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MEMORANDUM

December 8, 2014

TO: Tribal Tax Policy Clients

FROM: Michael Willis /s/

Re: ***Tax Policy Developments***

This memorandum reports on the following tribal tax policy developments:

- ***Indian Country Provisions are Included in the House-Approved Tax Extender Bill, Senate Adoption Expected by Wednesday***
- ***Treasury Announces Interim Tribal Consultation Policy***
- ***SSA Issues New Minors Trust Guidance***
- ***Senate Finance Committee Holds Tribal Leader Discussion***

Indian Country Provisions are Included in the House-Approved Tax Extender Bill, Senate Adoption Expected by Wednesday

On December 3, 2014, by a vote of 378-46, the House of Representatives approved a one-year retroactive extension of most the tax extender provisions for 2014. The bill adopted by the House (H.R. 5771) was substituted after bipartisan talks collapsed. H.R. 5771 is viewed as the "bare minimum package" and is based largely upon the Senate Finance Committee's "Expiring Provisions Improvement Reform and Efficiency (EXPIRE) Act" (S. 2260). The major difference was that the Senate version would have extended the tax breaks through 2015.

The House vote came after the bipartisan plan that was being negotiated by Senate Majority Leader Harry Reid (D-NV) and House Ways and Means Chairman Dave Camp (R-MI) collapsed. The Reid-Camp approach would have made a number of the tax extenders permanent (as House Republicans have urged) and would have given the other provisions retroactive effect for 2014 and extended them through 2015. The Reid-Camp plan fell through after President Obama threatened to veto the emerging agreement for not extending tax credits for low-income and middle-income families.

As approved by the House, H.R. 5771 includes all of the expired Indian tax extenders, including:

- (1) the Indian employment tax credits for firms hiring Native workers (Sec. 114);
- (2) the accelerated depreciation for projects on or near tribal lands (Sec. 124); and

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(3) the Indian coal tax credit (Sec. 154).

The bill also extends the New Markets Tax Credit (Sec. 115).

Senate Finance Committee Chairman Ron Wyden (D-OR) has indicated that a Senate vote on the bill may be held by Wednesday and that no amendments will be considered. President Obama is expected to sign the bill. If adopted, the legislation will secure \$41.6 billion worth of tax breaks, but for 2014 only. As the new Congress begins, the Republican leadership will be pressed to address the future of the extenders by making them permanent (or eliminating them) through tax reform. Incoming Senate Finance Committee Chairman Orrin Hatch (R-UT) commented that "if we can do tax reform the way I'd like to do it, you wouldn't have to worry about extenders ever again."

Treasury Announces Interim Tribal Consultation Policy

On December 3, 2014, the Department of the Treasury issued a notice in the Federal Register announcing an "interim" tribal consultation policy. (Please see attachment. The notice can be found at: <https://federalregister.gov/a/2014-28383>). Throughout the Obama Administration tribal leaders and tribal organizations have called upon the Department to establish and publish its tribal consultation policy.

Treasury's lack of formal consultation policy with Indian tribal governments gained additional scrutiny June, 2014, when the Advisory Committee on Taxation (ACT) for Tax-Exempt and Government Entities presented its study and recommendations on IRS and Treasury's consultation practices. The ACT devoted 56 pages of its annual report to a detailed evaluation and critique of Treasury and IRS's failure to develop any written policy to guide consultation with tribal governments and for failure to comply with the consultation requirements of Executive Order 13175. Given the lack of a written consultation policy, the ACT pointed out that Treasury and IRS have all too frequently adopted positions and taken actions with tribal implications prior to conducting consultation.

The issue also surfaced prominently in the build-up to the Obama Administration's Tribal Nations Conference last week. Many tribes and tribal leaders had been raising significant concerns that the Treasury Department and IRS had begun implementing the Tribal General Welfare Exclusion Act (PL 113-168) without consulting Indian Country. When Treasury responded by scheduling a one-hour Listening Session with tribal leaders for December 2, 2014, several tribes and tribal organizations insisted that Treasury engage in a sustained consultation process. Those tribes and tribal organizations expressed concerns regarding the consultation rules that might govern such a process, given Treasury's absence of an official consultation policy.

Treasury's Federal Register notice announces an interim policy applicable to all Treasury offices engaging with tribal governments on matters with tribal implications.

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The notice states that the policy "will be updated periodically and refined as needed to reflect ongoing engagement and collaboration with Tribal partners."

The effective date of the interim policy is December 3, 2014. The notice requests comments and establishes the deadline of April 2, 2015. Comments may be submitted through the Federal Rulemaking Portal (www.regulations.gov) or by emailing them to the following address: TRIBAL.CONSULT@treasury.gov.

The interim guidance defines "consultation" as the "direct, timely, and interactive process of receiving input from Indian Tribes regarding proposed Treasury actions on policy matters that have Tribal Implications." It also defines "Policies that have Tribal Implications" to have the same meaning as used in Executive Order 13175. Such policies include "Treasury regulations, published guidance, or other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or the distribution of power and responsibilities between the Federal Government and Indian Tribes."

Principles contained in the interim guidance recognize the right to self-government and the inherent sovereign powers of Indian tribes over their members and territories. Treasury's policy also acknowledges that "the principle of consultation has its roots in the unique relationship between the federal government and the governments of Indian Tribes. This government-to-government relationship has a more than 200-year history, and is built on the foundation of the U.S. Constitution, treaties, legislation, executive action, and judicial rulings."

Treasury's policy statement provides that its consultation process should achieve several core objectives:

- "(1) Timely identification of matters that may warrant Tribal Consultation;
- (2) implementation of a process that is accessible and convenient to Tribal participants; and (3) development of meaningful, transparent, and accountable dialogue involving the appropriate participants."

Meanwhile, the policy provides that enforcement actions or penalties for violations are not matters for consultation, even if multiple tribes are impacted.

Please let us know if you would like our assistance in further analyzing the interim consultation policy and/or preparing comments for submission.

SSA Issues New Minors Trust Guidance

The Social Security Administration (SSA) has issued new guidance regarding how it will evaluate trusts established by Tribal governments for minors and legally incompetent adults for the purposes of the Supplemental Security Income (SSI) program. See SI 01120.195 (available at <https://secure.ssa.gov/poms.nsf/lrx/0501120195>). As we

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have previously reported, the "kiddie tax," passed by Congress in 1986, was designed to prevent wealthy parents from avoiding taxes by transferring wealth to their children, who would be taxed at a lower rate than the parents. When the "kiddie tax" is applied to trusts established by Tribal governments for the benefit of minors, however, Indian children are taxed at two or three times the rate they would be taxed for earned income. The imposition of the "kiddie tax" on such trusts interferes with shared Tribal-Federal objectives and does not further the tax's objective of preventing wealthy parents from avoiding tax liability. Although legislative relief is required to protect trusts established by Tribal governments from the "kiddie tax", the SSA's new guidance is designed to address the problem of treating such trusts as income for the purposes of eligibility for the SSI program.

The SSA issued a new section of its Program Operations Manual System (POMS), entitled "Trusts Established under the Indian Gaming Regulatory Act (IGRA) for Minor Children and Legally Incompetent Adults (IGRA Trusts)." This section provides guidance on how to evaluate IGRA trusts when a tribal member files for SSI benefits. Previously, the SSA treated the minor child or legally incompetent adult as both the grantor and beneficiary of the trust. Thus, IGRA trusts were considered part of the beneficiaries' income and could make them ineligible for SSI benefits. The new guidance clarifies that, for determinations made after November 30, 2014, the SSA will treat the Tribe as the grantor of the trust so long as the IGRA trust meets certain requirements.

For the Tribe to be considered the grantor of the IGRA trust, the trust must meet nine requirements established by the new guidance. These nine requirements include the following:

- the trust must use only per capita payments from gaming revenues;
- the trust instrument must state that it is a grantor trust and that the Tribe is the grantor, and must grant the Tribe a power or interest in the assets, such as the ability to vote any shares held in trust;
- the Tribe must be the owner of the trust for tax purposes and all assets must be subject to the claims of general creditors of the Tribe under applicable law;
- the beneficiary may not have a preferred claim or beneficial ownership interest in any assets of the trust, and any rights created under the trust documents must be unsecured rights;
- trust assets are not available to the beneficiary until the beneficiary ceases to be a minor or legally incompetent, except for distributions for the beneficiary's health, education, or welfare.

The new guidance also provides an overview of the procedure for reviewing an IGRA trust, for establishing a precedent for a tribe's IGRA trust, and for appealing a trust resource determination.

Senate Finance Committee Holds Tribal Leader Discussion

On December 2, 2014, the Senate Finance Committee held a Tribal Leader Discussion co-hosted by the Native American Finance Officers Association (NAFOA). The format was a series of panels: Tribal Tax Concerns; Tribal Access to Capital; Other Tax Considerations—each comprised of different staff from the Senate Finance Committee. Tribal leaders provided comments and questions and NAFOA moderated. There was also a short speech by Committee Chairman Ron Wyden (D-OR). Attached are: the meeting agenda; NAFOA's Winter 2014 Policy Report; a letter to tribal leaders from John Dossett, General Counsel to the National Congress of American Indians (NCAI) regarding the implementation of the Tribal General Welfare Exclusion Act (Tribal GWE); and a summary from the Finance Committee of legislation extending certain tax provisions, commonly referred to as "tax extenders."

Tribal Tax Concerns. Committee staff Tiffany Smith and Adam Carasso indicated that they were very interested in tribal tax priorities in the context of tax reform—whatever form that tax reform might take. They also made clear they wanted to avoid problems such as the "definitions issue" where different sections of the Affordable Care Act referenced different definitions of the word "Indian" resulting in some inconsistencies in the application of the law.

A tribal leader raised a concern about the "kiddie tax" issue. Ms. Smith agreed that this was something to keep in mind with regard to tax reform and that it would likely only receive a very small score from the Joint Committee on Taxation (JCT). Mr. Carasso indicated that Chairman Wyden was aware of the issue and particularly aware of the adverse impact it had on certain younger tribal members who were not working because they were pursuing higher education, yet were still taxed at the much higher rate that their parents were paying.

A tribal leader made a number of points: 1) the tribal adoption tax credit parity bill should be enacted; 2) the wind production tax credit should be extended because: many areas of Indian Country have substantial potential for wind power development but it is costly to link electricity generated in Indian Country to the grid where it can be sold; 3) enacting the Tribal GWE was a significant milestone but work is needed on its implementation, particularly regarding the yet-to-be formed Tribal Advisory Committee—Finance and Ways and Means are urged to pressure Treasury to comply with not just the letter but the spirit of the law; 4) a priority for tax reform is the restoration of the tribal tax base: tax revenue is key for bond repayment and in order to secure financing tribes must be able to hold onto their tax base.

Ms. Smith stated that Chairman Wyden supports the Tribal GWE and that Treasury's compliance will be monitored. Ms. Smith thanked tribes for raising the concerns about the Treasury Department's implementation of the law and stated that the Finance Committee would increase its oversight of Treasury in response to these

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concerns. She also stated that the Finance and Ways and Means Committees need to remember to include tribes in any changes that are made during tax reform so that tribes are not faced with having to seek new amendments following such reforms because Congress has omitted tax code language to provide tribes parity with states. She pointed out that due to past omissions, tribes today must seek parity through new legislation (such as the Adoption Tax Credit Parity Act).

A tribal leader urged that the Indian Country-specific tax provisions included in the tax extenders package be made permanent. If Congress is unable to make them permanent, he urged that lawmakers ensure that temporary tax extenders span a longer time period. Currently they are extended in fits and starts for periods of one to two years. The version passed by the House would only extend them retroactively through 2014. The Senate version would extend them retroactively through 2014 and also forward through 2015. These short extensions do not provide individuals or businesses with the certainty to make investments. Finance Committee staff agreed that this was a problem.

Tribal Access to Capital. Committee staff Ryan Abraham and Kara Getz emphasized the importance of tribes gaining greater access to capital. They noted; however, that the Tribal Economic Development Bonds (TEDBs) included in the American Recovery and Reinvestment Act of 2009 (ARRA) were a one-time enactment, not a continuing program. Ms. Getz reported that there have been conversations with Senator Cantwell regarding the need to make the New Markets Tax Credit (NMTC) and Low Income Housing Tax Credit (LIHTC) work better for tribes. Ms. Getz also reported that they were aware of Senator Begich's suggestion that there be a ten percent set-aside for Native Community Development Entities (CDEs) in the NMTC program. Mr. Abraham suggested that rather than a set-aside for Native CDEs, there be a set-aside for the *qualified investments* in Indian Country, no matter which CDE financed them. The Vice President for Economic Development of Travois, a CDE which exclusively provides financing for projects in Indian Country, pushed back against this idea. He explained that Native CDEs (such as Travois), which specialize in financing projects in Indian Country, bring to the table a special understanding of the intricacies of working with Indian Country that non-Native CDEs do not have. Often non-Native CDEs take much longer, if at all, to agree to make a qualified investment in Indian Country because they lack the familiarity with such transactions. Often, non-Native CDEs require significantly more documentation in order to agree to make these qualified investments. If there was a Native CDE set-aside, it would ensure that CDEs with a proven track record of providing qualified investments in Indian Country are awarded NMTC allocations.

A tribal leader stated that the LIHTC program also needed a tribal set-aside. Currently, tribes must apply to their state. Tribes have complex relationships with the states in which they are located, which can introduce political obstacles. Also, many tribes located in rural areas with small population bases lose out in the application process to more urban areas of a state, despite having very strong applications. The Executive Director of NAFOA underscored these points. He stated that tribes are being left out of the \$6 billion available in the NMTC and LIHTC programs while competing

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for the \$8 million that the Bureau of Indian Affairs has available for project financing. Ms. Getz responded: we hear you and want to address this; we can be helpful working with the Treasury Department; we can work with you on draft legislation; and you have raised very legitimate concerns. Further points made by listening session participants included the following legislative and oversight concerns:: the TEDBs should be made permanent; that it is inappropriate and unworkable that the preferred source of collateral for tribes to secure financing has been limited to land; and that the NMTC and LIHTC should be made permanent because short extensions are not helpful as it often takes tribal projects longer to get approved so there needs to be certainty that these programs will continue. Ms. Getz again affirmed that important points were being raised.

Other Tax Considerations. Caitrin Shuy of the National Indian Health Board (NIHB) put forward three priorities: 1) that an extension of the Special Diabetes Program for Indians be included in any "Doc Fix" bill; 2) that a technical fix harmonizing the definition of Indian in the Affordable Care Act be enacted; and 3) that the Medicare-like rates legislation be enacted. Another individual from NIHB also expressed concern regarding the application of the employer mandate from the Affordable Care Act to tribal employers and urged that they be exempt from the requirement to provide health insurance to their employees, particularly those employees who are tribal members and are hence eligible to receive services form the Indian Health Service.

John Dossett (NCAI) followed up on a point made by a tribal leader earlier in the meeting: there is a revenue ruling from 1959 providing that individuals who receive compensation for serving on their tribal councils are not eligible to participate in Social Security, *even if they had been paying Social Security taxes during the time they were serving their tribal council.* This revenue ruling equated serving on a tribal council with serving in a state legislature. The difference is that state legislators receive a pension while the vast majority of tribal council members do not. Committee staff Anderson Heiman, Laura Bernsten and Scott Levy promised to follow up on the issues that were raised.

Remarks Made by Chairman Wyden. The Chairman stated that the U.S. tax code was in serious need of an overhaul. He emphasized that his position was that the tax extender provisions needed to be extended for two years to provide certainty to business and individuals while a comprehensive overhaul of the tax code was considered by Congress. He affirmed that it was important for his Committee to provide ongoing oversight of Treasury's implementation of the Tribal GWE Act. He urged tribes to report to the Finance Committee any problems they encounter with Treasury. He stated that his goals for tax reform were not to keep successful people from being more successful but rather to make sure that they paid their fair share in taxes and to make sure that *everyone* had a chance to get ahead. He affirmed his support for tribes having a level playing field with states when it came to access to tax exempt bond financing and he noted that Treasury had even issued a report urging the repeal of the "essential government functions test." He stated that repealing this restriction should be included in tax reform.

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Conclusion

We will continue to monitor tax developments on your behalf. Please contact us if you have any comments or questions.