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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** National Indian Gaming Commission—Reimbursing Bicyclists as Part of the Agency’s Transportation Fringe Benefit Program

**File:** B-318325

**Date:** August 12, 2009

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### DIGEST

Under the federal government’s transportation fringe benefit program, as established by 5 U.S.C. § 7905 and Executive Order No. 13150, the National Indian Gaming Commission (NIGC) provides monthly transit subsidies to employees who certify that they use mass transit to commute to and from work. NIGC may use its authority under 5 U.S.C. § 7905 to extend the program to provide a \$20 cash reimbursement to those employees who commute to and from work by bicycle. If NIGC chooses to do so, NIGC should consider the provisions of the Internal Revenue Code, 26 U.S.C. § 132(f)(5), and guidance provided by the Internal Revenue Service and the Office of Management and Budget.

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### DECISION

A certifying officer for the National Indian Gaming Commission (NIGC) requested an advance decision on whether NIGC may use appropriated funds to reimburse employees who bicycle to and from work under its transportation fringe benefit program. Letter from Director of Administration, NIGC, to Acting Comptroller General, GAO, June 8, 2009 (Request Letter).<sup>1</sup> As we explain below, agencies have authority to design their transit benefit programs consistent with 5 U.S.C. § 7905. In

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<sup>1</sup> Our practice when rendering decisions is to obtain the views of the relevant agency to establish a factual record and the agency’s legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at [www.gao.gov/legal/resources.html](http://www.gao.gov/legal/resources.html). In this case we did not solicit further information from the agency because the request included the opinion of the NIGC’s Office of General Counsel and fully articulated the agency’s views.

our view, NIGC may expand its program to provide a \$20 per month cash reimbursement to those employees who use their bicycles to commute to and from work. In designing and executing its program, NIGC should be mindful of the criteria in the Internal Revenue Code and the Office of Management and Budget (OMB) guidance.

## BACKGROUND

Congress established NIGC as a federal regulatory agency in the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2704. NIGC participates in the federal government's transportation fringe benefit program under 5 U.S.C. § 7905 and Executive Order No. 13150, *Federal Workforce Transportation*, Apr. 21, 2000, by providing monthly transit passes to employees who certify that they use mass transit to commute to and from work. Request Letter. Several NIGC employees who commute by bicycle and do not participate in the transit pass program have asked whether they can obtain commuting subsidies. They point out that Congress, in 2008, amended the Internal Revenue Code to permit employers to provide up to \$20 per month to those employees who commute to work by bicycle to cover the costs of a new bicycle, bicycle improvements and repairs, and storage.<sup>2</sup> 26 U.S.C. §§ 132(f)(1)(D), (f)(5)(F).

Because the provisions in 26 U.S.C. § 132(f) do not specify whether the bicycle reimbursement is available to federal employees, the certifying officer asked if NIGC can extend its transit program to include a \$20 cash reimbursement for employees who regularly commute to work by bicycle. The certifying officer also asked for advice on how such a program could be implemented.

## DISCUSSION

In 1993, Congress enacted the Federal Employees Clean Air Incentives Act, Pub. L. No. 103-172, 107 Stat. 1995 (Dec. 2, 1993), codified at 5 U.S.C. § 7905, which authorizes each agency head to establish a program to encourage employees to use means other than single occupancy motor vehicles to commute to and from work. The purposes of this authority are "to improve air quality and to reduce traffic congestion." Pub. L. No. 103-172, § 1(b), 5 U.S.C. § 7905 note. Programs established under this authority may include such options as: transit passes or cash reimbursements for transit passes; furnishing space, facilities, or services to bicyclists; and nonmonetary incentives. 5 U.S.C. § 7905(b)(2). At issue here is whether NIGC, under the transportation fringe benefit program that it established

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<sup>2</sup> Pub. L. No. 110-343, div. B, title II, § 211, 122 Stat. 3765, 3840–41 (Oct. 3, 2008). Under the Internal Revenue Code, an employer can deduct these costs as business expenses and the employees do not report the payments as income for tax purposes. See Internal Revenue Service (IRS) Publication 15-B, *Employer's Tax Guide to Fringe Benefits: For Use in 2009* (Dec. 16, 2008), at 2–3, 18–20, available at [www.irs.gov/pub/irs-pdf/p15b.pdf](http://www.irs.gov/pub/irs-pdf/p15b.pdf) (last visited July 30, 2009) (IRS Publication 15-B).

pursuant to section 7905, may use its appropriations to reimburse employees up to \$20 per month for costs incurred in commuting by bicycle.

NIGC's Office of General Counsel advised the certifying officer that a qualified bicycle commuting reimbursement program furthers the purpose of section 7905 and could be included as part of NIGC's transit program because an agency head is not limited by the examples given in section 7905. Request Letter, *quoting* Office of Personnel Management, Office of the General Counsel, *Compensation and Leave Decision*, OPM File No. S001842 (Aug. 11, 1998) ("Although [5 U.S.C. § 7905] gives several examples of the types of programs agencies may establish, it does not limit an agency head's discretion to approve any program reasonably related to the stated goal"). We agree with OPM's and the NIGC's Office of General Counsel's assessments.

As mentioned above, the purposes of the section 7905 program are to improve air quality and reduce traffic congestion by encouraging federal employees to commute by means "other than single-occupancy motor vehicles." 5 U.S.C. § 7905(b). The statute left it to the head of the agency to determine how to implement the program and what types of commuting activities would be covered by that particular agency. It provides, "A program established under this section may involve such options as" transit passes, space, facilities and services to bicyclists, and nonmonetary incentives. *Id.* While section 7905(b)(2) gives some options that the program "may involve," they are not exclusive. Bicycles could easily be found to serve the purpose of the statute: to improve air quality and reduce traffic congestion by encouraging employees "to use means other than single-occupancy motor vehicles to commute to or from work." *Id.* § 7905(b)(1). For example, the Federal Transit Administration considers bicycles important in helping to meet goals for cleaner air and less congested roadways because they "provide low-cost mobility and place fewer demands on local roads and highways to carry everyday trips." Federal Transit Administration, *Bicycles & Transit: A Partnership that Works* (1999), at 1.<sup>3</sup>

The legislative history of section 7905 supports the notion that, not only does the agency have discretion to determine the parameters of the program, but the legislators also contemplated that bicycle subsidies may be part of a program under section 7905. The conference report states:

"The program options that may be established under this legislation (7905(b)(2)) are not intended to be an inclusive list of programs that agencies may establish. Public Law 101-509 [predecessor legislation] limited the programs in which Federal agencies could participate to programs established by State or local governments. [Section 7905] expands the scope of the previous authorization to include, *but not be limited to*, privately operated vanpools. *The Committee believes that*

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<sup>3</sup> Available at [www.fta.dot.gov/publications/publications\\_5838.html](http://www.fta.dot.gov/publications/publications_5838.html) (last visited July 30, 2009).

*this expansion conforms the programs available to Federal agencies with those available in the private sector.*

“[Section 7905] also expands the scope of current law by permitting agencies to furnish space, facilities, or services to bicyclists as part of [a] transit program. For example, agencies are permitted to use the money allocated for the subsidy to provide bicycle racks, lockers, or other facilities for the use of bicyclists. *Agencies may also choose to provide a subsidy to those employees who commute by bicycle for use toward the cost of agency-provided locker rooms or showers.*”

H. R. Rep. No. 103-356(I), at 3 (1993) (emphasis added).

We have no objection, therefore, if NIGC decides to use its appropriations under the authority granted to it by section 7905 to extend its transportation fringe benefit program to include a \$20 per month reimbursement to NIGC employees who commute to and from work by bicycle.

The 2008 amendment to the Internal Revenue Code, 26 U.S.C. § 132(f), that led to the certifying officer’s question deals with the tax consequences of certain fringe benefit programs. The authority of a federal agency to use appropriated funds for what would otherwise be a personal expense is found, as discussed above, in section 7905, not section 132(f). However, the amendment provides useful guidance to NIGC and other agencies that choose to extend their transportation fringe benefit programs to cover bicycles.<sup>4</sup> For example, under the IRS rules, employees are eligible for a \$20 reimbursement in a “qualified bicycle commuting month” as defined by any month in which the employees meet certain criteria, including, for example, that they regularly use the bicycle for a substantial portion of the travel between their residence and their place of employment and do not receive a transit pass.<sup>5</sup> 26 U.S.C. § 132(f)(5)(F); IRS Publication 15-B, at 20.

NIGC should also be mindful of the guidance provided by OMB on preserving the benefits of the transit program while eliminating the opportunity for waste, fraud, and abuse. OMB Memorandum No. M-07-15, *Federal Transit Benefits Program* (May 14,

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<sup>4</sup> In the legislative history of section 7905, the House Committee on Post Office and Civil Service referred to private sector programs as a model for the federal program. H. R. Rep. No. 103-356(I), at 3 (“The Committee believes that this expansion conforms the programs available to Federal agencies with those available in the private sector.”).

<sup>5</sup> A bill pending before the House Committee on Ways and Means would amend section 132(f) to allow employees to receive both transit passes and bicycle commuting reimbursements, not to exceed an aggregate amount of \$100 per month. H.R. 863, 111<sup>th</sup> Cong. (2009).

2007).<sup>6</sup> The memorandum lists a set of internal controls that agencies should implement and may also apply to the inclusion of a bicycle expense reimbursement program. *Id.* at 2. These include requirements for application information, independent verification of eligibility, and implementation. *Id.*

A handwritten signature in black ink, appearing to read 'D. Gordon', with a long horizontal flourish extending to the right.

Daniel I. Gordon  
Acting General Counsel

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<sup>6</sup> Available at [www.whitehouse.gov/omb/memoranda\\_2007/](http://www.whitehouse.gov/omb/memoranda_2007/) (last visited July 30, 2009). The memorandum was written in response to a GAO report that found numerous instances of fraud and abuse of transit benefits by federal employees. *See* GAO, *Federal Transit Benefits Program: Ineffective Controls Result in Fraud and Abuse by Federal Workers*, GAO-07-724T (Washington, D.C.: Apr. 24, 2007).