ADVISORY COMMITTEE ON
TAX EXEMPT AND GOVERNMENT ENTITIES
(ACT)

Indian Tribal Governments: Survey of Issues Requiring Administrative Guidance in the Wake of Enactment of Section 906 of the Pension Protection Act of 2006

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I. Executive Summary

This report discusses the administration of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and the Internal Revenue Code of 1986, as amended (Code), respecting employee benefit plans sponsored by Indian tribal governments. In this report, ACT describes issues that will require administrative guidance, or, at a minimum, formulation of policy. The occasion for this report is Congress' enactment of Section 906 of the Pension Protection Act of 2006 (PPA). Section 906 of the PPA amended both the Code and the ERISA to legislatively classify, for the first time, tribally-sponsored employee pension plans as either governmental or commercial plans depending on the nature of the tribal employer's activities. Prior to the enactment of Section 906, the distinction between governmental and commercial employee benefit plans received inconsistent treatment. The distinction between governmental and commercial plans is reasonably well understood outside of Indian country; however, the distinction is not well understood within Indian country.

Section 906 defines governmental plans to include plans established by "an Indian tribal government, a subdivision of an Indian tribal government or an agency of or instrumentality of either, and all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government functions)." Section 906 leaves to the IRS the task of implementing the distinction between governmental plans and commercial plans. Since governmental plans are regulated differently than commercial plans, making the distinction between governmental plans and commercial plans in Indian country will not be easy. Given the sweeping language of Section 906, there is room for disagreement about what tribal activities are governmental and what are commercial. Moreover, there remain many questions about how ERISA applies to tribes whether or not tribal plans are classified as governmental or commercial. Guidance on these questions has been held in abeyance pending resolution of the threshold question which tribal plans are governmental plans and which are commercial plans. Those questions must be answered as well.

The need for administrative guidance in Indian country is significant. A survey conducted in 2004 found that 188 of the 562 federally recognized tribes sponsored some kind of defined contribution plan.[1] Of those plans, 62 were established as governmental plans. The total number of defined contribution plans is likely higher. The total number of all tribally sponsored employee benefit plans issued to date is not known. Correspondents report that tribal employee benefits plans, whether defined benefit plans or defined contribution plans, have not commonly been drafted in ways that account for the unique characteristics of tribal governments. Indian tribes, however, are "unique aggregations

[1] Yoder "Survey of Defined Contribution Retirement Plans For Federally Recognized Indian Tribes" June 9, 2004.

possessing attributes of sovereignty over both their members and their territory" that require special consideration.[2] Tribes share characteristics of both governments and private employers. They are often not subject to federal enactments and are rarely ever subject to state or local law. Few plans adequately address the difference between tribes and governments or private employers.[3] In this report, the ACT surveys the issues requiring special consideration in light of the differences between tribal governments, on the one hand, and other governments and private employers, on the other.

The specific recommendations made by this committee can be summarized, as follows. First, the ACT proposes a federal study be conducted, in consultation with tribes, to inventory and remedy the inconsistent and redundant treatment of tribes caused by the concurrent enforcement and administration of ERISA by the three responsible federal agencies, IRS, DOL and PBGC. This study should also address the matter of retroactive application of ERISA to tribes, as well as the force and authority of tribal law on issues such as Qualified Domestic Relations Orders, trust law, and other areas of conflict between local and tribal law. Second, and perhaps of greatest need, is guidance on the distinction between governmental and commercial plans. The ACT makes several recommendations as to how this distinction may be defined in a way that maximizes tribes' opportunities to sponsor plans that attract employees on at least the same basis as other governments and accords deference to tribal self-government. Third, once a determination is made as to what constitutes a governmental or commercial plan, special rules are warranted for dealing with Section 414 control group and aggregation testing given the unique structure of tribes. Finally, because tribes face imminent deadlines for tribal plan reporting, determination and audit requirements, interim rules allowing for safe harbor reporting and/or extensions are required until the tribes receive guidance from the IRS as to what to report as "commercial" or "governmental."

[2] U.S. v. Mazurie, 419 U.S. 544, 557 (1975).
[3] The ITG received a big assist from ACT's EP work group and others. The ITG group also wishes to thank the law firm Yoder & Langford, P.C.

II. Background

A. ERISA and the Code

1. SUBCHAPTER D OF THE INTERNAL REVENUE CODE

The applicability of the law of employee benefit plans to tribes has never been clear. The statutory framework for employee benefits plans evolved during the course of the 20th century. Amendments to the Revenue Act in 1921, 1926, and 1928 introduced tax advantages for private employment-based retirement plans. Amendments in 1921 to the Revenue Act allowed employers to deduct their contributions to profit-sharing and stock bonus plans from gross income as a business expense.[4] Employees were similarly authorized to defer recognition of income for their contributions to plans until withdrawn, as were investment earnings of plan trusts. The Revenue Act was subsequently expanded to include pension plans. In 1942, Congress amended the Code to impose nondiscriminatory coverage and nondiscrimination in benefits and contributions. In 1954 and again in 1986, the Code was amended and recompiled to articulate this arrangement into Subchapter D of the Code.[5] Currently, Code section 404 allows employers to take a deduction for contributions to a qualified plan[6] in the year of the employer's contribution. Sections 402 and 403 exempt such contributions on behalf of employees participating in a qualified plan from income tax in the year of contribution. Finally, section 401(a) exempts trust investment earnings from income tax.[7]

Neither the Code nor its predecessor Revenue Act makes reference to tribes in the early pension laws or the legislative history. Thus, congressional intention respecting tribes' ability to offer tax qualified employee pension plans is not known. Until the 1980's, there is no evidence in the many amendments to the Code that Congress ever considered whether and how tribes should be treated for purposes of employer-sponsored qualified plans. It is unlikely, however, that tribal employers were in a position to offer profit-sharing or pension plans throughout most of the 20th century. During that period, tribes did not generally engage in labor intensive industries such as manufacturing.

2. EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

ERISA was enacted to provide comprehensive regulation of employee benefit plans.[8] Congress found that "despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to lack of

[4] IRC Sec. 162.
[5] IRC Secs. 401-436, 457; IRC Sec. 501(a).
[6] A "qualified plan" is one which meets the requirements of Section 401(a) of the Code.
[7] See also Code sec. 501
[8] P.L. 93-406, 88 Stat. 832 (1974).

vesting provisions in such plans" and that "owing to the inadequacy of current minimum standards, the soundness of and stability of plans with respect to adequate funds to pay promised benefits may be endangered."[9] Title I of ERISA (Secs. 101-514) covers reporting and disclosure of plan terms, vesting of plan benefits, plan participation, funding and fiduciary standards in administering plans. Title II (Secs. 1001-2008) amends the Code provisions relating to employee benefits plans to regulate participation, vesting and funding issues. Title III (Secs. 3001-3043) covers jurisdictional issues and coordination of enforcement and regulatory activities between the Department of Labor and the Internal Revenue Service. Title IV (Secs. 4001-4082) covers termination of plans and provides federal insurance coverage for defined benefit pension plans.

The administration of ERISA is allocated between the Department of Labor (DOL), the Internal Revenue Service, and the Pension Benefit Guaranty Corporation (PBGC). The DOL has primary responsibility for administering and enforcing Title I. The IRS is responsible for administering and enforcing Title II. The PBGC has primary responsibility for administering and enforcing Title IV. Title III allocates regulatory tasks between the three agencies. Although ERISA allocates regulatory authority between the IRS, DOL and PBGC, there was substantial overlap in executing specific regulatory tasks. The regulatory overlap, however, caused "bureaucratic confusion" resulting in "unnecessarily complex government regulation."[10] The federal government has attempted to resolve the problem of regulatory overlap through several executive reorganizations. As a result of the executive reorganizations, the problem of overlap has been reduced.

Due to the interlocking provisions of ERISA, however, some potential for overlap remains. For the purposes of this report, one concern regarding ERISA overlap is the interpretation of provisions that apply to governmental plans. ERISA and the Code regulate governmental plans differently than commercial plans. Governmental plans are exempt from Titles I and IV. (Title III does not, in general, impose substantive requirements on either governmental or commercial plans). Governmental plans are defined and regulated by both Title I and Title II. Thus, although ERISA assigns responsibility for deciding what plans are governmental plans, the DOL and the IRS independently determine what is a governmental plan.

B. Federal Indian Law

American Indian tribes are unique in the American political landscape. Indian tribes "are neither states, nor part of the federal government, nor subdivisions of either." Tribes have existed as separate political communities since before discovery of the north America by European colonists. The original colonists recognized tribes as distinct political bodies

[9] 29 U.S.C. Sec. 1001.
[10] Message Of the President, Reorganization Plan No. 4 of 1978, E.O. 12108 (August 10, 1978).

and proprietors of aboriginal tribal lands as a tenet of international law. The press of north American colonization reduced the status of tribes through the doctrines of discovery and conquest. Although the federal constitution today vests Congress with plenary authority over tribal governments, the United States continues to recognize tribes as separate sovereigns.

Where Congress does not act, tribes retain their inherent right to "make their own laws and be governed by them."[11] Tribes reserve exclusive authority over intramural matters. A tribe's power to regulate internal affairs includes the power to regulate employment relations within a tribe's territory. In *NLRB v. San Juan Pueblo*, for example, the Tenth Circuit held that the tribe's inherent power of self-government included the right to pass right-to-work legislation governing the conduct of both members and non-members working within the tribe. Tribes also regulate civil affairs over nonmembers who enter into commercial dealings with tribes. Tribes are subject to state laws for their activities outside of Indian country but within the state.

For tribes, the distinction between government and commercial activities is significantly less sharp than in state and local government. Tribal governments act as both "governments" and "proprietors" at the same time. Unlike state or local governments, most property within an Indian reservation is communally-owned. Tribal real property and various assets are held in trust by the United States as trustee for the tribes.[12] Tribal trust property may not be encumbered or conveyed without approval by the tribe and the United States. Use, occupancy and transfer of property by individual members within Indian country are defined by the tribal government. Because tribal property (land, resources, certain tribal funds) is held communally, decisions about allocation of resources are vested in the tribe's government. Decisions about mobilization of tribal capital or other resources are public, not private, decisions.

Tribes do engage in commercial activities. Although tribes act in certain respects like private employers, tribes' tax status does not fully favor treating tribal plans as commercial plans. Tribes are not subject to income tax.[13] Tribal governments therefore do not benefit from the deduction allowed to private employers that sponsor pension plans. Tribal members are subject to income tax on most sources of income. Tribal members and non-members alike are subject to income tax on wage income from employment with tribal governments, with some exceptions. The deduction for employer contributions to qualified plans is therefore beneficial to tribal employees. Nonetheless, if tribes are to become

[11] *Williams v. Lee*, 358 U.S. 217 (1959).
[12] Allotted lands and income from those lands are also held in trust for the benefit of individual tribal members. Some tribal monies are also held in trust by the United States for the benefit of the tribes. *See* Cohen, Handbook of Federal Indian Law, Ch. 15.10 (2005).
[13] Rev. Rul. 67-284. 1967-2 C.B. 55. The IRS administratively determined that tribes are not entities subject to income tax.

economically successful, tribes must be able to recruit and retain workers who have the needed skill sets. Since most employers can offer tax advantaged employee benefits plans, tribes can compete in the labor market only if they can offer equivalent benefits. Treating tribal plans as commercial plans, therefore, imposes on tribes the burden of commercial plan regulation without the full tax benefit afforded private employers.

C. Applicability of Federal Employee Benefits Laws to Tribes

1. JUDICIAL TREATMENT OF TRIBALLY-SPONSORED EMPLOYEE BENEFIT PLANS

Where Congress does not explicitly regulate them, tribes retain their aboriginal right to govern themselves and their territory. The question necessarily arises whether a particular federal enactment that does not explicitly reference tribes should apply to them. The question arises because any federal enactment has the potential to suppress tribal self-government. In some cases, Congress does explicitly reference tribes in legislation. Title VII of the 1964 Civil Rights Act prohibits preferential employment on the basis of race, color, sex, national origin, and religion. Title VII, however, contains an exception that permits Indian preference in employment. Section 703 (I)[14] provides "[n]othing contained in this title shall apply to any business or enterprise on or near an Indian Reservation with regard to any publicly announced employment practices of such business or enterprise under which preferential treatment is given to any individual because he/she is an Indian." In most cases, however, Congress does not explicitly reference tribes in enacting legislation. When Congress does not reference tribes in enacting legislation, courts and administrative agencies must decide whether and how a federal statute might apply to tribes. For most of the nation's history, the presumption has been that federal legislation should be interpreted not to apply to tribes unless Congress so determines.[15] More recently, federal courts have shown a willingness to presume that federal enactments do apply to tribes. In *Federal Power Commission v. Tuscarora Indian Nation*, decided in 1960, the Supreme Court held that the Federal Power Act did apply to tribes' property interests.[16] In *Tuscarora,* the Court ruled that the Act authorized federal condemnation of tribal fee land for a power plant. Although the Act explicitly referenced tribal property interests, the Court observed that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."

Because of the ambiguity in *Tuscarora*, federal courts have limited the literal language of *Tuscarora's* dictum. Federal courts have limited *Tuscarora's* applicability to those federal statutes that do not unnecessarily infringe upon tribes' reserved "exclusive rights of self-government in purely intramural matters" or that would abridge treaty

[14] 42 U.S.C. 2000 e-l(i).
[15] See, e.g., *Elk v. Wilkins*, 112 U.S. 94 (1884).
[16] 362 U.S. 584, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960)

guaranteed rights. The question whether a federal enactment would abridge a tribal treaty right requires examination of the particular treaty. On the issue of treaty abrogation, no general rule respecting the applicability of a federal statute is possible, since the terms of treaties between the United States and different tribes vary from tribe to tribe.

The question whether a general federal enactment would "infringe" on tribal self-government produces different results. In *EEOC v. Fond Du Lac Heavy Machinery*,[17] for example, the Eighth Circuit Court of Appeals found that tribal employment relations were "intramural matters." The Equal Employment Opportunity Commission (EEOC) brought a discrimination claim under the Age Discrimination in Employment Act (ADEA), against Fond du Lac Heavy Equipment and Construction Company. The issue was whether the company had discriminated against a tribal member. The tribe owned the company, which was located on the reservation. The company performed services both on and off the reservation. The Eighth Circuit distinguished *Tuscarora*, noting that *Tuscarora* "does not apply when the interest sought to be affected is a specific right reserved to the Indians." The Eighth Circuit concluded that application of the ADEA in this case would infringe on intramural tribal affairs. The court reasoned that "consideration of a tribal member's age by a tribal employer should be allowed to be restricted (or not restricted) by the tribe in accordance with its culture and traditions."

Not surprisingly, even the interpretation of a specific congressional enactment can produce different results. The Ninth and Tenth Circuit Courts of Appeal have split on the question whether OSHA applies to tribes. In *Donovan v. Navajo Forest Products Industries*,[18] the Tenth Circuit, held that the Treaty of 1868, which reserved to the Navajo Nation the right to exclude nonmembers, including federal agents, from passing through the reservation without tribal consent precluded the enforcement of OSHA against a Navajo lumber mill. The Secretary of Labor issued citations against the tribe alleging OSHA violations at the mill. The Tenth Circuit found that employees moved mill products both within and outside of the reservation.[19] The court concluded that "the Navajos have not voluntarily relinquished the power granted under Article II of the treaty. Neither has that power been divested by congressional enactment of OSHA; to so imply would be to dilute the recognized attributes of Indian tribal sovereignty over both their members and their territory."[20]

In contrast, in *USDOL v. OSHA Health & Safety Bd.*[21], also involving a tribal lumber mill, the Ninth Circuit held that the tribe was subject to OSHA. As in *Navajo Forest Products*, the Secretary of Labor issued citations alleging OSHA violations. The

[17] 986 F. 2d 246 (8th Cir. 1993)
[18] 692 F. 2d 709 (10th Cir. 1985).
[19] 692 F. 2d at 711.
[20] *Id.*
[21] 935 F. 2d 182 (9th Cir. 1991)

Confederated Tribes of Warm Springs owned and operated the mill and the mill employed both tribal members and non-members. Tribal timber supplied the mill but end products were sold almost entirely off-reservation. A treaty entered into between the confederated tribes and the United States provided, "[a]ll of which [reservation lands] shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white person be permitted to reside upon the same without the concurrent permission of the agent and superintendent." Acknowledging that the tribe had reserved its right to exclude non-members in the treaty, the Ninth Circuit nonetheless held that "we do not find the conflict between the Tribe's right of general exclusion and the limited entry necessary to enforce the Occupational Safety and Health Act to be sufficient to bar application of the Act to the Warm Springs mill. The conflict must be more direct to bar the enforcement of statutes of general applicability. Were we to construe the Treaty right of exclusion broadly to bar application of the Act, the enforcement of nearly all generally applicable federal laws would be nullified, thereby effectively rendering the Tuscarora rule inapplicable to any Tribe which has signed a Treaty containing a general exclusion provision."

No federal circuit has held that ERISA does not apply to tribal employers. The Seventh and Ninth Circuits have each held that ERISA does apply to tribal employers. In *Smart v. State Farm Insurance*,[22] a tribal member filed suit over the denial of health benefits under a tribally-sponsored health plan. The tribe contracted with State Farm Insurance Company for a group health plan. The health plan covered employees of a health care center owned and operated by the tribe. The tribe asserted that application of ERISA to the dispute would infringe on the tribe's right to determine employment relations between the tribe and tribal members. The Seventh Circuit held that while the application of ERISA to plaintiffs claims might "affect" tribal self-governance, it did not directly "threaten" tribal self-governance, since the tribe had contracted with State Farm. The Seventh Circuit reasoned that the dispute did not "threaten" tribal self-governance because the dispute was, in effect, a dispute between the employee and the tribe's chosen insurer.

In *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*,[23] the Ninth Circuit likewise held that ERISA applied to a tribal enterprise that operated a reservation sawmill. Upon purchasing the sawmill, the tribe assumed the obligations to make contributions to the pension fund pursuant to a collective bargaining agreement. The tribe subsequently passed a law establishing a tribally-sponsored pension plan and the enterprise began paying into the tribe's fund. In a brief opinion, the Ninth Circuit held that enforcing ERISA in these circumstances would not "usurp the tribe's decision making power." The Ninth Circuit reasoned that tribe could form its own plan or transfer employees to the new plan at the end of the term of the collective bargaining agreement.

[22] 868 F. 2d 929 (7th Cir. 1989).
[23] 939 F. 2d 683 (9th Cir. 1991).

Both decisions have been the subject of criticism. In a subsequent decision, the Seventh Circuit criticized what the court referred to as dictum in *Smart* that federalism uniquely concerns States and that there is no tribal counterpart. The Seventh Circuit stated this "dictum" had gone too far:

> Comity argues for allowing the Indians to manage their own police as they like, even though no treaty confers such prerogatives, until and unless Congress gives a stronger indication than it has here that it wants to intrude on the sovereign functions of tribal government.[24]

Commentators have also questioned the Seventh and Ninth Circuits' reasoning in ERISA cases.[25]

Uncertainty about the applicability of federal enactments to tribes shows that the longstanding policies underlying federal Indian law collide with specific federal enactments in unpredictable ways. In an earlier report, the ACT noted that decisions about the applicability of federal enactments to tribes in the absence of any expression of congressional intent often create intractable administrative difficulties.[26] ERISA is no exception. If ERISA applies, then many questions arise how to interpret ERISA and the Code to apply to tribes. For tribes, the most important interpretive question in ERISA has been whether tribal plans were governmental plans or commercial plans. Both ERISA and the Code define a governmental plan as any plan "established and maintained for its employees by the Government of the United States, by a government of any state or political subdivisions thereof, or by any agency or instrumentality of any of the forgoing." Significantly, governmental plans are not defined by the nature of the employment activity of the participants who are covered by the plan. ERISA makes a distinction between governmental plans and private or commercial plans. Governmental plans are exempt

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[24] *Reich v. Great Lakes Indian Fish & Wildlife Commission*, 4 F.3d 490, 495 (7th Cir.1993)

[25] See Limas, "Application of Federal Labor And Employment Statutes To Native American Tribes: Respecting Sovereignty And Achieving Consistency" 26 Ariz. St. L. J. 681, 698 (1994)("A primary flaw in the reasoning of the Seventh and Ninth Circuit OSHA and ERISA cases, as well as that of the ADEA dissent, is that the reasoning fails to distinguish tribally owned business from private sector-sector business (this reasoning is also apparent in the FLSA case). In failing to make that distinction, courts ignore federal law and policy favoring tribal sovereignty and incorrectly determine that no sovereign rights are being affected by application of the statute in question. Such reasoning ignores the fact that the operation of a business by a tribe is a critical aspect of that tribe's sovereignty, allowing the courts to sidestep the first exception to the "Tuscarora rule": that Congress must "expressly" state that a statue applies to a tribe if the statute "touches upon 'exclusive rights of self-governance in purely intramural matters.'"); ; Burge, "ERISA and Indian Tribes: Alternative Approaches For Respecting Tribal Sovereignty," 2000 Wisc. L. R. 1291, 1309 (2000) ("In *Smart*, the Seventh Circuit would have considered congressional intent only if the Tribe could have proven that its situation fell under one of the exceptions. Ironically, at the beginning of its opinion, the court itself proclaimed that '[c]ongressional intent is paramount in determining the applicability of a [federal] statute to Indian tribes', but nevertheless, it assumed that ERISA applied to the Tribe without examining congressional intent."; Conrad, "The 9th Circuit Approach to Applying Federal Labor and Employment Law to Indian Tribes" Washington State Bar Association Bar News (November 2002)("it has become clear that the 9th Circuit is unwilling to extend the notions of tribal sovereignty to tribal commercial enterprises").

[26] 2010 ACT Report, "FICA Taxes In Indian Country And The Problem Of Selective Incorporation In Administration Of The Code" (June 9, 2010).

from Title I and IV. Title II generally applies to governmental plans but supplies partial exemptions to governmental plans. In some cases, such as with the minimum distribution or discrimination rules, the Code applies in a different way.[27] In contrast, all three titles of ERISA apply to commercial plans.

Courts and federal administrative agencies have reached different results in determining whether tribally-sponsored plans should be treated as governmental or commercial plans. In PBGC Opinion 81-3, the PBGC considered whether a tribally-sponsored plan was a governmental plan for purposes of Title IV. The employer organization was composed of elected tribal officials selected from different tribes. The organization distributed funds from various other governments and non-profits to member tribes. The PBGC concluded that the tribes were acting together as sovereigns and that the authority to define the Council's relationship with its employees "is undoubtedly an attribute of the Tribes' sovereignty." On the other hand, in Opinion 89-9, PBGC administratively opined that a tribal plan for employees of a tribal factory was a private plan for purposes of Title IV. The factory was located off-reservation and employed mostly non-Indians. The factory sold its products to non-Indians. The PBGC concluded that the tribal plan was not a governmental plan. The PBGC distinguished Opinion 81-3 on the ground that the activities in the Opinion "were characteristically governmental, non-profit activities focused within the reservation" whereas the factory served "to make a profit" for the tribe.

In *Colville Confederated Tribes v. Somday* is one of the very few court cases to consider the classification of tribes for purposes of ERISA. The district court for the eastern district of Washington considered whether a tribal plan was a governmental plan or commercial plan. The plan at issue covered tribal governmental employees. Due to a local economic downturn, the tribe reduced plan benefits. A tribal member challenged the reduction of benefits on the grounds that the tribe had not received federal approval. If the Colville plan was a governmental plan, then the tribe could reduce plan benefits without federal approval.[28] The district court deferred to a PBGC administrative determination that the Colville plan was a governmental plan. PBGC had opined that "the pension plan is a plan strictly for employees of the tribe. The tribe has the power to levy taxes as an aspect of its retained sovereignty which would allow the tribe the taxing authority to make up any funding deficit incurred by the pension plan." In ruling for the tribe, the court held that the PBGC interpretation of the tribe's status was reasonable.

The IRS does not issue determination letters or rulings on the question whether a tribal plan is a governmental plan. Since 2004, there has been a "no-rule" position foreclosing tribes' ability to seek confirmation whether tribally-sponsored plans were

[27] IRC Sec. 401(m); IRC Sec. 401(a)(9).
[28] 29 USC Sec. 1054(g)(1).

governmental plans.[29] It has been reported that the PBGC has rejected Form 5500 filings on the ground that tribal plans are governmental plans.[30]

2. CONGRESSIONAL TREATMENT OF TRIBALLY-SPONSORED EMPLOYEE BENEFIT PLANS

Congress has enacted special rules relating to tribal employee benefit plans. In several cases, it appears that Congress has acted legislatively to "ratify" plans previously adopted by tribal employers without expressing a preference whether tribes be treated as governmental plans or commercial plans or something else. The first expression of congressional preference was enactment of the 1982 Indian Tribal Governmental Tax Status Act. The Indian Tribal Governmental Tax Status Act allowed: a deduction from federal income tax for taxes paid to an Indian tribe; a deduction for charitable contributions to tribal governments; an exemption for tribal governments from various federal excise taxes; and an exemption from tax on interest of certain tribal governmental debt obligations. The Act also specifically authorizes tribes to sponsor 403(b) plans. The legislative history of the Act sheds few clues on the question how Congress intended tribes to be treated for purposes of qualified employee benefit plans. The fact that Congress believed that it was necessary to legislatively authorize 403(b) plans suggests Congress was uncertain about the applicability of pension laws to tribal governments. If ERISA and the Code applied, then there would not seem to have been a need for specific authorization for 403(b) plans. On the subsidiary question of classification of tribally-sponsored plans, the Act sheds no light on Congressional understanding whether tribal plans should be treated as governmental plans or commercial plans. It is difficult to imply a congressional preference because 403(b) plans may be sponsored by either tax-exempt or governmental entities.[31]

Congress subsequently enacted the Small Business Jobs Protection Act of 1996, which amended Section 401(k)(B) of the Code to allow tribal governmental employers to sponsor 401(k) plans. Because state and local governmental employers are ineligible to sponsor 401(k) plans, the 1996 Act amended Section 401 of the Code to provide "[a]n employer which is a tribal government... may include a qualified cash or deferred arrangement as part of a plan maintained by the employer." It has been reported that many tribal employers had set up 401(k) plans for tribal employees based on the assumption that tribal plans were not governmental plans. The legislative history shows that Congress was aware of the uncertainty about whether tribal employee benefit plans should be treated as governmental plans or commercial plans. The Senate Report and the Conference Report

[29] Rev. Proc. 2004-4, 2004-1 C.B. 125 (2004).
[30] Calhoun & Moore, "Governmental Plans Answer Book", p. 1-5 (2002)("it is the authors' understanding that the PBGC has routinely returned Form 5500 filings by plans of Native American tribes(regardless of whether the plans covered employees engaged in business or governmental functions) on the theory that they are not required because the plans are governmental plans ").
[31] Correspondents report that some tribal employers across the country were improperly sold 403(b) tax sheltered annuity programs largely because there was a lack of guidance regarding what tribal employers could or could not do. Some Section 403(b) program compliance issues remain unresolved.

both explain that "no inference is intended with respect to whether Indian tribal governments are permitted to maintain qualified cash or deferred arrangements under present law." The congressional reference can be read in alternative ways. Congress' reference might be read to mean that pre-existing tribally-sponsored 401(k) plans were not illegal under prior law. Alternatively, the congressional reference might be read to prohibit the broader inference that other tribally sponsored government plans could no longer be treated as government plans. Both interpretations are plausible.

Beginning in 2003, there were several efforts to amend ERISA to identify tribal plans as either governmental plans or commercial plans. The Governmental Pension Plan Equalization Act was introduced to "clarify" that a tribally sponsored plan would be treated as governmental plans. The bill made the clarification retroactive, providing that the bill would be effective for "years beginning before, on, or after the date of this enactment." It is reported that at least one aim of the bill was to address uncertainty about whether tribes could sponsor 457(b) arrangements. States and local governments or organizations exempt from tax are eligible to establish 457(b) arrangements. Commercial employers, on the other hand, are not eligible to sponsor 457(b) arrangements.[32]

3. THE PENSION PROTECTION ACT OF 2006

The legislative efforts, which began in 2003, culminated in the enactment of Section 906 of the Pension Protection Act (PPA). Section 906 amended Section 414(d) of the Code and Section 3(32) of ERISA to include, as a governmental plan, any pension plan which is "established and maintained by an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government." Section 906 added an important qualification that a subdivision of an Indian tribal government is, "determined in accordance with section 7871(d)), or an agency or instrumentality of either, and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential governmental function)." Section 906 made similar amendments to the definition of "governmental plan" in Section 4021(b) of ERISA. Minor amendments were also made to Sections 415(b)(2), 415(b)(10) and 414(h)(2) of the Code.

The PPA moved swiftly through Congress. The bill was introduced July 28, 2006, and signed by President Bush on August 17, 2006. There is little legislative history on the scope of Section 906. The congressional record does not disclose any tribal testimony on the scope or timing of Section 906. The Joint Committee on Taxation offered its post-passage view that a tribal governmental plan would include a plan in which "all of the

[32] See Bonnett, "Applicability of ERISA to Indian Tribes (A Law in No Need of Clarification)" 30 J. Pension Plan & Compliance 55 (Fall 2004)(arguing that tribes are not governments for purposes of 457(b)).

participants are teachers in tribal schools." A tribal commercial plan, by contrast, would, according to the Committee, include a plan covering "tribal employees who are employed by a hotel, casino, service station, convenience store, or marina."

The National Congress of American Indians (NCAI) opposed the enactment of Section 906. In a resolution adopted in October 2006, the NCAI asserted that Section 906 "unfairly singles out Indian tribal governments for disparate treatment by dividing Indian tribal employees into governmental and commercial categories, while state and local governments are not required to make distinctions so that state lottery employees, ABC liquor store employees, and others are free to enjoy the same plan benefits as other state employees." The NCAI objected to Section 906 for the additional reason that splitting plans "places undue and cost and administrative burdens on Indian tribal governments."

Section 906 became effective on January 1, 2007, and by its stated terms, applied to plan years beginning after the effective date of the Act. Many tribes that sponsored employee plans were put in the position of amending their plans immediately to create a second plan for commercial employees. In response, the Service issued Notice 2006-89. Notice 2006-89 provides transitional relief to tribes provided tribes operate their plans in a "reasonable and good faith manner." Operating a plan in a reasonable and good manner is presumed if the tribe: a) adopts a separate ERISA compliant plan covering commercial employees; b) the tribe freezes plan benefits accruals under its governmental plan for commercial employees; and c) the tribe does not reduce benefits in the continuing commercial plans (with exceptions). Tribes were required to effect these changes by September 30, 2007, for plan years beginning after the effective date of the Act. In August 2007, the Service extended the transitional relief afforded by Notice 2006-89 until a date six months after the Service issues guidance under Code Section 414(d) as amended by Section 906. The Notice warns that plans should not be amended to reduce benefits in a way that disadvantages commercial plan participants until further guidance.

That guidance has not been issued to date.

4. POST PPA DEVELOPMENTS

a. Retroactivity

Federal courts have recently considered the question whether Section 906 applies retroactively or prospectively only. In *Dobbs v. Anthem Blue Cross and Blue Shield*,[33] the Tenth Circuit held that Section 906 applied retroactively. The *Dobbs* Plaintiff was a tribal member who sued the tribes' insurer for failure to honor the terms of the tribes' employee

[33] 600 F. 3d 1275 (10th Cir. 2010); *but see, Geroux v. Assurant*, 2010 WL 1032648 (W. D. Mich.)(Section 906 applies prospectively).

benefit plan. Plaintiff's claims arose prior to enactment of the PPA. Except for claims brought by a participant under ERISA section 502(a)(1)(B) to recover benefits or enforce his rights under a plan, federal courts have exclusive jurisdiction to hear ERISA claims -- unless the plan is a governmental plan. The Colorado federal district court concluded that that the tribally-sponsored plan was not a governmental plan and the parties appealed. During the course of appeal from the district court's decision, Section 906 was enacted. If Section 906 applied prospectively only, then ERISA would apply to plaintiff's claims. If Section 906 applied retrospectively, then ERISA would not apply to plaintiff's claims. The *Dobbs* Court held that Section 906 applied retrospectively to bar removal of an ERISA claim to federal court. The Court concluded that Section 906(b) recites that it is intended to be a "clarification" of existing law. The Congressional Record described Section 906 as a bill to amend the Code and ERISA "to clarify that federally recognized Indian tribal governments are to be regulated under the same government employer rules and procedures that apply to federal, state, and other local governments employers." The Court concluded that this language sufficiently evidenced Congressional intent that Section 906 apply retrospectively.

b. Treatment as "A State" Versus "A Government"

This year, the DOL issued Opinion 2011-03A on the question whether a plan trustee could honor a tribal court domestic relations order without violating the anti-assignment provisions of Title I. The Opinion was given in response to an inquiry by a New Mexico private employer, some of whose employees were tribal members. Under Section 206 (d)(1) of ERISA plan benefits may be assigned only in accordance with a qualified domestic relations order.[34] A qualified domestic relations order is defined as a "a judgment or decree or order that relates to the provision of child support, alimony payments or marital property rights to a spouse... pursuant to state domestic relations law." In Opinion 2011-03A, the DOL interpreted this provision to prohibit plan administrators from giving effect to tribal court orders relating to domestic relations. The DOL concluded that although Section 906 attempted to afford tribes treatment as governments, Section 906 did not amend the provisions specifically relating to qualified domestic relations orders, and that tribes could not be treated as state governments for purposes of the anti-assignment provisions of ERISA.

[34] 29 USC 1056(d)(3)(ii).

III. Issues Requiring Administrative Guidance

The sections that follow outline issues that may require administrative guidance. Enactment of Section 906 of the PPA clarified that tribally-sponsored plans can be either governmental plans or commercial plans. Enactment of Section 906 is the clearest expression yet that Congress intends that the Code and ERISA should apply to tribes in full when tribes sponsor a plan covering employees of tribal commercial activities. The enactment of Section 906 therefore forces tribes and federal administrators to focus in detail on how ERISA and the Subchapter D of the Code apply to tribal employers. The issues requiring formal guidance, or at least internal discussion within the IRS, fall into two categories. The first category of issues requiring guidance concerns broad questions regarding applicability of ERISA and the Code, regulatory conflicts and the role of local law. The second category of issues requiring guidance concerns specific mechanics of compliance with provisions of ERISA and the Code.

A. Broad Issues Requiring Guidance

1. OVERLAPPING REGULATORY JURISDICTION CREATES CONFUSION AND CONFLICT

Labor Opinion 2011-03A raises several questions. Questions raised by Opinion 2011-03 include questions about *who* and *in what circumstances* tribes will be treated as governments or states for purposes of the Code and ERISA. At least three federal agencies are tasked with interpreting ERISA. The IRS, DOL, and the PBGC all must interpret ERISA, promulgate regulations, and take enforcement action. Judicial review of those administrative interpretations is limited because federal courts accord deference to the agency decisions.[35] The comprehensive scope of ERISA, however, leaves room for different interpretations of ERISA or the Code.[36] In some cases, ERISA imposes functionally equivalent requirements on the different agencies. Part 4 of Title I, for example, imposes statutory fiduciary standards on persons who have discretion over administration of the plan, investment of plan assets or persons who provide investment advice for a fee.[37] Although governmental plans are exempt from the specific fiduciary requirements imposed on private employers under ERISA, Section 401(a)'s exclusive benefit requirement has been interpreted to impose equivalent fiduciary standards on government plans so that, in effect, the Code imposes on governmental plans similar

[35] *Somday* 96 F. Supp. 2d at 1136 ("PBGC interpretations are afforded 'great deference' by courts").
[36] *Somday* at 1128 (dispute between litigants as to whether court should defer to PBGC opinion or await DOL interpretation of disputed provisions); (Message Of the President, Reorganization Plan No. 4 of 1978, E.O. 12108 (August 10, 1978) ("the Departments of Treasury and Labor both have authority to issue regulations and decisions. This dual jurisdiction has delayed a good many important rulings and, more importantly, produced bureaucratic runarounds and burdensome reporting requirements").
[37] See ERISA, Section 3(21).

fiduciary rules that apply to private plans.[38] In most cases, however, governmental plans are subject to statutory fiduciary standards imposed by their state or local laws.

Opinion 2011-03A presents interpretive issues common to both the IRS and the DOL. The Opinion analyzes the interplay of ERISA section 206 and Code section 401(a)(13). Section 206 prohibits the assignment of plan benefits except in response to qualified domestic relations orders. Qualified domestic relations orders are as defined in Section 206(d)(3)(ii) as a "judgment, decree, or order (including approval of a property settlement agreement) which relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and is made pursuant to a state domestic relations law (including a community property law)." Like section 206(d), section 401(a)(13) of the Code prohibits assignments of plan benefits.[39] Code sections 401(a)(13) and 414(p) except from the general anti-assignment rule assignments made pursuant to qualified domestic relations orders.[40] Like section 206(d) of ERISA, section 414(p) of the Code defines domestic relations orders as orders made "pursuant to State domestic relations law."[41] The IRS has not issued guidance whether a tribal domestic relations order should be treated as a qualified domestic relations order for purposes of Section 414.

Opinion 2011-03A illustrates the problem of conflicting interpretations. Either the IRS follows the DOL determination in interpreting section 414(p) or the IRS independently interprets section 414(p) to include tribal domestic relations orders as qualified domestic relations orders. Either interpretation poses problems for tribes. If the IRS interprets section 414(p) to include qualified tribal domestic relations orders as qualified domestic relations orders, then Indian tribes are subject to conflicting interpretations between different agencies on the same issue. Since each agency has the authority to interpret or police this issue, tribes would find themselves caught between conflicting commands of different federal agencies. In addition to being inherently undesirable, inconsistent treatment is likely not what Congress intended.

If, alternatively, the IRS interprets section 414(p) to exclude qualified tribal domestic relations orders, then tribes will be caught in a different conflict. State courts lack jurisdiction over matters involving tribal members. Federal law holds that tribal courts are the proper arbiters of tribal member disputes. This protective rule applies with particular force in tribal domestic relations matters. Even where tribal members agree, the Supreme

[38] IRC 401(a)(2).
[39] IRC 401(a)(13)(a).
[40] IRC 401(a)(13)(B); IRC 414(p)(1)(B).
[41] IRC 414(p)(1)(B).

Court has held state courts lack authority to adjudicate tribal domestic disputes.[42] Thus, interpreting section 414(p) the same as ERISA section 206(d) would require tribal members to proceed in a forum without jurisdiction to act. A determination that tribal domestic relations orders do not qualify would conflict with federal law holding that tribal court domestic relations orders are the only valid source of domestic relations orders. This result also seems doubtful.

Recommendation

The Committee recommends that the IRS undertake a study of the provisions in which tribes are exposed to inconsistent treatment between the administering agencies. The study should be coordinated with the Department of Labor and the PBGC. Executive Order 13175 mandates that all executive branch agencies consult with tribes when formulating and implementing policies that have a substantial direct effect on tribes. Section 3(b) provides that the federal government shall grant Indian tribal governments the maximum administrative discretion possible. Section 5(c) provides that, to the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and preempts tribal law unless the agency, prior to the formal promulgation of the regulation consults with tribal officers.

All three agencies operate under the Executive Order 13175. Each agency could take an important step toward satisfying its mandate by undertaking to inventory the possibilities for inconsistent or redundant treatment of tribes. Due to its complexity and breadth, ERISA has significant potential to interfere with tribal sovereignty. The three agencies might first meet among themselves to inventory possible areas of likely conflict. After making an inventory, the agencies could issue a notice to tribes and solicit comments on resolution of identified conflicts and seek input on any additional sources of conflict. Such consultation should occur early in the process of developing the proposed regulation and should provide a mechanism for tribes and Treasury to reconcile regulations or other guidance with tribal laws. When conflicting commands cannot be reconciled, then the agencies should coordinate in formulating a policy that provides a mechanism for tribes to seek waivers or other reasonable accommodation. The ACT would hope that guidance would be tailored to preserve tribal self-government.

[42] *Fisher v. District Court*, 424 U.S. 382 (1976)("since the adoption proceeding is appropriately characterized as litigation arising on the Indian reservation, the jurisdiction of the Tribal Court is exclusive"); *see also Williams v. Lee*, 358 U.S. 217 (1958)(exclusive tribal court jurisdiction over commercial dispute).

2. CONFLICT AND UNCERTAINTY REGARDING APPLICABILITY OF LOCAL LAW TO PENSION PLANS

Some aspects of employee benefits plans are determined by reference to local law. The Code, for example, determines whether the plan and trust qualify under sections 401(a) and 501(a). State or local law determines whether there is a valid trust for purposes of the Code. There is no formal guidance whether a trust established pursuant to tribal law would qualify as a valid trust for purposes of the Code. Likewise, Section 415(m) of the Code, relating to excess benefit arrangements of governmental entities, requires that creditors be able to attach trust assets. A question arises whether a requirement that a secured creditor proceed in tribal court or under tribal laws would satisfy section 415(m). In many cases, tribal laws regarding creditor remedies are less developed, or applied differently, than state or local laws. Similarly, Section 503(b), applicable to tax-exempt entities and governmental entities, prohibits certain transactions between trusts and others. Section 503(b)(3) prohibits making certain services available on a preferential basis. Many tribes, however, have enacted laws according employment or business preferences for tribal employees and businesses. Tribal preferences are valid exercises of tribal authority.[43] A similar question arises whether tribal preference laws would conflict with Section 503(b)(3) and, if so, how the conflict should be resolved.

A subsidiary question arises concerning the role of tribal courts in determining questions of local law. Tribal courts do not employ the same judicial procedures that state or local courts may employ. Nonetheless, Congress and the courts have adopted a policy of deferring to tribal courts on tribal matters.[44] The question whether tribal courts have jurisdiction to decide issues of local law as they relate to interpretation or administration of ERISA and the Code should be considered. The ACT suggests that tribal courts should be accorded the same role as state or local courts in deciding issues respecting the administration of ERISA.

3. RETROACTIVITY

The *Dobbs* decision raises the question whether ERISA will apply to tribes retroactively. The *Dobbs* decision supplies the decisional rule for the Tenth Circuit. The geographic jurisdiction of the Tenth Circuit covers a significant number of tribes in the western United States. For those tribes, the IRS will need to consider, even if only internally, what other consequences might flow from retroactive application of Section 906. Moreover, the question of retroactivity may have different consequences for DOL and

[43] *Morton v. Mancari*, 417 U.S. 535 (1974). For an example of a tribal business preference law, see 5 N.N.C. Chap. 2 (Navajo Nation business preference law); see also Cohen, Handbook of Federal Indian Law (2005), Sect. 21.02[5].
[44] See *Iowa Mutual v. LaPlante*, 480 U.S. 9 (1987)(tribal courts have exclusive jurisdiction over local law; federal courts defer to tribal court on questions of federal law subject to federal judicial review).

PBGC than for the IRS. The three agencies should jointly consider the question of retroactivity specifically as it relates to their respective regulatory responsibilities towards tribes.

4. GUIDANCE ON THE DISTINCTION BETWEEN TRIBAL GOVERNMENTAL PLANS AND COMMERCIAL PLANS

There is little question that the primary issue for substantive guidance is defining governmental and commercial plans. Most other issues requiring administrative guidance will be helpful only after guidance is issued on the issue of which tribal plans fall into which classification. The distinction between commercial and governmental plans will be difficult. There is no clear congressional expression of intent regarding the activities that should be treated as governmental or commercial. The distinction did not appear in any of the House or Senate versions of the tribal pension reform bills.[45] The distinction between governmental and commercial appears only in the final draft under consideration by the conference committee. The conference committee did not complete its review before the vote was taken, and a final conference report was not published.

The ACT suggests that there are three approaches to distinguishing between commercial and governmental plans. First, the distinction between tribal commercial and governmental activities could be defined by the decisional rules that distinguish between commercial and governmental for state and local governments. Second, the distinction between tribal commercial and governmental activities could be defined by reference to pre-enactment legal precedent. Third, the distinction between tribal commercial and governmental activities could be defined by reference to the rules employed in Section 7871 of the Code.[46]

First approach

Under the first approach, the IRS would interpret the distinction between governmental and commercial in the same way as other governments. State and local governments often sponsor activities that appear to be commercial. Those activities are nonetheless treated as governmental because the activities are carried out by the government and funds generated by the activities benefit the public. Correspondents report that from 2000 through 2004, state municipalities issued almost $61 billion in tax-exempt bonds for "park and recreation facilities" including theaters, stadiums and arenas.[47]

[45] See, for example, S 673 (introduced March 17, 2005) and HR 331 (introduced January 25, 2005).
[46] See ACT Report 2010 "Indian Tribal Governments: The Implementation of Tribal Economic Development Bonds Under the American Recovery and Reinvestment Act of 2009" (June 9, 2010), ("ACT 2010 Report") pp. 7-10 (discussing the "essential governmental function" test for purposes of Section 7871).
[47] Joint Comments of the Profit Sharing/401k Council of America and Yoder & Langford, P.C., to Notice 2006-89, (Jan. 22, 2007).

State and local governments financed 2,400 municipal golf courses in 2005. Many of those government-financed courses included "resorts or real estate developments." Similarly, state and local governments regularly engage in what can only be described as "commercial" ventures to raise funds for public purposes. Additional examples include lumber purchases from the state of Washington, sales of "Big Pick" lottery tickets in Arizona, and liquor purchases from the city owned liquor stores in Minnesota, Pennsylvania, and Delaware. Under the first approach, the IRS would define tribal activities in the same manner as it defines those activities for other governments. Such an approach would recognize that the definition of a tribally-sponsored commercial plan would have a very narrow scope. The first approach accords tribes the same treatment as other governmental employers for purposes of ERISA. The first approach, however, also significantly discounts the distinction between governmental and commercial plans set forth in the text of Section 906.

Second approach

Under the first approach, the IRS would interpret the distinction between governmental and commercial by reference to prior precedent. The second approach accounts for the distinction in the text of Section 906 between governmental and proprietary and also accounts for the possibility that Section 906 applies retroactively. At the time that section 906 was enacted, there were judicial and administrative precedents on the question whether tribal plans should be treated as governmental or commercial plans. Those precedents indicate that tribal plans would be categorized based upon: (1) whether the plan covered predominantly tribal employees; (2) whether the covered employees' activities were on or off-reservation; and (3) whether the activity was similar to the activities of a "non-profit" or "for profit" organization. The "for profit" versus "non profit" distinction is analogous to the "governmental" versus "proprietary" distinction that has governed state immunity from federal regulation and state law tort immunity.[48] There exists a body of precedent defining which activities are governmental and which are proprietary. The body of precedent, however, is not well suited to serve as a source of guidance because the many cases that distinguish between governmental functions and commercial functions cases are very difficult to reconcile.

Third approach

The third approach would analyze the administrative interpretations of IRC 7871. Section 7871(c) authorizes tribal governments to issue tax-exempt bonds in certain circumstances. The Section employs a distinction between commercial and governmental activities. The Conference Committee report on Section 906 suggests that the conference

[48] *South Carolina v. United States*, 199 U.S. 437 (1905)(federal law of immunity); 57 Am Jur "Municipal, County, School and State Tort Liability", Secs. 57 and 58 (providing examples of state law governmental immunity).

committee was of the view that the distinction between commercial and governmental is analogous to Section 7871(c). Then third approach is consistent with Section 906 and is supported by the Joint Committee. The third approach, however, accords tribes significantly different, and less desirable, treatment than other governments for purposes of ERISA. The distinction between governmental and commercial for purposes of Section 7871 has been the subject of much criticism.[49]

Recommendation

There are several reasonable interpretations of Section 906. The IRS should adopt an interpretation of Section 906 that affords tribes the same opportunity to sponsor plans that attract employees on the same basis as other governments and accords deference to tribal self-government.

5. CONTROL GROUP ISSUES

Once the IRS determines which plans will be treated as commercial plans and which will be treated as governmental plans, plan sponsors will need to know how various separate commercial entities within the tribal government should be treated for testing purposes under the Sections 414(b) and (c).[50] Control group testing causes persistent disagreement between private plan administrators and the IRS. These disagreements are made significantly more difficult for tribes. Because tribes do not resemble corporations or the other forms of business associations commonly employed by private employers, the control group issues are correspondingly more difficult for tribes when they act as "commercial" enterprises.

(a) Guidance should clarify whether controlled group tests apply.

Section 414 defines controlled groups, common control and affiliated service groups with reference to corporate shared ownership and profits interests. These testing statutes do not fully account for governmental plans. There is no indication in the legislative history expressing intent to apply those requirements to tribal government entities. There are significant differences in tribal governmental structures. Some tribes are "treaty" governed tribes. Others have "BIA form constitutions" and charters. Still others have constitutions very similar to state or federal constitutions. One feature common to tribes is that most tribally-owned entities do not issue stock. Most are structured under tribal charters, through tribal resolution, through tribal ordinance, through tribal non-stock corporate codes, or through federal Section 17 corporate charters. There is little barrier between the government and subordinate enterprise. Control remains vested in either the elected

[49] ACT 2010 Report, pp. 9-11; Tribal Advice and Guidance Policy Advisory Committee on Tax Exempt and Government Entities, June 9, 2004, pp. 10-14.
[50] IRC 414(b), (c) and (m).

governing council or membership. In some cases, the elected governing council will oversee management of each enterprise under the tribe. The variations in management illustrate the need for consultation with tribes before implementing a "one size fits all" approach to controlled group rules.

Recommendation

Section 414(c) picks up certain other trades or businesses "whether or not incorporated." Regulations promulgated under Section 414 identify other non-incorporated entities to be included, based on principals "similar to" those applied to corporations. The regulations prescribed under Code Section 414(c) do not mention tribal governments. The IRS should issue guidance clarifying that controlled group concepts will not be applied to tribal owned entities in a manner not expressly required by the ERISA or the Code.

(b) Applying controlled group rules to tribal commercial plans may cause hardship to tribal entities.

If coverage tests under Code Section 410(b) must be performed on a control group basis, many small tribal plans will need to be terminated or merged into other commercial plans. The control group testing requirements do not generally impact tribal casino plans, which in most cases have many more employees than other types of tribal entities. Instead, control group testing would adversely impact smaller traditional and cultural entities. These entities often cannot afford to offer the same benefits as are offered by plans sponsored by larger tribal entities.

For example, a farming enterprise with 20 employees and a single highly compensated employee (HCE)[51] would have difficulty passing the Section 410(b) coverage test when aggregated with a casino plan that has 2,000 non-highly compensated employees even if the casino plan has only one HCE. In that example, neither plan is set up to discriminate in favor of highly compensated employees. Unlike larger corporate employers who can take advantage of the Qualified Separate Line of Business rules, however, many tribes maintain a large number of smaller entities.[52] For example, some tribes own numerous enterprises[7] that generate revenue but would not be brought together for business reasons in a "corporate" model, such as:

- Housing authorities (can engage in tribal housing rentals and maintenance);
- Convenience stores (many tribes in remote areas have access only to tribal owned stores for groceries and other household items);

[51] IRC 414(q).
[52] The "QSLOB" rules are found at Section 414(r).

- Game and fish departments (fishing licenses, fish hatcheries and sales to state game and fish departments for stocking);
- Natural resource and recreation departments (cabin rentals, camping and hunting permits);
- Waste management services (trash collection);
- Cattle ranching and support activities (often engaged in as a means to retain culture and tradition rather than as a means to make "profits");
- Transportation services (tribal owned van services to transport members and seniors located in-remote areas);
- Job training and apprentice programs funded with federal and state grants to encourage employment opportunities on tribal reservations;
- Mining services (tribal owned operations managing tribal land minerals, oil and coal);
- Tribal land management enterprises (charged with overseeing tribal land rentals and industrial properties);
- Tribal owned halls and pavilions (rented to tribal members to perform ceremonies);
- Wood and forest services (selling trees and lumber harvested from tribal lands and from managing tribal forests); and
- Pottery and Native arts enterprises (established by tribes to maintain their culture and traditions).

Most of the above-described entities have a "revenue" component to their operations. Many of them are staffed with less than 50 employees. If Section 414 controlled group tests are applied to these entities, these entities would not qualify under the qualified separate lines of business rules. Moreover, many of these entities will have separate payrolls, separate revenue flows, and separate employee demographics making the "one size fits all" approach difficult to administer fairly.

(c) If control group testing is applied to tribal entities, then the Qualified Separate Line of Business testing exceptions should be adapted to accommodate structures unique to tribal governments.

If control group rules are applied to tribal entities, the Qualified Separate Line of Business regulations should be amended to ensure that tribes will not fail the "common management" tests simply due to their tribal constitutional structure.

6. AGGREGATION ISSUES

Tribes and tribal entities do not neatly fit within the definitions in Section 414 rules respecting aggregation. In most cases, stock ownership, voting power and other similar concepts are inapplicable to tribes and their enterprises. The difference in organization between tribes and traditional for-profit businesses raises several issues:

1. Are tribes required to aggregate their entities for coverage testing?
2. If so, what entities are included in the testing?
3. If tribes are not able to run a valid coverage test, ADP and ACP contribution testing becomes irrelevant.
4. Are the distribution rules to be enforced on a common control basis?

Recommendation

ACT recommends a moratorium on the application of all Section 414 control concepts for tribal retirement plans, pending final guidance which tailors any applicable rules to the common structures found within tribes. The interim compliance standards published in Notices 2006-89 and 2007-67 should be clarified to state that controlled group and common control rules do not apply pending the issuance of guidance.

B. Specific Issues Requiring Guidance

1. AMENDMENTS AND DETERMINATION LETTER COVERAGE

Section 906 of the PPA will require many tribes to establish separate government plans and commercial plans. Because there is currently no guidance on how to determine whether a plan should operate as a governmental or commercial plan, the IRS has granted relief indicating that separate plans, if required, need not be established until a date six months following the issuance of guidance. The IRS has, however, required that tribes operate plans in "good faith" during the interim period.

In the interim, tribes must comply with audit requirements, IRS testing, and related filings. Retirement programs must also meet deadlines for receiving IRS determination letters. Receiving determination letter provides valuable relief to tribes, often allowing them

to retroactively fix qualification errors.[53] Because the determination letter deadlines have not been extended for tribes to coincide with the PPA transition relief, tribes face a dilemma of having to split plan documents to meet the determination letter deadlines before any PPA guidance is issued. If they do not, tribes risk losing the benefits of the determination letter program. Thus, tribes find themselves caught in the dilemma of either submitting commercial or governmental plans for determination letters or waiting for PPA guidance.

Currently, governmental plans are classified as "Cycle C" plans under the determination letter program. Governmental plans were previously granted an extension to file in the current Cycle E until January 31, 2011. The Committee is without clear information on how tribes have handled the questions whether to file plans on the Cycle C deadline. The Committee anticipates, however, that some plans will not qualify as governmental plans and will therefore be "off-cycle." When tribes are required to document their commercial or enterprise plans, what will the sponsors' retroactive amendment rights be, and when will they need to file determination letter applications to preserve those amendment rights?

Recommendation

ACT recommends the following:

1) Indefinite extension of the Section 401(b) remedial amendment period for all tax-qualified tribal plans, pending issuance of guidance on Section 906, and

2) Suspension of restatement determination letter application deadlines for tribal plans pending final guidance under the PPA.

2. FORM 5500 AND PLAN AUDIT REQUIREMENTS

Many tribes maintained their retirement plans as governmental plans prior to the enactment of the PPA, and some received favorable determination letters from the Service approving the plans as governmental plans. Many of those tribes did not file Forms 5500 or engage auditors to perform plan audits under ERISA. Recently, many tribes have begun incorporating Form 5500 filings and plan audits into their operational good faith compliance with the PPA, with regard to employees who might be thought to be engaged in commercial functions. Preparing Form 5500 filings and performing audits for many of these plans will be difficult and expensive. Plans sponsors whose plans do not have an audit history and have assets attributable to both the governmental and commercial employee groups may find it difficult to separate for plan accounting purposes. As a result of the difficulty inherent in separating assets, correspondents report that audit firms prepare limited scope audits.

[53] IRC 401(b).

Most tribes are able to file the Form 5500 on a timely basis, but several are not able to obtain completed financial statements and auditor opinions on a timely or cost effective basis. When the Form 5500 is filed without the audit, tribes must allocate additional resources to responding to missing audit inquires at the same time they are conducting audits.

Recommendation

The IRS should clarify that interim compliance standards set forth in Notice 2006-89 and Notice 2007-67 do not require Form 5500 filings and plan audits as components of good faith compliance standard. Alternatively, the IRS should place a moratorium on enforcement actions related to Forms 5500 filed by sponsors of tribal retirement plans in good faith, but which are deemed to be late or incomplete, pending final guidance under Section 906.

3. TRUSTEE TO TRUSTEE TRANSFERS

Tribes experience a high number of employment transfers and rehires. The Committee anticipates that many tribal employees will move back and forth between a tribal governmental entity and an entity deemed by the Service to be a commercial entity. In the private sector, plan sponsors are able to process trustee-to-trustee transfers to move the retirement plan assets with the employee to facilitate hardship withdrawals, loans, etc. In the governmental sector, plan sponsors often allow trustee-to-trustee transfers to facilitate the purchase of service credit under a defined benefit pension plan.

State and local governments do not operate ERISA covered plans, and private sector employers do not operate governmental plans. Tribes are in the unique position of having to operate both governmental and ERISA compliant plans at the same time. In many situations, it is not possible to administer loans properly, or on a uniform basis, if transfers are not allowed. The difficulties involved in directing loan payments to the appropriate plan will result in loan compliance problems and/or the elimination of loan programs from tribal plans. The IRS will need to issue guidance on the question whether, and, if so, in what circumstances assets can be moved between commercial plans governmental plans in trustee-totrustee transfers.

Recommendation

ACT suggests that clarification of the interim compliance standards published in Notices 2006-89 and 2007-67 is required to allow trustee-to-trustee transfers among tribal governmental and tribal commercial plans, to the extent that the assets and liabilities of the commercial plans are voluntarily spun-off from the governmental plans prior to the deadline established under the final PPA guidance.

4. SHARED EMPLOYEES

Once it is determined what functions are "commercial," tribes will also need guidance with regard to those "government" employees that provide services to "commercial" enterprises, as well. For example, the tribal accounting staff may process payroll for both the "government" and a tribal owned "commercial" entity. A tribal finance director may advise on "commercial" matters. The attorney general's office or general counsel may advise on "commercial" matters.

A mechanical "percentage" test appears to be unworkable, since the percentage of "commercial" services will vary in most cases depending on particular activities over time. The general counsel, for example, may spend almost all of her time for a month or a year on contract negotiations for a commercial venture, and then spend most of the next year largely on tribal water rights. Changing an employee's plan status based on what she may be doing at a given moment would be unworkable. Allowance may be required to permit governing tribal councils to determine when and whether the employee is serving the government interests in a non-commercial manner.

Guidance is also needed with regard to the transfer of employees and benefits among different tribal entities. Many tribes have employees who transfer between different tribal entities on a frequent basis. It is also not uncommon for a "government" employee to work weekends at a tribal "commercial" entity. This presents several problems for an employer that is now subject to two sets of rules (government sector and private sector) at the same time, depending on what function an employee may be performing at any given moment.

One practical problem, for example, has to do with the 401(k) distribution event rules. If the entities are treated as a "single employer" there would not appear to be a distribution event when an employee leaves one tribal entity for employment at another. Now that most tribal entities will have to maintain separate plans for their government and "commercial" employees, tribes would benefit from guidance that allows employees to transfer their 401(k) benefits to a successor entity within the tribal control group. Without such transfer rights, the "separate plan" structure required by the PPA may create undue hardship for individual employees wanting to take plan plans or hardship distributions under the plan(s), and would create multiple accounts and recordkeeping burdens that would be confusing to employees and costly to employers.

5. SERVICE CREDITS

There are also a number of other compliance issues which must be confronted as a result of the same employer being subject to two sets of rules. The commercial plan, for

example, will be subject to ERISA service crediting rules and Code Section 410(b). The government sector plan would not. When an employee transfers between commercial and government employment, tribal administrators and others will need to know what service must be counted and retained. Therefore, guidance is required to determine proper accounting for service of employees who participate in both types of plans.

IV. CONCLUSION

The ACT offers this report as a beginning point for the much needed discussions and actions which must be taken to support tribal employee pension plans. Until the tribes receive clear guidance from the IRS, and solutions for uneven treatment of their pension benefit plans as compared to state and local governments, tribes' ability to offer tax qualified employee retirement plans will be impaired.