

JOINT COMMENTS  
OF  
AFFILIATED TRIBES OF NORTHWEST INDIANS  
CALIFORNIA ASSOCIATION OF TRIBAL GOVERNMENTS  
MIDWEST ALLIANCE OF SOVEREIGN TRIBES  
UNITED INDIAN NATIONS OF OKLAHOMA, KANSAS AND TEXAS  
UNITED SOUTH AND EASTERN TRIBES  
NATIONAL CONGRESS OF AMERICAN INDIANS  
NATIVE AMERICAN FINANCE OFFICERS ASSOCIATION

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Internal Revenue Service  
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Washington, DC 20044  
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**Re: Joint Comments on IRS Notice 2012-75 – A Proposed Revenue Procedure**

The purpose of this letter is to provide comments on the proposed Revenue Procedure from IRS and Treasury on applying the general welfare exclusion (the "GWE") to Indian tribal government programs, in response to Notice 2012-75 (the "Notice").

During last year's White House Tribal Nations Conference, Neil Wolin, Deputy Secretary of the Treasury, announced the issuance of IRS Notice 2012-75, a proposed revenue procedure that describes general principles under which tribal governments may provide assistance to their Members under the GWE. Under these general principles, assistance will be covered under the GWE that (1) is made pursuant to a government program, (2) for the promotion of the general welfare (that is based on "need"), and (3) does not represent compensation for services.

The Notice also provides two "safe harbors" designed to eliminate some of the uncertainty inherent in applying these principles.

- Under the first safe harbor, need will be presumed if certain procedural requirements are met and the program is designed to address one of several specific purposes.
- Under the second safe harbor, certain payments to spiritual leaders and other individuals will not be treated as compensation for services.

Our comments reflect input gathered from the memberships of each participating organization and suggestions where the safe harbors could be improved with additional clarity.

## **I. Introductory Statement:**

When the Treasury Department opened up consultation with Indian tribes on the GWE, the undersigned organizations and American Indian and Alaska Native Tribes (Tribes) around the country requested a meaningful dialogue respectful of the unique status that tribal governments have in our federal system under the U.S. Constitution and numerous federal laws, treaties, federal court decisions and executive orders. Tribes requested that the process of consultation and resulting administrative guidance reflect the fact that tribes have a governmental structure, with government powers and responsibilities. Tribes emphasized the need for IRS and Treasury to recognize that they provide a broad range of governmental services to their citizens, including education, transportation, public utilities, health, economic assistance, and domestic and social programs. Tribes also requested that any guidance under the GWE reflect their sovereign status, the federal trust relationship, and the federal policy of self-determination.

Many of the initial comments and consultation discussions with tribes focused on IRS attempts to impose federal tax on individual tribal citizens for the benefits received under tribal programs that seek to restore, protect, promote and extend tribal cultural heritage. In numerous audits, IRS asserted that the general welfare exclusion did not shelter tribal programs that the IRS deemed to be insufficiently based on individual and/or family financial need. Tribes across the country pointed out the problems with this inaccurate reading of "need" and the use of strict "means testing" by some IRS field agents. Tribes stressed the importance of deference to tribal decision makers in both assessing tribal needs and developing solutions to pervasive community problems.

Further, the IRS' own Advisory Committee on Taxation for Indian Tribal Governments (ACT) echoed the concerns of Tribes in its 2012 report on the General Welfare Exclusion. ACT called for the establishment of safe harbor general welfare exclusions that reflect the unique and critical role that tribal governments fulfill in meeting the vast unmet economic, social and cultural needs of their communities. The ACT Report also suggested that the general welfare exclusion should be construed to give deference to tribal governments in establishing programs to meet the needs of their communities. In doing so, ACT placed emphasis on shifting the burden of proof and administrative cost burden from the Indian tribe to the IRS through the development of a rebuttable presumption of full compliance with the general welfare doctrine should the tribal program conform to the IRS' general welfare doctrine core principles test.

That being said, we commend Treasury and IRS for the progress made and reflected in Notice 2012-75. It is through the consultation process and the efforts of both sides that we have made significant progress in addressing this critically important problem in Indian Country. Through the comments that follow, we hope to continue the positive dialogue and help ensure that the final guidance as clearly as possible continues to reflect the federal-tribal policies of the Self-Determination and Education Assistance Act of 1975, preservation of culture and traditions, and deference to tribal decision makers in matters of Tribal Self-Governance. We have made

progress but still more needs to be done. In this way, the decision to offer a proposed revenue procedure and continue the consultative dialogue was a helpful step.

## **II. Suspension of Audits:**

In commencing these comments, we feel it necessary to make one overarching recommendation on process. While the GWE guidance is being developed, we urge the IRS and Treasury to provide interim relief from the inconsistent application of the GWE to Indian tribes under audit or subject to other enforcement actions. We have made this request previously and believe it is important to reiterate the fundamental basis for our request. That is, it is very important to the integrity of the federal tax system and the government to government relations between tribes and the IRS that the actions in the field match the guidance and expressly stated views of agency and department representatives in Washington. Tribes do not have confidence that this is presently the case and their experiences show otherwise.

Over the past several years Tribal governments have been the target of an increasing amount of audit activity, primarily in the form of information return and employment tax examinations.<sup>1</sup> Tribal governments not under audit are often requested to participate in compliance checks by IRS Indian Tribal Government (“ITG”) specialists, not to mention hire experienced counsel to represent them in any potential audit matters. GWE issues are often addressed in these cases. Further, a January 2013 report released by the Treasury Inspector General for Tax Administration examined the ITG’s Abuse Detection and Prevention Team (ADAPT) and found that:

Although the ITG office established the ADAPT in Fiscal Year 2004 with the broad goal of stemming the growth of fraud and abuse in the Indian tribal sector, *it has not developed specific performance objectives and measures. As a result, TIGTA could not determine if the ADAPT is effectively combating fraud and abuse in the Indian tribal sector* (emphasis added).<sup>2</sup>

In other words, the enforcement team within the IRS’ ITG has operated, and continues to operate, in Indian Country for almost an entire decade without being able to measure or

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<sup>1</sup> While the IRS strives to treat all governments the same, a review of the IRS’s 2011 Work Plans indicates some notable differences. 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 mentioned. Higher audit activity with regard to member programs designed to address culture, tradition and issues of self-determination can raise concerns over the intrusion on tribal sovereignty, particularly when agents seek detailed background information on traditional and cultural matters. To the extent that they are premised on unduly narrow readings of the general welfare exclusion, the audits operate to undermine the establishment of a genuine government-to-government relationship between the Federal government and Tribal governments.

<sup>2</sup> TIGTA Final Audit Rep – Audit # 201210018, at “Highlights” (Jan. 28, 2013).

demonstrate effectiveness. Currently audits are being performed on tribal governments in some of the most impoverished regions of the country, such as South Dakota. We find it difficult to believe that the audits are finding significant federal revenue in these regions. Instead, they are a great burden on tribal governments trying to meet the most basic needs of their citizens.

The report found that ADAPT examiners generally lack “access to information for proactively identifying . . . the existence of fraud and abuse,” and instead rely upon “referrals from individuals, other law enforcement officials, news articles, and other sources, including examinations of the books and records of Indian tribal entities, to detect indications of . . . fraud and abuse.”<sup>3</sup> Essentially, ADAPT examiners are shown to be operating without any underlying internal regulations or guidance for determining abuse. Audits of Indian Tribal government programs have suffered from similar shortcomings in internal regulation and process, forcing tribes to pay significant costs associated with attorney’s fees, to dedicate scarce work hours for Tribal finance employees, and to endure other costs to establish the programs are exempt under the GWE.

As a result, the combination of increased audits and insufficient IRS guidance recognizing the important role played by tribal programs under the GWE is increasingly placing tribal governments in the position of having to cut back or eliminate needed programs to address serious problems faced by Tribal citizens in order to instead devote limited resources to defending those programs in audits. Or worse, if the tribe has the resources, they are still cutting back innovative programs that address real community needs because they are uncertain of their tax implications and do not want to attract any federal scrutiny for their programs.

Finally, in terms of audits, the nature of how field audits are conducted has led to inconsistencies in interpretation – even in terms of how the recent proposed guidance in Notice 2012-75 has been interpreted. At a minimum, interim relief should be granted until all IRS field agents have received the essential and necessary training on how to interpret the guidance. Should certain proposed limitations remain in the final Revenue Procedure, such as “lavish and extravagant” and “nominal,” then it will be important to ensure uniform application by agents and a process which does not simply allow agents to substitute their judgment for that of the Tribal governments’. (See, the discussion regarding “Lavish and Extravagant” in Section IV(2) of these comments.) It is difficult to collaborate on a “government-to-government” basis when tribal audits scrutinize and penalize tribal programs based upon questionable or mistaken legal premises. As we move forward in this endeavor it is critically important that we do so with the understanding that the actions on the ground will mirror the understandings reached between our sovereign governments.

The current level of tribal audits and compliance check activity has created the urgency to develop the proposed guidance outlined in the Notice, and the need for interim relief pending

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<sup>3</sup> *Id.* at 2.

finalization of this proposed guidance, so that critical programs are not eliminated based solely on a tribe's inability to expend limited resources on defending programs on audit or appeal.

Thus, we reiterate the Tribal request for suspension from ongoing audits until there is greater certainty that actions on the ground will mirror current policy. The interim relief we request is not a blanket exemption, but a "good faith" standard for auditors to apply that will permit tribes to continue services in good faith pending completion of a collaborative guidance process. This can take the form of a pause in these audits until IRS can confirm that all TEGE field office and agents have received the proper training on this new revenue procedure on GWE, and all existing rules and guidance as they relate to Tribes.

### **III. General Principles:**

In regards to Notice 2012-75, we will begin with broad, general comments then move to comments specific to the programs laid out within the Notice.

While the Notice provides an option for Tribes seeking "safe harbor" relief, we would suggest that it may make sense to add an express statement confirming that Tribal governments with programs falling outside the specific safe harbors in the Notice are still free to offer those programs under the general GWE principles. We recognize that this request is only a clarification of existing practice but think it will nonetheless be useful given the inconsistent application of policy which we continue to witness in the field.

Tribes have also emphasized the need for the revenue procedure to address the application and interpretation of the GWE as applied to Tribal programs. We believe that it would be helpful to reference the following general principles (including those appearing in Section I of these comments) in the preamble to the final rule or through the addition of a new sections pertaining to construction and interpretation of this guidance. To that end, we propose the following additional sections.

#### **A. Deference to Tribal Governments.**

In commenting on the overarching GWE, Indian tribes have stressed throughout the consultation process the importance of acknowledging Tribal government decision-making, and giving deference to Tribal processes for determining need in American Indian and Alaska Native communities. In general, Tribes view their programs as a supplement to inadequate federal programs based in the Trust responsibility or Treaty Rights, and attest that these rights belong to all Tribal citizens regardless of whether financial need is demonstrated. Further, Tribes are interested in moving away from poverty-based models of providing general welfare assistance. These models tend to create disincentives and divisions among tribal citizens, and reinforce the conditions that Tribes are trying to address. Instead, Tribes should be given the deference to determine the baseline needs for their communities and the most appropriate methods for addressing those needs. History has shown that Tribes are fully capable of this responsibility

Tribal self-determination in developing programs in accordance with Tribal priorities has proven the most effective federal policy approach for supporting healthy, successful tribal communities. Tribally-administered programs have expanded over time and today include authorizations that enable tribes to administer federal and formerly state-administered programs, including the operation of schools, colleges, hospitals, housing programs and numerous others. The ability of Tribes to create, modify, and operate a government (including social welfare programs) of their own design, to meet the needs and interests of their people is essential to achieve not only Tribal objectives, but also federal policy priorities.

The IRS and Treasury should give deference to Tribal governments in determining what programs meet the needs of their citizens and what benefits to provide in meeting those needs. Tribal representatives and Tribal members understand and can identify when general welfare programs are not accomplishing their objectives. They can identify shortcomings or abuse with an immediacy that federal agents or processes will never attain. Adding a statement to the final rule providing a guidepost for field agents to grant deference to Tribal administration of social welfare programs may help to avoid some of the pitfalls experienced by Tribes in recent IRS audits, and ensure that tribal assistance will be reviewed in the context of a government-to-government relationship.

#### B. Canon of Construction.

Another broad suggestion regarding the “safe harbors” is that the IRS shall resolve ambiguities in favor of the Tribe. Typically, the Supreme Court has resolved ambiguous statutory applications affecting the trust relationship in favor of Indian tribes. The federal Indian law canons of construction dictate that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.”<sup>4</sup> This bedrock principle of federal Indian law is rooted in the federal government’s trust responsibility to tribes, and extends to statutes, treaties, agreements, and executive orders.<sup>5</sup>

For instance, in *Squire v. Capoeman*, 351 U.S. 1(1956), the Court acknowledged the IRS’ tax canon but held in favor of the tribal interest, stating that “doubtful expressions are to be resolved in favor of . . . the wards of the nation, [who are] dependent upon its protection and good faith.”<sup>6</sup> Also, in *Choate v. Trapp*, 224 U.S. 665 (1912), the Court held that allotments under an amendment to the General Allotment Act were exempt from taxation, stating that:

[while ordinarily] tax exemptions are strictly construed . . . , in the government’s dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of the [tribal interest.] This

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<sup>4</sup> *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766-67 (1985).

<sup>5</sup> Newton, Nell Jessup, et al. *Cohen’s Handbook of Federal Indian Law*, § 2.02 [1] - § 2.02 [2], pp. 119-122 (2005 ed.).

<sup>6</sup> *Squire v. Capoeman*, 351 U.S. at 6.

rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases.<sup>7</sup>

We recommend including in any final guidance a statement which acknowledges that ambiguity of terms must be resolved in favor of the Tribal interest. This principle is important because the Indian canons are intended to ensure that each arm of the federal government acts as a fiduciary to Tribal governments. They are meant to protect Tribes from their unequal bargaining power when entering into Treaties, settlements, or being subjected to statutes, regulations, or any other act by Congress, the Supreme Court, or the federal government.

#### **IV. Safe Harbor - Needs:**

The first safe harbor in Notice 2012-75 addresses the issue of "need". For need to be "presumed," the tribe's program must satisfy six general or procedural requirements and, in addition, the program benefits must fit within one of the specified program descriptions, broken into five distinct categories: Housing; Education; Elder & Disabled; Other; and Cultural & Religious. In addition, the exclusion is available only to benefits received from a tribe by tribal members, spouses and dependents.

We have organized our comments in the same order that various categories appear in the Notice:

##### *1. Limitation of Benefits to Members, Spouses and Dependents:*

The IRS Notice applies to benefits provided to members of an Indian tribe, or their spouses or dependents. Section 3 (scope) of the Notice, as well as Section 5 (application) refer to the GWE exclusion as applying only to benefits provided to tribal members, their spouses and dependents. Several tribes have pointed out that this language may be too limiting for a variety of reasons.

- Some Indian tribes provide health benefits to domestic partners of tribal members.
- Some Indian tribes provide educational benefits to lineal "descendants" who do not qualify as tribal citizens and may not be dependents.
- Medicine men or women, or spiritual leaders or drum group members, for example, may include individuals who are not members of a Tribe that desires to honor them for their participation in ceremonies or events.
- Some Indian tribes provide benefits to a non-Indian parent who is caring for a young tribal member.

In short, some individuals who live in a Tribal community may not satisfy specific enrollment requirements for Tribal citizenship, but may be recognized for designated programs. This practice is similar to State governments that may choose to provide benefits to resident aliens and or others who are not citizens of their jurisdiction. Likewise, limiting benefits to citizens, spouses and dependents is an even narrower universe of qualified beneficiaries than many

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<sup>7</sup> *Choate v. Trapp*, 224 U.S. 665, 675-76 (1912).

federal programs allow. Thus, we contend that the Tribal governments should have full flexibility within the safe harbor to determine who will benefit from each Tribal assistance program.

2. *General / Procedural Requirements:*

To qualify under the "needs" safe harbor, a benefit (otherwise meeting the description of a specific safe harbored program) must meet six general or procedural requirements:

- (a) The benefit must be provided pursuant to a specific Tribal government program;
- (b) The program must have written guidelines that specify how individuals may qualify for the benefit;
- (c) The benefit must be available to any Tribal citizen who satisfies the program guidelines;
- (d) The distribution of benefits from the program must not discriminate in favor of members of the governing body of the Tribe;
- (e) The benefit cannot represent compensation for services; and
- (f) The benefit cannot be "lavish or extravagant".

Input from Tribes can be summarized as follows:

- Specific Tribal government program. Some Tribal programs are provided through tribal divisions or departments. Others may be provided through separate Tribal entities such as housing or utility authorities. Yet others may be provided through consortiums or Tribal owned corporations such as those commonly established to operate compacted Indian Health Service or Contract Health Service programs. Some of the actual services may be provided by an insurance policy or other third party. We would suggest that the phrase "Tribal government program" be clarified to include programs established by any Tribal departments, divisions, agencies, instrumentalities or entities authorized by the Tribal government to provide assistance consistent with Notice 2012-75. In addition, some programs follow long-standing custom and are not necessarily the result of a governmental resolution or legislative process. Therefore, Tribes submit that these program shall not fail to be treated as an Indian Tribal government program solely by reason of the program being established by Tribal custom
- Written guidelines. Many Tribes have not historically provided written guidelines for certain Tribal programs, especially in the area of cultural and religious tradition. We would suggest that Tribes be permitted to demonstrate compliance with the procedural requirements through a course of conduct or confirmation of oral tradition consistent with the principles of the safe harbor. If written guidelines remain required for some or all of the safe harbor programs, we would nonetheless suggest that the final guidance clarify that the written guideline criteria is for safe harbor treatment only, and will not foreclose a Tribe from GWE treatment for oral programs that otherwise satisfy the general GWE principles for exclusion.

- "Available to Any Tribal Citizen." Another one of the "general criteria" in the IRS Notice requires the benefit to be available to any Tribal citizen who satisfies the program guidelines. Tribes are concerned about how this requirement can be met by a Tribal program that is limited by the amount of funds a Tribe has available for the program. IRS should clarify that a program that has to curtail benefits before the end of a fiscal year because of a shortage of governmental funds will not be viewed as being in violation of this requirement. In addition, the guidelines should clarify that programs limited to a class of citizens (for example, "Elders") will be in compliance with this requirement if it is offered to all citizens within that class definition.
- Anti-Discrimination Requirement. In order to qualify for the safe harbors, all Tribal programs must satisfy an anti-discrimination requirement. On its face, the requirement only limits discrimination in favor of members of a Tribe's governing body. Some Tribes confine certain benefits to groups of people, such as elders. Presumably, these programs would not violate the anti-discrimination requirement. The IRS should clarify that the anti-discrimination requirement still allows Tribes the freedom to establish their own program eligibility guidelines and merely requires them to apply the criteria they set in a consistent manner.
- Compensation. We understand the GWE cannot convert taxable compensation into a non-taxable benefit. However, we also recognize that work or service requirements for programs primarily geared to training or the promotion of other social benefits (such as the Workforce Investment Act) have not disqualified benefits from GWE. We think it would be helpful to clarify that community service ties that are primarily intended to serve a social benefit will not violate the general restrictions on compensation. For example, where a Tribe provides educational assistance or loan forgiveness assistance to encourage members to pursue careers in areas where the Tribe has specific needs such as doctors, nurses, lawyers, or financial professionals, and that assistance is tied to some level of future community service.
- Not Lavish or Extravagant. Another one of the "general criteria" in the IRS Notice is that the "benefit is not lavish or extravagant." Although this formulation is generally utilized in tax determinations in a flexible manner ("not lavish or extravagant under the circumstances"), there is some concern that IRS agents will take an overly strict and inflexible approach to this standard. In the only example provided in the Notice of this standard, the IRS cites Rev. Rul. 74-205 in which displaced individuals and families were given replacement housing payments to help them acquire "dwellings of modest standards." We understand from the consultation meetings leading to Notice 2012-75 that the phrase was employed to empower IRS only to curb true abuses, while still deferring to each Tribal government's good faith application of the GWE. It would be helpful to add language, perhaps to the preamble, confirming that this requirement is intended to stop only serious abuses of discretion and not as a means to substitute a field agent's cost analysis for the reasonable decisions of the tribe. For example, providing Tribal citizens with educational scholarships to expensive private schools like Harvard or Stanford should not be judged lavish or extravagant merely because there are less expensive public school options. Nor should a housing repair program be hampered with the threat of

being second guessed on whether the program should have approved wood or vinyl siding, or countertop materials based on the least expensive option.

3. *Specific Benefits:*

Tribes have numerous suggestions with respect to specific programs that should qualify under the safe harbor. We recognize that the proposed Revenue Procedure is meant to encompass the programs known and understood by the IRS to exist and is not an exhaustive list of programs that may be exempt from tax under the GWE. Yet, tribes have expressed concern that equally meritorious programs not listed within the safe harbor will be subject to undue scrutiny and taxation. At the same time, tribes acknowledge it is impossible to identify all programs which could justifiably fall under the safe harbor. Therefore, these comments attempt to strike a balance by suggesting certain additional programs, or program parameters, be added to the safe harbor which are prevalent in the Indian community and have been consistently proposed by tribes as part of this comment process.

To qualify under the "needs" safe harbor, each program benefit must also fit within a specific program description broken into one of five broader categories. Our specific comments with regard to each benefit description follows:

- (a) **Housing programs. The housing safe harbor permits programs relating to principal residences that**
  - (i) **Assist in making mortgage or rent payments for residences on or near a reservation;**
  - (ii) **Enhance habitability of housing, such as by remedying water, sewage, sanitation service, or heating or cooling issues;**
  - (iii) **Provide basic housing repairs or rehabilitation; and**
  - (iv) **Assist in paying utility bills and charges (such as water, electricity, and gas).**

COMMENTS:

- **On or near reservation.** The most frequent comment received from tribes with regard to the housing assistance category was the ability of Tribes to help members with housing needs regardless of their proximity to the reservation. Not all Tribal citizens can live on or near the reservation. Some Tribes are extremely limited in the lands that are available for housing. Some Tribes have extremely limited job markets making it difficult for Tribal citizens to reside or on near the reservation. In some cases, Tribal citizens are even encouraged to reside away from home to acquire needed professional or job skills over a period of time that can eventually be brought back to the Tribe. We understand that the "on or near reservation" concept has been employed in different contexts throughout history, but contend that it does not belong within the GWE.
- **Principal residence.** The "principal residence" limitation should be clarified to include ancillary buildings such as a barn or storm shelter.

- Scope of "Enhance Habitability of Housing." The IRS Notice applies to programs that "enhance habitability of housing, such as by remedying water, sewage, sanitation service, or heating or cooling issues." Because the IRS has stated that the specific benefits listed in the Notice are not merely illustrative examples, but rather a series of limited instances that qualify for a safe harbor, it may be worth requesting that the IRS expand the benefits identified in this safe harbor to include other common expenses related to habitability, such as roof repair mold remediation and other remedial measures which ensure structural integrity, access (such as ADA compliance) and safety.
- Scope of "Rehabilitation." The IRS Notice applies to programs that "provide basic housing repairs or rehabilitation." Tribes may wish to request clarification on the scope of the term "rehabilitation", and in particular, how it differs from renovation.
- Scope of "Utilities." The IRS Notice applies to programs that "assist in paying utility bills and charges (such as water, electricity, and gas)." We recommend including cable television, internet, and telephone service within the scope of "utilities." For some Tribes, cable television is the only means of providing hurricane alerts and broadcasting tribal council meetings. In addition, Tribes may also choose to, or need to (for instance, to supply remote locations), provide alternative or green energy sources. In addition, home upgrades to increase energy efficiency may be warranted, such as replacing single pane windows and the like. Therefore, the scope of allowable utility assistance should include the costs of supporting and implementing alternative energy sources and energy efficiency.
- "Scope of "Assistance." The IRS Notice includes a safe harbor for programs that "assist" with mortgage or rent payments for residences on or near a reservation. We recommend clarifying that the term "assist" does not connote only partial payment, but may also apply where a Tribe's program pays the entire amount of a Tribal citizen's monthly mortgage or rent payment, so long as the basic criteria outlined in Section 5.02(1) of the Notice are met. In addition, some Tribes permit their members to occupy Tribally-owned on-reservation housing without charging rent or at a reduced rent. We would like clarification that this is covered within the safe harbor for rental assistance.
- Down-payment Assistance. Instead of "assisting" with mortgage or rent payments, some Tribes provide down-payment assistance so that their citizens can purchase a first home. We recommend clarifying language that includes down-payment assistance, as well as other similar assistance, such as Tribal assistance with closing costs, home loan forgiveness programs, and assistance with security deposits.

**(b) Educational programs. Programs to--**

- (i) Provide students (including post-secondary students) transportation to and from school, tutors, and supplies (including clothing, backpacks, laptop computers, musical instruments, and sports equipment) for use in their studies;**

- (ii) **Provide tuition payments for students (including allowances for room and board for the student, spouse, and dependents) to attend an accredited college or university, educational seminars, vocational education, technical education, adult education, continuing education, and alternative education; and**
- (iii) **Provide job counseling and programs for which the primary objective is job placement or training, including allowances for--**
  - (A) **Expenses for interviewing or training away from home (such as travel, auto expenses, lodging, and food);**
  - (B) **Tutoring; and**
  - (C) **Necessary clothing for a job interview or training (for example, an interview suit or a uniform required during a period of training).**

COMMENTS:

- Grade incentives. Several Tribes have mentioned that they have programs designed to encourage academic performance with grade based incentives. These programs are clearly designed to promote education but may not fit neatly into the current safe harbor without some additional clarification.
- K-12 Tuition: Neither the first nor second program descriptions reference K-12. While both contain the phrase "including" that would seem to allow for this flexibility, several Tribes have requested that K-12 be specifically mentioned in the education categories as many Tribes have found the need to place greater emphasis on improving elementary and high school performance.
- Day Care. Day care programs do not appear to be included within the scope of any of the educational program safe harbors in the IRS Notice. A number of Tribes provide a day care program benefit for their members, and many of these programs include a strong educational and cultural component. Further, in some cases, day care enables one or both parents to pursue a college degree or other post-secondary education or job training. The education safe harbor should be clarified to include any day care that has an educational and/or cultural component, as well as day care provided to enable parents to further their education or pursue or maintain employment.
- Supplies for Use in Studies. Based on the examples in the Notice, the exclusion of "supplies for use in their studies" appears to be quite flexible (including sports activities as well as music lessons), but IRS should clarify that this category includes assistance with supplies needed for extracurricular school activities (including extracurricular sports participation fees) as well as coursework (which should be expanded to also include lab fees, student fees, or other fees charged by the institution).
- Preschool, Primary, and Secondary Education. The tuition-related safe harbor (including, for this purpose, payments for room and board) as described in the IRS Notice appears to

be limited to post-secondary education. Although some of these benefits may be excludable as scholarships under Section 117 of the Internal Revenue Code (the "Code"), it would be useful for IRS to clarify that the tuition safe harbor applies to all forms of education (e.g., boarding school and private high school tuition), as well as pre-school and primary school fees and tuition. We recommend expanding "room and board" to include rental assistance for off-campus housing as well.

- **Distance Learning and Online Education.** Distance learning and online education appear to be encompassed within the scope of "alternative education" in the tuition-related safe harbors. However, tuition payments for distance learning and online education do not qualify for an exclusion from income under Section 117 of the Code. Consequently, it would be helpful to for IRS to clarify that tuition payments for distance learning and online education are included within the scope of the IRS Notice.
- **Job support.** Category (iii) addresses specifically job placement and training. This category is very important for Tribes to facilitate employment. However, Tribal citizens generally suffer from the highest unemployment rates in the nation. Accordingly, some Tribal programs encourage and support not only job placement, but job retention. To that end, day care for working parents may be offered. Tribes ask that the safe harbor include day care assistance to help their citizens maintain their employment.

(c) **Elder and disabled programs.** Programs for individuals who have attained age 55 or are disabled that provide--

- (i) **Meals through home-delivered meals programs or at a community center;**
- (ii) **Home care such as assistance with preparing meals or doing chores, or day care outside the home;**
- (iii) **Local transportation assistance;**
- (iv) **Travel expenses for doctor appointments or other medical care;**
- (v) **Transportation costs and admission fees to attend educational, social, or cultural programs offered by the Tribe or another Tribe; and**
- (vi) **Improvements to adapt housing to special needs (such as grab bars and ramps).**

COMMENTS:

- **Scope of "Meals."** Some of the safe harbors in the IRS Notice apply to "meals", while others apply to "food". Is there a difference in meaning between the two terms, or are they interchangeable? We recommend clarifying language that includes money for groceries within the scope of "meals" and "food."

- Home improvements to assist with “special needs.” We recommend including durable medical equipment, medical supplies and hygiene supplies to this section of the guidance, and acknowledging that some Tribes may offer programs for home improvements that are similar but do not necessarily fall under “elder or disabled programs.”
- Scope of elder programs "offered by the Tribe." The IRS Notice provides a safe harbor for "transportation costs and admission fees to attend educational, social, or cultural programs offered by the Tribe or another Tribe." Some Tribes have asked for clarification that this safe harbor includes all elder programs "organized by" the Tribe, and is not limited to programs where the cultural program (e.g., a symphony concert) is literally offered by the Tribe.
- Home loan forgiveness programs for elders of the Tribe. The IRS Notice does a good job of providing safe harbors for elder programs that provide for food, transportation, household assistance and home improvements, but some Tribes offer home loan forgiveness to Tribal citizens that reach elder status. This type of program is reflective of a general shared value among Tribal peoples: the honoring and respect for elders. We recommend expanding this section to include elder housing assistance, including home loan forgiveness programs, and other similar assistance.
- Definition of “Elder.” The proposed guidance properly acknowledges that many Tribes have, in fact, established elder status for members who have attained the age of 55. However, for some Tribes elder status may be defined earlier. For example, in some Tribes an individual becomes an “elder” when he/she has grandchildren. It is undisputed that the life expectancy of American Indians is a full five years under any other ethnicity in the United States; death before the age of 55 is not uncommon. Therefore, Tribes submit that they should be given the ability to define elder status based on the special circumstances, conditions, and customs unique to their particular community.
- Special Needs Programs. Some Tribal programs target specific health and mortality risks in the community for individuals who may not be “disabled.” For instance, to address high rates of diabetes and heart disease among American Indians and Alaska Natives, some Tribes have programs to provide nutrition assistance or other non-medical interventions that may not fall within the Section 139D medical assistance exemption. To address infant malnourishment-related morbidities, Tribes may provide nutrition assistance in the form of free formula. Therefore, Tribes request that the safe harbor be clarified to permit programs directed as special medical needs not otherwise exempt under Section 139D.
- Coordination with SSA and other federal agencies. Elders and disabled Tribal citizens who receive benefits under these GWE programs cannot risk losing their Social Security benefits or federal benefits that are awarded based on means testing. Therefore, Tribes request that the IRS and Treasury coordinate with the Social Security Administration, Department of Housing and Urban Development and other federal agencies to ensure that the GWE benefits provided under these safe harbors will not result in reduction or disqualification of benefits provided under federal programs that are means-tested.

- (d) **Other qualifying assistance programs.** Programs to--
- (i) **Pay bus, taxi, or public transportation fares from the Indian reservation to public facilities (such as medical facilities and grocery stores);**
  - (ii) **Pay for the cost of transportation and temporary meals and lodging of a tribal member, spouse, or dependent while the Tribal citizen, spouse, or dependent is receiving medical care away from home;**
  - (iii) **Provide assistance to individuals in exigent circumstances (such as victims of abuse), including the costs of food, clothing, shelter, transportation, auto repair bills, and similar expenses;**
  - (iv) **Pay costs for temporary relocation and shelter for individuals displaced from their homes (for example, when a home is destroyed by a fire or natural disaster);**
  - (v) **Provide emergency assistance in the form of bus fare, a hotel room, or meals for an individual who is stranded off the Indian reservation; and**
  - (vi) **Provide or reimburse the cost of nonprescription drugs.**

**COMMENTS:**

- **Reservation-Based.** Examples (i) and (v) contain reservation-based limitations. As noted above, several Tribes have emphasized the need to assist citizens who have similar needs but do not reside on reservation. Therefore, we request that the reservation restriction be eliminated.
- **Bus/Taxi/Public Transportation.** Examples (i) and (v) contain limiting language with regard to the types of transportation assistance that may be provided "in the form of bus fare", for example. In many cases taxi, bus service and other public transportation is not available. It would be helpful to refer simply to "transportation costs or assistance" so that things like fuel reimbursement could be included.
- **General "do-all".** The "other" category contains a listing of specific items that appear not to have fit neatly into the previous categories. Some Tribes have requested that the "other" category include a "do-all" description that would allow additional programs that are substantially similar to any of the specifically mentioned benefits, but which may have variations or slight differences (that are not material to the general tax principles).
- **Economic development / Employment.** One of the keys to Tribal Self-Determination legislation is economic development and employment. The preamble to Notice 2012-75 recognizes that the GWE may "uniquely in the case of programs of Indian tribal governments [include programs] to help establish Indian-owned businesses on or near a reservation". However, the safe harbors do not address any such programs. It would be

helpful to include, perhaps in the "other" category, Tribal grants or programs designed to foster economic development within reservations.

- Veterans Programs – Some tribal governments provide specific s to tribal members who are military veterans. Although these education, job-training or housing benefits may be encompassed within other safe harbors, we encourage the IRS to include a general reference to veterans programs.
- Supplementing Federal Governmental Programs. Another type of program that is not yet included in the safe harbor are those programs established by Tribal governments that are intended to supplement or replace under-funded federal programs. . We would suggest that an additional description be added to the "other" category to address these programs. For example, housing assistance and services under Native American Housing Assistance and Self-Determination Act NAHASDA which are instead offered by a tribal government, under the same terms and conditions, should be exempt from tax to the same extent as the correlating federal program.
- Gas Money. The IRS Notice provides a safe harbor for programs to "pay bus, taxi, or public transportation fares from the Indian reservation to public facilities (such as medical facilities and grocery stores). A large number of American Indian and Alaska Native communities are located in remote areas with no bus, taxi, or public transportation. Tribes have indicated that this safe harbor should be extended to include money for gasoline.
- Meaning of "stranded off the reservation." The IRS Notice provides a safe harbor for programs to provide certain forms of emergency assistance to individuals who are "stranded off the Indian reservation." This safe harbor should be clarified and expanded to a broader range of transportation emergencies.
- Nonprescription drugs. The IRS Notice provides a safe harbor for programs to provide or reimburse the cost of nonprescription drugs. Some Tribes have questioned what is included in this category, and whether it should be expanded to cover the cost of alternative medical treatments. This is important given the cultural use of such treatments.

(e) **Cultural and religious programs.** Programs to--

- (i) **Pay or reimburse travel expenses (transportation, food, and lodging) to attend an Tribe's cultural, social, or community activities such as pow-wows, ceremonies, and traditional dances;**
- (ii) **Pay or reimburse travel expenses (transportation, food, and lodging) to visit other Indian reservations or sites that are culturally and historically significant for the Tribe;**
- (iii) **Pay or reimburse the costs of receiving instruction about an Indian tribe's culture, history, and traditions (for example, traditional language, music, and dances); and**

**(iv) Pay or reimburse funeral and burial expenses and expenses of hosting or attending wakes, funerals, burials, or similar bereavement events.**

COMMENTS:

- Participation: Item (iii) addresses the cost of receiving instruction for culture and traditions. Several Tribes have pointed out that this description should cover the costs of "participating in or sponsoring" these activities or ceremonies. For example, some Tribes have specific ceremonies that can last for a week or more for which a Tribal member selected as a "sponsor" must clear an area, erect temporary shelters and cooking areas, and feed hundreds of members and their families throughout the week long ceremonial events. Many of these ceremonies require the purchase of expensive supplies and may require time away from work for not only the sponsor, but others as well. Often, Tribal governments provide assistance to individuals who are sponsors. Without assistance, many could not afford to continue these traditions.
- Awards: Some Tribes will provide awards to individuals participating in cultural, traditional or religious activities. These awards may be to encourage participation, for example, in cultural gatherings or to reward participants in tribal pageants that may focus on traditional dance and custom. They may simply include awards that may be items of cultural or spiritual significance or cash honoraria for attendees as a matter respect or custom. Thus, it is not "fee for service" but rather an expression of custom integral to the activity.
- Bereavement Events. The IRS Notice provides a safe harbor for "funeral and burial expenses and expenses of hosting or attending wakes, burials, or similar bereavement events." Some Tribes conduct memorials for deceased Tribal citizens. In certain cases, these memorials may last up to a day and include sporting events in memory of the deceased. The IRS should clarify that it is up to the Tribe to define what constitutes a bereavement event. The final guidance should also clarify that tribes must retain flexibility for funding bereavement and funeral assistance, for example, through burial, funeral or life insurance designed to help the tribe meet member needs for benefits otherwise qualified under the GWE.
- Religious Programs Other Than Those Described in the Notice. The IRS Notice provides a safe harbor for travel expenses to attend "a Tribe's cultural, social or community activities such as pow-wows, ceremonies, and traditional dances, such as pow-wows, ceremonies, and traditional dances" but fails to cover travel to "non-traditional" religious activities, such as prayer retreats or regional church meetings, that an Tribe may want to support by assisting citizens with transportation expenses.
- Protection of Sacred Sites. There are many Tribally-sponsored, and federally-sponsored, archaeological programs and grants for the preservation of American Indian and Alaska Native sacred sites. Tribes request that the safe harbor include grants paid to individuals in connection with their activities directly related to preserving sacred sites.

## V. Safe Harbor - Compensation:

In addition to the "needs" safe harbor, Notice 2012-75 addresses contains a "compensation" safe harbor for benefits provided under a Tribal governmental program that are items of cultural significance (not lavish or extravagant) or nominal cash honoraria provided to medicine men or women, shamans, or similar religious or spiritual officials to recognize their participation in cultural, religious, and social events (for example, pow-wows, rite of passage ceremonies, or funerals, wakes, burials, or other bereavement events).

The Notice confirms that "the Service will conclusively presume that individual need is met for the tribal officials receiving these benefits and that the benefits do not represent compensation for services."

### COMMENTS:

- Deference to Culture and Tradition. American Indian and Alaska Native Tribal Nations are the First Nations of this continent with a rich and diverse history of trade and commerce. Unfortunately, along with the loss of an enormous amount of land, natural resources and autonomy, Tribal economies were displaced with a new global economy. So where a Tribal ceremony may have been paid for with livestock, blankets, crops or feasts – the current form of reciprocity for such services is primarily monetary compensation. However, regardless of how the ceremony or cultural practice is ‘paid back’ so to speak, the fact remains that these were and still are the practices and traditions that predate any concept of paper currency or federal regulation thereof. Tribes should not be burdened by the concept of tax implications when practicing their traditional practices and cultures. For these reasons, we submit that payments or benefits for cultural activities, *e.g.*, prayers, the performance of ceremonies or dances, and feasts, should not be subject to the ‘lavish and extravagant’ analysis. Instead, the IRS and Treasury should yield its jurisdiction where tribal cultural activities begin. The United States government has had a history of attempting to destroy Tribal culture, language and life ways – including an entire era of federal Indian policy described as the Allotment and/or Assimilation Era, which was followed with the Termination Era. As such, any prioritizing the Indian tribal government makes for language or cultural retention and/or revitalization, the continuation of traditional gatherings (*e.g.*, pow wows, community feasts, burial processions), the offering given for traditional prayers or ceremonies, or the like, must be insulated from all federal taxes. These priorities are innate and organic to the Tribal Nations, and hold deeper meaning to American Indian and Alaska Native peoples than other equally important priorities, because they speak to tribal peoples’ identity as human beings. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 39 (1978), the United State Supreme Court acknowledged this distinction as follows:

Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." They have power to make their own substantive law in internal matters, and to enforce that law in their own forums.

As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.<sup>8</sup>

The IRS and Treasury must acknowledge, as the Supreme Court acknowledged in regards to the internal practices of an Indian tribe, that there are certain areas that are completely reserved for the Tribe, and fall outside the scope of federal regulatory jurisdiction. These programs which support cultural activities fall within that category.

- Spiritual officials. The current language would cover items of cultural significance or nominal cash honoraria provided to medicine men or women, shamans "or similar religious or spiritual officials". Several Tribes have indicated that this phrase should include cultural or traditional leaders, elders and other Tribal citizens or even Native Americans from another Tribe (such as drum groups) who may not be considered to be a "religious or spiritual official" but who are otherwise important or recognized in a Tribe's cultural, traditional, religious or social activities or ceremonies.
- Nominal. The IRS Notice provides that the IRS will presume that certain benefits provided by a Tribe are not compensation for services. These benefits include "nominal cash honoraria provided to medicine men or women, shamans, or similar religious or spiritual officials to recognize their participation in cultural, religious, and social events." In the experience of a number of Tribes, the IRS's interpretation of "nominal cash honoraria" is too narrow and unrealistic. For example, an IRS agent recently maintained that a \$250 payment by a tribe to a spiritual official who prayed for an entire day is not "nominal" and that "nominal" generally connotes a payment of \$25 or less. Consequently, we fear that this qualifier could be read far more restrictively than IRS and Treasury intended. Compensation provided to spiritual leaders should be required to be "reasonable under the circumstance." Such a standard would be sufficient to prevent abuse while still deferring to tribal practice and decision making with regard to what is appropriate under its own traditions, culture and religious activity.
- Officials. The sentence confirming that need will be presumed under the compensation safe harbor refers to "Tribal officials". Medicine men, spiritual leaders and other individuals covered by this safe harbor will most often not be considered Tribal officials. It would be helpful to make that reference more general to cover any individual receiving the qualifying benefits.

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<sup>8</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-6 (1978).

## **VI. Establishment of a Tribal Governmental Advisory Committee:**

Lastly, Tribes strongly urge the IRS and Treasury to form a “Tribal Governmental Tax Policy Advisory Counsel.” This request is consistent with the recommendation of ACT to form a Treasury/IRS Secretary’s Tribal Advisory Council (STAC). Each organization contributing to these comments, ATNI, CATG, MAST, UINOKT, USET, NCAI and NAFOA, has access to tax practitioners who work with a broad representation of Indian tribal governments. The organizations have collectively developed a joint task force on taxation that is equipped to coordinate and provide input on tax policy matters such as the GWE, and would be more than willing to assist in the establishment of such an Advisory Work Group.

We submit that the proposed STAC be comprised of Tribal representatives from the various geographic regions in which the IRS/ITG has a regional office. This will ensure that any policies, practices and issues in tax administration that are specific to particular regional IRS offices will have a forum to be addressed at a national level.

In recent years, Tribal governments and the Internal Revenue Service have disagreed on several issues concerning when tax liability attaches to tribal payments, or benefits, provided to their citizens. It would be extremely helpful to have a Tribal Tax Policy Advisory Work Group assisting to ensure Treaty rights and principles of self-governance are properly balanced with the IRS’ internal policies. Further, a Tribal Tax Policy Advisory Council would be entirely consistent with this Administration’s commitment to Indian Country, and align directly with Executive Order 13175. We recommend that the Assistant Secretary for Indian Affairs (AS-IA) might also have an observer role in such a work group. For many years, Tribal tax issues were addressed by the Department of Interior due to the unique relationship between Indian tribal governments and the United States. As such, it makes sense to include the Office of the AS-IA in a work group that will address many issues which directly affect the Trust relationship between Tribes and the United States.

Finally, thank you for the opportunity to submit these comments.

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