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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-133223-08]

RIN 1545-BI19

Indian Tribal Governmental Plans

AGENCY: Internal Revenue Service (IRS), Department of the Treasury.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Treasury Department and IRS anticipate issuing regulations under section 414(d) of the Internal Revenue Code (Code) to define the term “governmental plan.” This document describes the rules the Treasury Department and IRS are considering proposing relating to the determination of whether a plan of an Indian tribal government is a governmental plan within the meaning of section 414(d) and contains an appendix that includes a draft notice of proposed rulemaking on which the Treasury Department and IRS invite comments from the public. This document applies to sponsors of, and participants and beneficiaries in, employee benefit plans of Indian tribal governments.

DATES: Written or electronic comments must be received by February 6, 2012.

ADDRESSES: Send submissions relating to the section 414(d) draft ITG regulations to: CC:PA:LPD:PR (REG-133223-08), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington DC, 20044. Submissions may be hand delivered Monday through Friday, between the hours of 8 a.m. and 4 p.m. to

CC:PA:LPD:PR (REG-133223-08), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC.

Alternately, taxpayers may submit comments relating to the section 414(d) draft ITG regulations located in the Appendix to this ANPRM electronically via the Federal eRulemaking Portal at www.regulations.gov (IRS-REG-133223-08).

FOR FURTHER INFORMATION CONTACT:

Concerning the ANPRM, Pamela R. Kinard, at (202) 622-6060; concerning submission of comments, Richard Hurst, at (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document describes rules that the Treasury Department and IRS are considering proposing and contains a draft notice of proposed rulemaking (in the Appendix to this ANPRM) under section 414(d) of the Internal Revenue Code (Code). Under the draft notice of proposed rulemaking (in the Appendix to this ANPRM), the rules would provide guidance relating to the determination of whether a plan of an Indian tribal government, a subdivision of an Indian tribal government, or an agency or instrumentality of either (ITG) is a governmental plan within the meaning of section 414(d) of the Code (section 414(d) draft ITG regulations).

Section 414(d) of the Code provides that the term "governmental plan" generally 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 any agency or instrumentality of any of the foregoing. See sections 3(32) and 4021(b)(2) of the Employee Retirement Income Security Act of 1974 (ERISA) for definitions of the

term “governmental plan,” which govern respectively for purposes of title I and title IV of ERISA¹.

The term “governmental plan” also includes any plan to which the Railroad Retirement Act of 1935 or 1937 (49 Stat. 967, as amended by 50 Stat. 307) applies and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation by reason of the International Organizations Immunities Act (59 Stat. 669). See section 414(d)(2) of the Code.

Section 414(d) was amended by the Pension Protection Act of 2006, Public Law 109-280 (120 Stat. 780) (PPA '06) to include certain plans of Indian tribal governments and related entities.² Section 906(a)(1) of PPA '06 provides that the term “governmental plan” includes a plan which is established and maintained by an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or an agency or instrumentality of either (ITG), and all the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential governmental function).

Neither section 414(d) of the Code, section 3(32) of ERISA, nor section 4021(b)(2) of ERISA define key terms relating to governmental plans, including the terms “established and maintained,” “political subdivision,” “agency,” and “instrumentality.” Currently, there are no regulations interpreting section 414(d).

¹ The three definitions of the term “governmental plan” are essentially the same. The only difference is that, in defining the term “governmental plan,” section 3(32) of ERISA uses the phrase “established or maintained,” whereas section 414(d) of the Code and section 4021(b) of ERISA use the term “established and maintained.”

² Section 906(a) of PPA '06 made similar amendments to sections 3(32) and 4021(b)(2) of ERISA.

Revenue Ruling 89-49 (1989-1 CB 117), see §601.601(d)(2), sets forth a facts and circumstances analysis for determining whether a retirement plan is a governmental plan within the meaning of section 414(d).³ This analysis is used by the IRS in issuing letter rulings. In connection with this advanced notice of proposed rulemaking, an advance notice of proposed rulemaking is also being issued with respect to the general definition of a governmental plan (REG-157714-06 that is being published elsewhere in this issue of the **Federal Register**).

Governmental plans are subject to different rules than retirement plans of nongovernmental employers. Governmental plans are excluded from the provisions of titles I and IV of ERISA. In addition, governmental plans receive special treatment under the Code. These plans are exempt from certain qualification requirements and they are deemed to satisfy certain other qualification requirements under certain conditions. As a result, the principal qualification requirements for a tax-qualified governmental plan⁴ are that the plan--

- Be established and maintained by the employer for the exclusive benefit of the employer's employees or their beneficiaries;
- Provide definitely determinable benefits;
- Be operated pursuant to its terms;
- Satisfy the direct rollover rules of section 401(a)(31);
- Satisfy the section 401(a)(17) limitation on compensation;

³ See also Rev. Rul. 57-128 (1957-1 CB 311), see § 601.601(d)(2), which provides guidance on determining when an entity is a governmental instrumentality for purposes of the exemption from employment taxes under section 3121(b)(7) and 3306(c)(7).

⁴ A special rule applies to contributory plans of certain governmental entities. Section 414(h)(2) provides that, for a qualified plan established by a State government or political subdivision thereof, or by any agency or instrumentality of the foregoing, where the contributions of the governmental employer are designated as employee contributions under section 414(h)(1) but the governmental employer picks up the contributions, the contributions picked up will be treated as employer contributions.

- Comply with the statutory minimum required distribution rules under section 401(a)(9);
- Satisfy the pre-ERISA vesting requirements under section 411(e)(2);⁵
- Satisfy the section 415 limitations on benefits, as applicable to governmental plans; and
- Satisfy the prohibited transaction rules in section 503.

State and local governments, political subdivisions thereof, and agencies or instrumentalities thereof are generally not permitted to offer cash or deferred arrangements under section 401(k). However, an ITG is permitted to offer a cash or deferred arrangement under section 401(k).

Notice 2006-89 (2006-2 CB 772) and Notice 2007-67 (2007-35 IRB 465), see §601.601(d)(2), summarize the changes made by section 906(a)(1) of PPA '06 and provide transitional relief to ITGs under a reasonable and good faith standard to comply with such changes. The notices provide that until such guidance is issued, a plan established and maintained by an ITG for its employees is treated as satisfying the requirements of section 906(a)(1) of PPA '06 to be a governmental plan under section 414(d) of the Code if it complies with those requirements based on a reasonable and good faith interpretation of section 414(d). For further background, see the "Background" section of the preamble of the section 414(d) draft ITG regulations in the Appendix to this ANPRM under the headings, "Notices Issued by the IRS Relating to ITG Retirement Plans under PPA '06."

⁵ Section 411(e)(2) states that a plan described in section 411(e)(1) is treated as meeting the requirements of section 411 if the plan meets the vesting requirements resulting from the application of section 401(a)(4) and (a)(7) as in effect on September 1, 1974.

The Treasury Department and the IRS participated in a series of telephone listening meetings with the ITG community following the passage of PPA '06. The attached draft notice of proposed rulemaking in the Appendix to this ANPRM takes into account comments provided through a number of informative and cooperative comments received in response to Notices 2006-89 and 2007-67 and open and direct consultations with the Indian tribal community. Those comments received from Notices 2006-89 and 2007-67 and during the consultations were considered in drafting the proposed rulemaking.

The Treasury Department and the IRS have determined to seek public comment and consult with ITGs on the draft proposed regulations in advance of issuing a notice of proposed rulemaking. In light of the interaction of the governmental plan definitions in the Code and ERISA, a copy of the comments will be forwarded to DOL and PBGC.

Explanation of Provisions

Attached to the Appendix to this ANPRM is a draft notice of proposed rulemaking. These draft regulations include proposed rules, a preamble, and a request for comments. The Treasury Department and IRS invite the public to comment on the rules that the Treasury Department and IRS are considering proposing, which would set forth special rules relating to retirement plans of ITGs.

Section 414(d) Draft ITG regulations

A plan established and maintained by an ITG is a governmental plan under section 414(d), as amended by section 906 of PPA '06, only if all of its participants are employees substantially all of whose services are in the performance of essential governmental functions (but not in the performance of commercial activities whether or

not an essential governmental function). Therefore, the rules under the section 414(d) draft general regulations (in the Appendix to the ANPRM that is being published elsewhere in this issue of the **Federal Register**) would apply to ITG governmental plans, as well as the special rules under the attached section 414(d) draft ITG regulations. The anticipated proposed regulations would use the broader concepts of governmental activity and commercial activity, instead of the terms essential governmental function and commercial activity. See the “Explanation of Provisions” section in the section 414(d) draft ITG regulations in the Appendix to this ANPRM under the heading, “Determination of Governmental and Commercial Activities.”

Under the section 414(d) draft ITG regulations (in the Appendix to this ANPRM), whether a plan of an ITG is a governmental plan or a nongovernmental plan within the meaning of section 414(d) would be based, in part, on: (1) a determination of which activities are commercial activities and (2) a determination of whether employees of the ITG covered by the plan are employees who perform substantial services in commercial activities of the ITG (and are thus commercial employees).

The anticipated proposed regulations would provide that certain specific activities are deemed to be governmental or commercial for purposes of section 414(d). Under the anticipated proposed regulations, commercial activities would be operations involving a hotel, casino, service station, convenience store, or marina. These activities are examples that were identified as commercial activities in Notices 2006-89 and 2007-67, as well as in the Joint Committee on Taxation Technical Explanation to section 906 of PPA '06. The section 414(d) draft ITG regulations in the Appendix to this ANPRM would provide that governmental activities include activities related to the building and

maintenance of public roads, sidewalks, and buildings, activities related to public work projects (such as schools and government buildings), and activities that are subject to a treaty or special rules that pertain to trust land ownership and use. See §601.601(d)(2).

In addition to listing certain specified activities, the anticipated proposed regulations would provide a facts and circumstances test for determining whether an activity is a governmental or commercial activity. See the “Explanation of Provisions” section in the section 414(d) draft ITG regulations in the Appendix to this ANPRM under the heading, “Governmental and Commercial Activities.” The anticipated proposed regulations would also provide examples illustrating the application of the facts and circumstances tests to particular activities.

The anticipated proposed regulations would also provide rules for determining whether employees covered by an ITG plan are employees who perform substantial services in activities that are governmental. For this purpose, the determination of whether an employee’s services are for governmental or commercial activities would generally be based on the employee’s assigned duties and responsibilities. See the “Explanation of Provisions” section in the section 414(d) draft ITG regulations in the Appendix to this ANPRM under the headings, “Determination of Governmental ITG Employees” and “Determination of Commercial ITG Employees.”

The anticipated proposed regulations do not address the broader issue of whether a retirement plan is a governmental plan within the meaning of section 414(d). That topic is addressed in the advance notice of proposed rulemaking relating generally to the definition of governmental plan that is being published elsewhere in this issue of the **Federal Register**.

Request for Comments

Before a notice of proposed rulemaking is issued, consideration will be given to any written comments that are submitted timely (preferably a signed original and eight (8) copies) to the IRS. All comments will be available for public inspection and copying. Copies of the comments will be provided to the DOL and PBGC.

Comments are also requested on whether, as an alternative to issuing proposed regulations, the Department of Treasury and IRS should publish a notice that reflects some or all of the rules in the draft proposed regulations and that also modifies the rule in Notice 2007-67 concerning when a mixed ITG is required to be amended to be two different plans, one for governmental employees and another for commercial employees. If so, the notice would include a significant transitional period for compliance similar to the transition period that would be expected to apply for regulations (such as not being effective until plan years that begin at least 18 months after publication of the notice). The Department of Treasury and IRS invite comments on whether this method of guidance would be preferable to the issuance of regulations.

The IRS and Department of Treasury plan to schedule a public hearing on the ANPRM. That hearing will be scheduled and announced at a later date. In addition to a public hearing, the Treasury Department and IRS anticipate scheduling consultation listening meetings in order to obtain comments from tribal governments on the section 414(d) draft ITG regulations. It is expected that these meetings will take place in different locations across the country. Participants will be encouraged to pre-register for the meetings. Information relating to these meetings, including dates, times, locations, registration, and the procedures for submitting written and oral comments, will be

available on the IRS website relating to governmental plans at

<http://www.irs.gov/retirement/article/0,,id=181779,00.html>.

EO 13175, Consultation and Coordination with Indian Tribal Governments

In the Appendix to this ANPRM is a draft notice of proposed rulemaking. These draft regulations include proposed rules, a preamble, and a request for comments. The Treasury Department and the IRS invite the public to comment on the rules under

consideration, which would set forth special rules relating to retirement plans of ITGs. This solicitation of comments is in furtherance of the objective of Executive Order 13175 under which Treasury consults with tribal officials in the development of Federal policies that may have tribal implications. The IRS and Treasury Department will consult with Indian tribes through the normal comment process in the **Federal Register**, issuing this advance notice of public rulemaking, and reaching out to Indian tribes through a series of consultation listening meetings.

Drafting Information

The principal author of this advance notice of proposed rulemaking is Pamela R. Kinard, Office of the Chief Counsel (Tax-exempt and Government Entities), however, other personnel from the IRS and Treasury Department participated in its development.

Steven T. Miller,
Deputy Commissioner for Services and Enforcement.

APPENDIX

The following is draft language for a notice of proposed rulemaking that would set forth rules relating to the determination of whether a plan of an Indian tribal government is a governmental plan within the meaning of section 414(d). The IRS and Treasury release this draft language in order to solicit comments from the governmental plans community:

Background

This document contains proposed regulations under section 414(d) of the Internal Revenue Code (Code). These regulations, when finalized, would provide guidance relating to the determination of whether a plan of an Indian tribal government or other entities related to an Indian tribal government is a governmental plan within the meaning of section 414(d). The definition of a governmental plan under section 414(d) applies for purposes of Part I of Subchapter D of Chapter 1 of Subtitle A (Income Taxes) of the Code (sections 401 through 420) and certain other Code provisions that refer to section 414(d) (such as sections 72(t)(10), 501(c)(25)(C), 4975(g)(2), 4980B(d)(2), 9831(a)(1), and 9832(d)(1) of the Code).

Statutory Definition of Governmental Plan

Both the Code and the Employee Retirement Income Security Act of 1974 (ERISA) define the term “governmental plan.” Prior to the Pension Protection Act of 2006, Public Law 109-280 (120 Stat. 780) (PPA '06), section 414(d) of the 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 any agency or instrumentality of any of the

foregoing. Sections 3(32) and 4021(b)(2) of ERISA have parallel definitions of the term “governmental plan.” The term “governmental plan” also includes any plan to which the Railroad Retirement Act of 1935 or 1937 (49 Stat. 967, as amended by 50 Stat. 307) applies and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation by reason of the International Organizations Immunities Act Public Law 79-291 (59 Stat. 669).

Section 906 of PPA '06

Section 906(a) of PPA '06 amended section 414(d) of the Code (and the parallel provisions in sections 3(32) and 4021(b)(2) of ERISA) to include in the definition of “governmental plan” certain plans of an Indian tribal government, a subdivision of an Indian tribal government, or an agency or instrumentality thereof. Specifically, under section 906(a)(1) of PPA '06, the term “governmental plan” includes a plan which is established and maintained for its employees by an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or an agency or instrumentality of either (ITG), and all of the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential governmental function). Section 906(c) of PPA '06 provides that the amendments made by section 906 of PPA '06 apply to any year beginning on or after the date of enactment, which is August 17, 2006.

In its Technical Explanation⁶ to section 906 of PPA '06, the Joint Committee on Taxation refers to an employee substantially all of whose services for an ITG are in the performance of essential governmental services and not in the performance of commercial activities (whether or not such activities are an essential governmental function) as a qualified employee who is eligible to participate in a governmental plan as described in section 414(d). The Technical Explanation states, for example, that a governmental plan includes a plan of an ITG, all of the participants of which are teachers in tribal schools. However, the Technical Explanation also states that a governmental plan does not include a plan covering tribal employees who are employed by a hotel, casino, service station, convenience store, or marina operated by a tribal government.

Exemption of Governmental ITG Plans from Certain Qualified Plan Rules

Governmental plans under Code section 414(d), including governmental ITG plans, receive special treatment with respect to certain qualification rules. Such plans are exempt from certain qualification requirements and are deemed to satisfy certain other qualification requirements under certain conditions. For example, the nondiscrimination and minimum participation rules do not apply to governmental plans.⁷ In addition, the Code provides other exemptions for section 414(d) governmental plans:

⁶ Joint Committee on Taxation, Technical Explanation of H.R. 4, the "Pension Protection Act of 2006" as passed by the House on July 28, 2006, and considered by the Senate on August 3, 2006 (JCX-38-06), August 3, 2006, 109th Cong., 2nd Sess. 244 (2006).

⁷ Section 861 of PPA '06 amended sections 401(a)(5)(G) and 401(a)(26)(G) of the Code to provide that the minimum participation standards and nondiscrimination requirements of section 410 and the additional participation requirements under section 401(a)(26) do not apply to governmental plans within the meaning of section 414(d) of the Code. Section 861 of PPA '06 also exempts governmental plans from the nondiscrimination and participation requirements applicable to qualified cash or deferred arrangements under section 401(k)(3) of the Code.

- Section 401(a)(10)(B)(iii), which provides that the top-heavy requirements of section 416 do not apply to a governmental plan.
- Section 410(c)(1)(A), which provides that the minimum participation provisions of section 410 do not apply to a governmental plan.
- Section 411(e), which provides that a governmental plan is treated as satisfying the requirements of section 411 if the plan meets the pre-ERISA vesting requirements.
- Section 412(e)(2)(C), which provides that the minimum funding standards of section 412 do not apply to a governmental plan.
- Section 417, which provides rules relating to qualified joint and survivor annuities and qualified preretirement survivor annuities.

Section 415 also provides a number of special rules for governmental plans. The special rules include section 415(b)(11) (under which governmental pensions are not limited to 100% of a participant's average high 3 compensation), section 415(b)(2)(I) (the reduced limitation to the annual benefit payable beginning before age 62 and the reduction in the dollar limitation to the annual benefit payable for participation or services of less than 10 years do not apply to disability or survivor benefits received from a governmental plan), section 415(m) (benefits provided under a qualified governmental excess benefit arrangement are not taken into account in determining the section 415 benefit limitations under a section 414(d) governmental plan), and section 415(n) (permissive service credit).

As a result, the principal qualification requirements for a tax-qualified governmental plan⁸ are that the plan--

- Be established and maintained by the employer for the exclusive benefit of the employer's employees or their beneficiaries;
- Provide definitely determinable benefits;
- Be operated pursuant to its terms;
- Satisfy the direct rollover rules of sections 401(a)(31) and 402(f);
- Satisfy the section 401(a)(17) limitation on compensation;
- Comply with the statutory minimum required distribution rules under section 401(a)(9);
- Satisfy the pre-ERISA vesting requirements under section 411(e)(2);⁹
- Satisfy the section 415 limitations on benefits, as applicable to governmental plans; and
- Satisfy the prohibited transaction rules in section 503.

State and local governments, political subdivisions thereof, and agencies or instrumentalities thereof are generally not permitted to offer cash or deferred arrangements under section 401(k).¹⁰ However, Indian tribal governments and their

⁸ A special rule applies to contributory plans of certain governmental entities. Section 414(h)(2) provides that, for a qualified plan established by a State government or political subdivision thereof, or by any agency or instrumentality of the foregoing, where the contributions of the governmental employer are designated as employee contributions under section 414(h)(1) but the governmental employer picks up the contributions, the contributions picked up will be treated as employer contributions.

⁹ Section 411(e)(2) states that a plan described in section 411(e)(1) is treated as meeting the requirements of section 411 if the plan meets the vesting requirements resulting from the application of section 401(a)(4) and (a)(7) as in effect on September 1, 1974.

¹⁰ Section 401(k)(4)(B)(ii) provide that a cash or deferred arrangement shall not be treated as a qualified cash or deferred arrangement if it is part of a plan maintained by a State or local government or political subdivision thereof, or any or agency or instrumentality thereof.

related entities are permitted to offer cash or deferred arrangements as part of a plan maintained by an ITG.¹¹

Rules Treating Indian Tribal Governments as States for Purposes of Issuing Tax-Exempt Bonds

Section 7871 provides special rules for Indian tribal governments. Section 7871(a)(4) provides that an Indian tribal government is to be treated as a State for purposes of section 103, relating to tax-exempt bonds.¹² Section 7871(c)(1) generally provides that section 103(a) applies to an obligation issued by an Indian tribal government only if such obligation is part of an issue substantially all of the proceeds of which are to be used in the exercise of any essential governmental function.

On August 9, 2006, an advance notice of proposed rulemaking under section 7871 was published in the **Federal Register** (71 FR 45474). The ANPRM describes the rules that the Treasury Department and the IRS anticipate proposing on the definition of essential governmental function under section 7871(e). The rules would provide that an activity is considered an essential governmental function that is customarily performed by State and local governments 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

¹¹ See section 401(k)(4)(B)(iii). For a general overview of the special rules relating to plans of ITGs, see the Joint Committee on Taxation, Overview of Federal Tax Provisions Relating to Native American Tribes and Their Members (JCX 61-08), July 18, 2008.

¹² An Indian tribal government is treated in the same manner as a State for certain specified purposes under the Code, but not for purposes of section 414(d) (or any provision in sections 401 through 424, other than sections 403(b)(1)(A)(ii)).

not a commercial or industrial activity. The ANPRM provides examples of activities customarily performed by State and local governments, including public works projects such as roads, schools, and government buildings.

Notices Issued by the IRS Relating to ITG Retirement Plans under PPA '06

Notice 2006-89 (2006-2 CB 772) and Notice 2007-67 (2007-35 IRB 467), see §601.601(d)(2), summarize the changes made by section 906(a)(1) of PPA '06 and provide transitional relief to ITGs under a reasonable and good faith standard to comply with such changes. The notices provide that, until such guidance is issued, a plan established and maintained by an ITG for its employees is treated as satisfying the requirements of section 906(a)(1) of PPA '06 to be a governmental plan under section 414(d) of the Code if it complies with those requirements based on a reasonable and good faith interpretation of section 414(d). The notices further provide that it is not a reasonable and good faith interpretation of section 414(d) for an ITG plan to claim to be a governmental plan within the meaning of section 414(d) if employees participating in the plan perform services for a hotel, casino, service station, convenience store, or marina operated by an ITG.

In Notices 2006-89 and 2007-67, the Treasury Department and IRS announced that regulations would be proposed to provide guidance on section 414(d), including changes made to section 414(d) by section 906 of PPA '06, and to provide transitional relief pending the issuance of these regulations. Comments were requested on issues relating to section 906 of PPA '06, including transitional issues not addressed in the notice.

The transitional relief provided to plans of ITGs under Notices 2006-89 and 2007-67 continues up to the date that is six months after the date that guidance is issued under section 414(d) of the Code, as amended by section 906 of PPA '06 (extended date). For ITG plans that provide benefits both to employees substantially all of whose work is in essential governmental functions that are not commercial activities (governmental ITG employees) and to employees who perform services substantially in the performance of commercial activities (commercial ITG employees), the Notices provide that the ITG plan will be treated as satisfying the reasonable, good faith standard if certain steps are taken, which include adopting a separate plan covering commercial ITG employees effective as of the beginning of the first plan year beginning on or after August 17, 2006, the enactment of PPA '06. The commercial ITG plan, beginning on the same effective date, must comply with the qualification requirements for plans that are not governmental plans.

These proposed regulations would provide guidance relating to ITG plans under section 414(d). The transitional relief provided under Notices 2006-89 and 2007-67 would end six months after the effective date of the final regulations published in the **Federal Register**.

The transitional relief in Notices 2006-89 and 2007-67 is conditioned on the ITG plans involved not being amended, for periods before the extended date, to reduce benefits unless the reduction does not distinguish between reductions for commercial ITG employees and governmental ITG employees or the reduction for commercial ITG employees is the minimum amount necessary to satisfy any requirement under the Code. If any reduction occurs that does not satisfy these conditions, the transitional

relief provided under Notices 2006-89 and 2007-67 ends on the date that the reduction goes into effect.

Executive Order 13175

Executive Order 13175 requires that Federal departments and agencies engage in consultation procedures in certain circumstances where regulations are issued which have substantial direct effects with respect to the Federal government and Indian tribes. While these regulations when issued as final regulations would not have such substantial direct effects, the IRS and Treasury Department have followed similar procedures. Further, the Treasury Department and the IRS participated in a series of telephone listening meetings with the ITG community following the passage of PPA '06 and these proposed regulations also take into account the comments that were provided in response to Notices 2006-89 and 2007-67, including the related open and direct consultations with the Indian tribal community.

Judicial Determinations

The few court cases that discuss section 906 of PPA '06 primarily relate to welfare benefit plans. One reason for the legislative change to section 414(d) of the Code and section 3(32) of ERISA is “to clarify the legal ambiguity regarding the status of employee benefit plans established and maintained by tribal governments.”¹³ In Bolssen v. Unum Life Insurance Company of America, 629 F.Supp. 2d 878 (E.D. Wis. 2009), Mr. Bolssen sued the Unum Life Insurance Company for failing to provide disability insurance benefits. He argued that the case should be remanded to state court because the insurance plan sponsored by his employer, an Indian tribal casino,

¹³ See Dobbs v. Anthem Blue Cross & Blue Shield, 475 F.3d 1176, 1178 (10th Cir. 2007) (citing 150 Cong. Rec. S9526, 9533), *rev'd in part* 600 F.3d 1275 (2010). See also Bolssen v. Unum Life Insurance Company of America, 629 F.Supp. 2d 878, 881 (E.D. Wis. 2009).

was a governmental plan within the meaning of section 3(32) of ERISA. In analyzing whether the welfare benefit plan was a governmental plan, the Bolssen court looked to another case involving an Indian tribal casino, San Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306 (D.C. Cir. 2007). In San Manuel Indian Bingo & Casino, the court held that the National Labor Relations Act applied to an Indian tribal casino because the operation of the casino was a commercial function. The court reasoned that “it can be argued any activity of a tribal government is by definition ‘governmental,’ and even more so an activity aimed at raising revenue that will fund governmental functions. Here, though, we use the term ‘governmental’ in a restrictive sense to distinguish between the traditional acts governments perform and collateral acts that, though perhaps in some way related to the foregoing, lie outside their scope.”¹⁴

The court, in San Manuel Indian Bingo & Casino, held that the operating a casino is not a traditional act of government, but is commercial in nature.¹⁵ The court in Bolssen applied the same reasoning to conclude that disability plan of the casino was not a governmental plan within the meaning of section 3(32) of ERISA.

Explanation of Provisions

These proposed regulations would provide special rules for purposes of the definition of a “governmental plan” under section 414(d) of the Code, as it relates to plans of ITGs. The Treasury Department and IRS also expect to issue separate proposed regulations under section 414(d) to define a governmental plan for purposes other than the special rules applicable to ITGs. However, these proposed regulations relating to ITGs would provide Indian tribal governments with guidance in determining

¹⁴ San Manuel Indian Bingo & Casino, 475 F.3d at 1313.

¹⁵ Id. at 1315.

whether an ITG plan is a governmental ITG plan or a commercial ITG plan. As discussed in the background of this preamble, under the heading “Exemption of Governmental ITG Plans from Certain Qualified Plan Rules,” governmental plans receive special treatment with respect to certain qualification rules. Thus, the determination of whether an ITG plan is a governmental ITG plan is essential in ensuring compliance with the qualified plan rules because an ITG must be able to ascertain which of its plans are governmental plans under section 414(d) and which of its plans must comply with the requirements for a plan that is not a governmental plan. These proposed regulations take into account comments received in response to Notices 2006-89 and 2007-67 and a number of open and direct consultations with the Indian tribal community. Those comments received from Notices 2006-89 and 2007-67 and during the consultations were considered in drafting these proposed regulations.

Determination of Governmental and Commercial Activities

As discussed earlier in the background section of this preamble, a governmental plan, as it relates to ITGs, may include a plan established and maintained by an ITG, but such a plan is a governmental plan under section 414(d) only if all of its participants are employees substantially all of whose services are in the performance of essential governmental functions (but not in the performance of commercial activities whether or not an essential governmental function). Key to determining whether a plan of an ITG is a governmental plan within the meaning of section 414(d) is the determination of the terms “essential governmental function” and “commercial activity.”

These proposed regulations would use the concepts of “governmental activity” and “commercial activity,” instead of the terms “essential governmental function” and

“commercial activity.” The terms “governmental activity” and “commercial activity” would apply only for purposes of the governmental plan rules under section 414(d) and not for any other purpose under the Code, including section 7871. The use of these terms is meant to provide guidance on the requirements of section 414(d) with respect to ITG plans, while maintaining flexibility and without directly impacting future guidance on section 7871.

These proposed regulations would define a governmental ITG plan as any plan that is established and maintained by an Indian tribal government, a subdivision of an Indian tribal government, or an agency or instrumentality of either, and all of its participants are employees substantially all of whose services are in the performance of governmental activities. The regulations would define a commercial ITG plan as a plan covering any ITG employees who perform substantial services in a commercial activity, such as a hotel, casino, service station, convenience store, or marina, which are examples of commercial activities that are listed in the Joint Committee on Taxation Technical Explanation to section 906 of PPA '06.¹⁶ A plan would also be a commercial plan if it covers any individual who is not an employee of an ITG.

Governmental and Commercial Activities

Under the proposed regulations, whether a plan of an ITG is a commercial plan or a governmental plan within the meaning of section 414(d) is based in part on (1) a determination of which activities are commercial activities and (2) a determination of whether employees of the Indian tribal government covered by the plan are employees

¹⁶ Joint Committee on Taxation, Technical Explanation of H.R. 4, the “Pension Protection Act of 2006” as passed by the House on July 28, 2006, and considered by the Senate on August 3, 2006 (JCX-38-06), August 3, 2006, 109th Cong., 2nd Sess. 244 (2006).

who perform substantial services in commercial activities (and are thus commercial employees).

Under the first step, the proposed regulations would provide guidance for determining whether an activity operated by an ITG is a governmental activity or a commercial activity for purposes of section 414(d). This is achieved by listing certain specific activities that are deemed to be governmental or commercial for purposes of section 414(d). Specific governmental activities would include the following: (1) activities that are related to public infrastructure, such as the building and maintaining of public roads and buildings; (2) activities that involve providing criminal protection services to the public (such as police and fire departments) or providing civil or public administrative service (such as providing public housing and operating public schools and hospitals, as well as managing the ITG's civil service system); and (3) activities subject to a treaty or special rules that pertain to trust land ownership and use. Under the regulations, operations involving a hotel, casino, service station, convenience store, and marina would be commercial activities. As discussed above, these activities are examples that are identified as commercial activities in Notices 2006-89 and 2007-67, as well as in the Joint Committee on Taxation Technical Explanation to section 906 of PPA '06.

In addition to listing certain specified activities, the proposed regulations would provide a facts and circumstances test for determining whether an activity is a governmental or commercial activity. The proposed regulations provide that, in making a determination of whether an activity is a governmental activity, the factors to be considered include whether--

- The activity provides a public benefit to members of the Indian tribal government (not treating the generation of profits from commercial acts as providing a public benefit); and
- The absence of one or more of the relevant factors listed for a commercial activity as provided in these proposed regulations.

The proposed regulations also provide that, in making a determination of whether an activity is a commercial activity, the factors to be considered include whether--

- The activity is a type of activity that is operated to earn a profit;
- The activity is a type of activity that is typically performed by private businesses; and
- The activity is a type of activity where the customers are substantially from outside of the Indian tribal community, including whether the activity is located or conducted outside of Indian tribal land.

These proposed regulations also provide examples illustrating the application of the facts and circumstances tests to particular activities. Some examples of activities of an Indian tribal government that are commercial might include: (1) operating a bank for a profit, serving tribal and non-tribal customers; (2) operating a trucking business for a profit; and (3) operating a factory producing goods for sale primarily to non-tribal customers. Conversely, examples of activities of an Indian tribal government that are governmental could include: (1) a community swimming pool on tribal land used primarily by tribal members; and (2) the operation of a cultural center and a museum on tribal land.

The proposed regulations would also delegate to the Commissioner of Internal Revenue the authority to publish guidance under section 414(d) that the Commissioner determines to be necessary or appropriate with respect to determining whether a plan of an Indian tribal government is a commercial ITG plan because the tribe's employees are performing services in an activity that the Commissioner determines to be a commercial activity. Any such guidance would be published in the form of revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin (see §601.601(d)(2)).

Determination of Governmental ITG Employees

These proposed regulations would also provide rules for the second step, namely determining whether employees covered by an ITG plan are employees who perform substantially all of their services in activities that are governmental. For this purpose, the determination of whether an employee's services are for governmental or commercial activities would generally be based on the employee's assigned duties and responsibilities. In making this determination, the rules in these regulations would not require that a plan keep track of the individual hours worked by any employee or that the compensation of any particular employee be traced through the hours worked by that employee. The proposed regulations would provide that an employee whose assigned duties and responsibilities are in the performance of a governmental activity is treated as performing substantially all of his or her services in a governmental activity, and not treated as performing services for a commercial activity, even though the performance of those services for the governmental activity may temporarily involve significant time working in the commercial activity. For example, the chief financial officer (CFO) for an ITG may be expected to spend a substantial amount of time

working on the financing for any casino, marina, or hotel to be built on the ITG's tribal lands, but, despite temporarily working in a commercial activity, the proposed regulations would provide that the CFO is a governmental employee of the ITG all of whose services are in that capacity.

Determination of Commercial ITG Employees

The proposed regulations set forth rules for determining an employee's assigned duties and responsibilities, and thus when his or her services are substantially in the performance of a governmental or commercial activity. The analysis would start with the location of the employee's services in relation to the activity. The regulations provide that if a commercial activity has a specific location that is identifiable and is not associated with a governmental activity, any employee performing services at the location of activity is a commercial employee. One example is a security guard whose work is providing security services at a location which is an Indian tribal casino. In the case of an employee who works at a location other than a location where a commercial activity is being performed, the result would depend on the employee's assigned duties and responsibilities.

Another key part of the analysis is who pays the employee. If an employee is on the payroll of an ITG entity that is engaged in a commercial activity, the employee's assigned duties and responsibilities are treated as being for a commercial activity and, thus, the employee is a commercial ITG employee. For example, if a cashier is on the payroll of a convenience store (which is a commercial activity) owned by an ITG, the cashier is a commercial ITG employee. However, in the case of an employee who is

not on a payroll of an ITG that engages in a commercial activity, the result would depend on the employee's assigned duties and responsibilities.

Where an employee neither works at a location where a commercial activity is being performed nor is on the payroll of a commercial entity, the result would depend on the employee's assigned duties and responsibilities, taking into account the facts and circumstances. Thus, for example, a bookkeeper located in a governmental building and paid through the general payroll of the ITG would nevertheless be a commercial employee if the facts and circumstances indicate that his or her assigned duties and responsibilities are to maintain the books and records for a hotel owned and operated by an ITG.

The statutory language in section 414(d) makes it clear that a plan is not a governmental ITG plan if it covers any employee who is a commercial ITG employee. There is no de minimis exception relating to this rule under section 414(d). In light of these circumstances, an ITG may choose to use caution when covering employees in a governmental plan. If, after applying the rules, an ITG plan sponsor is not certain whether an employee is a governmental ITG or commercial ITG employee, the ITG may choose to provide coverage for the employee in its commercial ITG plan in order to ensure the preservation of the status of the governmental ITG plan. Coverage of a governmental employee in a commercial plan would not adversely affect the qualified status of the commercial plan.

Reasonable, Good Faith Interpretation

The proposed regulations provide that, in general, an ITG plan will not be treated as failing to satisfy the assignment of employee rules if the plan complies with those

rules under a standard that constitutes a reasonable, good faith interpretation of the statute, taking into account the final regulations and any other published guidance that relates to the application of section 414(d) to ITGs. The reasonable, good faith interpretation standard for the assignment of employees to governmental and commercial plans would only apply if the benefit levels between the separate governmental and commercial plans are uniform. Thus, this reasonable, good faith interpretation standard would not apply if the benefit level for employees under a plan purporting to be a governmental plan is higher than that of the benefit level under a separate plan covering employees who include commercial employees.

Assignment of Shared Employees

Under these rules, there may be cases in which an employee is transferred from one ITG employer to another. An employee may also perform substantially all of his or her services in the performance of a governmental activity and later the employee's assigned duties and responsibilities may change, so that the employee is subsequently performing substantially all of his or her duties in the performance of a commercial activity. In addition, an employee may work two separate and distinct jobs, one in a commercial activity of an ITG and another in a governmental activity of an ITG (for example, an ITG employee who works as a full-time police officer and also works at the front desk in the lobby of a hotel over the weekends). For all of these scenarios, assuming the ITG maintains separate plans for its governmental and commercial employees, the ITG should assign the employee to either plan based on prorating service credits and allocating compensation between the governmental and commercial activities.

Application of the Controlled Group Rules to ITG Plans

These proposed regulations do not address the rules under which, for purposes of sections 401, 408(k), 408(p), 410, 411, 415, and 416, all employees of all corporations that are members of a controlled group of corporations are treated as employed by a single employer for purposes of these controlled group rules. Note that, under current guidance, a reasonable, good faith interpretation standard applies with respect to governments. See Notice 89-23 (1989-1 CB 654) and Notice 96-64 (1996-2 CB 229), see §601.601(d)(2) of this chapter.

Proposed Effective Date

The proposed regulations would apply to plan years beginning 6 months after publication of these regulations as final regulations. For plan years after the statutory effective date of the PPA '06 amendment of section 414(d) and prior to the effective date of these regulations as final regulations, a plan of an ITG would be treated as a governmental plan for purposes of section 414(d), providing that a reasonable, good faith effort is made to ensure that the plan satisfy the conditions for being a governmental plan under section 414(d), taking into account relevant guidance, including Notices 2006-89 and 2007-67. To the extent that a plan of an Indian tribal government complies with the requirements under either the notices or the proposed regulations, the plan will be treated as making a reasonable, good faith effort to satisfy the requirements of section 414(d).

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory

assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. In addition, because no collection of information is imposed on small entities, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply, and therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury Department and the IRS specifically request comments on the clarity of the proposed rules and how they can be made easier to understand. Comments are specifically requested on whether a correction mechanism under the Employee Plans Compliance Resolution System (EPCRS), as set forth in Rev. Proc. 2008-50 (2008-35 IRB 464), see §601.601(d)(2), might be helpful for cases in which an employee substantially all of whose services are not in the performance of a governmental activity has nevertheless inadvertently become a participant in a plan purporting to be a governmental plan. For example, assuming the various conditions for self correction have been satisfied (see section 4.09 of Rev. Proc. 2008-50, which provides that the failure must be an operational failure which occurred by mistake or oversight, even though the plan had established practices and procedure to ensure qualification, and which is promptly corrected), the plan's assets and liabilities with respect to the employee might be

transferred to a similar plan covering commercial employees under which the employee would accrue benefits up to the level that would have applied if he or she had participated in that commercial plan during the period when he or she was a commercial employee. All comments will be available for public inspection and copying.

A public hearing has been scheduled for (date to be provided when proposed regulations are published), beginning at 10 a.m. in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington DC. Due to building security procedures, visitors must enter at the main entrance, located at 1111 Constitution Avenue, NW. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the "FOR FURTHER INFORMATION CONTACT" portion of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments must submit written or electronic comments and an outline of the topics to be discussed and time to be devoted to each topic (signed original and eight (8) copies) by (date to be provided when proposed regulations are published). A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving comments has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these proposed regulations is Pamela R. Kinard, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), Internal Revenue Service. However, personnel from other offices of the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part:

Authority: 26 U.S.C. 7805 * * *

Par.2. Section 1.414(d)-1 is amended by adding paragraph (g) to read as follows:

§1.414(d)-1 Definition of governmental plan.

* * * * *

(g) Special rules for plans of Indian tribal governments--(1) Definition of governmental plan as it relates to Indian tribal governments. For purposes of applying paragraph (a)(3) of this section, a governmental plan as it relates to an Indian tribal government is a plan that is established and maintained for its employees by an Indian tribal government, a subdivision of an Indian tribal government, or an agency or instrumentality of either (ITG), provided that the employees covered under the plan provide substantially all of their services in the performance of governmental activities as determined in paragraph (g)(6) of this section.

(2) Definition of commercial ITG plans. For purposes of paragraph (g) of this section, the term commercial ITG plan means a plan of an ITG that covers any ITG employee who is not a governmental ITG employee under paragraph (g)(8) of this section or that covers any individual who is not an employee of an ITG.

(3) Definition of an Indian tribal government. For purposes of this paragraph (g), the term Indian tribal government has the meaning set forth in section 7701(a)(40).

(4) Definition of subdivision of an Indian tribal government. For purposes of this paragraph (g), the term subdivision of an Indian tribal government has the meaning set forth in section 7871(d).

(5) Definition of agency or instrumentality of an Indian tribal government or subdivision of an Indian tribal government. For purposes of this paragraph (g), the term agency or instrumentality of an Indian tribal government or subdivision of an Indian tribal government means an entity that would be treated as an “agency or instrumentality of a State or political subdivision of a State” under paragraph (f) of this section if the related Indian tribal government or subdivision of an Indian tribal government were treated as a State or political subdivision of a State, respectively.

(6) Definition of governmental activities--(i) In general. The following activities are governmental activities for purposes of paragraph (g)(1) of this section:

(A) Activities that are related to the building and maintaining of public roads; . public sidewalks, public buildings, and related areas, such as parking lots.

(B) Activities that are related to public sewer and drainage facilities, and related facilities such as a waste-water treatment plant.

(C) Activities relating to public works projects, such as schools and government buildings.

(D) Activities relating to public utilities, such as electricity and other power sources, including the development of newer and emerging technologies.

(E) Activities related to providing criminal protection services, such as police and fire departments, providing civil and public administrative services, such as operating and managing public housing, libraries, judiciary buildings, and administrative buildings, teaching in and managing public schools, managing and providing services at public hospitals and health clinics, operating the government's civil service system, and other related public services.

(F) Activities subject to a treaty or special rules that pertain to trust land ownership and use.

(ii) Facts and circumstances test. Whether any other activity is a governmental activity for purposes of section 414(d) is based on facts and circumstances. In making this determination, the facts to be considered include the following:

(A) Whether the activity provides a public benefit to members of the Indian tribal government; and

(B) Whether there is the absence of one or more of the relevant factors listed for a commercial activity as provided in paragraph (g)(7) of this section.

(iii) Examples. The following examples illustrate the application of this paragraph (g)(6):

Example 1. (i) Facts. Indian tribal government C owns and operates a community swimming pool on tribal land. Indian tribal members of Indian tribal government C may use the pool for free. Other local community members pay a fee to

use the pool. Due to its location, this pool is used primarily by tribal members of Indian tribal government C.

(ii) Conclusion. Based on the facts and circumstances and the factors in paragraph (g)(6)(ii) of this section, the operation of the community swimming pool is a governmental activity of Indian tribal government C because it is a type of activity that is operated on a nonprofit basis and is similar to an activity that other non-tribal local governments operate for their communities. In addition, the pool is located inside tribal land and provides recreational benefits to tribal members.

Example 2. (i) Facts. Indian tribal government D owns and operates a cultural center and a museum on tribal land. The purpose of the cultural center and museum is to preserve and showcase items related to the culture of Indian tribal government D, including crafts and artistry. The center contains an exhibit area, a lobby and reception area, a small gift shop, a theater and various activity rooms. A variety of civic functions are held in the activity rooms. The other areas display and sell local handicraft items produced locally by members of Indian tribal government D.

(ii) Conclusion. Based on the facts and circumstances and the factors in paragraph (g)(6)(ii) of this section, the operation of the cultural center and museum is a governmental activity of Indian tribal government D even though the majority of its visitors are individuals who are not members of the tribe. Its purpose is to promote and display the culture of Indian tribal government D, which is a type of activity that is generally operated on a nonprofit basis (similar to municipal museums operated by public authorities) and not by private businesses. In addition, the center and museum are located inside tribal land and provide a public benefit by educating the public and preserving and highlighting the culture of the tribe.

(7) Definition of commercial activities--(i) In general. The following activities are commercial activities for purposes of paragraph (g)(2) of this section:

- (A) Activities relating to the operation of a hotel.
- (B) Activities relating to the operation of a casino.
- (C) Activities relating to the operation of a service station.
- (D) Activities relating to the operation of a convenience store.
- (E) Activities relating to the operation of a marina.

(ii) Facts and circumstances test. Whether any other activity is a commercial activity for purposes of section 414(d) is based on facts and circumstances. In making this determination, the facts to be considered include the following:

(A) Whether the activity is a type of activity that is operated to earn a profit.

(B) Whether the activity is a type of activity that is typically performed by private businesses.

(C) Whether the activity is a type of activity where the customers are substantially from outside of the Indian tribal community, including whether the activity is located or conducted outside of Indian tribal land.

(iii) Delegation of authority to the Commissioner. Any activity that the Commissioner of the Internal Revenue Service determines is a commercial activity under section 414(d), in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin (see §601.601(d)(2) of this chapter).

(iv) Examples. The following examples illustrate the application of this paragraph (g)(7)(ii):

Example 1. (i) Facts. Indian tribal government A owns and operates a recreational RV park and campground facility, serving transient non-tribal customers, primarily tourists. Other RV parks and campgrounds in the area operated by non-tribal private entities also attract the same type of customers. Very few, if any, tribal members of Indian tribal government A use this RV park and campground facility. Indian tribal government A charges a fee to customers to use the RV park and campground.

(ii) Conclusion. Based on the facts and circumstances and the factors in paragraph (g)(7)(ii) of this section, the operation of the recreational RV park and campground facility is a commercial activity of Indian tribal government A because it is the type of activity that is operated to earn a profit and is the type of activity that is performed by other private businesses. In addition, the facility includes customers who are substantially from outside of the Indian tribal community.

Example 2. (i) Facts. Indian tribal government B owns and operates a bank. This bank serves both tribal and non-tribal customers primarily living in the local area

(either on or off the tribal land). No distinction is made between the services and fees provided to any customer based on whether or not he or she is a tribal member of Indian tribal government B.

(ii) Conclusion. Based on the facts and circumstances and the factors in paragraph (g)(7)(ii) of this section, the operation of a bank is a commercial activity of Indian tribal government B because it is the type of activity that is operated to earn a profit and is the type of activity that is performed by other private businesses.

Example 3. (i) Facts. Indian tribal government E entered into a lease with Company X, which is in the trucking business. The lease provides that Indian tribal government E will purchase tractors, trailers and other equipment and lease such equipment to Company X on a long-term basis.

(ii) Conclusion. Based on the facts and circumstances and the factors in paragraph (g)(7)(ii) of this section, the leasing transactions relate to a commercial activity of Indian tribal government E because it is the type of activity that is operated to earn a profit and is the type of activity that is performed by other private businesses.

Example 4. (i) Facts. Indian tribal government G operates a factory on tribal land that produces goods for sale primarily to non-tribal customers, intended to earn a profit.

(ii) Conclusion. Based on the facts and circumstances and the factors in paragraph (g)(7)(ii) of this section, this is a commercial activity of Indian tribal government G because the activity is operated to earn a profit and is the type of activity that is performed by private businesses. In addition, the customers are substantially from outside of the Indian tribal community. The result could be different if the factory produced goods to promote and display the culture of Indian tribal government G, even if non-tribal customers primarily purchase the goods. This could be a governmental activity, depending on the factors.

(8) Determination of ITG employees--(i) Governmental and commercial ITG employees. This paragraph (g)(8) applies to determine whether an employee is an employee substantially all of whose services are in the performance of a governmental activity of an ITG (a governmental ITG employee), or is instead an employee who renders a significant portion of his or her services in the performance of a commercial activity of an ITG (a commercial ITG employee), for purposes of this paragraph (g). As

provided in paragraph (g)(8)(iv) of this section, this determination is based on the employee's assigned duties and responsibilities.

(ii) Location of the activity. If a commercial activity (within the meaning of paragraph (g)(7) of this section) of an ITG has a specific location that is readily identifiable and is not associated with a governmental activity, an employee performing substantial services at such a location is treated as having assigned duties and responsibilities for that commercial activity and, thus, the employee is a commercial ITG employee within the meaning of paragraph (g)(8) of this section. For example, a guard who is assigned to provide security services for an Indian tribal government at an Indian tribal casino (which is a commercial activity under paragraph (g)(7)(i)(B) of this section) is a commercial ITG employee within the meaning of paragraph (g)(8) of this section. However, where an employee is not on a payroll of an ITG that engages in a commercial activity, the result would depend on the other rules in this paragraph (g)(8).

(iii) Payroll records. If an employee is on the payroll of an ITG entity that is engaged in a commercial activity (within the meaning of paragraph (g)(7) of this section), the employee's assigned duties and responsibilities are being treated as for the commercial activity and, thus, the employee is a commercial ITG employee. For example, if a cashier is on the payroll of a convenience store (which is a commercial activity under paragraph (g)(7)(i)(D) of this section) owned by an ITG, the cashier is a commercial ITG employee within the meaning of paragraph (g)(8) of this section.

(iv) Duties and responsibilities. Subject to the specific rules in paragraph (g)(8)(ii) or (iii) of this section, whether an employee is a governmental or commercial ITG employee within the meaning of this paragraph (g)(8) is based on the employee's

assigned duties and responsibilities, taking into account facts and circumstances. Thus, whether an employee is a governmental or commercial ITG employee depends on whether the facts and circumstances indicate that the employee's assigned duties and responsibilities are substantially in the performance of a governmental or commercial activity. Thus, for example, a bookkeeper located in a governmental building and on the payroll of the general ITG government would nevertheless be a commercial employee if the facts and circumstances indicate that his or her assigned duties and responsibilities are to maintain the books and records for the hotel owned and operated by an ITG. However, an employee whose assigned duties and responsibilities are in the performance of a governmental activity, based on all the facts and circumstances, in accordance with the standards set forth in this paragraph (g)(8), is not treated as performing services for a commercial activity, even if the performance of services for the governmental activity may temporarily involve significant time working in a commercial activity in furtherance of the employee's duties and responsibilities for the governmental activity. For example, although, over a six-month period, the chief financial officer (CFO) for an ITG may spend a substantial amount of time working on the financing for a casino to be built on the ITG's tribal lands, the CFO would not be a commercial employee within the meaning of this paragraph (g)(8) because the CFO's duties and responsibilities are for a governmental activity.

(v) Reasonable, good faith interpretation. Except as provided in paragraph (g)(8)(ii) and (iii) of this section, an ITG plan will not be treated as failing to satisfy the rules in this paragraph (g)(8) if it complies with those rules under a standard that constitutes a reasonable, good faith interpretation of the statute, taking into account the

rules in this paragraph (g) and any other published guidance that relates to the application of section 414(d) to ITGs. However, this paragraph (g)(8)(v) applies with respect to the assignment of employees to governmental and commercial plans only if the benefit levels provided by the separate governmental and commercial plans are uniform. Thus, this paragraph (g)(8)(v) would not apply if the benefit level for employees under a plan purported to be a governmental plan is higher than that provided under a separate plan which covers commercial ITG employees.

(vi) Examples. The following examples further illustrate the application of this paragraph (g)(8):

Example 1. (i) Facts. Employee A, who is an attorney, works at the Attorney General's office of Indian tribal government B. Employee A's job location is in a government office building on tribal lands. The assigned duties and responsibilities of Employee A are principally to review the operations of marina boat operators to ensure that they comply with tribal rules and regulations as applicable to marina boat operators. Employee A provides some services for the marina, such as speaking at conferences or meetings with marina boat operators. Employee A's area of expertise is contract law.

(ii) Conclusion. Based on the facts and circumstances and the factors in paragraph (g)(8)(ii) through (iv) of this section, Employee A is a governmental ITG employee within the meaning of this paragraph (g)(8). Employee A primarily performs services for Indian tribal government B at a government building which is a governmental location and Employee A is on the payroll of Indian tribal government B. In addition, Employee A's assigned duties and responsibilities are primarily to provide government oversight services for Indian tribal government B.

Example 2. (i) Facts. Employee C is a police officer providing services for Indian tribal government D. Employee C's job location is the tribal police station located in a government building on tribal lands. The assigned duties and responsibilities of Employee C indicate that Employee C is expected to maintain public order, detect crime, and apprehend offenders on tribal lands of Indian tribal government D. Occasionally, while on patrol, Employee C must go to the casino operated by Indian tribal government D to restore order relating to a disturbance. Employee C's area of expertise is in general law enforcement.

(ii) Conclusion. Based on the facts and circumstances and the factors in paragraph (g)(8)(ii) through

(iv) of this section, Employee C is a governmental ITG employee within the meaning of this paragraph (g)(8). Employee C primarily performs services for Indian tribal government D at either a government building or while on patrol, even though Employee C's patrol duties include providing law enforcement services at the casino, which is a commercial activity under paragraph (g)(7)(i)(B) of this section. In addition, the assigned duties and responsibilities of Employee C, as well as Employee C's area of expertise, relate to general law enforcement and do not substantially relate to a commercial activity.