

Tribal Consultation Progress Report

The Treasury Department's consultation plan focuses on issues and regulatory or legislative activities that are likely to have direct and identifiable economic impacts on Indian tribes, or to preempt tribal law.

Guiding Principles: In addition to the overarching Fundamental Principles stated in Section 2 of Executive Order 13175, three principles are guiding the development of the Treasury action plan.¹

- The Treasury Department is committed to the establishment of a comprehensive consultation process leading to meaningful dialogue with Indian tribes on Treasury policies that have tribal implications for such tribes, including those policies that have a direct and identifiable economic impact on Indian tribes or preempt tribal law.
- Tribal consultation will assist Treasury in development of policy, regulation and legislative activities as it will increase Treasury's understanding of the issues and potential impacts of activities on tribes and American Indians and Alaskan Natives.
- The Treasury Department is also committed to developing and issuing regulations and guidance in a timely and efficient manner.

Agency point of contact: The agency point of contact for Executive Order 13175 (EO 13175) and tribal consultation is the Deputy Assistant Secretary for Policy Coordination in the Office of Economic Policy (hereafter the Point Of Contact for Tribal Consultation or POCTC). The POCTC relies on the Departmental Office's Executive Secretariat (ES) and the Office of the General Counsel (OGC) to assist program and legislative staff with identifying issues that could require consultation prior to issuance of Treasury policy, and, in the initial stages of policymaking, relies on each Treasury Department Bureau and Office to undertake tribal consultation in accordance with EO 13175.

New laws, regulations, and administrative practices, including changes to existing policies, require consultation to the extent that they affect tribal governments and/or tribal members exclusively or in a significantly disproportionate manner relative to the majority of U.S. residents, or to the extent that Native Americans and Alaskan Natives are targeted explicitly by these policies.

In some cases, Offices and Bureaus may routinely incorporate tribal consultation into Federal Register (FR) notices and Department guidance. This process may be sufficient, for example, when program staff deal exclusively with highly-complex and/or sophisticated financial matters affecting a small number of well-known constituent groups.² In other cases Offices and Bureaus that work directly with a variety of tribal governments and tribal members may develop, in

consultation with tribal governments and members, detailed guidelines on tribal consultation practices, regular schedules for consultation meetings during regional conferences, and a dedicated staff.³ Current examples of each approach are attached in Appendices C, D, and E. The POCTC will maintain examples that Bureaus and Offices may review when revising their own consultation guidelines.

Treasury-Wide Policy on Tribal Consultation: The tasks undertaken by different Treasury Offices and Bureaus are complex and varied. Findings during internal and external review of current tribal consultation practices are consistent with this view.⁴ Therefore, the Treasury Department will not prescribe a single, uniform approach to tribal consultation. Rather, each Office and Bureau is responsible for maintaining its own well-defined set of procedures to achieve the core objectives listed below.

- Timely identification of matters that may require tribal consultation, to include regulative and legislative activities that fall within the span of Bureau and/or Office operations as well as direct program responsibilities;
- Timely process for determining whether consultation is required, to include timely notice to the POCTC on non-routine issues of importance regarding legislative activities, regulations, and administrative practices that may require tribal consultation; and consultation on the consultation process as needed; and
- Ongoing, proactive tribal consultation processes, to include early outreach to solicit comments from tribal governments and members who may be substantially affected by changes in laws, regulations or policies under consideration, when it has been determined that consultation is required by EO 13175. Outreach should incorporate an open process through which tribal governments may proactively consult with the Treasury Bureau or Office, on a government-to-government basis, regarding matters that involve tribal and Federal law regulations, and administrative practice.

Each Treasury Office and Bureau shall explicitly identify consultation procedures to meet these core objectives, as discussed below.

Timely identification of matters that may require tribal consultation

Program and/or legislative staff in each Treasury Office and Bureau are responsible for identifying pending legislation and regulations that may disproportionately affect tribal governments and members.

- Explicit criteria consistent with the mandate of the Bureau or Office should be developed and made clear to program and legislative staff, and to the appropriate points of contact in

OGC. Documents describing these criteria should be forwarded to the POCTC as they are completed, for reference when drafting future reports.

- Indicators of disproportionate effects on tribal governments and members will be specific to each Treasury Office or Bureau. Illustrative examples are suggested in Appendix B. Offices and Bureaus are encouraged to revise or replace these examples, as appropriate, so that they may be used by program staff and legal counsel to identify issues within their program mandate that are likely to require tribal consultation. Also see actual examples in Appendices C, D and E.

Timely process for determining whether consultation is required

Each Office and Bureau is responsible for complying with EO 13175 and initiating consultation at the earliest stage possible. In general, program or legislative staff in each Treasury Office and Bureau should inform the POCTC regarding all pending legislation, regulations and/or administrative practices that may require tribal consultation. If that Office or Bureau is unsure as to whether consultation is required, it shall ask the POCTC and OGC whether or not consultation is required. The POCTC is available to assist Treasury Bureaus and Offices in the identification of laws, regulations, and administrative practices that require tribal consultation, if the application of the requirements of EO 13175 is questionable in the view of program staff. In such cases the POCTC will respond to the inquiry within 15 days. If the POCTC and Treasury Bureau or Office subsequently agree that consultation is required, consultation should be initiated within 30 days. If the POCTC and Treasury Bureau or Office disagree on the need for tribal consultation, the question will be referred to OGC.

To ensure that EO 13175 is followed, ES and OGC shall ask each Office or Bureau, at the earliest stage that it becomes aware of an activity that might require consultation, whether or not a consultation decision has been made. If the associated clearance documents do not indicate explicitly that tribal consultation is planned or under way, then OGC and ES will return the documents to program staff for clarification and also alert the POCTC that there is a potential need for consultation.

Ongoing, Proactive Tribal Consultation Process

Target Audience: Treasury Bureaus and Offices should consult directly with tribes and tribal governing officials on matters that disproportionately affect such tribes and officials. When it is appropriate and useful, organizations representing the interests of tribes and American Indians and Alaskan Natives should be consulted as well. However, consultation with tribal governments and tribal leaders is required, and discussions solely with non-tribal organizations that represent tribes do not constitute consultation under EO 13175.

Methods of Consultation: Each Office and Bureau may develop its own method of consultation to best achieve the guiding principles above. The POCTC will maintain a record of the Treasury Department's consultation efforts and will make available to the Office or Bureau descriptions of various methods that have been used in the past. The POCTC will assist the Office or Bureau in developing a consultation plan. Consultation plans may include, but are not limited to, the following.

- *Federal Register notices soliciting comment on the proposed idea.* FR notices requesting comments from tribal governments and members regarding proposed changes in law or regulation should be published as soon as practicable after Treasury staff have determined that tribal consultation is necessary, and ideally within 30 days. When tribal consultation is indicated, a 60- to 120-day minimum comment period should be specified in the FR notice whenever practicable to allow sufficient time for tribal leaders to consult with their members and legal counsel on any matters of particular concern, and to formulate a response to the notice. Copies of all FR notices requesting comments from tribal governments and members, together with brief descriptions of other tribal consultation activities, should be sent to the POCTC to become part of a comprehensive record of Treasury activity.⁵
- *Meetings, conference calls, videoconferences and workshops to encourage and exchange of views.* When Treasury policies explicitly target Native American and Alaskan Native governments, organizations and members, or when the issue is complex with a disproportionate effect on tribes and tribal members, consultation should extend beyond FR notices to the extent practicable. Consultation may be conducted through email, regular mail, telephone calls, video conferences and in-person meetings or conferences, as schedules and resources permit. Disparities in time zones and travel costs should be taken into account when scheduling phone calls and conferences, noting that Alaskan Native tribes are located to the extreme west.
- *Targeted outreach.* Contact information for Federally-recognized tribes is available on the Bureau of Indian Affairs (BIA) web site.¹ The POCTC will also maintain a Treasury-specific list, including contact points for tribal organizations that sponsor potentially-useful conferences.²

Open process: An open process should be explicitly identified through which tribal governments may proactively consult with each Treasury Bureau or Office, on a government-to-government basis, regarding matters that involve tribal and Federal law regulations, and administrative practice.

- *Tribal.Consult@do.treas.gov.* Tribal governments may channel information or concerns to the Treasury Department email address Tribal.Consult@do.treas.gov, or to the POCTC. These points of contact may be used only for general information and concerns. Specific cases involving particular tribal governments and tribal members must be referred to the Bureau(s) or Office(s) with direct jurisdiction.
- *Meetings and workshops.* Intra- and inter-agency sponsorship of meetings to address areas of concern is encouraged, to conserve resources and ensure comprehensive coverage.
 - The IRS Office of Indian Tribal Governments (ITG) has scheduled a series of training workshops during the months of June through September 2010. Workshop topics include employment taxes, casino-related topics, and gaming information returns.⁶
 - The Community Development Financial Institutions (CDFI) Fund and the Seattle Branch of the Federal Reserve Bank of San Francisco are co-sponsoring a series of workshops on the theme "Economic Development Strategies in Indian Country." Workshops are being held from June 30, 2010 to September 16, 2010.⁷

Update on Department-Level Tribal Consultation Process: All Treasury Offices and Bureaus have received copies of EO 13175 and President Obama's November 5, 2009 Memorandum on tribal consultation. Treasury Offices and Bureaus that deal with American Indian or Alaska Native tribal governments have identified themselves to the Office of Economic Policy. Descriptions of targeted programs and tribal outreach associated with Treasury Offices and Bureaus have been compiled (see Appendix A).

- In early January 2010, Treasury Deputy Secretary Wolin sent a letter to leaders of Federally-recognized Indian tribes and regional tribal organizations, inviting participation in a series of conference calls and requesting comments on ways to improve consultation.
- The Treasury Department conducted two conference calls and one videoconference with tribal representatives during the months of January through March 2010. Treasury officials have engaged in repeated outreach, attending and presenting a description of the Treasury consultation process at conferences, including the National Congress of American Indian (NCAI) Executive Council Winter Session in Washington D.C., the National Indian Gaming Association Conference (Washington, DC), the United South

and Eastern Tribes Annual Impact Week (Washington, DC) and the NCAI Mid-Year Conference (Rapid City, S.D).

- Deputy Secretary Wolin sent a memo to all Treasury Office and Bureau heads on March 9, 2010, reminding them of their responsibilities under EO 13175 and asking them to contact the POCTC if they had questions regarding whether a policy matter required consultation or needed assistance in establishing the policy consultation process.
- An e-mail address, Tribal.Consult@do.treas.gov, has been established to facilitate the receipt of comments from tribal governments and members. Comments received to date have been reviewed and summarized. A summary of key comments is available upon request. The Treasury Department will continue to monitor this email address.
- A web site has been established to report on consultation between tribal governments and Treasury Department Bureaus and Offices. A link labeled Tribal Policy is on the main Treasury web site, www.treas.gov.
- Representatives from the IRS's Advisory Committee on Tax Exempt and Government Entities, who advise on Indian tribal government issues, have offered advice and background information, based on their earlier experience developing recommendations on tribal consultation process for the IRS.
- The American Recovery and Reinvestment Act of 2009 (Recovery Act) directs the Treasury Department to conduct a study of a \$2 billion stimulus program for tax-favored bonds, called "Tribal Economic Development Bonds," created under the Recovery Act to allow more flexible access to lower cost borrowing for Indian tribal governments and to report back to Congress with recommendations regarding this provision. The Treasury Department published a Notice and Request for Comments in the Federal Register (75 Fed. Reg. 39730 (July 12, 2010)), seeking comments from Indian tribal governments to assist the Treasury Department in developing recommendations for this study and in furtherance of the tribal consultation process required by EO13175.
- The Treasury Department is participating in the Federal agency review of the United Nations Declaration on the Rights of Indigenous Peoples.

During initial outreach, beginning in January 2010, the following concerns have been raised:

- Clear recognition of tribal government sovereignty and the importance of communicating directly with tribal governments when conducting the tribal consultation process.

- Tax treatment of services provided by tribal governments, tribal goods, and culturally relevant activities.
- The restrictive existing standard for tax-exempt bond financing by Indian tribal governments and the future of the more flexible standard for such financing reflected in the Tribal Economic Development Bond program under the Recovery Act.
- The transparency of the administration of tribal trust funds.

The concerns identified to date and described above are being taken into account. The importance of consulting directly with tribal leaders, rather than broader groups not authorized to represent tribal governments, is noted in the first section of this report. An IRS tribal consultation review confirms greater coordination between the Indian Tribal Governments group and regular IRS field staff is indicated.⁸ The Office of Tax Policy issued a Federal Register notice on July 2010 to request comments on the Tribal Economic Development Bond program under the Recovery Act for purposes of Treasury's study of this provision, including comments regarding possible permanent revisions to tax-exempt bond eligibility criteria to give Indian tribal governments more flexible access to tax-favored bonds under standards comparable to State and local governments.⁹ The POCTC has consulted with Treasury staff in the Bureau of Public Debt, the Departmental Office for Financial Markets, and the Deputy Solicitor for Indian Affairs at the U.S. Department of the Interior on the administration of tribal trust funds.

The revision of bureaucratic procedures can admittedly be a slow process, but revision of Treasury's tribal consultation process is underway.

Appendix A: List of Programs in Various Treasury Offices and Bureaus that are Actively Involved in Issues affecting Tribal Governments and Members

Comptroller of the Currency

<http://www.occ.treas.gov/Cdd/Nativeam>

The Office of the Comptroller of the Currency (OCC) participated in two initial conference calls with tribal leaders, and is reviewing its process independently.

Bureau of the Public Debt

Domestic Finance/ Office of Financial Markets

<http://www.publicdebt.treas.gov/>

<http://www.treas.gov/offices/domestic-finance/financial-markets>

Treasury is required by current statute to invest five Indian tribal funds and one “tribally-related” fund from which payments will be made to several Indian tribes as well as to non-Indian entities. The Office of Financial Markets works closely with the Bureau of the Public Debt with regard to the investment of these six funds. Three of these funds have been established and are capitalized. The other three funds have been established, but are not yet fully capitalized.

Three of the aforementioned funds are currently being invested in by Treasury. These funds are the Cheyenne River Sioux and the Lower Brule Sioux Tribes’ Terrestrial Wildlife Habitat Restoration Trust Funds (the “Title VI Funds”) and the Lower Colorado River Basin Development Trust Fund.

Treasury consulted extensively with Cheyenne River Sioux and the Lower Brule Sioux Tribes to develop mutually agreed-upon amendments to the then-existing, technically deficient statutory investment provisions for their respective Title VI Funds. These amendments were enacted into law in November 2007. Among other things, they require Treasury to review the investment of the funds with the two tribes involved on at least an annual basis, which is in addition to Treasury’s monthly reports to the tribes on the investment activities of their funds.

As with the tribal funds invested by Interior, by statute, Treasury is required to distribute certain monies in the aforementioned funds to the tribes involved only for certain statutorily-prescribed purposes. Treasury is currently reviewing its existing statutory investment authority with respect to the Lower Colorado River Basin Development Trust Fund and certain other tribal and/or tribally-related funds. . If Treasury considers any legislative amendments with respect to current law, it will continue its active consultation process with the tribes involved.

Community Development Financial Institutions Fund

<http://cdfifund.gov>

The Community Development Financial Institutions (CDFI) Fund's Native American CDFI Assistance (NACA) Program serves economically distressed Native American, Alaska Native, and Native Hawaiian communities across the nation. As of June 30, 2010, there are 57 certified Native CDFIs.

CDFIs are non-government financial entities whose primary mission is to promote community development, principally by serving and being accountable to a low-income community, and by providing development services. To be certified as a Native CDFI an organization must meet the CDFI eligibility requirements and direct more than 50 percent of its activities to Native communities and/or Native persons.

The CDFI Fund provides two types of funding through the NACA Program. Financial Assistance awards, used primarily for financial capital, are available only to entities that have been certified as Native CDFIs. Technical Assistance grants are available to certified Native CDFIs, Emerging Native CDFIs, and Sponsoring Entities.

- Technical Assistance grants are usually used to acquire products or services including computer technology, staff training, and professional services such as market analysis, and support for other general capacity-building activities.
- Sponsoring entities are unique to the NACA Program. They create and support fledgling Native organizations as they move toward CDFI certification.

On April 30, 2010, the CDFI Fund announced awards totaling \$10.3 million to NACA Program participants in the FY2010 funding round. Awardees' primary financing activities are small business/venture capital (23 awardees), affordable housing (12), and consumer loans (12). In FY2009, awards were made with both ARRA and standard appropriated FY2009 funds. ARRA funded \$8 million in Financial Assistance and Technical Assistance awards to 10 Native CDFIs through the NACA Program. These awards averaged \$800,000 and ranged from \$590,000 to \$878,000. In addition, standard appropriated FY2009 funds provided \$7.7 million in Technical Assistance and Financial Assistance awards to 36 Native institutions. The NACA Program itself is not new, but funding and Native participation increased significantly in 2009 and 2010.

The CDFI fund Native Initiatives website includes a link to a helpful Treasury study on barriers to economic development in Indian Country, and a Native Initiatives Strategic Plan for 2009-2014.

As noted above, the CDFI and Federal Reserve Bank San Francisco Branch, Seattle Office are sponsoring a series of workshops on Economic Development in Indian Country. See

http://www.cdfifund.gov/news_events/CDFI-2010-31CDFIFundAnnouncesNewNativeInitiativesWorkshopSeries.asp

For an example of FR consultation initiated by CDFI, see March 8, 2010 (Volume 75, Number 44)] CDFI request for comments. Also see March 11, 2010 (vol 75, No. 47).

Financial Crimes Enforcement Network

<http://www.fincen.gov>

The Financial Crimes Enforcement Network (FinCEN) typically deals with complex and/or sophisticated financial matters that affect a small number of well-known constituent groups. Casinos are included in this category because they are vulnerable to exploitation through money laundering activities. FinCEN staff working closely with tribally-owned casinos for this reason. An example of FinCEN's outreach through FR notices is included in Appendix D.

Financial Management Services

<http://www.fincen.gov>

Within the Financial Management Services (FMS), some outreach to tribal governments and businesses has been undertaken by Customer Relationship Managers (CRMs), who serve as the central point of contact for Federal Program Agencies (FPAs). CRMs can help FPAs to improve government-wide cash management practices.

FMS Surety FMS administers the surety bond program for the federal government under 31 U.S.C. 9304-9308 for companies who wish to: direct write federal bonds, reinsure federal bonds, and/or be recognized as an Admitted Reinsurer. This spring the POCTC, on the advice of staff from the Office of Domestic Finance, has directed consulting parties to FMS for further information.

Internal Revenue Service

<http://www.irs.gov/tribes>

The overall goal of the IRS' Indian Tribal Governments Office (ITG) is to use partnership opportunities with Indian tribal governments, tribal associations, and other federal agencies to respectfully and cooperatively meet the tax administration needs of both the Indian tribal governments and the federal government. ITG field groups consist of tribal government specialists who work in locations near the seats of tribal governments. ITG specialists can address issues that relate to tribal governments as employers, distributions to tribal members, and the establishment of governmental programs, trusts and businesses. ITG has consulted extensively with tribal governments throughout the development of its programs and is currently leading a review of the IRS to ensure the agency complies with EO 13175. A full description of the current IRS consultation review is included in Appendix E.

Office of Thrift Supervision

<http://www.financialstability.gov>

The Troubled Asset Relief Program Public-Private Investment Program and Community Development Capital Initiative (TARP PPIP and CDCI) programs, established under the Emergency Economic Stabilization Act of 2008 (EESA), were designed to address the financial crisis that developed in that year. Under EESA authority, Treasury contracted with established financial management institutions to evaluate and manage portfolios of troubled assets.

- Treasury contracts strongly encouraged PPIP fund managers to establish sub-contracting relationships with leading small businesses, including veteran-, minority-, and women-owned financial services businesses. The Los Angeles private-equity fund Oaktree Capital Management LP (Oaktree), one of Treasury's primary PPIP contractors, sub-contracted with Inupiat Eskimo-owned Arctic Slope Regional Corporation (Arctic Slope). Oaktree partners and consults with Arctic Slope in investment decisions.
- CDCI, a separate component of TARP, invests lower-cost capital in specified CDFIs that lend to small businesses in the country's hardest-hit communities. Through CDCI, certified NACA CDFIs (described above) may be eligible to receive capital investments at a dividend rate of 2 percent for eight years.

United States Mint

<https://www.usmint.gov>

The Mint's Citizens' Coinage Advisory Committee reviews and discussion of candidate designs for coins and currency. The Mint consults with Native American and Alaskan Native tribes on the design of coins and currency when indicated. For example, consultation has addressed the reverse of the 2011 Native American \$1 Coin.

Appendix B: Possible Criteria for Tribal Consultation

Specific criteria that Treasury Offices and Bureaus may use to identify legislation and regulations requiring consultation with sovereign American Indian and Alaskan Native tribes are suggested below, together with illustrative examples.

1. Programs or policies that target AI/ANs explicitly or directly, and programs that target groups and activities in which AI/ANs are disproportionately represented, should engage in consultation early in the regulation drafting process. For example:
 - Policies that related to the definition of permissible uses for which tribal governments can issue tax exempt debt;
 - Policies that specifically deal with the taxation of benefits provided by tribal governments, such as health care;
 - Programs that seek to increase the availability of capital to Native American owned or controlled financial institutions through additional support for Native American owned CDFIs, directly or as part of a targeted initiative toward similarly situated CDFIs; and
 - Programs that seek to prevent exploitation of Native American tribes and tribal businesses through criminal and terrorist activities, such as money laundering activities that target tribally-owned gambling institutions.¹⁰
2. Tribal consultation process may be required when AI/AN tribes request consultation on substantive issues that are unique to tribal governments, when consultation is requested to address regulatory or legislative activities that are likely to have direct and identifiable economic impacts on Indian tribes, or when it is evident, or should be evident, that the contemplated regulations or legislation could preempt tribal law.

Appendix C: July 2010 Federal Register Notice on Tribal Economic Development Bonds (Tax Policy) (Attached in PDF Format)

Appendix D: January 2009 Federal Register Notice on Financial Reports (FinCEN) (Attached in PDF Format)

Appendix E: Summary of IRS Tribal Consultation Review (Attached in PDF Format)

Endnotes

¹ See: http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2000_register&position=all&page=67249, for a copy of EO 13175.

² For example, the Treasury Financial Crimes Enforcement Network (FinCEN) guidance to gaming organizations is highly specialized, and it directly targets a relatively small number of organizations. Therefore routine requests for comments and guidance that includes brief mention of Indian gaming activities is often sufficient to fulfill EO 13175. For example, see FIN-2990-G004, "Frequently Asked Questions, Casino Recordkeeping, Reporting and Compliance Reporting Requirements, September 30, 2009, extracted 070110 from http://www.fincen.gov/news_room/nr/html/19960222.html ,

³ A summary of IRS ITG tribal consultation procedures are described in Appendix E and further details on their regular consultation process can be found on their website www.irs.gov/tribes.

⁴ Brief descriptions of relevant activities in Treasury Offices and Bureaus are provided in Appendix A.

⁵ This information will provide the basis for annual reports that the Treasury Department is required to submit to OMB under EO 13175.

⁶ The workshop schedule is available at a link titled "ITG Education and Training," at the left of the ITG web site <http://www.irs.gov/tribes/index.html> .

⁷ The workshop schedule, including links to registration sites, is posted at <http://www.frbsf.org/community/resources/events>

⁸ A summary report from the IRS is included in Appendix E,

⁹ This Federal Register notice is included in Appendix D.

¹⁰ See "Anti-Money Laundering Controls for Indian Tribal Casinos," February 22, 1996, posted at http://www.fincen.gov/news_room/nr/html/19960222

the public because the Treasury Department requires frank and full advice from representatives of the financial community prior to making its final decisions on major financing operations. Historically, this advice has been offered by debt management advisory committees established by the several major segments of the financial community. When so utilized, such a committee is recognized to be an advisory committee under 5 U.S.C. App. 2, § 3.

Although the Treasury's final announcement of financing plans may not reflect the recommendations provided in reports of the Committee, premature disclosure of the Committee's deliberations and reports would be likely to lead to significant financial speculation in the securities market. Thus, this meeting falls within the exemption covered by 5 U.S.C. 552b(c)(9)(A).

Treasury staff will provide a technical briefing to the press on the day before the Committee meeting, following the release of a statement of economic conditions and financing estimates. This briefing will give the press an opportunity to ask questions about financing projections. The day after the Committee meeting, Treasury will release the minutes of the meeting, any charts that were discussed at the meeting, and the Committee's report to the Secretary.

The Office of Debt Management is responsible for maintaining records of debt management advisory committee meetings and for providing annual reports setting forth a summary of Committee activities and such other matters as may be informative to the public consistent with the policy of 5 U.S.C. 552(b). The Designated Federal Officer or other responsible agency official who may be contacted for additional information is Fred Pietrangeli, Deputy Director for Office of Debt Management (202) 622-1876.

Dated: July 2, 2010.

Mary Miller,

Assistant Secretary, (Financial Markets).

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DEPARTMENT OF THE TREASURY

Tribal Economic Development Bonds

AGENCY: Department of the Treasury, Departmental Offices.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury ("Treasury") seeks comments

from Indian Tribal Governments regarding the Tribal Economic Development Bond provision in Section 7871(f) of the Internal Revenue Code. The purpose of this solicitation of comments is to assist Treasury in developing recommendations regarding this bond provision for a Congressionally-directed study under the American Recovery and Reinvestment Act of 2009. This solicitation of comments is in furtherance of the objectives of Executive Order 13175 under which Treasury consults with tribal officials in the development of Federal policies that have tribal implications, to reinforce the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes. Additional comments from the general public related to this matter are also welcome.

DATES: Please submit comments on or before September 10, 2010.

FOR FURTHER INFORMATION CONTACT: John J. Cross III, Office of Tax Policy, at (202) 622-1322.

SUPPLEMENTARY INFORMATION:

Introduction and Background

Section 1402 of Title I of Division B of the American Recovery and Reinvestment Act of 2009, Public Law No. 111-5, 123 Stat. 115 (2009) ("ARRA"), added a \$2 billion bond authorization for a new temporary category of tax-exempt bonds with lower borrowing costs for Indian tribal governments, known as "Tribal Economic Development Bonds," under Section 7871(f) of the Internal Revenue Code ("Code") to promote economic development on tribal lands. (Except as noted, section references in this Notice are to the Code.) Section 1402(b) of ARRA directs the Secretary of the Treasury or the Secretary's delegate to conduct a study of the Tribal Economic Development Bond provision and to report back to Congress with recommendations regarding this provision. In a summary of this ARRA provision, the House Ways and Means Committee and the Senate Finance Committee indicated that, in particular, Treasury should study whether to repeal on a permanent basis the existing more restrictive "essential governmental function" standard for tax-exempt governmental bond financing by Indian tribal governments under Section 7871(c). See <http://waysandmeans.house.gov/media/pdf/111/arra.pdf>.

The more restrictive existing standard under Section 7871(c) generally limits

the use of tax-exempt bonds by Indian tribal governments to the financing of certain activities that constitute "essential governmental functions" customarily performed by State and local governments with general taxing powers and certain manufacturing facilities. The essential governmental function standard under Section 7871(c) was enacted originally in 1982 as part of the Indian Tribal Government Tax Status Act, Public Law No. 97-473 (1983), 96 Stat. 2605 ("Tribal Tax Act"). The legislative history to the Tribal Tax Act indicated that essential governmental functions for this purpose included activities such as schools, streets, or sewers, but did not include activities financed with private activity bonds or other commercial or industrial activities. See H.R. Rep. No. 97-982, 97th Cong. 2d Sess. 17 (1982) and S. Rep. No. 97-646, 97th Cong. 2d. Sess. at 13-14 (1982).

In 1987, Section 7871(e) was added to the Code to limit the essential governmental functions standard further to provide that an essential governmental function does not include any function which is not customarily performed by State and local governments with general taxing powers. See The Omnibus Budget Reconciliation Act of 1987, Public Law No. 100-203, 101 Stat. 1330, § 10632(a) (1987). Further, in the legislative history to this provision, the House Ways and Means Committee criticized 1984 Temporary Treasury Regulations under section 7871(c) for treating certain commercial and industrial activities eligible for Federal funding as essential governmental functions and indicated that these regulations were invalid to that extent. H.R. Rep. No. 100-391, 100th Cong. 1st Sess. at 1139 (1987). However, in 1987, Section 7871(c)(3) was added to the Code to allow Indian tribal governments to use tax-exempt bond financing for manufacturing facilities under certain parameters.

The custom-based essential governmental function standard under Section 7871(e) has proven to be a difficult administrative standard and has led to audit disputes, based on difficulties in determining customs, the evolving nature of the functions customarily performed by State and local governments, and increasing involvement of State and local governments in quasi-commercial activities.

In 2006, Treasury and the Internal Revenue Service ("IRS") promulgated an Advance Notice of Proposed Rulemaking regarding the essential governmental function standard for the issuance of tax-exempt bonds by Indian

tribal governments under Section 7871. See 71 FR 45474 (August 9, 2006) (the "2006 Advance Notice"). In the 2006 Advance Notice, Treasury and the IRS indicated that proposed regulations will treat an activity as an essential governmental function that is customarily performed by State and local governments under Section 7871(c) and Section 7871(e) if: (1) There are numerous State and local governments with general taxing powers that have been conducting the activity and financing it with tax-exempt governmental bonds, (2) State and local governments with general taxing powers have been conducting the activity and financing it with tax-exempt governmental bonds for many years, and (3) the activity is not a commercial or industrial activity. The 2006 Advance Notice further indicated that examples of activities customarily performed by State and local governments will include, but will not be limited to, public works projects such as roads, schools, and government buildings.

In general, new Section 7871(f) regarding Tribal Economic Development Bonds gives Indian tribal governments greater flexibility to use tax-exempt bonds to finance economic development projects than is allowable under the existing standard of Section 7871(c). The more flexible standard under new Section 7871(f) generally allows Indian tribal governments to use tax-exempt bonds under a new \$2 billion volume cap to finance economic development projects (excluding certain gaming facilities and excluding projects located outside of Indian reservations under Section 7871(f)(3)(B)) or other activities under comparable standards for which State or local governments are eligible to use tax-exempt bonds under Section 103.

State and local governments generally can use tax-exempt "governmental" bonds (as contrasted with "private activity bonds," as further described herein) to finance an unspecified broad range of projects and activities so long as private involvement is limited sufficiently to avoid classification as private activity bonds. Bonds are classified as private activity bonds if private involvement exceeds both of the following thresholds: (1) More than 10 percent of the bond proceeds are used for private business use; and (2) the debt service on more than 10 percent of bond proceeds is payable or secured from payments or property used for private business use. Thus, under this general standard for State and local governments, bonds qualify as tax-exempt governmental bonds if the bond proceeds are used predominantly for

State or local governmental use. Special rules under Sections 141(b)(3) and 141(c) further limit the use of tax-exempt governmental bonds in certain circumstances involving disproportionate or unrelated private business use and private loans.

By contrast, private business use generally arises from private business ownership, leasing, or certain other arrangements involving private business use of bond-financed facilities. Certain safe harbors allow private businesses to manage governmental facilities under management contracts with prescribed compensation arrangements without resulting in private business use. See Rev. Proc. 97-13, 1997-1 C.B. 632.

Bonds also qualify as tax-exempt governmental bonds if, despite private business use, the bonds are payable predominantly from State or local governmental sources of payment, such as generally applicable taxes.

State and local governments also are eligible to use tax-exempt qualified private activity bonds under Section 141(e) and related provisions without regard to private business use or the level of private involvement to finance certain specified types of projects and activities, including the following: (1) Airports, (2) docks and wharves, (3) mass commuting facilities, (4) facilities for the furnishing of water, (5) sewage facilities, (6) solid waste disposal facilities, (7) qualified low-income residential rental multifamily housing projects, (8) facilities for the local furnishing of electric energy or gas, (9) local district heating or cooling facilities, (10) qualified hazardous waste facilities, (11) high-speed intercity rail facilities, (12) environmental enhancements of hydroelectric generating facilities, (13) qualified public educational facilities, (14) qualified green buildings and sustainable design projects, (15) qualified highway or surface freight transfer facilities, (16) qualified mortgage bonds or qualified veterans mortgage bonds for certain single-family housing mortgage loans, (17) qualified small issue bonds for certain manufacturing facilities, (18) qualified student loan bonds, (19) qualified redevelopment bonds, and (20) qualified 501(c)(3) bonds for exempt charitable and educational activities of Section 501(c)(3) nonprofit organizations.

Subject to certain exceptions, most types of tax-exempt qualified private activity bonds are subject to annual State bond volume caps based on State populations, with adjustments for inflation and minimum allocations for smaller States, and with three-year carryforward periods for unused

allocations. For 2010, each State's private activity bond volume cap is equal to the greater of: (1) \$90 multiplied by the State population; or (2) \$273,775,000. Exceptions to the State private activity bond volume caps apply to certain governmentally-owned projects (including airports, docks and wharves, environmental enhancements of hydroelectric generating facilities, high-speed intercity rail facilities, and solid waste disposal facilities), qualified veterans mortgage bonds, and qualified 501(c)(3) bonds.

In general, the new \$2 billion bond authorization for Tribal Economic Development Bonds under Section 7871(f) allows Indian tribal governments to use tax-exempt bonds to finance an unspecified broad range of governmentally-used projects, including hotels or convention centers, as well as projects involving certain qualified private activities, to the same extent and subject to the same limitations imposed on State and local governments under Section 103. In addition, Tribal Economic Development Bonds may be issued as Build America Bonds under Section 54AA upon satisfaction of the additional eligibility requirements for Build America Bonds. See IRS Chief Counsel Advice No. AM 2009-14 (October 26, 2009).

Section 7871(f)(3)(B) includes certain limitations on Tribal Economic Development Bonds that prohibit the use of any proceeds of these bonds to finance either of the following: (1) Any portion of a building in which class II or class III gaming (as defined in section 4 of the Indian Gaming Regulatory Act) is conducted or housed or any other property actually used in the conduct of such gaming; or (2) any facility located outside the Indian reservation (as defined in Section 168(j)(6)).

Section 7871(f)(1) requires Treasury to allocate the \$2 billion national volume cap for Tribal Economic Development Bonds among Indian tribal governments in such manner as Treasury, in consultation with the Secretary of the Interior, determines to be appropriate.

Pursuant to Notice 2009-51, 2009-28 IRB 128 (July 13, 2009), Treasury and the IRS solicited applications for allocation of the \$2 billion in bond volume cap of Tribal Economic Development Bonds and provided guidance on the application procedures, deadlines, forms, and methodology for allocating this bond volume cap. Generally, Treasury employed a pro rata allocation method to allocate this bond volume cap in two separate \$1 billion phases, subject to specified maximum allocations for any particular Indian tribal government. Treasury and the IRS

announced the results of the two phases of Tribal Economic Development Bond allocations in IRS News Release 2009–81 (September 15, 2009) and IRS News Release 2010–20 (February 11, 2010). For further information regarding these bond allocations, see <http://www.irs.gov> under the heading “Tax-exempt Bond Community” and subheading “IRS Announces Tribal Economic Development Bond Allocations.”

Request for Comment on Particular Questions

In order to assist Treasury in developing recommendations for its study of the Tribal Economic Development Bond provision, Treasury seeks public comment on the following particular questions.

Whether the State or Local Governmental Standard for Tax-Exempt Governmental Bond Status Should Replace the Essential Governmental Function Standard

A State or local governmental bond is treated as a tax-exempt governmental bond (rather than a private activity bond) under Section 141 if either 90 percent or more of the bond proceeds are used for governmental use (*i.e.*, not private business use) or 90 percent or more of the debt service on the bonds is payable or secured from governmental payments or property, as previously described herein. In treating Indian tribal government use of facilities financed with Tribal Economic Development Bonds as governmental use under Section 141, the Tribal Economic Development Bond provision effectively applies this standard.

1. In general, should consideration be given to changing the law permanently to apply the standard described above, applicable to State and local governments under Section 141, with respect to tax-exempt bond financing for Indian tribal governments (rather than the existing essential governmental function standard under Section 7871(c))?

2. Would focusing on Indian tribal governmental use of bond-financed facilities (rather than essential governmental functions) under the standard applicable to State and local governments provide Indian tribal governments with a sufficiently workable and flexible standard for tax-exempt governmental bond financing?

3. In determining qualified governmental sources of payment for tax-exempt governmental bonds for Indian tribal governments, should special consideration be given to any unique sources of revenue for Indian tribal governments, including (i) income

derived from tribal lands held in trust by the Department of the Interior, (ii) state and local government revenues from oil, gas, or other natural resources on Indian tribal government lands, or (iii) revenue derived from gaming or other tribally owned corporate interests, in comparison to the general tax-based sources of revenue for State and local governments?

Types of Projects and Activities Eligible for Financing With Private Activity Bonds

For State and local governments, Section 141 provides that certain specific types of projects and activities may be financed with qualified tax-exempt private activity bonds, as described previously herein.

4. Should consideration be given to changing the law permanently to authorize Indian tribal governments to use qualified tax-exempt private activity bonds for the same types of projects and activities as are allowed for State and local governments?

5. Are there any specific additional types of projects or activities beyond those allowed for State and local governments for which Indian tribal governments should be authorized (or not authorized) to use qualified tax-exempt private activity bonds (*i.e.*, in which private business ownership, leasing, or other private business use of the bond-financed projects would be permitted) in light of their special needs or unique circumstances? For example, would federal corporations chartered under Section 17 of the Indian Reorganization Act of 1934 (25 U.S.C. 477) require special provisions to use qualified tax-exempt private activity bonds?

Private Activity Bond Volume Cap Considerations

In the case of State and local governments, an annual State bond volume cap applies to qualified tax-exempt private activity bonds based on State populations. For 2010, each State's private activity bond volume cap is equal to the greater of: (1) \$90 multiplied by the State population; or (2) \$273,775,000. In the case of Indian tribal governments, the new Tribal Economic Development Bond provision under Section 7871(f) included a \$2 billion total national bond volume cap on these bonds.

6. If Congress were to determine that it was necessary to impose some form of bond volume cap on the use of qualified tax-exempt private activity bonds by Indian tribal governments similar to that imposed on State and local governments, how specifically should

such a bond volume cap be structured to best promote fair, effective, and workable use? One option would be to allocate the private activity bond volume cap among Indian tribal governments based on population, coupled with some minimum allocation for small Indian tribal governments. Another option, similar to that used for the \$2 billion Tribal Economic Development Bond authorization, would be for Treasury (or another Federal agency, such as the Department of the Interior's Bureau of Indian Affairs) to allocate the volume cap using some prescribed method, such as a population-based allocation method that incorporates an adjustment factor to take into account holdings of land and other natural resources in the case of tribes with small populations. Suggestions for other alternative allocation methods are welcome.

Considerations Regarding the Restriction Against Financing Projects Located Outside of Indian Reservations

Section 7871(f)(3)(B)(ii) includes a restriction that limits the use of Tribal Economic Development Bonds to the financing of projects that are located on Indian reservations (as defined in Section 168(j)(6)). Section 168(j)(6) provides that the term “Indian reservation” means a reservation as defined in § 3(d) of the Indian Financing Act of 1974, 25 U.S.C. 1452(d), applied by treating the term “Indian reservations in Oklahoma” as including only lands that are within the jurisdictional area of an Oklahoma Indian tribe (as determined by the Secretary of the Interior) and which are recognized by the Secretary of the Interior as eligible for trust land status under 25 CFR part 151 (as in effect on August 5, 1997 or a reservation defined in § 4(10) of the Indian Child Welfare Act of 1978, 25 U.S.C. 1903(10).

7. Should the limitation on use of Tribal Economic Development Bonds to finance projects that are located outside of Indian reservations be modified to address special needs or unique circumstances of Indian tribal governments? For example, should consideration be given to allowing the use of Tribal Economic Development Bonds to finance projects within some prescribed reasonable proximity to Indian reservations or projects located on land owned by Indian tribal governments which has not formally been designated in trust as part of an Indian reservation?

Considerations Regarding the Restriction Against Financing Gaming Facilities

Section 7871(f)(3)(B)(i) prohibits the use of Tribal Economic Development Bonds to finance any portion of a building in which class II or class III gaming (as defined in section 4 of the Indian Gaming Regulatory Act) is conducted or housed or any other property actually used in the conduct of such gaming.

8. Should the prohibition on the use of Tribal Economic Development Bonds to finance gaming facilities be modified to address special needs or unique circumstances of Indian tribal governments?

Additional General Comments on Special Needs or Unique Circumstances of Indian Tribal Governments

9. Are there additional factors that should be considered in refining the statutory scope of tax-exempt bond financing for Indian tribal governments to better address the special needs or unique circumstances of Indian tribal governments? Such factors might include, for example, special sources of revenue, priority government-like activities, geographic distribution and legal status of land associated with Indian tribal governments, or credit market access considerations.

Certain Identifying Information

When submitting comments, please include your name, affiliation, address, e-mail address, and telephone number.

Comments are Public Information

All comments received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. Commentators should submit only information that they wish to make available publicly.

ADDRESSES: Please submit comments electronically through Tribal.Consult@do.treas.gov. Alternatively, comments may be mailed to: Tribal Economic Development Bond Comments, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Room 3454, Washington, DC 20220.

Dated: July 6, 2010.

Michael F. Mundaca,

Assistant Secretary for Tax Policy, U.S. Department of the Treasury.

[FR Doc. 2010-16881 Filed 7-9-10; 8:45 am]

BILLING CODE 4810-25-P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

Proposed Information Collections; Comment Request

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of our continuing effort to reduce paperwork and respondent burden, and as required by the Paperwork Reduction Act of 1995, we invite comments on the proposed or continuing information collections listed below in this notice.

DATES: We must receive your written comments on or before September 10, 2010.

ADDRESSES: You may send comments to Mary A. Wood, Alcohol and Tobacco Tax and Trade Bureau, at any of these addresses:

- P.O. Box 14412, Washington, DC 20044-4412;

- 202-453-2686 (facsimile); or

- formcomments@ttb.gov (e-mail).

Please send separate comments for each specific information collection listed below. You must reference the information collection's title, form or recordkeeping requirement number, and OMB number (if any) in your comment. If you submit your comment via facsimile, send no more than five 8.5 × 11 inch pages in order to ensure electronic access to our equipment.

FOR FURTHER INFORMATION CONTACT: To obtain additional information, copies of the information collection and its instructions, or copies of any comments received, contact Mary A. Wood, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044-4412; or telephone 202-453-2265.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Department of the Treasury and its Alcohol and Tobacco Tax and Trade Bureau (TTB), as part of their continuing effort to reduce paperwork and respondent burden, invite the general public and other Federal agencies to comment on the proposed or continuing information collections listed below in this notice, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Comments submitted in response to this notice will be included or summarized in our request for Office of Management and Budget (OMB) approval of the relevant information

collection. All comments are part of the public record and subject to disclosure. Please do not include any confidential or inappropriate material in your comments.

We invite comments on: (a) Whether this information collection is necessary for the proper performance of the agency's functions, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the information collection's burden; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the information collection's burden on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide the requested information.

Information Collections Open for Comment

Currently, we are seeking comments on the following forms and recordkeeping requirements:

Title: Brewer's Report of Operations and Brewpub Report of Operations.

OMB Control Number: 1513-0007.

TTB Form Numbers: 5130.9 and 5130.26.

Abstract: Brewers periodically file these reports of their operations to account for activity relating to taxable commodities. TTB uses this information primarily for revenue protection, for audit purposes, and to determine whether an activity is in compliance with the requirements of law. We also use this information to publish periodical statistical releases of use and interest to the industry.

Current Actions: We are submitting this information collection as a revision. We are correcting the number of respondents and burden hours; however, the information collection instruments remain unchanged.

Type of Review: Revision of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 2,026.

Estimated Total Annual Burden Hours: 12,152.

Title: Brewer's Bond; Brewer's Bond Continuation Certificate; Brewer's Collateral Bond; and Brewer's Collateral Bond Continuation Certificate.

OMB Control Number: 1513-0015.

TTB Form Numbers: 5130.22, 5130.23, 5130.25, and 5130.27, respectively.

Abstract: The Internal Revenue Code requires brewers to give a bond to

bullion to the petitioner or when the Secretary is not convinced that the petitioner was an innocent purchaser or holder without knowledge that the gold coins were counterfeit.

PART 103—FINANCIAL RECORD-KEEPING AND REPORTING OF CURRENCY AND FOREIGN TRANSACTIONS

Subpart A—Definitions

Sec.

103.11 Meaning of terms.

Subpart B—Reports Required To Be Made

- 103.15 Determination by the Secretary.
- 103.18 Reports by banks of suspicious transactions.
- 103.20 Reports by money services businesses of suspicious transactions.
- 103.22 Reports of transactions in currency.
- 103.23 Reports of transportation of currency or monetary instruments.
- 103.24 Reports of foreign financial accounts.
- 103.25 Reports of transactions with foreign financial agencies.
- 103.26 Reports of certain domestic coin and currency transactions.
- 103.27 Filing of reports.
- 103.28 Identification required.
- 103.29 Purchases of bank checks and drafts, cashier's checks, money orders and traveler's checks.

Subpart C—Records Required To Be Maintained

- 103.31 Determination by the Secretary.
- 103.32 Records to be made and retained by persons having financial interests in foreign financial accounts.
- 103.33 Records to be made and retained by financial institutions.
- 103.34 Additional records to be made and retained by banks.
- 103.35 Additional records to be made and retained by brokers or dealers in securities.
- 103.36 Additional records to be made and retained by casinos.
- 103.37 Additional records to be made and retained by currency dealers or exchangers.
- 103.38 Nature of records and retention period.
- 103.39 Person outside the United States.

Subpart D—Special Rules for Money Services Businesses

- 103.41 Registration of money services businesses.

Subpart E—General Provisions

- 103.51 Dollars as including foreign currency.
- 103.52 Photographic or other reproductions of Government obligations.
- 103.53 Availability of information.
- 103.54 Disclosure.
- 103.55 Exceptions, exemptions, and reports.
- 103.56 Enforcement.
- 103.57 Civil penalty.
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- 103.60 Enforcement authority with respect to transportation of currency or monetary instruments.
- 103.61 Access to records.
- 103.62 Rewards for informants.
- 103.63 Structured transactions.
- 103.64 Special rules for casinos.

Subpart F—Summons

- 103.71 General.
- 103.72 Persons who may issue summons.
- 103.73 Contents of summons.
- 103.74 Service of summons.
- 103.75 Examination of witnesses and records.
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- 103.77 Payment of expenses.

Subpart G—Administrative Rulings

- 103.80 Scope.
- 103.81 Submitting requests.
- 103.82 Nonconforming requests.
- 103.83 Oral communications.
- 103.84 Withdrawing requests.
- 103.85 Issuing rulings.
- 103.86 Modifying or rescinding rulings.
- 103.87 Disclosing information.

APPENDIX TO PART 103—ADMINISTRATIVE RULINGS

AUTHORITY: 12 U.S.C. 1829b and 1951-1959; 31 U.S.C. 5311-5330.

SOURCE: 37 FR 6912, Apr. 5, 1972, unless otherwise noted.

Subpart A—Definitions

§ 103.11 Meaning of terms.

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

(a) *Accept.* A receiving financial institution, other than the recipient's financial institution, accepts a transmittal order by executing the transmittal order. A recipient's financial institution accepts a transmittal order

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by paying the recipient, by notifying the recipient of the receipt of the order or by otherwise becoming obligated to carry out the order.

(b) *At one time.* For purposes of § 103.23 of this part, a person who transports, mails, ships or receives; is about to or attempts to transport, mail or ship; or causes the transportation, mailing, shipment or receipt of monetary instruments, is deemed to do so "at one time" if:

(1) That person either alone, in conjunction with or on behalf of others;

(2) Transports, mails, ships or receives in any manner; is about to transport, mail or ship in any manner; or causes the transportation, mailing, shipment or receipt in any manner of;

(3) Monetary instruments;

(4) Into the United States or out of the United States;

(5) Totaling more than \$10,000;

(6) (i) On one calendar day or (ii) if for the purpose of evading the reporting requirements of § 103.23, on one or more days.

(c) *Bank.* Each agent, agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) A commercial bank or trust company organized under the laws of any State or of the United States;

(2) A private bank;

(3) A savings and loan association or a building and loan association organized under the laws of any State or of the United States;

(4) An insured institution as defined in section 401 of the National Housing Act;

(5) A savings bank, industrial bank or other thrift institution;

(6) A credit union organized under the law of any State or of the United States;

(7) Any other organization (except a money services business) chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a State;

(8) A bank organized under foreign law;

(9) Any national banking association or corporation acting under the provisions of section 25(a) of the Act of Dec. 23, 1913, as added by the Act of Dec. 24,

1919, ch. 18, 41 Stat. 378, as amended (12 U.S.C. 611-32).

(d) *Beneficiary.* The person to be paid by the beneficiary's bank.

(e) *Beneficiary's bank.* The bank or foreign bank identified in a payment order in which an account of the beneficiary is to be credited pursuant to the order or which otherwise is to make payment to the beneficiary if the order does not provide for payment to an account.

(f) *Broker or dealer in securities.* A broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

(g) *Common carrier.* Any person engaged in the business of transporting individuals or goods for a fee who holds himself out as ready to engage in such transportation for hire and who undertakes to do so indiscriminately for all persons who are prepared to pay the fee for the particular service offered.

(h) *Currency.* The coin and paper money of the United States or of any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issuance. Currency includes U.S. silver certificates, U.S. notes and Federal Reserve notes. Currency also includes official foreign bank notes that are customarily used and accepted as a medium of exchange in a foreign country.

(i) [Reserved]

(j) *Deposit account.* Deposit accounts include transaction accounts described in paragraph (q) of this section, savings accounts, and other time deposits.

(k) *Domestic.* When used herein, refers to the doing of business within the United States, and limits the applicability of the provision where it appears to the performance by such institutions or agencies of functions within the United States.

(l) *Established customer.* A person with an account with the financial institution, including a loan account or deposit or other asset account, or a person with respect to which the financial institution has obtained and maintains on file the person's name and address, as well as taxpayer identification number (e.g., social security or employer

identification number) or, if none, alien identification number or passport number and country of issuance, and to which the financial institution provides financial services relying on that information.

(m) *Execution date.* The day on which the receiving financial institution may properly issue a transmittal order in execution of the sender's order. The execution date may be determined by instruction of the sender but cannot be earlier than the day the order is received, and, unless otherwise determined, is the day the order is received. If the sender's instruction states a payment date, the execution date is the payment date or an earlier date on which execution is reasonably necessary to allow payment to the recipient on the payment date.

(n) *Financial institution.* Each agent, agency, branch, or office within the United States of any person doing business, whether or not on a regular basis or as an organized business concern, in one or more of the capacities listed below:

(1) A bank (except bank credit card systems);

(2) A broker or dealer in securities;

(3) A money services business as defined in paragraph (uu) of this section;

(4) A telegraph company;

(5)(i) *Casino.* A casino or gambling casino that: Is duly licensed or authorized to do business as such in the United States, whether under the laws of a State or of a Territory or Insular Possession of the United States, or under the Indian Gaming Regulatory Act or other federal, state, or tribal law or arrangement affecting Indian lands (including, without limitation, a casino operating on the assumption or under the view that no such authorization is required for casino operation on Indian lands); and has gross annual gaming revenue in excess of \$1 million. The term includes the principal headquarters and every domestic branch or place of business of the casino.

(ii) For purposes of this paragraph (i)(7), "gross annual gaming revenue" means the gross gaming revenue received by a casino, during either the previous business year or the current business year of the casino. A casino or gambling casino which is a casino for

purposes of this part solely because its gross annual gaming revenue exceeds \$1,000,000 during its current business year, shall not be considered a casino for purposes of this part prior to the time in its current business year that its gross annual gaming revenue exceeds \$1,000,000.

(iii) Any reference in this part, other than in this paragraph (n)(7) and in paragraph (n)(8) of this section, to a casino shall also include a reference to a card club, unless the provision in question contains specific language varying its application to card clubs or excluding card clubs from its application;

(6)(i) *Card club.* A card club, gaming club, card room, gaming room, or similar gaming establishment that is duly licensed or authorized to do business as such in the United States, whether under the laws of a State, of a Territory or Insular Possession of the United States, or of a political subdivision of any of the foregoing, or under the Indian Gaming Regulatory Act or other federal, state, or tribal law or arrangement affecting Indian lands (including, without limitation, an establishment operating on the assumption or under the view that no such authorization is required for operation on Indian lands for an establishment of such type), and that has gross annual gaming revenue in excess of \$1,000,000. The term includes the principal headquarters and every domestic branch or place of business of the establishment. The term "casino," as used in this Part shall include a reference to "card club" to the extent provided in paragraph (n)(7)(iii) of this section.

(ii) For purposes of this paragraph (n)(8), *gross annual gaming revenue* means the gross revenue derived from or generated by customer gaming activity (whether in the form of per-game or per-table fees, however computed, rentals, or otherwise) and received by an establishment, during either the establishment's previous business year or its current business year. A card club that is a financial institution for purposes of this Part solely because its gross annual revenue exceeds \$1,000,000 during its current business year, shall not be considered a financial institution for purposes of this Part prior to the time in its current business year

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when its gross annual revenue exceeds \$1,000,000;

(7) A person subject to supervision by any state or federal bank supervisory authority.

(o) *Foreign bank.* A bank organized under foreign law, or an agency, branch or office located outside the United States of a bank. The term does not include an agent, agency, branch or office within the United States of a bank organized under foreign law.

(p) *Foreign financial agency.* A person acting outside the United States for a person (except for a country, a monetary or financial authority acting as a monetary or financial authority, or an international financial institution of which the United States Government is a member) as a financial institution, bailee, depository trustee, or agent, or acting in a similar way related to money, credit, securities, gold, or a transaction in money, credit, securities, or gold.

(q) *Funds transfer.* The series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order. The term includes any payment order issued by the originator's bank or an intermediary bank intended to carry out the originator's payment order. A funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order. Funds transfers governed by the Electronic Fund Transfer Act of 1978 (Title XX, Pub. L. 95-630, 92 Stat. 3728, 15 U.S.C. 1693, *et seq.*), as well as any other funds transfers that are made through an automated clearinghouse, an automated teller machine, or a point-of-sale system, are excluded from this definition.

(r) *Intermediary bank.* A receiving bank other than the originator's bank or the beneficiary's bank.

(s) *Intermediary financial institution.* A receiving financial institution, other than the transmitter's financial institution or the recipient's financial institution. The term intermediary financial institution includes an intermediary bank.

(t) *Investment security.* An instrument which:

(1) Is issued in bearer or registered form;

(2) Is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment;

(3) Is either one of a class or series or by its terms is divisible into a class or series of instruments; and

(4) Evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

(u) *Monetary instruments.* (1) Monetary instruments include:

(i) Currency;

(ii) Traveler's checks in any form;

(iii) All negotiable instruments (including personal checks, business checks, official bank checks, cashier's checks, third-party checks, promissory notes (as that term is defined in the Uniform Commercial Code), and money orders) that are either in bearer form, endorsed without restriction, made out to a fictitious payee (for the purposes of § 103.23), or otherwise in such form that title thereto passes upon delivery;

(iv) Incomplete instruments (including personal checks, business checks, official bank checks, cashier's checks, third-party checks, promissory notes (as that term is defined in the Uniform Commercial Code), and money orders) signed but with the payee's name omitted; and

(v) Securities or stock in bearer form or otherwise in such form that title thereto passes upon delivery.

(2) Monetary instruments do not include warehouse receipts or bills of lading.

(v) *Originator.* The sender of the first payment order in a funds transfer.

(w) *Originator's bank.* The receiving bank to which the payment order of the originator is issued if the originator is not a bank or foreign bank, or the originator if the originator is a bank or foreign bank.

(x) *Payment date.* The day on which the amount of the transmittal order is payable to the recipient by the recipient's financial institution. The payment date may be determined by instruction of the sender, but cannot be

earlier than the day the order is received by the recipient's financial institution and, unless otherwise prescribed by instruction, is the date the order is received by the recipient's financial institution.

(y) *Payment order.* An instruction of a sender to a receiving bank, transmitted orally, electronically, or in writing, to pay, or to cause another bank or foreign bank to pay, a fixed or determinable amount of money to a beneficiary if:

(1) The instruction does not state a condition to payment to the beneficiary other than time of payment;

(2) The receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender; and

(3) The instruction is transmitted by the sender directly to the receiving bank or to an agent, funds transfer system, or communication system for transmittal to the receiving bank.

(z) *Person.* An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, an Indian Tribe (as that term is defined in the Indian Gaming Regulatory Act), and all entities cognizable as legal personalities.

(aa) *Receiving bank.* The bank or foreign bank to which the sender's instruction is addressed.

(bb) *Receiving financial institution.* The financial institution or foreign financial agency to which the sender's instruction is addressed. The term receiving financial institution includes a receiving bank.

(cc) *Recipient.* The person to be paid by the recipient's financial institution. The term recipient includes a beneficiary, except where the recipient's financial institution is a financial institution other than a bank.

(dd) *Recipient's financial institution.* The financial institution or foreign financial agency identified in a transmittal order in which an account of the recipient is to be credited pursuant to the transmittal order or which otherwise is to make payment to the recipient if the order does not provide for payment to an account. The term recipient's financial institution includes

a beneficiary's bank, except where the beneficiary is a recipient's financial institution.

(ee) *Secretary.* The Secretary of the Treasury or any person duly authorized by the Secretary to perform the function mentioned.

(ff) *Sender.* The person giving the instruction to the receiving financial institution.

(gg) *Structure (structuring).* For purposes of section 103.53, a person structures a transaction if that person, acting alone, or in conjunction with, or on behalf of, other persons, conducts or attempts to conduct one or more transactions in currency, in any amount, at one or more financial institutions, on one or more days, in any manner, for the purpose of evading the reporting requirements under section 103.22 of this part. "In any manner" includes, but is not limited to, the breaking down of a single sum of currency exceeding \$10,000 into smaller sums, including sums at or below \$10,000, or the conduct of a transaction, or series of currency transactions, including transactions at or below \$10,000. The transaction or transactions need not exceed the \$10,000 reporting threshold at any single financial institution on any single day in order to constitute structuring within the meaning of this definition.

(hh) *Transaction account.* Transaction accounts include those accounts described in 12 U.S.C. 461(b)(1)(C), money market accounts and similar accounts that take deposits and are subject to withdrawal by check or other negotiable order.

(ii) *Transaction.* (1) Except as provided in paragraph (ii)(2) of this section, transaction means a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument or investment security, purchase or redemption of any money order, payment or order for any money remittance or

transfer, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected.

(2) For purposes of § 103.22, and other provisions of this part relating solely to the report required by that section, the term "transaction in currency" shall mean a transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency, is not a transaction in currency for this purpose.

(jj) *Transmittal of funds.* A series of transactions beginning with the transmittor's transmittal order, made for the purpose of making payment to the recipient of the order. The term includes any transmittal order issued by the transmittor's financial institution or an intermediary financial institution intended to carry out the transmittor's transmittal order. The term transmittal of funds includes a funds transfer. A transmittal of funds is completed by acceptance by the recipient's financial institution of a transmittal order for the benefit of the recipient of the transmittor's transmittal order. Funds transfers governed by the Electronic Fund Transfer Act of 1978 (Title XX, Pub. L. 95-630, 92 Stat. 3728, 15 U.S.C. 1693, *et seq.*), as well as any other funds transfers that are made through an automated clearinghouse, an automated teller machine, or a point-of-sale system, are excluded from this definition.

(kk) *Transmittal order.* The term transmittal order includes a payment order and is an instruction of a sender to a receiving financial institution, transmitted orally, electronically, or in writing, to pay, or cause another financial institution or foreign financial agency to pay, a fixed or determinable amount of money to a recipient if:

(1) The instruction does not state a condition to payment to the recipient other than time of payment;

(2) The receiving financial institution is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender; and

(3) The instruction is transmitted by the sender directly to the receiving financial institution or to an agent or communication system for transmittal to the receiving financial institution.

(ll) *Transmittor.* The sender of the first transmittal order in a transmittal of funds. The term transmittor includes an originator, except where the transmittor's financial institution is a financial institution or foreign financial agency other than a bank or foreign bank.

(mm) *Transmittor's financial institution.* The receiving financial institution to which the transmittal order of the transmittor is issued if the transmittor is not a financial institution or foreign financial agency, or the transmittor if the transmittor is a financial institution or foreign financial agency. The term transmittor's financial institution includes an originator's bank, except where the originator is a transmittor's financial institution other than a bank or foreign bank.

(nn) *United States.* The States of the United States, the District of Columbia, the Indian lands (as that term is defined in the Indian Gaming Regulatory Act), and the Territories and Insular Possessions of the United States.

(oo) *Business day.* Business day, as used in this part with respect to banks, means that day, as normally communicated to its depository customers, on which a bank routinely posts a particular transaction to its customer's account.

(pp) *Postal Service.* The United States Postal Service.

(qq) *FinCEN.* FinCEN means the Financial Crimes Enforcement Network, an office within the Office of the Under Secretary (Enforcement) of the Department of the Treasury.

(rr) *Indian Gaming Regulatory Act.* The Indian Gaming Regulatory Act of 1988, codified at 25 U.S.C. 2701-2721 and 18 U.S.C. 1166-68.

(ss) *State.* The States of the United States and, wherever necessary to carry out the provisions of this part, the District of Columbia.

(tt) *Territories and Insular Possessions.* The Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern

Mariana Islands, and all other territories and possessions of the United States other than the Indian lands and the District of Columbia.

(uu) *Money services business.* Each agent, agency, branch, or office within the United States of any person doing business, whether or not on a regular basis or as an organized business concern, in one or more of the capacities listed in paragraphs (uu)(1) through (uu)(6) of this section. Notwithstanding the preceding sentence, the term "money services business" shall not include a bank, nor shall it include a person registered with, and regulated or examined by, the Securities and Exchange Commission or the Commodity Futures Trading Commission.

(1) *Currency dealer or exchanger.* A currency dealer or exchanger (other than a person who does not exchange currency in an amount greater than \$1,000 in currency or monetary or other instruments for any person on any day in one or more transactions).

(2) *Check casher.* A person engaged in the business of a check casher (other than a person who does not cash checks in an amount greater than \$1,000 in currency or monetary or other instruments for any person on any day in one or more transactions).

(3) *Issuer of traveler's checks, money orders, or stored value.* An issuer of traveler's checks, money orders, or stored value (other than a person who does not issue such checks or money orders or stored value in an amount greater than \$1,000 in currency or monetary or other instruments to any person on any day in one or more transactions).

(4) *Seller or redeemer of traveler's checks, money orders, or stored value.* A seller or redeemer of traveler's checks, money orders, or stored value (other than a person who does not sell such checks or money orders or stored value in an amount greater than \$1,000 in currency or monetary or other instruments to or redeem such instruments for an amount greater than \$1,000 in currency or monetary or other instruments from, any person on any day in one or more transactions).

(5) *Money transmitter—(i) In general.* Money transmitter:

(A) Any person, whether or not licensed or required to be licensed, who

engages as a business in accepting currency, or funds denominated in currency, and transmits the currency or funds, or the value of the currency or funds, by any means through a financial agency or institution, a Federal Reserve Bank or other facility of one or more Federal Reserve Banks, the Board of Governors of the Federal Reserve System, or both, or an electronic funds transfer network; or

(B) Any other person engaged as a business in the transfer of funds.

(ii) *Facts and circumstances; Limitation.* Whether a person "engages as a business" in the activities described in paragraph (uu)(5)(i) of this section is a matter of facts and circumstances. Generally, the acceptance and transmission of funds as an integral part of the execution and settlement of a transaction other than the funds transmission itself (for example, in connection with a bona fide sale of securities or other property), will not cause a person to be a money transmitter within the meaning of paragraph (uu)(5)(i) of this section.

(6) *United States Postal Service.* The United States Postal Service, except with respect to the sale of postage or philatelic products.

(vv) *Stored value.* Funds or monetary value represented in digital electronics format (whether or not specially encrypted) and stored or capable of storage on electronic media in such a way as to be retrievable and transferable electronically.

[52 FR 11441, Apr. 8, 1987; 52 FR 12641, Apr. 17, 1987, as amended at 53 FR 777, Jan. 13, 1988; 53 FR 4138, Feb. 12, 1988; 54 FR 3027, Jan. 23, 1989; 54 FR 28418, July 6, 1989; 55 FR 20143, May 15, 1990; 58 FR 13546, Mar. 12, 1993; 60 FR 228, Jan. 3, 1995; 61 FR 4331, Feb. 5, 1996; 61 FR 7055, Feb. 23, 1996; 61 FR 14249, 14385, Apr. 1, 1996; 63 FR 1923, Jan. 13, 1998; 64 FR 45450, Aug. 20, 1999; 65 FR 13692, Mar. 14, 2000]

Subpart B—Reports Required To Be Made

§ 103.15 Determination by the Secretary.

The Secretary hereby determines that the reports required by this subpart have a high degree of usefulness in



COMMISSIONER
TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
Washington, D.C. 20224

JUL 27 2010

MEMORANDUM FOR AARON KLEIN
DEPUTY ASSISTANT SECRETARY FOR POLICY
COORDINATION (OFFICE FOR ECONOMIC POLICY)

FROM: Sarah Hall Ingram *Sarah Hall Ingram*
Commissioner, Tax Exempt and Government Entities

SUBJECT: Summary of Internal Revenue Service
Tribal Consultation Review

This memorandum responds to Deputy Secretary Wolin's March 9, 2010, request that the Internal Revenue Service (IRS) conduct a review of operations and initiatives for potential tribal implications. This review was requested as part of the Treasury Department's effort to develop and implement a comprehensive consultation process. This memorandum provides a summary of the IRS review.

Background

The IRS established the Indian Tribal Governments Office (ITG) in 2000 as part of the overall restructuring of the Service. ITG is part of the Tax Exempt and Government Entities Division (TE/GE) and is charged with both education and compliance efforts related to federally recognized tribes and the Internal Revenue Code. ITG is also designated as the single point of contact for tribes in order to ensure that the IRS interacts on a government-to-government basis with the tribal governments. ITG staff receives specialized training in Federal Indian Law and Protocol.

In 2002, the Advisory Committee to Tax Exempt and Government Entities (ACT) issued a public report titled "Recommended Process for the Internal Revenue Service to Follow in Developing a Tribal Consultation Policy" (copy attached). The purpose of the ACT report was to provide recommendations to the IRS on steps the agency should take to develop and implement tribal consultation procedures. The ACT reviewed policies and procedures of various Federal agencies, which had been put in place following issuance of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, and used those to formulate best practice recommendations for the Service.

ITG accepted the recommendations and embarked upon a series of working meetings with tribal leaders using an iterative process to draft consultation principles for use at the IRS. The individual tribal leaders participation varied over time. Items discussed with the tribal leaders included communications protocols, determining the appropriate party to contact within a Tribal Government, possible procedures to follow, and the necessity of a periodic review of any process implemented. Tribal leaders thought it was very important for the procedures to apply to the entire IRS and not just the Indian Tribal Governments Office. They also recommended that the IRS allow for both relational and issue-based consultation, with reasonable time frames for responses from the tribes. Finally, on matters involving specific Federal tax disputes, the tribal leaders highlighted the need to respect privacy and disclosure rules under Section 6103 of the Internal Revenue Code. They agreed with the IRS that such matters should not fall within any procedures developed.

Although formal procedures were never implemented, principles developed in the process are utilized in ITG business practices. For example, ITG holds several regional "listening meetings" each year in order to gather feedback directly from tribes on Federal tax issues that affect them. ITG has also coordinated with other IRS functions to draft and implement Internal Revenue Manual (IRM) procedures relating to tribal interactions.

However, ITG does not have jurisdiction over every Federal tax matter that may be related to tribes. For example, ITG does not have jurisdiction over tribal member issues, collection procedures, charities, pensions, nor provisions relating to Alaska Native Claims Settlement Act corporations. Thus, a review of each operating division within the IRS was deemed necessary in order to capture all matters related to tribes.

Due to the unique role of ITG within the IRS, the Commissioner of the IRS designated the TE/GE Division and the ITG Office to lead a Service-wide review of agency practices and procedures in order to identify any policies, procedures, actions or issues that are underway or under consideration, which may result in an impact upon an Indian tribe.

Methodology

Each Operating Division within the IRS and the Office of Chief Counsel was asked to identify any current or pending policy, action, issue or procedure that may impact tribal individuals, organizations, governments, or businesses. The review requested was intentionally broad to ensure all potential items were identified. To facilitate the review, each division was provided with an explanatory letter and a template. The purpose of the template was to capture the issue, the timing of the issue, the external or internal impact of the issue on tribes or the IRS, and whether any consultation on the issue had occurred or was proposed.

Summary of Results

Information gathered includes technical and legal issues, as well as process and procedural aspects of IRS matters. The information gathered can generally be divided into three categories: 1) Items that have a clear and direct impact upon tribes; 2) Items that have a disparate impact upon tribes; and 3) Items that have no unique impact upon tribes.

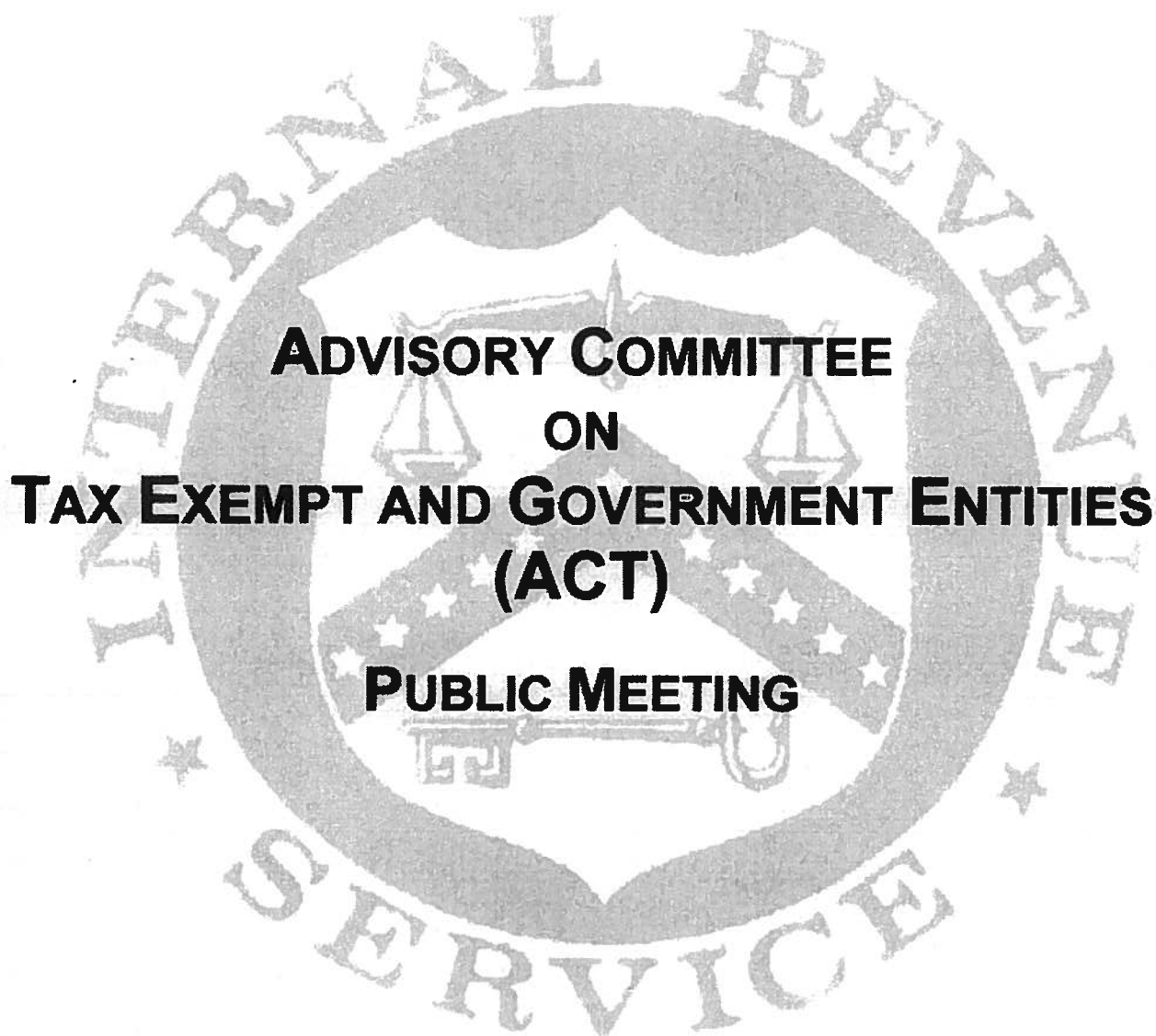
In addition to the level of impact, the information gathered indicates that approximately one third of the issues raised relate to the lack of clarity regarding how a particular piece of tax authority applies to tribes. This lack of clarity creates a challenge for both the IRS and the tribes.

The review reflects a diversity of activities and understanding across the Service regarding matters with tribal impact, and reinforces the need to craft procedures carefully. The review indicates that the Office of Chief Counsel may be uniquely situated to spot and address tribal issues as a result of regulatory or guidance development. The review also revealed that IRM procedures currently in place are used by the Service's field agents in their interactions with the tribes only when placed in the portion of the IRM relevant to them.

Conclusion

While the IRS does have an Office of Indian Tribal Governments (ITG) with knowledgeable staff to address many tribal tax matters, ITG does not have jurisdiction over every issue or program with potential tribal impact. Due to the wide range of issues and procedures identified in the IRS review, we believe it will be necessary to put additional internal procedures and guidelines in place to ensure IRS compliance with any consultation policy the Treasury Department adopts.

Attachment



**1111 Constitution Ave., NW
Washington, DC
June 21, 2002**

**ADVISORY COMMITTEE ON TAX EXEMPT AND GOVERNMENT ENTITIES
(ACT)**

**III. TRIBAL CONSULTATION POLICY
PROJECT GROUP**

DAVID MULLON, PROJECT LEADER
JAYNE FAWCETT
PERRY ISRAEL

JUNE 21, 2002
