



# USET

SOVEREIGNTY PROTECTION FUND

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April 19, 2024

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

Dear Chief Malerba,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Treasury, March 19, 2024, Tribal consultation on the Treasury Tribal Advisory Committee (TTAC), Subcommittee on Parity and Reform's, "Project Plan and Report on Tribal Pension Issues" (Report). This initial Report provides an outline on proposed guidance recommendations to enhance parity for Tribal governments under the Pension Protection Act (PPA), as well as related provisions under Internal Revenue Code Sec. 414 and Sec. 3(31) of the Employee Retirement Income Security Act (ERISA). The TTAC Subcommittee on Parity and Reform (formerly the TTAC Subcommittee on Tribal Pensions) is seeking additional Tribal input on the Report to further develop guidance regarding the government status of Tribal Nations under the Internal Revenue Code and ERISA. USET SPF appreciates the opportunity to provide comments on this long-standing and important issue. Specifically, our comments are directed to the proposed regulations published by Treasury and the Internal Revenue Service (IRS) under [Announcement 2011-79](#), as well as recommendations for Treasury to adhere to the Indian Canons of Construction and uphold its trust and treaty obligations, including those pursuant to Executive Order 14112 in order to promote the next era of Tribal self-determination.

USET SPF is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.<sup>1</sup> USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

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<sup>1</sup> USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), 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), , Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), 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), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

*Because there is Strength in Unity*

At the USET Annual Meeting in November 2011, Tribal Leaders comprising USET's Board of Directors adopted [USET Resolution No. 2012:018, "Eliminate the Distinction Between Government and Commercial Activities in Tax Treatment of Tribal Government Employee Pension Plans."](#) In this Resolution, we've recognized that Tribal Nations retain inherent rights to make our own laws and be governed by them, which includes the power to regulate employment relations within our territories. Further, the Resolution recognizes that Tribal governments sponsor employee retirement plans that federal law has recognized, under certain conditions, to be eligible for the favorable tax treatment provided to the pension plans of federal, state, and local governments.

However, Tribal Nations continue to be subjected to discriminatory conditions imposed by federal legislation and the Internal Revenue Service's (IRS) interpretation of the law that restricts the benefits afforded to Tribal government retirement plans to only those employees performing "essential governmental functions." This interpretation by the IRS has established distinct treatment for the Tribal retirement plans for employees engaged in a Tribal government's so-called "commercial" functions, such as Tribally owned service stations, convenience stores, hotels, gaming facilities, and marinas. While IRS has upheld this treatment, state and local government-sponsored theaters, stadiums, municipal golf courses, resorts, and real estate development activities are treated by the IRS as governmental functions because the activities are carried out by the government entity and the funds generated by these activities benefit the public.

USET's Resolution urges the IRS to eliminate the disparate treatment of Tribal government retirement plans by developing agency interpretation and/or regulations that distinguish whether an activity is governmental or commercial based on the same considerations that are applied to state and local governments, such as whether the activity is carried out by a government entity and generates revenues for public benefit. USET SPF reasserts this stance and urges Treasury to eliminate the distinction between government and commercial activities in the tax treatment of Tribal government employee pension plans. As a matter of governmental fairness and parity, Treasury and the IRS must recognize and acknowledge the non-taxable status of Tribal governments and equalize the treatment of Tribal retirement plans to that of state and local plans.

### **Background on the Employee Retirement Income Security Act and Relevant Laws Related to Retirement Accounts**

The Employee Retirement Income Security Act of 1974 (ERISA) drew a line between government sector and private sector employees. Private employers were subject to ERISA, while government employees were not. USET SPF emphasizes that the decision to treat governments differently was not an oversight, since there were concerns that ERISA would infringe on sovereignty if applied to government employers. Further, it was recognized that governments could raise tax revenues to secure benefit promises, if needed, while private companies could not. In exchange for the added regulation of ERISA, private sector employees received "benefits" that government sector employers do not need: caps on liability (no punitive damages), limitations on jury trials, protection against conflicting state laws, and tax deductions.

Unfortunately, the original definition of "government" under Section 3(32) of ERISA and Section 414(d) of the Internal Revenue Code was silent on the treatment of Tribal governments. For more than 25 years, many Tribal governments throughout the country asserted governmental status under ERISA and the Code. Tribal governments applied for and routinely received IRS determination letters under the government sector rules. The lack of clarity resulted in a legislative effort to confirm that Tribal Nations were "governments" under ERISA and the Internal Revenue Code Section 414(d). These efforts produced many stand-alone bills from 2003 through 2006.

Ultimately, Section 906 of the Pension Protection Act of 2006 (PPA), [P.L. 109-280](#), amended Internal Revenue Code Section 414(d) to specifically address governmental retirement plans sponsored by Tribal governments and other Tribal employers. Tribal governments and certain other Tribal entities are entitled to governmental status and exemptions for their retirement plans under Internal Revenue Code Section 414(d). Government status, however, was limited to Tribal plans where all of the participant-employees performed substantially all of their services in “essential governmental functions” that are not commercial activities. The PPA definition created two sets of rules for Tribal employers – one for employees performing government functions and another for those engaging in commercial activities.

### **Background and History of IRS Guidance on Tribal Retirement Plans**

The IRS issued guidance relatively quickly after enactment of the PPA. IRS [Notice 2006-89](#) provided transition relief and provided approaches for implementing a new plan for commercial employees. The following year, the IRS published [Notice 2007-67](#), which extended the transitional relief until six months after guidance was issued under Internal Revenue Code Sec. 414(d). The transition relief was conditioned, however, on the plan meeting certain benefit reduction tests.

In 2011, the IRS published [Announcement 2011-79](#). The new guidance provided an Advanced Notice of Proposed Rulemaking (ANPRM), which contained an appendix including a draft notice of proposed rulemaking for regulations interpreting whether plans should be treated as governmental or commercial. The ANPRM provided the following as examples of governmental activities:

- Building and maintaining public roads, sidewalks, buildings, and related areas, such as parking lots;
- Public sewer and drainage facilities, and related facilities such as waste-water treatment plants;
- Public works projects, such as schools and government buildings;
- Public utilities, such as electricity and other power sources;
- Criminal protection services, such as police and fire departments, and administrative services, such as public housing, libraries, judiciary buildings, public schools, hospitals and health clinics, and operating a civil service system; and
- Activities relating to treaty or special rules pertaining to trust land ownership and use.<sup>2</sup>

The ANPRM also defines commercial activities as those relating to the operation of a hotel, casino, service station, convenience store, or marina.<sup>3</sup> If the activity is not described as a governmental function or commercial activity, the ANPRM set out facts and circumstances tests that should be used to make a determination.<sup>4</sup>

### **Tribal Sovereignty, the Federal Trust Responsibility, Self-Determination, and the Indian Canons of Construction Must be Upheld by Treasury and the IRS**

Tribal governments have a unique status in our federal system of government. We have sovereign governmental structures, inherent powers and authorities, and responsibility for the well-being of our citizens and communities. Our Tribal governments enact civil and criminal laws, provide government services (including courts of law, police, fire protection, schools, housing, utilities, transportation, social services, and health care), and are generally treated in the same manner as states under the Indian Tribal Governmental Status Act of 1982, which is codified at Internal Revenue Code Sec. 7871.

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<sup>2</sup> Announcement 2011-79, p. 34-35.

<sup>3</sup> *Id.* at 36.

<sup>4</sup> *Id.* at 35, 37.

Federal trust and treaty obligations to Tribal Nations were established by the U.S. Constitution, treaties, statutes, Executive Orders, and judicial interpretations of law. These established trust and treaty obligations legally bind the United States to provide for the continued viability of Tribal self-government and self-determination, the well-being of our citizens, the reinvigoration of our cultures and languages, and our efforts to pursue Nation rebuilding. This includes federal recognition of the power that Tribal Nations possess to determine our own form of government, and to organize and govern to provide for the well-being of our citizens.<sup>5</sup>

The official policy of the United States with regard to Tribal-federal relations has changed over the years. From 1887 through 1934, the United States followed a policy of “allotments and assimilation.” With the enactment of the Indian Reorganization Act in 1934, the focus shifted to reorganization and constitutional reform of Tribal government. From 1953 through 1968, the policy took a harsh turn toward “termination and relocation,” with the government status of many Tribal Nations terminated during that period. From 1968 to the present, the official policy of the United States has been to promote “Tribal self-determination.”

Guidance under Internal Revenue Code Section 414(d) must reflect the policy of the United States government to promote Tribal self-determination. Tribal governments, which generally have little or no effective opportunity to levy taxes, are not able to pursue and achieve self-determination without revenue generating activities. Denying government status to Tribal activities because those activities generate revenue required for Tribal self-determination contravenes that policy.

In addition, the guidance must reflect the well settled Indian Canons of Construction. The United States Supreme Court has stated that, “statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit.”<sup>6</sup> It is not enough for guidance regarding the PPA definitions of “essential governmental functions” and “commercial activities” to reflect a possible or reasonable interpretation. The Indian Canons of Construction require the PPA to be liberally construed in favor of Tribal Nations with any ambiguities resolved in our favor.

### **The ANPRM is Flawed and Does Not Account for the Unique Status and Operations of Tribal Governments**

As noted during the Treasury Tribal consultation on March 19, 2024, the ANPRM is flawed because it starts from the premise that taxes are the only valid form of government revenue. Tribal governments are fundamentally different from other governments. We generally do not raise revenue through taxes, as our citizens do not own real property and states often infringe on our jurisdiction to impose sales taxes. Tribal governments must rely on revenue generating activities to provide government services and achieve self-determination. In fact, the generation of revenue to support Tribal operations and programs is itself an essential governmental function for Tribal governments. These fundamental differences are not accounted for in the ANPRM.

The ANPRM continues the Joint Committee on Taxation’s (JTC) classification of casinos, hotels, gas stations, convenience stores, and marinas as commercial activities. This classification by the JCT is not supported by legislative history and must be examined thoroughly in consultation with Tribal Nations. For example, and as was discussed in the March 2024 consultation, the classification of marinas as commercial activities is inconsistent with the operation of ports by other governments. The classification of marinas as commercial activities also runs counter to the reality that many Tribal Nations are located in remote areas that are not accessible by roads and highways and those Tribal Nations cannot exist or thrive

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<sup>5</sup> See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978).

<sup>6</sup> *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L.Ed.2d 753 (1985).

without significant shipping activity conducted through ports and marinas. Under the ANPRM, a Tribal Nation's building and maintenance of public roads would qualify as a governmental function, but the same Tribal Nation's building and maintenance of a marina and port would be considered a commercial activity.

The ANPRM also incorporates facts and circumstances tests which fail to provide the appropriate level of deference and parity to Tribal employers. The facts and circumstances tests in the ANPRM are designed from the perspective that Tribal employers may be more akin to private businesses than they are to state and local governments, which is a deeply flawed standard. In our view, it would be most appropriate to eliminate the proposed facts and circumstances tests. Instead, any activity that is not defined as commercial should be deemed governmental.

### **Treasury Must Withdraw the Proposed Guidance Included in the ANPRM and Initiate Consultation with Tribal Nations**

Moving forward, Treasury and the IRS must apply the Indian Canons of Construction to liberally interpret the PPA in a manner that is favorable to Tribal Nations. Treasury and the IRS must withdraw the proposed guidance in the ANPRM, initiate consultation Tribal Nations on this matter, and issue updated proposed regulations for comment. Further, Treasury is obligated to ensure that Tribal Nations are empowered to conduct revenue generating activities to provide government services for our citizens and achieve self-determination. These activities must be recognized as essential government functions and an exercise of our inherent sovereignty. Treasury must adhere to the directives of [Executive Order 14112](#), "Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination." As aptly stated in E.O. 14112:

"Now is the time to build upon this foundation by ushering in the next era of self-determination policies and our unique Nation-to-Nation relationships, during which we will better acknowledge and engage with Tribal Nations as respected and vital self-governing sovereigns. As we continue to support Tribal Nations, we must respect their sovereignty by better ensuring that they are able to make their own decisions about where and how to meet the needs of their communities. No less than for any other sovereign, Tribal self-governance is about the fundamental right of a people to determine their own destiny and to prosper and flourish on their own terms."

### **Conclusion**

As we continue to pursue our efforts in Nation rebuilding, all unnecessary policy barriers toward this objective must be rescinded or interpreted for the benefit of our inherent sovereignty and self-determination. As stated throughout our comments, due in large part to the actions of other units of government, Tribal Nations find ourselves in a position that requires us to develop economic development ventures to generate the necessary revenues and resources required to support our citizens and communities. However, these efforts should not be construed as replacing the federal government's trust and treaty obligations, which exist in perpetuity, and Treasury and the IRS must uphold these obligations to Tribal Nations to foster the next era of self-determination. 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](mailto:LMalerba@usetinc.org) or 615-838-5906.

Sincerely,



Chief Kirk Francis  
President



Kitcki A. Carroll  
Executive Director