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CONGRESS NEEDS TO CLARIFY AND CODIFY TREATMENT OF TRIBAL GOVERNMENT SPONSORED RETIREMENT PLANS AS "GOVERNMENTAL PLANS" UNDER IRC 414(d) AND ERISA 3(32) BY ENACTING HR 331 AND S 673, THE GOVERNMENTAL PENSION PLAN EQUALIZATION ACT OF 2005

February 1, 2005

BACKGROUND

Section 414(d) of the Internal Revenue Code provides that the term "governmental plan" means a plan established and maintained for its employees by the government of the United States, by the government of any State or political subdivision thereof, or by an agency or instrumentality of any of the foregoing. The term "governmental plan" also includes any plan to which the Railroad Retirement Act of 1935 or 1937 (the Act) applies and which is financed by contributions under that Act, and any plan of an international organization which is exempt from taxation by reason the International Organizations Immunities Act (59 Stat. 669). Identical language appears in ERISA 3(32).

Section 1505 of the Taxpayer Relief Act of 1997 generally provides that the nondiscrimination rules do not apply to State and local governmental plans. In particular, TRA '97 amended the Code to provide that sections 401(a)(3), 401(a)(4) and 401(a)(26) shall not apply to such plans. TRA '97 also amended section 401(k) to provide that State and local governmental plans shall be treated as meeting the requirements of section 401(k)(3). In addition, TRA '97 amended section 410(c) of the Code to provide that all governmental plans shall be treated as meeting the requirements of section 410 for purposes of section 401(a)(4). The Treasury Department presently extends the relief afforded to State and local governmental plans to all governmental plans. Section 4(b)(1) of ERISA generally exempts governmental plans from the provisions of ERISA.

The IRS previously issued determination letters that explicitly recognized that tribal sponsored retirement plans were governmental plans. However, on January 5, 2004, in Revenue Procedure 2004-4, the IRS declared that it would no longer issue letter rulings or determination letters on whether or not an Indian tribal government satisfies the requirements of section 414(d). The Service reiterated its no ruling position in Revenue Procedure 2005-4 on January 4, 2005.

RATIONALE FOR CONGRESSIONAL CLARIFICATION

As a governmental employer, tribal governments derive no tax benefits whatsoever from the establishment of a tax qualified retirement plan. Nor do tribal governments operate with the "profit" motive of a business. It is tribal governments' ultimate responsibility to ensure not private wealth and individual gain, but employment, economic security, and public services for tribal members. In order to do this, tribal governments, as do the federal, state, and other local governments, must attract and retain qualified personnel. To compete with private employers who do not face the added constraint and salary caps of the

public budgetary process, however, governments have traditionally countered high private salaries with strong public benefits.

Given the diverse nature of government employment and operations, it was conceded early on that governmental employers (as defined in IRC 414(d) and ERISA 3(32)) would not be able to offer tax qualified retirement programs if they had to be tested under the standard corporate employer rules. Like its state and federal government counterparts, tribal governments have many diverse employment segments, such as a fire department, a police department, a public housing department, a judiciary, an administrative branch, and several enterprises designed to bring revenue into the public fisc. Like its state and federal counterparts, tribal governments could not offer tax qualified programs tailored to address the different needs of their diverse workforce if they had to be tested under the standard corporate rules. In fact, the traditional early retirement defined benefit plans commonly provided to public safety workers cannot be provided without the relief resulting from governmental plan status.

A TRIBE'S ENTITLEMENT TO GOVERNMENTAL PLAN TREATMENT SHOULD NOT BE LIMITED TO ANYONE'S NOTION OF WHAT IS A "TRADITIONAL GOVERNMENTAL FUNCTION OR ACTIVITY."

Some have expressed a desire to limit a tribe's right to governmental treatment only insofar as it is performing a "traditional" governmental function or activity. While certain statutes, such as Code section 7871(c), expressly limit favorable treatment to conduct which is deemed to be an essential governmental function, section 414(d) does not limit governmental plan status in that fashion. The exemptions under section 414(d) are based on the governmental status of the employer, and not on the specific conduct or activity engaged in by the government's employees. For example, selling lottery tickets is not a traditional governmental activity. However, the state is not required to exclude employees who sell lottery tickets from participation in state benefit programs.

Moreover, if the section 414(d) exemption at issue was to distinguish between employees performing "traditional or essential government functions" and those who do not, some tribal government plans (and other federal, state, and local government plans for that matter) would be subject to one set of rules for some employees and another set of rules for other employees. Construing section 414(d)'s governmental plan exemption to allow a single plan to be subject to different (and conflicting) rules and regulations depending on the identity or position of each employee is completely contrary to the primary purpose served by the enactment of today's federal pension laws. Nor would such a structure be workable with regard to coordinating current testing requirements applicable to the "non-governmental" employee groups participating in an otherwise "governmental" program. Certainly, if no such "conduct test" is read into section 414(d) as applied to state and other local governments, such a limitation cannot be read into section 414(d) as applied to tribal government plans.

Finally, we note that when Congress wanted to make distinctions based on the employment activities of a plan participant, it clearly knew how to do so. For example, just one subparagraph further in the very same statute under review, Congress expressly limited the church plan exemption (Code Section 414(e)) by including conduct requirements. No such limitation, however, appears in Code Section 414(d)'s governmental rules. Tribal governments should be explicitly entitled to governmental status under section 414(d), and that status should not contain a conduct restriction that is not applied to any other government employer.

REMEDY

HR 331 AND S 673 AMEND IRC SECTION 414(D) AND ERISA SECTION 3(32), AND RELATED PROVISIONS, BY ADDING LANGUAGE THAT CLARIFIES THAT RETIREMENT PLANS SPONSORED BY TRIBAL GOVERNMENTS ARE GOVERNMENTAL PLANS.