort to settle a significant number of lawsuits brought by Indian tribes for mismanagement of tribal trust funds. Many of the tribes settling these lawsuits are considering the payment of some portion of the settlement funds in per capita payments to tribal members. The IRS change in policy on the taxability of these payments is salt on a wound created by historic and unprecedented unfair dealing by the United States. The settlements attempt to make tribes and their citizens whole from fraudulent activities perpetuated by the federal government. Does the federal government really want to tax, in any manner, a settlement based on their own historic transgression?

### **Conclusion**

The Internal Revenue Service (IRS) interpretation of the application of the general welfare doctrine and taxing trust assets and settlements has far-reaching impacts on tribal sovereignty. So far, the IRS has used the authority of the agency as a deterrent to tribal efforts to improve the quality of life for all citizens through methods appropriate for each respective tribe. They have also shown their intent of continuing to target tribal governments and ignoring long-standing federal policy by reaching in to tax settlements and trust assets.

All of these actions clearly call for Congress to oversee an agency that has not been accountable and acted independently of Administrative and congressional intent. The result of this IRS effort has been to cause confusion, place a strain on already limited personnel and financial resources, and, to have tribes once again feeling as if their cultural practices are under scrutiny.

The IRS has the opportunity to use the authority of the agency to incent such activity. When they issue guidance, it should firmly support self-governance and federal Indian policy.

We are hopeful that the views expressed during this hearing, in tribal comments, and in the ACT Report will be carried forward. In the absence of this, we strongly request Congress to act to uphold fairness and its federal trust responsibility. In addition, we are calling on Congress to put an immediate end to the current aggressive IRS activities of determining tribal welfare and taxing trust and settlement assets until these issues are resolved. After all, these are internal administrative IRS decisions that can be reversed without a regulatory change, let alone a legislative fix.

**Appendix:**

The major provisions of the Joint Comments provided by the Tribal Tax Working Group in response to IRS Notice 2011-94 and the Advisory Committee on Tax Exempt and Government Entities (ACT) report entitled “Indian Tribal Governments: Report on the General Welfare Doctrine as Applied to Indian Tribal Governments and Their Members.”

**Joint Comments provided by the Tribal Tax Working Group in response to IRS Notice 2011-94:**

**1. Honor Tribal Sovereignty, the Federal Trust Responsibility, and Deference to Tribal Self-Government**

Any guidance the IRS develops on the application of the general welfare exclusion to benefits provided by tribal governments to their members must take into account the backdrop of inherent tribal sovereignty, federal treaties and the trust responsibility, tribal history and social and economic conditions, the federal policy of tribal self-determination, as well as tribal authority for program administration under the Indian Self-Determination and Education Assistance Act and numerous other laws establishing a mechanism for tribal administration of federal programs (housing, child care, elder care, family services). These laws cover a broad range of federal program and services that have been consistently underfunded and understaffed. The resource pool is finite; tribes compete for these funds annually, and tribes that supplement or supplant federal funding are working.

**2. Developing Substantive Guidance Consistent with Federal Indian Law and Policy**

General Statement of Doctrine - The general welfare doctrine has been described in various forms of guidance over the years. Not all forms describe it alike, and some emphasize different elements. To promote tax compliance and allow tribes greater predictability in structuring their programs, we urge IRS and Treasury to adopt the following statement of the doctrine:

- The general welfare exclusion (as applied to Indian tribes and their programs) provides for the exclusion of payments that are (1) paid by or on behalf of an Indian tribe (2) under a social benefit program, that is based on either needs of the Indian community as a whole or upon the needs of individual recipients (which need not be financial in nature), and (3) that are not compensation for services or per capita payments.

Given the recent tendency by some IRS auditors in the field to interpret the doctrine narrowly by focusing largely on individual income determinations, it is critical to

recognize non-financial needs in the guidance itself. The guidance should expressly affirm that the doctrine recognizes that the needs criteria can be both individual and community-based.

### **3. Consistency and Certainty in Key Definitions and Concepts**

Even in cases where there is general agreement between tribes and IRS auditors on the GWE itself, there is often disagreement on how key terms and definitions within the doctrine are to be construed. We urge IRS and Treasury to adopt key definitions that are sufficient to promote tax compliance yet flexible enough to accommodate the broad range of tribal services impacted by the doctrine. For example:

- a. Community needs should reflect that certain programs are so important to self-determination and the preservation of culture and tradition that they may qualify for general welfare protection regardless of individual financial need. Without limitation, these may include education, housing, health care, maintenance of language and traditions, and promotion of the tribal community's financial well-being and long term goals. In doing so, the guidance would respect that each tribal government, through its own policy setting process, is best situated to determine the needs of the tribe and its members and the policy solutions.
- b. Social benefit should be defined with reference to a goal or goals established by the tribal council or governing body of each tribe. Each tribe has its own checks and balances in place for the approval of programs and those processes should be given deference in IRS field audits, even where the particular tribal program does not have a federal or state counterpart. IRS agents cannot substitute their personal judgment for decisions that are made pursuant to a political process and form of government recognized by treaties, Congressional acts and Presidential executive orders spanning more than a century of tribal-federal relations. The guidance must recognize the federal government's interests and responsibility to support tribal programs designed to provide for the well-being of their members and to ensure the continuance of tribal cultures in accordance with the priorities of each tribal government. There must be deference to programs that emerge and are implemented pursuant to this concept, even if those programs do not have a federal or state counterpart.
- c. Income guidelines used to establish individual financial need, when required, should not be dictated with reference to specific federal or state statistics (such as median income or poverty thresholds). While tribal governments may look to state and

- federal income guidelines as a starting point, GWE guidance should ultimately defer to the political process within each tribe. When required, income guidelines should be recognized as a “safe harbor” only, with the ability of tribal governments to consider the individual facts and circumstances of each recipient (e.g., income far above the median, for example, may still be insufficient to address a catastrophic loss or displacement caused by a hurricane, fire or flood).
- d. Compensation for services used to disqualify a payment from exclusion under the GWE should not apply to bona fide programs with community service ties. For example, tribal governments should be able to condition tax free educational assistance on a commitment by the recipient to serve the tribal community for a period of time during or after completion of course work in professions needed within the community. Tribal governments should be able to establish summer youth leadership programs that offer tax free food, housing and transportation to young members who develop a sense of community, for example, by mending fences, repairing reservation homes, cleaning trash from the roads or doing other tasks that teach responsibility and citizenship. In recent years, some IRS examining agents have construed tribal activities such as service on cultural preservation boards and summer youth work program offering nominal stipends or benefits as “employment.”
  - e. Per capita payments should be limited to amounts designated as per capita payments under a federally approved revenue allocation plan in accordance with the Indian Gaming Regulatory Act (“IGRA”). Recipients of per capita payments are not restricted on how those funds are spent. In recent audits, however, some IRS agents have attempted to reclassify social welfare payments and in-kind benefits as taxable IGRA per capita distributions subject to tax and withholding under Section 3402(r) of the Code. The GWE guidance should confirm that IRS will respect the IGRA revenue allocation plan designations, and that payments made under a bona fide social benefit program are not per capita payments even if the benefits are provided on a community-wide or tribal-wide basis. A tribal government should be able to implement education or housing assistance, for example, on a universal basis without triggering per capita reclassification.
  - a. Deference to tribal determinations of community needs is a key concept for tribal leadership, but IRS officials have suggested in discussions that some standards are needed to prevent abuses. In the discussion, a suggestion was made that a narrative standard could be developed that would defer to tribes to develop programs

consistent with their own social and/or community needs, except where the programs are “lavish or extravagant under the circumstances,” a standard that applies to deduction of business expenses. We would encourage further discussion of this concept. The concept offers a guiding principle for general deference to tribal decisions, but there is some skepticism among tribal leaders that IRS agents have sufficient understanding of tribal circumstances, such as cultural programs and cultural travel.

#### **4. Means Testing**

As noted above, a recurring theme from discussions with tribal leaders is the need to dispel the notion that the GWE applies only to programs that are individually means tested. IRS guidance on the GWE should expressly acknowledge the right of tribal governments to provide community-based programs that are not means-tested, and programs that are based on non-financial needs.

#### **5. Programs that Implement and Supplement Federal Responsibilities**

The federal government, as a result of its treaty obligations and trust responsibility, has committed to providing education, housing, clean water and many other basic needs for Indian people. Through a conscientious shift in policy in recent decades, the federal government has encouraged the tribes themselves to provide for such needs in partnership with the federal government and, increasingly in recent years, instead of the federal government. Taxing benefits from tribes that would not be taxed if provided under a federal program is counterproductive to this government-to-government partnership.

#### **6. Privacy / Information Sharing**

The guidance should recognize that tribal governments are a partner in the goal of tax compliance and there should be a “government-to-government” level of deference in the scope of review that the IRS undertakes with regard to tribal general welfare issues.

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Advisory Committee on Tax Exempt and Government Entities (ACT) report entitled “Indian Tribal Governments: Report on the General Welfare Doctrine as Applied to Indian Tribal Governments and Their Members.”

#### **1. The Case for Modification of the General Welfare Exclusion as Applied to Indians**

To resolve the General Welfare Exclusion issue, it may be appropriate to develop a general welfare exemption that applies specifically to tribal governments and their individual members. The U.S. has committed to protecting tribes as separate sovereigns. One expression of that commitment is the rule that federal laws should not be interpreted to invade upon a tribe's internal affairs – i.e., in this instance, its determination of general welfare needs of its members. Naturally, when the IRS asserts that a tribal government's distribution of cash or in-kind benefits is not made to promote general welfare of its members, this is perceived as a federal intrusion into the internal affairs of a sovereign tribe. On the other hand, the IRS is tasked with enforcing the federal tax laws, which entails seemingly intrusive audits to determine the form and substance of a transaction for tax purposes. Accordingly, there is cause to develop an administrative tax exemption that takes into account the unique circumstances of tribes and their sovereign authority over internal affairs, while at the same time promoting effective tax administration.

It is in the best interests of both the tribes and the IRS to seek a more cost-efficient and predictable means of testing tribal general welfare programs for tax exemption. Tribes require a predictable test or safe harbor for establishing their programs to maximize tax exemption and tax-favored opportunities.

## **2. Methods for Tribal Deference & Inclusion Going Forward**

ACT made three recommendations for meaningful tribal inclusion and included justifications for the following:

a. Create a Rebuttable Presumption in Favor of Tribal General Welfare Programs

The ACT submits that it is important for Treasury to explore avenues for addressing the issue in a proactive manner, and to reduce the necessity of audits. The process must also achieve some certainty, while at the same time providing flexibility for tribes. There is, of course, an advance ruling process that can be implemented. But, this can be quite costly for tribes. Instead, the ACT suggests that Treasury (in consultation with tribes) explore the development of a process which permits tribes to take affirmative steps to develop their general welfare programs in a way that will provide either a safe-harbor or rebuttable presumption to shift the burden of proof to the IRS to establish that the particular tribal program has not met the General Welfare Exclusion.

b. Modify IRS Approach to "Disguised" or "Deemed" Per Capita Payments under IGRA

The ACT further submits that a review and modification of the IRS application of Code Section 3402(r) withholding requirement, as it relates to general welfare payments, is necessary. In that regard, the ACT submits that it is improper and contrary to the intent of IGRA to re-characterize a general welfare program distribution as a deemed per capita subject to tax withholding under Code Section 3402(r). Such a presumption is likely to vitiate the Revenue Allocation Plan that has been approved by the BIA, particularly when the tribe has already distributed the total allocable percentage of per capita payments under its Revenue Allocation Plan for the year. To suggest that any distributions above that allocable per capita percentage are deemed per capitas subject to Code Section 3402(r), would arguably violate the Revenue Allocation Plan limits on per capita payments. It is the exclusive jurisdiction of the Bureau of Indian Affairs to determine allowable per capita uses of gaming revenue; IRS re-characterization of program uses of net gaming revenue obviates BIA's exclusive jurisdiction.

c. Develop a Treasury Level Advisory Committee/Undersecretary of American Indian Alaska Native Affairs/Tribal Consultation Policy Amendment

The United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.

The Treasury/IRS STAC purpose would be to seek consensus, exchange views, share information, provide advice and/or recommendations; or facilitate any other interaction related to intergovernmental responsibilities or administration of Treasury/IRS programs, including those that arise implicitly under policy or rule, or explicitly under statute, regulation, or Executive Order. This purpose will be accomplished through forums, meetings, and conversations between federal officials and elected tribal leaders in their official capacity (or their designated employees or national associations with authority to act on their behalf).

The Undersecretary for Tribal Affairs office should be established to serve as the official point of contact for tribes, tribal governments, and tribal organizations wishing to access the Department of the Treasury. The Tribal Affairs office, to be

effective, must be established within the immediate Office of the Secretary, report directly to the Secretary, and be the Departments' lead office for tribal consultation in accordance with Executive Order 13175- Consultation and Coordination with Indian Tribal Governments.