

HAVE YOU REVIEWED YOUR TRIBAL 401(k) PLAN TO MEET THE PENSION PROTECTION ACT & IRS REQUIREMENTS?

Under the Pension Protection Act of 2006 (PPA), an Indian Tribal government that wants to preserve its 401(k) plans under a government status must segregate and account for the financial resources and contributions for employees who work in “commercial activities” from those who perform “essential government functions”.

Because these terms are not defined in the PPA, the IRS has adopted a “good faith” standard and extended the deadlines for tribes to adopt separate plan documents until a future date that is 6 months after issuance of guidance (which has not yet been issued). **However, Tribes are required to be in “operational” compliance with the PPA now.**

While the IRS has not defined “commercial” activities under the PPA, it has enumerated five categories that are presumed to be commercial under the good faith transition rules: hotels, casinos, service stations, convenience stores and marinas. All other categories are subject to good faith interpretation. Several tribes and tribal associations, including the Native American Finance Officers Association (NAFOA), submitted comments to the IRS arguing for a flexible approach that would allow tribal revenue generating activities to qualify for government treatment. The comments point out, after all, that states use lotteries and other enterprises to generate public funds and they are not subject to segregating their 401(k) plans.

If a Tribe has only one 401(k) plan, for example, for all its employees (including the employees who work on commercial and government activities as defined in the PPA), then the participation groups should be segregated for testing and 5500 reporting purposes. Although the transitional relief amendment (IRS Notice 2007-67) allows Tribes to delay actually separating plans and assets, it does require Tribes to segregate and separately report commercial activity employees from essential governmental function employees to meet the good faith test under the notice.

Failure to meet the provisions of the PPA Act of 2006 and the IRS good faith standards (IRS Notice 2006-89 and 2007-67) could have the effect of waiving a tribe’s government status under the PPA and creating additional compliance limitations. We recommend that Tribes obtain the advice of legal counsel, a CPA, and plan administrators with expertise related to Tribal 401(k) plans under the Pension Protection Act of 2006 and the published IRS Notices to ensure the compliance of their plans.

Tribes also need to realize that these concepts under the PPA are developing at a rapid pace given that the same definitions are implicated in several other areas including tax exempt bonds under the Indian Tax Status Act. As a result, there are several legislative proposals to clarify the matter, in addition to regulatory projects pending at both Treasury and DOL. Any advice on these issues, therefore, should be updated for periodic changes.

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