



USET

SOVEREIGNTY PROTECTION FUND

1730 Rhode Island Avenue, NW
Suite 210
Washington, DC 20036
P: (615) 872-7900
F: (615) 872-7417
www.usetinc.org

Transmitted Electronically to:
Tribal.consult@treasury.gov

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The Honorable Chief Lynn Malerba
U.S. Treasurer
U.S. Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Chief Malerba,

We write on behalf of United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) to provide comment to the U.S. Department of Treasury regarding the Treasury Tribal Advisory Committee's (TTAC) report on the Tribal General Welfare Exclusion Act (TGWEA). Passage of the TGWEA at the end of the 113th Congress was an important step forward in recognizing and affirming the sovereign governmental rights and authorities of Tribal Nations to provide for the general welfare needs of our respective citizenry. Since then, USET SPF has urged that implementation of the law be in accordance with Congressional intent and in consultation with Tribal Nations. It is long past time that TGWEA should be fully implemented, and we urge this Administration to ensure that this occurs prior to its conclusion. We appreciate the efforts of the TTAC in soliciting Tribal comment in the development of its recommendations to the U.S. Department of Treasury. Treasury must ensure that its interpretation of the law upholds Tribal sovereignty and self-determination, especially through deference to Tribal Nation decision-making in accordance with Section 3 of Executive Order 13175 and the Indian Canons of Construction.

USET SPF is a non-profit, inter-Tribal organization advocating on behalf of thirty (30) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico¹. USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations, and assisting our membership in dealing effectively with public policy issues. Collectively, our member Tribal Nations represent diverse cultures, backgrounds, structures, and socio-economic interests—much like those found more broadly throughout Indian Country.

¹ USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

General Comments

TTAC GWE Report's Proposed Core Principles and Specific Concepts

USET SPF extends its strong support to the TTAC GWE Report, and the concepts and directives contained therein. If Treasury is to uphold its obligations to Tribal Nations, as well as implement the TGWEA in accordance with Congressional intent, it must defer to Tribal Nations to set our own standards as we administer GWE programs to ensure each policy responds to the unique circumstances of our communities and our own cultural traditions. Indeed, Section 3 of Executive Order 13175 requires that:

- “(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.
- (c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:
 - (1) encourage Indian tribes to develop their own policies to achieve program objectives;
 - (2) where possible, defer to Indian tribes to establish standards; and
 - (3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.”

All successful federal Indian policy is that which recognizes and upholds our inherent sovereignty. As sovereign governments with accountability to our citizens, Tribal Nations are well-versed in responding to local conditions and needs via program administration. Deferring to Tribal governments to develop individual guidelines around the administration of GWE programs supports our inherent sovereignty and self-determination, in addition to providing a mechanism for accommodating the great diversity found in Indian Country—our unique customs, traditions, history, and circumstances. We urge Treasury to maintain this and other core principles as it engages in further policymaking on TWGEA.

IRS Field Agent Training Must be Developed via Tribal Consultation

While we recognize this solicitation is just the first step in the development of TWGEA policies, we note that there is little mention of the Internal Revenue Service (IRS) Field Agent Training, which Treasury is required to develop under the law. A major impetus for the TGWEA was the IRS' inconsistency in approach to Tribal Nations, as well as a clear lack of familiarity with and understanding of the federal trust obligation, federal Indian law, and Tribal culture and tradition. With this in mind, USET SPF stresses the importance of ensuring this training is designed thoughtfully and in a way that addresses these issues. This cannot happen without the input of Tribal Nations. Treasury should prioritize this piece of implementation and ensure that it is .

GWE Benefits Should Not Impact Eligibility for Other Federal Programs

In the years since the passage of the law and as Tribal Nations have worked to implement our own GWE programs, it has become clear that there is a need for clarification regarding the impact of

general welfare benefits on eligibility for state and federal assistance. More specifically, Treasury should work with other Departments and Agencies to ensure that just as Tribal general welfare benefits are not taxable income, they are excluded in eligibility determinations for assistance like Supplement Security Income or the Supplemental Nutrition Assistance Program. To leave this issue unaddressed would run counter to the purpose of the TGWEA by further penalizing Tribal citizens for the assistance provided by Tribal governments. Treasury should remain cognizant of this problem and ensure solutions are reflected in final guidance or policy.

Departmental Guidance on Other Programs Should Comport with GWE

We would also like to highlight Treasury's failure to incorporate its own existing guidance and the principles of TGWEA as it issued guidance to Tribal Nations on benefits provided using Coronavirus Relief Fund (CRF) resources during the COVID-19 pandemic. Treasury's CRF guidance, issued on June 24, 2020, suggested that a Tribal Nation must make a showing that the economic relief payments under the CRF are made to Tribal citizens based on an individual assessment of the citizen's need for the assistance (i.e. means-testing). This ran counter to both the TWGEA and IRS Revenue Procedure 2014-35, under which payments made pursuant to Tribal government general welfare programs) are "conclusively presumed" to comply with the financial need requirement so that the payment is not subject to tax or tax reporting. Once the Tribal Nation puts a qualified general welfare program in place, including the determination of a particular general welfare need of the Tribal community, benefits payments under that program are not taxable to the recipient and do not require an individual to demonstrate need. Rather, the IRS and other Treasury agencies must defer to the inherent sovereignty of Tribal Nations as we determine what actions to take for the general welfare of our communities.

This is the framework the Treasury should have relied upon for Tribal payments made under the CRF for economic relief. Instead, Treasury's guidance delayed the distribution of critical funds to Tribal families and is an example of precisely the type of means-testing that the TGWEA sought to address. With this in mind, we ask that Treasury work to ensure that all Departmental guidance and policymaking issued reflects the TGWEA and any supporting guidance.

Consultation Questions

USET SPF strongly supports the regulatory recommendations and proposed regulations found in the TTAC GWE Report. While we understand that the consultation questions provide information regarding the Department's thought process as it implements the TGWEA, the way the questions are framed neglects to fully account for the fact that the TTAC GWE Report contemplates the answers to many of these questions and offers proposed regulations. In addition, we would like to underscore the inappropriate nature of several questions, particularly those asking Tribal Nations to provide examples of 'lavish and extravagant' GWE benefits, distinguish between pro rata payments and other types of payments, make distinctions between vendor payments and payments made directly to Tribal citizens, provide sources of funding for GWE payments, and speculate on abuses of discretionary authority. These questions (and the potential thought process they reveal at the Internal Revenue Service) undermine the intent of the law, the Department's obligations to Tribal Nations, and the TTAC GWE Report. We urge the Department to avoid this granular, paternalistic perspective as it implements the law. The Department should ensure that it honors the input and guidance of Tribal Nations and the GWE Report as it implements the TGWEA. The GWE Report offers an appropriate regulatory framework for TGWEA implementation and those items that remain unaddressed appear to be Departmental rather than statutorily required.

Conclusion

Nearly 10 years after passage of the TGWEA, USET SPF is pleased to see the Department of Treasury commitment to implementing the law through Tribal consultation. The TTAC's GWE Report represents a regulatory framework that supports the sovereign decisions of Tribal Nations, in accordance with the law and this Administration's stated policies. We ask that Treasury commit to revising its overall approach to our Nation-to-Nation relationship in a way that upholds the inherent sovereignty and self-determination of Tribal Nations and ensure this is memorialized through meaningful policy change. Please count USET SPF partner in your efforts to advance Tribal sovereignty through Treasury's improved understanding of its obligations to Tribal Nations. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 615-838-5906.

Sincerely,



Kirk Francis
President



Kitcki A. Carroll
Executive Director