

JOINT-ORGANIZATIONAL WEBINAR
FOR TRIBAL INPUT ON GENERAL WELFARE ASSISTANCE

KEY POINTS OUTLINE

January 31, 2012

Purpose and Scope:

The Native American Finance Officers Association (NAFOA), the National Congress of American Indians (NCAI) and the United South and Eastern Tribes, Inc. (USET) combined efforts to prepare an initial “talking points” paper when IRS and Treasury (collectively, “IRS”) announced their intent to open consultation on the general welfare tax doctrine on November 15, 2011.

The first consultation meeting was conducted by IRS and Treasury in Washington DC on November 30, 2011, and additional meetings will be held throughout the country over the course of this year. In the interim, IRS has requested formal comments to be submitted no later than February 13, 2012.

NAFOA, NCAI and USET understand that the short deadlines for submitting comments may present difficulty in getting input from tribes on this important topic. The three organizations have decided to join efforts and organize a Webinar, to be held on January 31, 2012, in order expedite the process of gathering tribal input and to make sure tribes are aware of their right to submit individual comments.

The three organizations will use the input received by tribes in preparing preliminary joint comments, with a request that the organizations and tribes be provided additional time throughout the course of this year’s consultation efforts to submit supplemental comments as these issues are more fully developed.

Background on General Welfare Doctrine:

The “general welfare doctrine” is a federal tax doctrine whereby certain payments made under legislatively provided social benefit programs for the promotion of the general welfare are excludable from gross income. The general welfare doctrine only applies to governmental payments based on “need”. It does not exempt compensation for services or per capita distributions from federal taxation.

Key Points Outline:

The following “key points” outline is intended to provide a starting point for soliciting tribal input during the course of the upcoming Webinar. It is based upon the initial talking points paper and input received from the initial consultation meeting held on November 30. It is not intended to limit discussion.

1. General Definitions: We would like to propose a uniform statement of the doctrine, listing the required elements. The following is a starting point of the statement and key elements for comment:

- **Tribal general welfare doctrine** provides for the exclusion of payments that are (1) paid by or on behalf of an Indian tribe (2) under a social benefit program, (3) based on either needs of the Indian community itself or upon individual needs of the recipient (which need not be financial in nature), and (4) that are not compensation for services or per capita payments.
- “**Need**” can be based either on individual need (means testing) or on broader needs of the community itself. For example, states provide free education (k-12) and subsidize college tuition for in state residents regardless of individual need.
- **Financial need guidelines** should reflect minimum standards of living established by the Tribal Governments themselves. For example, many tribes are located in areas with extremely low median incomes, while neighboring counties may have much higher income. Requiring tribes to use the lower figures would only perpetuate the economic differences between tribal and non-tribal communities. State programs have had a tremendous amount of flexibility in establishing income guidelines. The guidelines must be flexible to meet the unique needs of each tribe.
- **Community need** should reflect that certain programs are so important to self determination and the preservation of culture and tradition that they may qualify for general welfare protection regardless of individual financial need. It should also include programs that attempt to correct the impact of generations or prior unmet need.
- **Compensation** for services should reflect that qualifying programs are not disguised employment. However, Tribal Governments should be free to structure programs with community service ties. In recent years, IRS has construed almost all tribal activities (even service on cultural preservation boards) that have even nominal payments or benefits as “employment”. The prohibition against compensation for services should not prevent a tribe from tying assistance to community service or job training programs.
- **Per capita payments** restrictions should not prohibit equal access to tribal services or programs that serve designated social purposes.

- **Indian tribe** should be broad enough to include Indian tribes within the meaning of Internal Revenue Code Section 7871 as well as tribal entities, programs or enterprises through which tribal general welfare assistance payments may be paid.
- **Social benefit** should be defined with reference to a goal or goals established by and in the sole discretion of the tribal council or governing bodies of each tribe, for example, in furtherance of tribal self determination, culture and tradition.
- **Self-determination** should be construed broadly to reflect traditional health, education and welfare programs as well as unique cultural and traditional based programs and economic development. In 1999, for example, IRS approved the provision of tax free non-reimbursable business grants of up to \$100,000 for tribal members who committed to establishing business within a reservation suffering from little business activity and high unemployment. PLR 199924026.
- **Guidelines** for financial need (such as median income or poverty thresholds), when required, should be recognized as a “safe harbor” only, with the ability of Tribal Governments to consider the individual facts and circumstances of each recipient. Guidance in this regard may focus on process as much as the final income data or figures selected. For example, did the council look to reasonable alternatives, consider income or financial figures in good faith, and establish guidelines specific to their own tribal needs and goals?

2. Means Testing: Initial comments indicate that Tribes oppose means testing.

- As noted above, general welfare should include the right to provide community based programs that are not means tested.
- One comment from the initial consultation meeting was that treaty rights, tribal sovereignty, and public policy require that payments sourced from tribal tax exempt funds that serve a tribal; community purpose should remain tax exempt to the recipient.
- Another initial comment was 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 “1099” without distorting traditional community values.

3. Privacy/ Information Sharing: It should be recognized 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 IRS undertakes with regard to tribal general welfare issues.

- Some IRS auditors have sought information on traditional ceremonies and cultural matters that no tribal government should have to disclose for the sake of a 1099.

- IRS has entered into information sharing with state revenue departments, opening up disclosure of tribal information that states would not otherwise have access to. Information shared with IRS when reviewing general welfare matters should respect tribal privacy, including disclosure under these state agreements and under the Freedom of Information Act.

4. IGRA / Per Caps: There has been some effort by IRS to reclassify welfare payments as taxable IGRA per capita distributions. Per capita payments under IGRA are limited by specific percentages designated in federally approved revenue allocation plans. These allocation percentages should be respected.

5. Government-to-Government Relationship: Any guidance should be grounded in the unique relationship between the federal government and tribal governments.

- 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. This must be reflected in the guidance that is issued.

5. No “one size fits all” guidance:

- There are over 500 recognized tribes, with diverse histories, needs, and policy approaches.

7. Tribal Deference: Essential to the government-to-government relationship is mutual respect and deference to tribal governance decisions.

- 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.
- It is important for any guidance to respect the tribal government’s determination of needs and the appropriate solutions.

8. Collaborative Process: Consultation requires meaningful input from tribes and a true “seat and the table” as the rules are developed.

- Guidance should be developed in a true collaborative process, not just by “listening” and then drafting and publishing guidance behind closed doors.

9. Interim Relief from audits! It is difficult to collaborate on a “government-to-government” basis when there are hundreds of tribal “941, 1099, and W2” audits going on which scrutinize tribal programs.

- Pending final guidance, tribes should be granted relief from audit. Not complete relief from the general welfare concepts themselves, but a “good faith” standard that will permit tribes to continue services in good faith without the threat of audit.
- Without relief, many tribes with tremendous need are facing the choice of having to eliminate programs or risk costly audits.

10. Examples: The guidance should seek input from Tribal Governments on program examples, while making it clear that the examples included in any guidance are not intended to limit the flexibility of individual Tribal Governments to establish unique programs to meet their own needs. For example:

- **Health Care Programs** - Not limited by traditional health plan rules. Often tribes need health related assistance that has as much to do with transporting family members to be with sick family members far from the reservation as much as providing actual health benefits.
- **Educational Programs** – Not limited by traditional grant and scholarship rules. Often tribes must provide assistance (such as clothing or transportation) to encourage scholastic pursuit that on its face may not look like education assistance at all.
- **Transportation Assistance** - Not limited to “business travel”. Transportation needs are critical for many remote reservations and may take many forms including auto repair.
- **Housing Programs** – Including repair, loan assistance, construction assistance, housing code enforcement, elder or disabled member improvements, temporary shelter or hotel reimbursement programs and other housing related assistance.
- **Loan Forgiveness Programs** – For tribal goals and self-determination. For example, home loan forgiveness programs to retain membership within or near a reservation, loans to encourage investment in land on or near a reservation or to foster traditional values in the land itself, or loans that encourage education or investment or service within the community.
- **Emergency Assistance** – That 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** – Some tribes offer bereavement and /or burial assistance as a direct means of preserving culture and tradition. While employers can provide group term life insurance as a tax free benefit despite its tie to employment compensation, Tribal Governments often provide similar 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 Events and Community Activities** (e.g., pow-wows) – Which may include the cost of hiring a drum group, dancers, a medicine man, food, ceremonial crafts or other items or services unique to the cultural activity at hand.
- **Cultural Travel** – Which may include, for example, travel to other tribal reservations or traditional tribal lands or areas for the performance of ceremonies or to study tradition or culture.
- **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, 1971-2 CB 3, 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.
- **Utility Assistance** – Which may take many forms depending on the tribal location.
- **Economic Development Programs** – Such as job training programs, the 1999 business grants ruling referred to above, and other programs that recognize that tribal communities must develop revenue sources and employment in order to survive and achieve long term self determination.

11. Extended time for review: 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.