

JOINT COMMENTS
OF
National Congress of American Indians
Native American Finance Officers Association
United South and Eastern Tribes, Inc.
The Affiliated Tribes of Northwest Indians
California Association of Tribal Governments

Submitted Electronically to:

Notice.Comments@IRScounsel.treas.gov (NOTICE 2011-94)

RE: NOTICE 2011-94
Comments on the General Welfare Exclusion

Dear Treasury and Internal Revenue Service:

The purpose of this letter is to provide comments in response to Notice 2011-94 (the “Notice”) requesting input for the development of guidance on the general welfare exclusion (“GWE”) as it applies to Indian tribal governments and their social welfare programs benefitting tribal members.

I. Introductory Statement

Indian tribal governments have a unique status in our federal system under the U.S. Constitution and numerous federal laws, treaties and federal court decisions. They have a governmental structure, and have the power and responsibility to enact civil and criminal laws regulating the conduct and affairs of their members and reservations. They operate and fund courts of law, police forces, and fire departments. They provide a broad range of governmental services to their citizens, including education, transportation, public utilities, health, economic assistance, and domestic and social programs. Like the income of states and local governments, tribal revenues are not treated as taxable income – but as the governmental revenues of a distinct sovereign. Any guidance under the GWE must be designed to be consistent with federal law and policy and must reflect the sovereign status of tribes, the federal trust relationship, and the federal policy of self-determination.

Brief History

The GWE is an administrative doctrine that recognizes that it is inappropriate to impose federal income tax on the value of assistance provided from federal, state, and tribal government social welfare or benefit programs.¹ While the GWE has been applied to social programs for which eligibility turns in whole or in part on the recipient's financial status (whether it be a percentage of poverty, which is sometimes as high as 500%, or use of national or local median family income statistics), it has also been applied to government programs that address non-financial needs, such as educational needs, and government programs designed to focus on broader "needs" of the government or community.

This broad concept of community need was evident in a 1977 Revenue Ruling addressing a federal program designed to promote Indian business development. In Revenue Ruling 77-77, 1977-1 C.B. 11, the IRS applied the GWE to exclude from taxation governmental payments provided to individuals without evidence of financial need. Revenue Ruling 77-77 held that grants received by Indian tribal members, pursuant to an act of Congress for the purpose of promoting Indian entrepreneurship and employment, qualified for exclusion from the recipients' gross income under the GWE.

Twenty-two years later, in a private letter ruling, the IRS took a similar approach in ruling on a business grant program designed by a tribal government to stimulate the creation of reservation-based business enterprises.² In this ruling, general features of the particular reservation, such as its high unemployment rate and lack of access to capital, were cited as factors supporting the conclusion that the payments were excludable under the GWE. There was no individualized means testing.

¹ The GWE is not defined by statute, but has evolved through various revenue rulings, court cases and private letter rulings. Many of the earliest administrative rulings were actually developed to prevent the federal government from taxing its own social welfare programs. For example, in 1938, the Bureau of Revenue (predecessor to the IRS) determined that it would not be appropriate for it to tax lump sum payments made to Social Security recipients. I.T. 3447, 1941-1 C.B. 191, *superseded by* Rev. Rul. 70-217, 1970-1 C.B. 12 (holding that Social Security payments are excluded from income); *see also* Rev. Rul. 70-341, 1971-2 C.B. 31 (extending Rev. Rul. 70-217 to Medicare payments); Rev. Rul. 74-205, 74-1 C.B. 20 (excluding federal HUD replacement housing payments to assist displaced persons to obtain housing). The IRS has recognized Indian tribes as governments for purposes of the general welfare doctrine in several private rulings and similar determinations issued beginning in the late 1990s. *See, e.g.*, Tech. Adv. Mem. 9717007 (Jan. 13, 1997) (treating tribes like other governments in analyzing the applicability of the general welfare doctrine); Priv. Ltr. Rul. 200336030 (Jun. 6, 2003) (tribal housing benefits consisting primarily of loans in amounts up to \$80,000, 75% of which could be forgiven, qualified as nontaxable general welfare benefits).

² Priv. Ltr. Rul. 199924026 (Mar. 19, 1999).

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In recent years, however, the IRS has increasingly narrowed the scope of the GWE by ruling favorably primarily on programs based on individual financial need. The focus on means testing appears frequently during the course of IRS examinations, through voluntary compliance checks, and through “informal” guidance contained in newsletters and the IRS website.

Our comments stress that income tax exclusion under the GWE should not be dependent on means testing. Tribal governments and federal agencies engage in a wide range of community-based programs crucial to the well-being of tribal members, including programs that seek to restore, protect, promote and extend tribal cultural heritage.³ Guidance under the GWE must recognize that tribal governments establish many programs that are not based upon recipient income.

We offer these comments in order to suggest a balanced approach to the general welfare exclusion that is flexible enough to accommodate unique tribal interests and expressly recognizes non-financial and community-based factors that often form the basis of many key tribal programs. The suggested approach promotes tax compliance while respecting the sovereign right of tribes to establish programs designed to preserve tribal traditions, carry on their culture and further the federal policy of self-determination.

³ The Obama Administration has committed to promote tribal self-determination and promote the well-being of tribal members. This commitment is grounded in the unique legal and policy obligations of the federal government towards Indian tribes. In announcing United States support for the United Nations Declaration on the Rights of Indigenous People, the Administration stated:

This recognition [of the inherent sovereign authority of tribes] is the basis for the special legal and political relationship, including the government-to-government relationship, established between the United States and federally recognized tribes, *pursuant to which the United States supports, protects, and promotes tribal governmental authority over a broad range of internal and territorial affairs*, including membership, culture, language, religion, education, information, social welfare, community and public safety, family relations, economic activities, lands and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous governmental functions.

Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples (emphasis added), *available at* <http://www.state.gov/documents/organization/153223.pdf>.

II. 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 toward the same goals of federal policy, even in the absence of federal funding.

Tribal leaders have frequently raised the concern that the IRS examiners who audit tribal programs in the field have little understanding of Indian tribes or their status as sovereign governments, and often treat Indian tribes as similar to corporations or other business entities while questioning the need for tribal government social welfare programs. This misunderstanding results in a diminution of tribal government status that is offensive to tribal leadership, inconsistent with federal law and policy, and contrary to the established positions of the Obama Administration.⁴ There is a need for training IRS employees on the status of Indian tribes as sovereign government entities with a long recognized government-to-government relationship with the federal government. Guidance on the GWE must ultimately reflect tribal sovereignty and the government-to-government relationship of the United States and each of the Indian tribes.

⁴ 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.

President Obama's Executive Memorandum on Tribal Consultation (Nov. 5, 2009).

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As noted above, Indian tribal governments have a unique status in our federal system under the U.S. Constitution and numerous federal laws, treaties and federal court decisions. They have governmental structures, power and responsibility. They enact civil and criminal laws, provide government services (including courts of law, police, fire protection, schools, housing, utilities, transportation, social services and health), and are generally treated in the same manner as states under the Indian Tribal Governmental Tax Status Act of 1982, which is codified at Section 7871 of the Internal Revenue Code (the “Code”). Tribal regulatory authority is strongest within the core bundle of rights reserved to control the internal matters of the tribe: the power to determine membership; the power to legislate and tax; the power to determine a form of tribal government; and the power to administer justice. In these comments, we stress that the power to develop programs legislatively for the greater good of the community falls within the core, inherent, sovereign rights of Indian tribes.

The federal trust responsibility is derived from the long history of treaties and agreements between the federal government and Indian tribes, and establishes the obligation of the United States to provide for the continued viability of tribal self-government, tribal communities and tribal cultural practices. This includes federal recognition of the power that tribes possess to determine their own form of government, and to organize and govern to meet the needs of their citizens. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978) (noting that in enacting the Indian Civil Right Act, Congress intended “to promote the well-established federal policy of furthering Indian self-government” by adapting the safeguards of the Bill of Rights “to fit the unique political, cultural, and economic needs of tribal governments”) (internal quotations omitted).

In addition to their retained inherent sovereignty, tribal governments also administer programs that provide services to tribal members arising from federally-authorized programs. These federal programs have been developed based on commitments embodied in treaties, as part of the trust responsibility, and pursuant to federal policy objectives set forth in statutes.⁵ Although these services have historically been provided by the Indian Department and later the Bureau of Indian Affairs, Congressional and Executive policy since the 1970s has been to encourage and facilitate direct tribal administration of those federal programs and services.⁶

⁵ The federal government committed to provide many of these federal services in treaties as consideration for lands. President William J. Clinton, on signing the Executive Order on Tribal Consultation observed that “Indian nations and tribes ceded lands, water and mineral rights in exchange for peace, security, health care and education.” 36 Weekly Comp. Pres. Doc. 2806 (Nov. 13, 2000).

⁶ President Nixon is often credited with beginning the era of self-determination policy in his Special Message on Indian Affairs, July 8, 1970, in which he repudiated the existing policy of tribal termination, stating:

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Under the Indian Self-Determination Act, federal programs have been transferred to tribes so that tribal governments plan, conduct, and administer quality programs for Indians. 25 U.S.C. § 450a(b).

Indian tribes must develop programs that address unique social, cultural and economic problems. Indian tribes are generally geographically and culturally isolated with a high degree of inter-relationship among tribal members. Indian communities face extremely high levels of unemployment and poverty, low educational attainment, poor health and shortened life spans. Tribes share histories of colonization, including dramatic military resistance, externally imposed forms of governance, and mandatory boarding school education. Although some tribes have managed to generate significant revenue sources, these changes have come recently and have only begun to address longstanding social needs. Tribes view their programs as a supplement to inadequate federal programs based in the trust responsibility or treaty rights, and that these rights belong to all tribal members. In general, Indian tribes are not interested in poverty-based models of providing general welfare assistance based on measurements of financial need. These models tend to create disincentives and divisions among tribal members, and reinforce the conditions that Indian tribes are trying to address.

Because of the unique circumstances on Indian reservations, 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.⁷ 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

It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the *Indian future is determined by Indian acts and Indian decisions*.

Richard Nixon, Special Message to Congress, July 8, 1970, *Public Papers of the President of the United States* (1970), p. 564 (emphasis added). Self-determination has remained the official Indian policy of every president since Nixon.

⁷ See, e.g., Stephen Cornell & Joseph P. Kalt, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today* 27-32, available at <http://hpaied.org/images/resources/publibrary/PRS98-25.pdf>.

meet the needs and interests of their people is essential to achieve not only tribal objectives, but also federal policy priorities.

Built into these tribally-administered programs are internal controls for accountability grounded in tribal culture and pursuant to federal requirements. This direct and local accountability is also exercised by tribes in carrying out their general welfare programs. Deference to tribal authority should be incorporated into the IRS and Treasury GWE guidance in recognition of the appropriate accountability mechanisms in place that are based on tribal community values, reciprocal responsibilities and programmatic objectives. 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 will never attain.

Furthermore, tribes rely upon political, community-based and governmental controls to ensure accountability of program delivery in all arenas. In addition to these internal controls based on cultural values, tribes have also implemented control systems pursuant to federal program activities they implement. Federal agencies appropriately rely on those systems of local accountability and Congress has emphasized them in enacting the Indian Self Determination Act. Evidence has shown that tribal authority in program design, implementation and oversight is more accountable to local needs and therefore more effective in achieving community objectives. The IRS and Treasury should recognize tribal systems for local accountability by expressly making reference to tribal internal controls as part of the general welfare exclusion guidance.

III. Developing Substantive Guidance Consistent with Federal Indian Law and Policy

(1) General Statement of Doctrine

The GWE has been described in various forms of guidance over the years. Not all 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.

For example, in Private Letter Ruling 200632005 (Aug. 11, 2006), the IRS recognized that “need” of a recipient “need not necessarily be financial” in nature.⁸ State governments provide public education at no cost to students or their families, and the value of this education is not taxed to them. Basic high school education is deemed a fundamental need of the community itself, providing benefits to society as a whole regardless of individual financial need.

At the college and graduate levels, the cost of public education is heavily subsidized for all students, without regard to their individual financial need, and even more so for resident students who generally pay much lower tuition than nonresidents. At the University of Illinois, for example, effective tuition as a percentage of full instructional cost is only 41.65%, and only nonresident students are expected to pay tuition at a rate that will cover certain key components of this cost.⁹ Similarly, revenue from tuition and fees made up only 18.5% of the overall budget of the University of California - Berkeley in the 2008-2009 school year.¹⁰

(2) 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:

- **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

⁸ In this ruling, the tribal government provided housing assistance to community members on a “needs-based priority system” which took into account the member’s age, disability status, income, and the condition of the family’s current housing.

⁹ See Background Information Concerning Tuition and Financial Aid at the University of Illinois: An Update for FY 2012, *available at* <http://www.pb.uillinois.edu/Documents/tuitionenrollment/FY-2012-Tuition-Book.pdf>.

¹⁰ See UC-Berkeley Facts at a Glance, *available at* <http://berkeley.edu/about/fact.shtml>.

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 GWE 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.

- **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.
- **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).
- **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 programs offering nominal stipends or benefits as “employment.”

- **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.
- **Deference** to tribal determinations of community needs is a key concept for tribal leadership, but Treasury 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.

(3) **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.

In Revenue Ruling 77-77, business grants were provided to Indians without means testing. The grants were based on broader needs of the tribal community rather than on individual financial needs. In Revenue Ruling 70-341, 1971-2 C.B. 31, the IRS ruled that government-provided health care benefits for the elderly, commonly known as Medicare benefits, were nontaxable to recipients. The IRS did not condition this ruling on whether the Medicare recipients were financially needy. Instead, it found that such health benefits – provided to the elderly regardless of income – furthered the “social welfare” objectives of the

federal government. The Medicare benefits at issue were found to be legally indistinguishable from monthly social security payments.¹¹

In Revenue Ruling 57-102, 1957-1 C.B. 26, the IRS ruled that governmental benefit payments provided to blind individuals pursuant to a state-created public assistance program were excludable from the recipients' gross income. The payments, provided on the basis of health-related needs, were determined to be "in the interest of the general public," and therefore, not taxable to the recipients. There was no requirement, and therefore, no showing of "financial need" by the recipients. The IRS did not specifically exclude the payments from the recipients' income under the general welfare doctrine. However, the IRS concluded that the payments, made on the basis of need (in this case, individual health-related needs), benefited the public in general, and as a result, should not be subject to tax. Revenue Ruling 57-102 established a basis for excluding government payments for health needs under what was later termed the "general welfare doctrine."

We are in agreement with tribal leader comments made during the initial consultation meeting on November 30, 2011, that means testing can distort tribal cultural and community values. An act of respect or honoring tribal elders cannot be reduced to a dollar value or placed on a Form 1099 without distorting traditional community values.

(4) 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.

Tribal leaders and members question why the federal government should be seeking to tax tribal educational and other welfare expenditures under the general welfare doctrine when, in fact, the tribal government is, in many cases, carrying out and/or supplementing the federal government's own trust obligations.

By assessing income taxes on tribal programs, the federal government is undercutting the ability of tribal governments to meet the basic needs of their citizens and increasing dependence. Assessing federal income tax on tribal government programs not only impinges on tribal sovereignty, it also imposes direct and substantial economic burdens on already overextended

¹¹ See Rev. Rul. 70-217, 1970-1 C.B. 13, *superseding* I.T. 3447, 1941-1 C.B. 191 (holding that Social Security benefit payments for the elderly are excludable under the general welfare doctrine).

tribal government budgets. This must be recognized in the process of developing the guidance that is issued.

(5) **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.

Some IRS auditors, for example, have sought information on traditional ceremonies and cultural matters that tribal governments should not have to disclose in this context. Tribes are also concerned about information that may be subject to information-sharing agreements between the IRS and state revenue departments. Information shared with the IRS should respect tribal privacy, and information provided should be exempt from disclosure under these state agreements and under the Freedom of Information Act.¹²

IV. **Examples of Programs**

We urge that these examples, as well as those provided by individual tribes in separate comments, are for illustrative purposes only and not intended to be exhaustive nor exclusive. The guidance must expressly affirm the flexibility of individual tribal governments to establish unique programs to meet their own needs that may not be reflected by any of the illustrative examples. The examples could include illustrations such as the following:

- **Health Care Programs** - The Patient Protection and Affordable Care Act added a statutory exclusion from income for member-based health programs in Section 139D of the Code. However, some tribes still need health related programs to cover things that traditional health plans may not cover. For example, some tribes provide medical coverage for traditional and ceremonial healing practices and care that health plan providers may be unable to accommodate. *See, e.g.*, Rev. Rul. 70-341, 1971-2 C.B. 31 (government provided health benefits under Medicare were non-taxable regardless of individual financial need).
- **Educational Programs** - Tribal education programs are often enacted to address systemic, community-wide, gaps in achievement. Historically, “over 150 federal treaties between tribes and the United States have included educational provisions.”¹³ These provisions span from general promises to provide occupational training, or instructions on farming, to

¹² Section 304 of the National Historic Preservation Act authorizes the withholding of information with respect to ceremonies associated with sites that are eligible for the National Register of Historic Places. 16 U.S.C. § 470w-3.

¹³ *Cohen’s Handbook of Federal Indian Law*, § 22.03[1][a], 1356 (2005).

directives that necessitate that tribes “compel their children to attend school and ordering [an] Indian agent to ensure strict compliance.”¹⁴ As a result of the United States’ early policy towards Indian education, entire generations of tribal members were removed from their homes and forcefully subjected to boarding schools where the object of education went beyond scholastics and sought to “civilize” the Indian: banning the use of native languages, the practice of native culture and/or religion, cutting students’ long hair and giving students English names and identities.

Currently, tribes exercise a great deal of control over their own education programs. Tribes frequently provide a variety of educational services and types of assistance, some of which is not excludable under Section 117 of the Code as a qualified scholarship. Also, tribes often provide assistance (such as clothing or transportation) to encourage scholastic pursuit. School-age clothing assistance programs, for example, encourage participation in school by ensuring that children have basic essentials such as school-appropriate clothing, equipment and backpacks. Tribal education programs may include assistance for deposits needed to rent musical instruments for a music class.¹⁵ Overall, the federal programs and services related to Indian education have been consistently underfunded and understaffed, and tribes that supplement or supplant federal funding are working toward the same goal, even in the absence of federal funding.

- **Transportation Assistance** - Transportation needs are critical for many remote Indian reservations. Assistance with transportation may take many forms including auto repair, tires, public transportations, and facilitating access to employment locations, health and education facilities.
- **Housing Programs** – These programs include repair, loan assistance, construction assistance, housing code enforcement, elder or disabled member improvements, temporary shelter or hotel reimbursement programs and other housing related assistance. *See, e.g.*, Rev. Rul. 98-19, 1998-1 C.B. 840 (relocation payments to flood victims); Rev. Rul. 74-205, 1974-1 C.B. 20 (HUD replacement housing payments to assist displaced persons obtain modest housing); Rev. Rul. 76-395, 1976-2 C.B. 16 (home rehabilitation grants); Rev. Rul. 75-271, 1975-2 C.B. 23 (mortgage assistance payments). In particular, we would encourage deference to tribal housing assistance directed at community needs such as health & safety, energy efficiency, and environmental and natural resources protection (such as storm water control or water and sewage.)

¹⁴ *Id.* at n. 164.

¹⁵ *See, e.g.*, Tech. Adv. Mem. 200035007 (May 23, 2000) (education benefits provided by a tribe without regard to members’ financial need were nontaxable general welfare benefits).

- **Loan and Loan Forgiveness Programs** – These programs often serve overall tribal goals and self-determination. For example, home loan forgiveness programs often are implemented to retain membership within or near a reservation, to encourage investment in land on or near a reservation, to foster traditional values in the land itself or to encourage education or investment or service within the community. *See, e.g.*, Rev. Rul. 75-271, 1975-2 C.B. 23 (mortgage assistance payments); Priv. Ltr. Rul. 200336030 (Jun. 6, 2003) (tribal housing benefits consisting primarily of loans in amounts up to \$80,000, 75% of which could be forgiven, qualified as nontaxable general welfare benefits).
- **Emergency Assistance** – This can come in many forms. For example, discretionary assistance to help members with unexpected loss such as help for a member stranded in a city in need of bus fare to get home or a meal or hotel for the night.
- **Bereavement and Burial Assistance Programs** – Many tribes offer bereavement and /or burial assistance as a direct means of preserving culture and tradition. Tribal governments often provide these benefits as a means to promote family unity and culture, with wakes and family obligations unique to each tribe arising from the death of a tribal member.
- **Cultural Programs** - Programs to preserve tribal traditions must be made available to all tribal members, regardless of individual income. Maintaining and revitalizing culture and traditions, is of paramount importance to each Indian tribe and is integral to the United States' government-to-government relationship with tribal governments. As Congress recognized in the American Indian Religious Freedom Act, "the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems." Pub. L. No. 95-341, 92 Stat 469 (1978). In enacting the Indian Civil Rights Act (ICRA) – which imported many of the guarantees under the Bill of Rights into Indian Country – Congress purposefully excluded the establishment of religion clause in recognition of the “theocratic traditions of some tribes.”¹⁶ Recognition of this unique governing structure has driven the development of federal laws and policies for the protection and extension of tribal culture and heritage.¹⁷

¹⁶ *Cohen's Handbook of Federal Indian Law*, § 14.04[2], 95 n. 437 (2005).

¹⁷ Illustrations include the Indian Child Welfare Act, the National Historic Preservation Act, the Archeological Resources Protection Act, the National Museum of the American Indian Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Tribally Controlled Schools Act and the Indian Arts and Crafts Act.

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During recent conversations with Treasury, the cultural programs that an Indian tribe may provide to meet community needs (*e.g.*, language classes; burial assistance; pow wows, other ceremonies, events or traditional dances¹⁸; travel funding for ceremonies, or to learn about history and culture; programs intended to honor and care for elders, etc.) were analogized with programs and benefits a church might provide to its members (*e.g.*, funding a pilgrimage or mission; trips to visit Israel or the Vatican, etc.). In doing so, it was suggested that churches often receive an amount of deference which is not afforded tribal governments.

We believe that comparisons between tribal culture and churches provide a conceptual bridge which we can use to better understand one another. However, when making this comparison, it is important to underscore that *churches are not sovereign governments*. However, IRS field agents seem to understand that when a church's activities promote religious principles they are insulated from tax liability. Similarly, when a tribe provides for the exercise of culture, the cultural enrichment, or the cultural restoration of its members, those benefits should be exempt from taxation as well.¹⁹

- **Elder Programs** (including meals, social events, home improvement, travel and utility assistance) – Which may recognize unique traditional or cultural obligations to elders that may have no counterpart in non-tribal programs or even among different tribes. For example, in Revenue Ruling 70-341, 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. The guidance must defer to tribal priorities in honoring elders.
- **Utility Assistance** – This assistance may take many forms depending on the tribal location.

¹⁸ This may include the cost of arranging for participation of a drum group, dancers, a medicine man and the provisions of prizes, food, ceremonial crafts or other items or services unique to the cultural activity at hand.

¹⁹ Tax exempt exercise of cultural practices and traditions is consistent with the recognition of rights set forth in Article 9 of the United Nations Declaration on the Rights of Indigenous Peoples, *available at* http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. That Article provides that “Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.” The federal government has expressed its commitment to support tribal investments in their community and their culture. Federal law cautions against “religious infringements result[ing] from the lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations....” Pub. L. No. 95-341, 92 Stat 469 (1978). Tribes and their members should not be taxed for conducting these activities.

- **Economic Development Programs** - Tribal programs to promote economic diversification and development and job creation for tribal members, such as job training programs, and the business grant program mentioned earlier,²⁰ are generally based on community needs rather than on individual income. Indian tribes must develop programs that address the unique economic problems on Indian reservations.

Under each of these areas of need, the tribe, as the governing body, retains the inherent authority to enact programs consistent with community goals. Guidance on the GWE must be flexible enough to accommodate tribal determinations of their own community needs, which may not depend on the financial needs of their citizens. Approaching the GWE in this manner is consistent with federal law and policy, as well as the official position of the Obama Administration.²¹

V. **Interim Relief From Audits**

While the GWE guidance is being developed, we urge the IRS and Treasury to provide interim relief from the inconsistent application of the exclusion to Indian tribes under audit or subject to other enforcement actions. While Treasury and IRS have told us this is “off the table” as an option, our members resubmit this request, at least in those instances where tribal social benefit programs are being examined under the GWE.

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.²² Tribal governments not under audit are often requested to participate in

²⁰ Grant program which was approved in Revenue Ruling 77-77 and Private Letter Ruling 199924026.

²¹ See *supra* n. 4.

²² 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.

compliance checks by IRS Indian Tribal Government (“ITG”) specialists. GWE issues are often addressed in these cases. In many instances, tribal governments are asked for detailed information about all of their social welfare programs – including education, health care, housing, legal assistance, burial assistance, and even community recreation.

Furthermore, 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 in order to devote limited resources to defending those programs in audits.

One tribe in the Southwest, for example, was challenged in an IRS audit on a school age clothing assistance program designed to increase attendance rates by ensuring that all children had basic garments, backpacks and shoes for school. The clothing was not lavish. The program was limited to no more than \$300 per year for any child, and most purchases were required to be made at the local Wal-Mart. The tribe at issue is located in one of the most impoverished areas of the country. The U.S. Census Bureau noted an average per capita income within this reservation of less than \$4,500 *per year*, with less than a 50% high school graduation rate. The same reservation had an unemployment rate before the recession of 62% and many households have no indoor plumbing. Yet because of the narrow reading of this tax doctrine, the tribe had to endure a federal tax examination that lasted more than a year, with money spent on legal fees that could have helped school age children. These challenges were ultimately dropped on appeal, but only after the damage had been done. Having incurred the expense of responding to months of Information Document Requests and filing an appeal, the tribe had depleted most of the funds that the tribe had allocated for the benefit of these children in need.

The current level of tribal audits and compliance check activity has created an urgency among tribes for guidance, and the need for interim relief pending that 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. It is also difficult to collaborate on a “government-to-government” basis when there are tribal audits going on which scrutinize and penalize tribal programs, some based upon questionable or mistaken legal premises.

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.

VI. Guidance on Tax Reporting and Withholding:

Assuming that a payment or benefit qualifies under the general welfare doctrine, it is not taxable to the recipient and there is no reporting or withholding requirement. However, some

IRS agents in audit have taken the position that if governmental benefits are taxable, they are also subject to withholding under Section 3402(r) of the Code as “deemed” or “constructive” per capita payments. The IRS maintains that if any tribal program payment or benefit is taxable, the tribal government should report the value of the benefit to the IRS (and the member) on Form 1099. Essentially, even though not supported by formal or informal guidance, some IRS auditors are taking the position that if the program is funded by gaming revenue, the tribal government should withhold income tax.

Any guidance should clarify that Section 3402(r) (*i.e.*, withholding on per capita payments) applies only to actual per capita distributions of gaming revenue and does not apply to government program benefits that are merely funded by gaming revenues.

VII. Suggestions for Process and the Form Guidance Should Take

We appreciate the willingness of IRS to put this issue on its agenda of administrative guidance priorities. We particularly appreciate that it has done so in a way that provides for meaningful input from tribal elected leaders, staff and advisors. In this regard, we emphasize the following points that may improve process and produce a more meaningful form of guidance:

(1) Extended Period for Genuine Consultation

The GWE applies to a broad range of tribal programs that differ depending on each tribal government’s unique needs, both culturally and economically. Because of its potential breadth and impact on diverse tribal programs, we urge Treasury and IRS to consider an extended period of consultation to ensure notice and opportunity for input from tribes across all regions. Organizations such as NCAI, NAFOA, CATG, ATNI and USET can assist in providing notice to members of developments and opportunities for input as the process moves forward. We encourage the IRS to keep the organizations informed of progress and we will continue to solicit input from our collective memberships.

Throughout the guidance project, we urge continued consultation with tribes and incorporation of their input into the final product. There are over 500 recognized tribes, with diverse histories, needs, and policy approaches. Consultation requires *meaningful* input from tribes and a true “seat at the table” as the rules are developed. Guidance on this critical tax doctrine should be developed in a true collaborative process. “Listening” group meetings followed by published guidance will not provide the collaboration needed to make this guidance a success. We also believe that it will take an extended period of time to secure input from the many tribes and tribal programs impacted by the guidance project.

(2) Establishment of an Advisory Work Group

Some of our members have suggested that the IRS and Treasury work with us to form an “Advisory Work Group on General Welfare Issues.” As noted below in the background section for each organization contributing to these comments, NCAI, NAFOA, CATG, ATNI and USET, in combination, include members from most Indian tribes throughout the country. The organizations also have access to tax practitioners who work with these tribes. The organizations also have developed a joint task force on taxation that is equipped to coordinate and provide input on tax policy matters such as the GWE.

(3) Circulation of Discussion Draft for Comment

To ensure that Tribal governments both understand the potential impact of guidance on their individual programs and have an opportunity for meaningful input on the development of that guidance, we request that Treasury or IRS circulate discussion drafts providing specific examples of the types of programs that may be impacted along with proposed or possible rules for comment before proposed guidance is issued.

In the event that guidance is issued in a proposed form with opportunity to comment (such as that used in the advance notice of proposed rulemaking that was issued on the “essential government function” requirement for purposes of Section 7871 of the Code) we would urge Treasury and the IRS to include a preamble or other communication responsive to the comments received so that the final guidance reflects the considerations given to specific tribal concerns.

(4) Form that Guidance Should Take

In addition to the substantive guidance itself, the contributing organizations have solicited input from tribes on the form that the guidance should take. The organizations, for example, asked their members for input on whether the guidance should take the form of regulations, a revenue ruling, a revenue procedure, a notice or private letter rulings.

The general consensus was that whatever form the guidance takes, it must be flexible enough to take into account the unique issues that each tribe faces. If a “safe harbor” approach is employed, we would request that tribal governments still be provided the ability to establish programs outside of the safe harbor with some basic principles or standards for guidance on those non-safe harbor programs.

One suggestion is that the GWE guidance could include a training manual developed in partnership between tribes and the IRS that can address more background material on tribal governments. For example it should include a discussion of the basics of tribal sovereignty,

treaty rights, tribal government structures, and the federal trust responsibility. These principles highlight the need for appropriate deference to tribal government decision making in designing programs for the general welfare of tribal citizens.

In addition, a training manual would likely be produced more quickly than a regulation, and unlike a revenue ruling, could be written in a way that is adaptable to the broad range of tribal government services provided on Indian reservations. In our view, a fundamental problem is IRS examiners who have lacked an understanding of tribal governments and had inadequate training on tribal programs and the nature of the general welfare doctrine. A training manual would be aimed directly at this problem, and should be developed in cooperation with tribes.

We also encourage Treasury and the IRS to retain the option for individual tribes to secure guidance specific to their particular programs through the private letter ruling process. When guidance was issued on minors trusts (Revenue Procedure 2003-14 and Revenue Procedure 2011-56), for example, the ruling process was closed for tribes seeking individualized rulings. We believe that many tribal governments, while welcoming general guidance, would like to maintain their ability to seek individual guidance as an option to determine the tax treatment of issues unique to each tribe.

Until formal guidance is developed or until tribes can work with the IRS in developing a training manual to address the foregoing issues, we suggest that Treasury and the IRS consider interim guidance in the form of a Notice during which a good faith standard can be applied. The transitional relief or good faith standards should not be contingent upon narrow readings or examples of the doctrine. Until final guidance is fully developed, the doctrine (and any interim relief or guidance) should be applied in a manner designed to allow as much flexibility for tribal programs as possible, and to prevent tribes from unnecessarily limiting or terminating their tribal programs. We cannot over emphasize the need for flexibility during the interim period awaiting guidance. Experience from prior tribal tax guidance projects teaches us that interim periods can extend for many years even with the best of intentions. A narrow “safe harbor” or obvious examples standing alone for an extended period will stifle the creativity and flexibility that tribes need in developing programs to meet ever changing needs.

(5) No “Informal” Guidance without Tribal Input

Finally, we discourage the IRS from relying too heavily on “informal” guidance that is provided without the benefit of tribal consultation or (in some cases) IRS chief counsel review and input. For example, IRS has in the past issued newsletters and educational publications

suggesting that tribal programs must require “individualized determinations of need” for the GWE to apply to them.²³

Website Q&A’s can also provide a false sense of simplicity. Narrow examples provided in this format often are limited to the most basic “easy cases”, and can give the impression that the doctrine is narrower than the law may actually allow. For example, ITG FAQ for Indian Tribal Governments regarding Terminology #6 “What is the General Welfare Doctrine” on the IRS website currently provides that the GWE “applies only to governmental payments out of a welfare fund based upon the recipient’s need”

VIII. Membership and Representation Within the Contributing Organizations

The National Congress of American Indians, the Native American Finance Officers Association, the United South and Eastern Tribes, the Affiliated Tribes of Northwest Indians, and the California Association of Tribal Governments, in combination, represent tribes and tribal entities in all regions throughout the country. The Joint Comments reflect input solicited by all organizations through various means including member communications and meetings, joint taxation taskforce meetings with tribal and tribal representative participation, and a Webinar conducted with nationwide participation on January 31, 2012. The organizations also participated in the initial consultation meeting conducted by IRS and Treasury in Washington D.C., on November 30, 2011, and contributed to that effort with an initial “talking points” paper to help Treasury and IRS in securing tribal input.

The organizations reserve the option to present oral testimony at any hearings on the general welfare doctrine and to secure testimony from their member tribes.

²³ See, e.g., IRS Pub. 3908, Gaming Tax Law and Bank Secrecy Act Issues for Indian Tribal Governments, pp. 17-18 (Rev. Aug. 2008) (asserting that “[i]ndividuals are required to establish ‘need’” under a general welfare program for the benefits to be excluded from income); ITG News, “What is a Nontaxable General Welfare Payment,” p. 2 (Eastern Ed. January 2007) (focusing on the development of needs-based criteria for program eligibility as key to exclusion under the GWE)..