

Congress of the United States

Washington, DC 20515

November 14, 2014

The Honorable Jacob Lew
Secretary of the Treasury
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Secretary Lew:

The President signed the Tribal General Welfare Exclusion Act (Act) into law as Public Law No. 113-168. As the primary sponsors, we write to promote full implementation of the Act as intended by Congress. This letter outlines three key points towards full implementation: (1) appointment of the Tribal Advisory Committee (TAC) that includes tribal government officials; (2) organization of the TAC in a manner that imposes the least amount of burden on tribal governments; and (3) suspension of audits pending consultation and advice from the TAC.

The overriding purpose of the Act is to promote tribal self-government, acknowledge the federal government's treaty and trust obligations to Indian tribes, and better align federal Indian law and policy with federal tax law. The more specific purpose of the Act is to clarify the treatment of general welfare benefits provided by Indian tribes. This specific goal was accomplished through amendment to Part III of subchapter B of chapter 1 of the Internal Revenue Code. Full implementation of the Act will require close attention to both of these goals.

The Tribal Advisory Committee

P.L. 113-168, Section 3, directs the Department to establish a Tribal Advisory Committee that will: (1) "advise the Secretary *on matters relating to the taxation of Indians*;" and (2) in consultation with the Secretary, establish training and education for IRS field agents to better understand "Federal Indian law and the Federal Government's unique legal treaty and trust relationship with tribal governments."

The importance of the TAC cannot be understated. The TAC is purposely intertwined with other Sections of P.L. 113-168 to ensure that tribal governments will have a direct hand in all aspects of implementation of the Act. As you know, the TAC will be the first advisory committee established within the Treasury Department that requires tribal governments to directly advise the Secretary.

The Act mentions the TAC in both Sections 2 and 4. In Section 2, the TAC is charged with aiding the Secretary in developing "guidelines for what constitutes lavish or extravagant with respect to Indian tribal government programs." Section 4 references the TAC's charge of working with the Secretary to develop training and education for IRS agents.

To best accomplish all of these goals, we offered legislative history regarding our intentions of the TAC. We stated our intent that the Tribal Advisory Committee address concerns regarding field agents' understanding of the role that general welfare programs play in

maintaining tribal culture and tradition. To best accomplish this goal, we urged that the Department appoint “qualified tribal leaders and in the alternative, qualified tribal financial officers to the Tribal Advisory Committee.” Tribal leaders are uniquely qualified to provide expertise and guidance to the Department given they have intimate knowledge of federal Indian law and policy as well as the financial and community needs of Indian tribes and these qualifications would enhance the Department’s administration of federal tax policies affecting tribal governments while ensuring that treaty rights and principles of tribal self-governance are properly balanced with federal tax policy. Appointing individuals with these qualifications will enhance the Department’s ability to meet both the overriding goal of respecting tribal treaty rights and the government’s trust obligation as well as the specific goal of implementing changes to the Code. We urge the Department to appoint tribal leaders to the Committee.

Application of the Unfunded Mandates Reform Act

Second, we understand that the Department is considering application of the Federal Advisory Committee Act (FACA) to establish the TAC. We believe that the Secretary need not organize the TAC under FACA, because doing so could conflict with the Unfunded Mandates Reform Act (“UMRA”) as well as the underlying purposes of establishing the TAC (noted above).

Application of UMRA is appropriate in this instance because Congress intended to lift the unnecessary burdens of constant IRS audits and examinations of tribal general welfare benefits by providing a clear statutory exclusion of income. The Tribal Advisory Committee will meet both aspects of the UMRA test because Treasury should hold its meetings with the TAC exclusively between Treasury officials and tribal government leaders to resolve questions concerning the Act as well as its application to tribal laws, customs and cultures, and matters relating to the taxation of Indians. Federal law treatment of such matters is inherently a matter of intergovernmental concern because they are the very heart of tribal self-government.

Finally, application of FACA could imply that the TAC has an expiration date, which would be directly contrary to congressional intent. As noted above, it is our intent that the TAC serve as a standing advisory committee to not only implement P.L. 113-168, but also to better align federal Indian law and policy with federal tax laws by advising the Secretary on “matters relating to the taxation of Indians.” The scope of this latter purpose is broad and will take significant effort to begin to address.

Suspension of Audits

Finally, P.L. 113-168 Section 4 provides that the Secretary “shall suspend all audits and examinations of Indian tribal governments and members of Indian tribes ..., to the extent such an audit or examination relates to the exclusion of a payment or benefit from an Indian tribal government under the general welfare exclusion, until the education and training prescribed by section 3(b)(2) of this Act is completed.”

This provision of Section 4 is necessarily intertwined with Section 3, which means that audits must be suspended until: (1) the TAC is established; and (2) the Secretary, in consultation with the TAC, finalizes a training and education regime to assist IRS field agents in implementing the new law.

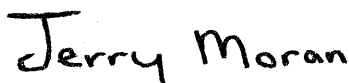
As the Department considers implementing this requirement, we urge you to look to Section 2(c) of the Act. Possibly one of the most important provisions of P.L. 113-168 can be found at Section 2(c), which provides that “Ambiguities in section 139E of such Code, as added by this Act, shall be resolved in favor of Indian tribal governments and deference shall be given to Indian tribal governments for the programs administered and authorized by the tribe to benefit the general welfare of the tribal community.” To our knowledge, this is the first time that federal law codifies the longstanding “Indian canon of statutory construction.” As with other provisions of the Act, this important provision must be read to apply throughout the new law.

As a result, as the Department considers implementing the required temporary suspension of audits and examinations that relate to tribal government benefits, we urge you to provide deference to tribal government programs – at least until the TAC is established and broader consultation with Indian tribal governments has been accomplished.

To help Congress better understand how this provision has been implemented to date, we ask that you provide us with an overview and approximate number of audits or examination that the IRS has suspended pursuant to this provision of Section 4.

In closing, we truly appreciate the Administration’s support of enacting the Tribal General Welfare Exclusion Act into law. We look forward to working with you to ensure its full implementation as Congress intended.

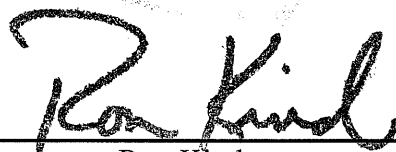
Best regards,



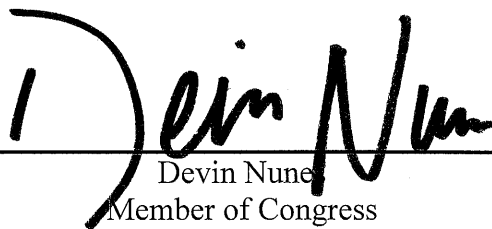
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United States Senator



Heidi Heitkamp
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Ron Kind
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