

Treasury Tribal Advisory Committee, GWE Sub-committee

March 7, 2021

Re: Initial Draft Report of the GWE Subcommittee

Dear Tribal Leader:

The Treasury Tribal Advisory Committee (“TTAC”), Subcommittee on General Welfare Exclusion (“GWE”) (the “GWE Subcommittee”) is releasing the enclosed draft report for public comment regarding regulatory guidance for implementation of the Tribal General Welfare Exclusion Act (the “Act”) and related provisions under Internal Revenue Code (the “Code”) Section 139E.

The TTAC was created by the Act and is expressly tasked with advising the Secretary of the U.S. Department of Treasury (“Treasury”) on the taxation of Indians and the implementation of the Act. Pursuant to its operating procedures, the GWE Subcommittee was formed in 2019 to provide the TTAC with technical expertise on recommendations for the implementation of the Act. To accomplish this broad directive, the GWE Subcommittee divided its work into two steps under Section 4 (a)-(b) of its operating procedures:

- a) recommendations on the substantive guidance needed to implement the Act; and
- b) recommendations on guidelines for the training of Internal Revenue Service (“IRS”) agents.

To commence work on Section 4(a), the TTAC approved a work plan (“Plan”) on March 30, 2020 that was most recently updated on November 24, 2020. The enclosed plan, sets forth a four step process for issuance of a recommendation by the GWE Subcommittee to the TTAC that incorporates public feedback. In accordance with this plan, the GWE Subcommittee distributed two letters to tribal leadership via its technical advisors that requested input on draft core GWE principles and requested input from tribal leadership on a survey of GWE topics. This feedback period extended from July 2020-February 2021 and resulted in the submission of twenty seven tribal comments and involved a virtual public forum on August 26, 2020 that was attended by over 70 individuals.

The attached draft report and addenda are the product of our review of this extensive feedback and the technical expertise of our subcommittee. The GWE Subcommittee is committed to transparency and believes it is important to receive tribal input on this draft report prior to final submission to the TTAC by their June 16, 2021 meeting.

All input should be submitted, **by April 23, 2021 at 5:00pm EDT**, to GWE Subcommittee organization technical advisors via Ellie Beckett, ellie@nafoa.org and Nicholas Courtney, ncourtney@ncai.org. A designated tribal representative may submit

Treasury Tribal (TTAC) GWE Subcommittee Letter to Tribal Leadership

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feedback on behalf of an undisclosed Tribe if the representative certifies via email that they are duly authorized to provide said submission.

The GWE Subcommittee consists of tribal leaders and practitioners and understands the confidentiality of GWE programs. The purpose of this solicitation is solely to inform the GWE Subcommittee's recommendations to the TTAC. As a result, the GWE Subcommittee intends to take the following steps to maintain the confidentiality of submissions:

1. Technical advisors will remove identifying information from all submissions and assign them a unique ID. Original identifying submissions will then be deleted.
2. These anonymized submissions will then be shared with only the GWE Subcommittee for the purpose of informing their guidance recommendations to the TTAC.
3. The submissions will not be shared with Treasury or the IRS.

The GWE Subcommittee hopes these good faith efforts will facilitate tribal engagement on the development of our guidance recommendations. After submission of our recommendation on the substantive implementation of the Act, we will commence work on a report addressing the training of IRS agents and will similarly seek public input.

Thank you in advance for assisting the GWE Subcommittee to better refine its guidance.

Sincerely,



W. Ron Allen, GWE Subcommittee Co-Chair
Chair/CEO, Jamestown S'Klallam Tribe



Sharon Edenfield, GWE Subcommittee Co-Chair
Council, Confederate Tribes of Siletz Indians

U.S. Department of the Treasury
Office of the Secretary of the Treasury

Treasury Tribal Treasury Advisory Committee

Adopted Dec. 3, 2019

Duration: December 3, 2019 – December 3, 2021

- Section 1. The following Operating Procedures (hereinafter, the “Operating Procedures”) will govern the operations of the U.S. Department of the Treasury (the “Department”) Treasury Tribal Advisory Committee, (the “TTAC”), Subcommittee on the General Welfare Exclusion Act (the “SGWEA”).
- Section 2. **Authority.** The SGWEA has authority to engage in assigned responsibilities pursuant to TTAC Bylaws, Section 4.3.
- Section 3. **Mission and Purpose.** The mission and purpose of the SGWEA is to (1) to collect input; (2) review and analyze collected input and provide the SGWEA’s technical expertise; and (3) make a recommendation to the TTAC on the implementation of the of the General Welfare Exclusion Act (“GWEA”), Public Law 113-168.
- Section 4. **Objectives and Tasks.** The SGWEA’s objectives and tasks are to complete the three enumerated activities in Section 3 for the following GWEA implementation categories:
- (a) **Definitions**
 - 1. Recommend guidelines for defining “lavish or extravagant benefits” with respect to tribal government programs under the GWE.
 - 2. Recommend guidelines for defining “ceremonial and culturally significant activities” with respect to tribal government programs under the GWE.
 - 3. Recommend other terms and key phrases under the GWE framework
 - (b) **Training**
 - 1. Recommend guidelines for training and education for internal revenue employees who administer and enforce internal revenue laws and procedures with respect to Indian tribes on Federal Indian law, laws impacting tribal nations, and the Federal Government’s unique legal treaty and trust relationship with Indian tribal governments.
 - 2. Recommend guidelines for instituting Department training and education for internal revenue employees to: (1) administer the GWEA; and (2) administer internal revenue laws and procedures with respect to tribal nations.
 - 3. Recommend guidelines for instituting Department training and technical assistance to tribal financial officers for implementation of the GWEA.
- Section 5. **Procedures.** The SGWEA’s procedures will be as follows:
- (a) **Communications with TTAC.** The SGWEA may have at least three in-person and/or telephonic meetings with TTAC, as necessary, to discuss assigned responsibilities.

- (b) **Collection of Input.** The SGWEA may solicit and accept input on Section 4. Outreach may include, but not be limited to, the following:
 - 1. Sending a request for input to all national and regional inter-tribal and American Indian and Alaska Native organizations that work on taxation issues.
 - 2. Sending a request to the Department and/or other agencies for input, best practices, and precedent that informs the work of the SGWEA.
 - (c) **Review and Analysis.** After receipt of input collected in 5(b), the SGWEA shall review and analyze recommendations to TTAC. The SGWEA may contribute their respective technical expertise to the objectives identified in Section 5.
 - (d) **Preliminary Recommendations and Draft Report.** The SGWEA shall develop preliminary recommendations and draft reports to address the objectives identified in Section 4. The SGWEA shall submit draft reports to the TTAC for initial review and comment and shall incorporate the TTAC's feedback in a final report and submit to the TTAC.
 - (e) **Final Recommendations.** Final decision to accept, reject, and/or otherwise modify the SGWEA's recommendations and/or reports will rest with the TTAC.
 - (f) **Sources.** All reports must include relevant sources.
 - (g) **Records.** The SGWEA shall make every effort to record, collect, and otherwise preserve input and analysis produced or collected whether or not it is included in the final report. These documents shall be forwarded to the TTAC.
- 5.2. **Meetings.** The SGWEA shall have regular telephonic meetings, at the discretion of the co-chairs, and convene telephonically at least two (2) weeks in advance of a scheduled TTAC public meeting when possible.
- 5.3. **Duration.** The SGWEA shall exist for up to two (2) years from the date of its creation and may be subject to an extension and modification by the TTAC through a majority vote of the TTAC. The TTAC may amend the duration of any subcommittee at its discretion and for any reason.

Section 6. **Membership, Designation and Terms in Office.**

- 6.1. **Membership.** The SGWEA may consist of maximum of seven (7) members, but no less than three (3) members including two (2) co-chairs and:
 - (a) the two (2) co-chairs shall be comprised of TTAC members; and
 - (b) all remaining members shall be selected based on technical expertise in the subcommittee subject area and ability to perform all assigned responsibilities, including time and financial commitments for subcommittee service.
- 6.2. **Membership Terms.** The terms of the SGWEA members shall run for 2 years from date of selection or the duration of the Committee and may be extended by the Committee.
- 6.3. **Conflicts of Interest.** All SGWEA members shall comply with the conflict of interests requirements set forth in Section 5.3 of the TTAC's bylaws.
- 6.4. **Volunteer Membership.** All SGWEA members are considered volunteer members and shall not be compensated for their time and services in accordance with the Department's policy.

Subcommittee on the General Welfare Exclusion Act (SGWEA)¹
Work Plan 2020
Updated 11/24/20

Purpose: In compliance with the Operating Procedures for the SGWEA, utilize the procedures set forth in Mission and Purpose in Section 3 to accomplish the identified Objectives and Tasks in Section 4(a).

Step 1: Collect Input

Timeline: July 6, 2020-September 14, 2020

1. SGWEA drafts a solicitation letter seeking stakeholder input to inform the SGWEA's recommendations.
2. SGWEA submits this draft letter to TTAC and the Designated Federal Officer for the purpose of providing advance notice and distributes to the public five days from the date of this notice.
3. A copy of this letter will be shared by SGWEA's technical advisors through avenues that include, but are not limited to, the following: broadcasts to tribal organizations, posting to NAFOA and NCAI websites, and through other avenues of engagement with the public.

Step 2: Review and Analyze

Timeline: September 14, 2020-February 26, 2021

1. The deadline for response to the solicitation in Step 1 will be extended until January 29, 2021.
2. Subcommittee technical advisors will organize input.
3. The SGWEA will review and analyze substantive input and offer their respective technical expertise.

Step 3: Draft Recommendation to the TTAC

Timeline: March 1, 2021-March 17, 2021

1. The SGWEA will provide a draft recommendation to the TTAC by the March 17, 2021 TTAC meeting regarding the issues identified in Section 4(a) of the operating procedures.
2. The SGWEA will also provide a draft copy of the recommendation to the public via a broadcast by its technical advisors.

Step 4: Final Recommendation to the TTAC

Timeline: March 18, 2021-June 16, 2021

1. The SGWEA will receive and review input on the draft recommendation.
2. On April 22, 2021 the SGWEA will hold a public forum to receive additional feedback on its draft recommendation.
3. After analysis of feedback, a final recommendation on the issues identified in Section 4(a) will be submitted to the TTAC by their June 16, 2021 meeting.

¹The deadlines within this work plan may be subject to extension by the SGWEA Co-Chairs due to the effects of the COVID-19 pandemic. The SGWEA shall provide the Treasury Tribal Advisory Committee five days' notice prior to modification of any work plan timelines.

INITIAL DRAFT REPORT OF THE GWE SUBCOMMITTEE
FOR THE MARCH 17, 2021 TTAC MEETING

I. Core GWE principles for consideration and further input:

The following represent core General Welfare Exclusion (“GWE”) principles for which the GWE Subcommittee believes there is a high likelihood of consensus from tribal stakeholders based on initial public meetings and input, as well as subcommittee deliberations to date. This initial listing of core GWE principles is not intended to be an all-inclusive list as it is anticipated that the list will expand and be modified as additional input is gathered and considered.

1. **Flexibility:** In accordance with federal tribal self-determination principles, GWE guidance must recognize tribal jurisdiction, sovereign discretion, and exclusive authority to budget for general welfare benefits and determine such programs and benefit levels in the design, development and administration of programs according to the unique circumstances, needs, customs, culture, traditions and government practices of Tribal governments. GWE definitions must not be used to narrow or restrict tribal rights otherwise provided under the Act.
2. **Deference:** GWE guidance must reflect the canon of construction set forth in Section 2(c) of the Tribal General Welfare Exclusion Act (“TGWEA” or the “Act”): that ambiguities in Code Section 139E shall be resolved in favor of Tribal governments and deference shall be given to Tribal governments for the programs administered and authorized by the Tribe to benefit the distinctive general welfare needs of each tribal community.
3. **Purpose:** GWE guidance must reflect the Act’s purpose in promoting tribal traditions, culture, custom and government practices, as well as the promotion of self-determination and self-governance. Tribal budget dollars reserved for promoting the general welfare shall not be diminished by the payment of taxes or costs of compliance.
4. **Expansion of the Common Law:** GWE guidance must reflect the Act’s intent to build upon rather than supplant the common law. Thus, Tribes should be able to continue to rely upon the common law as reflected in Revenue Procedure 2014-35 as well as Code Section 139E.
5. **Prospective Enforcement:** GWE guidance must confirm that it will be applied prospectively and that Tribes and Tribal citizens who have developed and administered programs in good faith will not be audited retroactively once the temporary suspension is lifted.

6. **The Term “lavish or extravagant” is Relative**: GWE guidance must recognize that “lavish or extravagant” is a relative term that depends on the unique circumstances of each tribal community.

7. **Use of “Safe Harbors”**: GWE guidance must confirm that the use of “safe harbors” is optional and not a limitation on the statutory rights that Tribes have under the Act or Code Section 139E.

The GWE Subcommittee will take these core principles into account when developing proposed GWE guidance. The GWE Subcommittee will refine and add to these principles as additional input is received and considered.

II. **Specific Concepts under Consideration:**

The following represent specific concepts under consideration for the possible development of guidance. This initial listing is not intended to be an all-inclusive list as it is anticipated that the list will expand and be modified as additional input is gathered and considered.

1. **GWE versus gaming per capita**

Issue:

Should GWE equal payments from gaming revenue be treated presumptively as per capita?

Answer: Tribal response is no. Many tribes develop general welfare programs with set amounts for specific benefits or budget a uniform amount per member to address tribally-approved general welfare purposes.

Benefits designed to address special purposes or needs should not be presumed or taxed as “per capita.”

Possible Guidance Solution:

- (1) Adhere to the Indian Gaming Regulatory Act of 1988 (IGRA), Pub. Law §2710 (2)(B)(ii) which specifically allows tribes to set aside a portion of gaming revenue for general welfare purposes, and 25 CFR § 290.2, which recognizes that per capita under IGRA does not include payments set aside by a Tribe for special purposes or programs.
- (2) Amounts allocated by a Tribe from IGRA revenues for general welfare purposes, and paid under programs designed to address specific needs and purposes in promoting the general welfare, must be treated presumptively as general welfare and not taxed as IGRA per capita payments.

- (3) For GWE paid with gaming revenue, a Tribe must be entitled to rely upon its approved Revenue Allocation Plan (RAP) in determining what will be treated as a per capita distribution or GWE. IRS must not take enforcement positions contrary to a Tribe's approved RAP.

Appendix Regulatory Language for Consideration: TTAC Prop Treas. Reg. § 1.139E-10. Coordination with IGRA; Presumptions.

Tribal Comment Summary:

GWE payments may include uniform assistance/equal payments and are distinct from per capita. IGRA regulations (25 CFR § 290.2) provide that per capita distributions do not include "payments which have been set aside by the tribe for special purposes or programs, such as payments made for social welfare, medical assistance, education, housing or other similar, specifically identified needs." Thus, if the GWE program meets GWE criteria, the payments are tax exempt regardless of whether the payment is uniform. A Tribe shall be entitled to rely on its approved Revenue Allocation Plan. In addition to the general rule of prospective enforcement following GWE guidance, in the event of a perceived conflict between IGRA or the Tribe's RAP and Code Section 139E, the Service shall consult with the Tribal government in an effort to resolve the perceived conflict. Subsequent enforcement contrary to an approved RAP will be prospective only.

2. Minors Trusts:

Issue:

Can the Tribe direct that a portion of minors trust assets be set aside for specific GWE program purposes?

Answer: Tribal response is yes. When Tribes pay benefits from an IGRA trust, they should be entitled to structure those payments to comply with the GWE.

Proposed Guidance Solution:

- (1) For minors' trusts covered by an IGRA Revenue Allocation Plan (RAP), the RAP should be looked to in determining whether the payment is properly characterized as per capita or whether it may qualify for GWE if the payments otherwise satisfy 139E.
- (2) Tribes retain the sovereign discretion to structure minors trust payments under an IGRA trust in compliance with the TGWEA.
- (3) IGRA specifically contemplates the ability of Tribal governments to pay health, education, and welfare ("HEW") from minors trust accounts despite the fact that

amounts contributed into the trust would have been paid as per capita but for the individual's age.

Appendix Regulatory Language for Consideration: TTAC Prop. Treas. Reg. § 1.139E-11. Trusts; Health Education and Other Welfare Payments.

Tribal Comment Summary:

As Tribes may pay health education and welfare benefits under an IGRA trust, Tribes may also structure such payments to comply with the GWE. GWE treatment is determined based on compliance with Code Section 139E at the time of distribution.

3. Substantiating GWE Expenses:

Issue:

GWE contemplates that payments will be used consistent with program guidelines and tribal custom or government practices to “promote the general welfare”. How does the Tribe need to “substantiate” that funds were used for a qualified purpose?

Proposed Guidance Solution:

- (1) Code Section 139E does not require Tribes to require members to submit receipts. The standard would be what is “reasonably calculated” to meet general welfare needs/purposes; that is, the tribal government has evaluated and determined what the need is, the best way to address it, the feasible means by which they can address it, and the determination that the program, as designed, can reasonably be expected to achieve its goals.
- (2) Substantiation should be presumed when a Tribe can show that (a) GWE benefits are “reasonably calculated” to meet general welfare needs/purposes; and (b) the method of distribution is reasonably expected to achieve program goals.
- (3) Tribal governments may show that benefits are reasonably calculated to meet general welfare needs/purposes by relying on data or studies corroborating such expenses. Without limitation, this would include national or regional studies, member surveys, or amounts deemed reasonable by federal or state program guidelines.
- (4) Tribes may show that the method of distribution is reasonably expected to achieve program goals by establishing reasonable verification procedures such as but not limited to: direct pay arrangements, applications in which recipients agree to specified program requirements, or end-of-year certifications.

- (5) Tribes must be afforded flexibility with regard to substantiating expenses that relate to tribal cultural traditions and religious expenses.
- (6) IRS must recognize that some GWE benefits address historical need which will not require substantiation by the tribal citizen. For example, benefits paid only to elders to make up for historic economic deprivation and shorter life expectancy.

Appendix Regulatory Language for Consideration: TTAC Prop. Treas. Reg. § 1.139E-8. Substantiation.

Tribal Comment Summary:

Determining substantiation is a sovereign function of the Tribe. Substantiation should be presumed when a Tribe can show that (a) GWE benefits are reasonably calculated to meet general welfare needs/purposes; and (b) the method of distribution is reasonably expected to achieve program goals. Tribes should be granted deference to create tribal substantiation processes that incorporate flexibility, including without limitation use of annual certifications by GWE benefit recipients, reliance on member studies or surveys, reference to state or federal program guidelines, reliance on tribal, national, state or local agency living expenses data, and exceptions for cultural assistance or other payments to address historic economic deprivation.

4. Code Section 139E versus Rev Proc 2014-35:

Issue:

Rev Proc 2014-35 is arguably broader in some respects. For example, it contemplates qualified non-tribal citizens (such as lineal descendants and domestic partners). Code Section 139E contemplates benefits to or on behalf of tribal citizens, spouses, and dependents.

Possible Guidance Solution:

- (1) Confirm that Tribes may continue to rely on both 139E and Rev Proc 2014-35 as 139E is a statutory benefit and Rev Proc 2014-35 reflects the “common law.” Consider guidance confirming that 139E expands rather than supplants the common law. This is supported by the GWE legislative history. Any guidance must clearly incorporate language specifically stating Congressional intent preserved in a colloquy between Senator Jerry Moran (R-KS) and Senator Heidi Heitkamp (D-ND), the original co-sponsors of the Tribal General Welfare Exclusion Act (TGWEA) (P.L.113-168), and the Chairman of the Senate Finance Committee, Senator Ron Wyden (D-OR). See the Colloquy of Senator Ron Wyden (D-OR), Senator Heidi Heitkamp (D-ND), and Senator Jerry Moran (R-KS), Cong. Rec. S5686 (September

17, 2014) (emphasis added); also see the Statement of Senator Heidi Heitkamp (D-ND), Cong. Rec. S5686 (September 17, 2014).

- (2) In addition, Notice 2015-34 reaffirming the validity for Rev. Proc. 2014-35 should also be incorporated in any guidance.
 - a. The phrase “on behalf of” the tribal citizen must be read broadly. For example, depending on particular tribal culture, custom and tradition, a tribal citizen may have obligations to care for extended family, and a Tribe may determine that such assistance promotes the general welfare.
- (3) Consider guidance that adopts Rev. Proc. 2014-35 flexibility for both payments and reimbursements.

Appendix Regulatory Language for Consideration: TTAC Prop. Treas. Reg. § 1.139E-5. Continued Reliance on Rev Proc 2014-35.

Tribal Comment Summary:

Code Section 139 E incorporates Rev. Proc. 2014-35. This was confirmed in IRS Notice 2015-34. IRS GWE guidance must confirm that continued interpretation. Note: the subcommittee commented that there may be legislative history further supporting a broader interpretation of eligible program recipients that follows 2014-35.

5. Flexible “Safe Harbor” Plans:

Issue:

Tribes may want to develop programs to reflect that tribal citizens will have different needs. For example, a Tribe may budget up to a certain amount for annual GWE benefits per tribal citizen. A tribal citizen with a home may use all of it for roof repairs. Another tribal citizen who is a renter may need deposit assistance for an apartment instead.

Possible Guidance Solution:

- (1) Confirm that Tribes may develop flexible programs that allow tribal citizens to select from among pre-approved GWE program purposes subject to budget limits and program guidelines. This helps with tribal budgets and allows tribal citizens to prioritize GWE needs.
- (2) Confirm that the “safe harbors” in Rev. Proc. 2014-35 are not exclusive and that Tribal Governments can establish their own “safe harbors.”

- (3) Provide that such Tribal Government “safe harbors” shall be given the same status and effect as the “safe harbors” in Rev. Proc. 2014-35.

Appendix Regulatory Language for Consideration: TTAC Prop. Treas. Reg. § 139E-6. Flexible Safe Harbor Programs.

Tribal Comment Summary:

Tribal citizens must be permitted to elect how they can use GWE benefits within the parameters of a tribal GWE program.

6. Compensation for Services:

Issue:

Code Section 139E prohibits “compensation for services” from being treated as GWE. Some tribes, however, have traditionally tied certain types of assistance to community service. Rev. Proc. 2014-35 mentions honoraria for ceremonial events but fails to describe larger tribal wide cultural, ceremonial and community service General Welfare programs.

Possible Guidance Solution:

- (1) Confirm that “compensation for services” is not intended to prohibit Tribal custom or tradition with regard to community service.
- (2) Confirm that “compensation for services” never includes cultural and ceremonial gifts and payments as determined by each Tribe.
- (3) Confirm that payments as part of a training program are not compensation for services.

See, for example: Revenue Ruling 75-246 (Payment for services rendered under a work-training program was not “compensation” when payments were in the nature of relief payments made for the promotion of the general welfare). *See also* Revenue Ruling 63-136 (Manpower Development and Training Act of 1962 payments are intended to aid the recipients in efforts to acquire new skills and promote the general welfare); Revenue Ruling 68-38 (Basic purpose training program is to train unemployed and underemployed residents and payment is not compensation for services); Revenue Ruling 68-133 (stipend received by "job service corpsmen" is intended to aid in efforts to acquire skills and characterized as employment promoting the general welfare); Revenue Ruling 72-340 (stipends intended to aid in acquiring training skills made for the promotion of the general welfare).

Tribal Comment Summary:

Assistance that includes, but is not limited to, training, community service, cultural and traditional practices and ceremonial activities shall not be considered compensation for services.

7. Prospective Enforcement:

Issue:

The GWE includes a temporary audit suspension pending IRS education and training. However, it also extends the statute of limitations for assessments. It is critical that Tribes with established general welfare benefit programs, prior to the issuance of any new guidance, not be penalized for their reasonable interpretations of then-applicable authority and administration of general welfare benefit programs.

Possible Guidance Solution:

- (1) Confirm that the GWE guidance, once developed, will be applied prospectively only, not retroactively.
- (2) Establish a grace period of not less than one year for Tribes to comply with the new guidance before it applies.

Appendix Regulatory Language for Consideration: TTAC Prop. Treas. Reg. § 1.139E-1. Suspension of Audits; Prospective Enforcement.

Tribal Comment Summary:

Same as possible guidance solution.

8. Lavish and Extravagant:

Issue:

The Act calls for the development of guidance on what will be treated as “lavish or extravagant” for purposes of GWE.

Possible Guidance Solution:

- (1) GWE guidance must recognize that “lavish or extravagant” is a relative term that depends on the unique circumstances of each tribal community and the type of benefit provided (e.g., one-time down payment vs. monthly utility assistance).

- (2) Relevant circumstances include, without limitation, an Indian tribal government's economic conditions or factors, culture and cultural practices, history, geographic areas, traditions, resources, and other considerations such as a tribe's process to meet goals and objectives for general welfare purposes.
- (3) Recognizing that tribal governments are best situated to determine what constitutes "lavish or extravagant," the IRS should establish a rebuttable presumption that defers to a tribal government's interpretation of this term.
- (4) When claiming a benefit is lavish or extravagant, the IRS must not utilize guidance in other areas of the law (such as under the "innocent spouse" doctrine) because those areas do not reflect the circumstances unique to tribal governments and GWE.

Appendix Regulatory Language for Consideration: TTAC Prop. Treas. Reg. § 1.139E-3. Lavish or Extravagant.

Tribal Comment Summary:

Same as possible guidance solution.

9. Wellness and Health-related Programs:

Issue:

Rev. Proc. 2014-35 states that it "does not address certain benefits that tribal citizens of an Indian tribe may exclude from income under a specific provision of the Code" such as Section 139D (generally limited to health-related expenses that meet the definition of a deductible "medical expense" under Code Sections 213 and 105). Wellness incentive programs have also been recognized as promoting the welfare of individuals under Section 4108 of the Affordable Care Act. Numerous Tribes offer health and wellness programs. Given the constant litigation surrounding the Affordable Care Act that included Section 139D, separate General Welfare treatment should be included for health-related expenditures and other unique programs like "wellness" that may not fit within a traditional health plan.

Possible Guidance Solution:

- (1) Confirm that wellness and health-related programs, including wellness incentive programs, qualify under GWE.
- (2) Clarify that the Code Section 139E exclusion for wellness and health-related programs is independent of, and not limited by, Code Section 139D (Indian health care benefits).

Appendix Regulatory Language for Consideration: TTAC Prop. Treas. Reg. § 1.139E-9. Wellness and Health-Related Programs; Coordination With Section 139D.

Tribal Comment Summary:

Many commenters expressed that they have health and wellness programs to improve the physical and mental welfare of their community.

10. Accumulated or Deferred GWE benefits:

Issue:

A Tribe with a small annual GWE budget may want to allow citizens to defer annual benefits in favor of larger GWE expenses down the road (such as a housing down payment or college tuition).

Possible Guidance Solution:

- (1) Consider guidance confirming that GWE benefits can be deferred to future dates.
- (2) Allow for accumulation of GWE benefits prior to distribution which will still meet requirements of 139E(b)(2)(A) and (C).

Appendix Regulatory Language for Consideration: TTAC Prop. Treas. Reg. § 1.139E-12. Deferred Benefits.

Tribal Comment Summary:

Commenters felt that programs should be able to provide for rolling over GWE benefits and elective conversion from per-capita to GWE.

11. Coordination with SSI and Other Federal “Needs Based” Programs:

Issue:

While the GWE presumes need, some federal programs such as the Social Security Administration’s (SSA) Supplemental Security Income (SSI) program still require means testing. Thus, tribal GWE program benefits may be used to disqualify tribal citizens from federal program benefits.

Possible Guidance Solution:

- (1) Consider SSI change in policy that TGWEA benefits are deemed to meet SSA Assistance Based on Need (ABON) standards.

- (2) Confirm with SSA that Tribes can establish a means based general welfare program utilizing their own financial standards, not necessarily federal standards, which will qualify for existing SSA ABON standards
- (3) Support legislation to amend 139E to clarify that amounts exempt under GWE should not be counted as a resource or treated as income for other federal programs.

Appendix Proposed Regulatory Language: TTAC Prop. Treas. Reg. § 1.139E-13. Coordination with SSI and Other Federal “Needs Based” Programs.

Tribal Comment Summary:

Many commenters requested that Treasury engage in inter-agency assistance to educate other federal departments that tribal general welfare benefits are not income and should not be included in eligibility determinations for assistance like Supplemental Social Security Income or Supplemental Nutrition Assistance. In addition to asking for inter-agency support, commenters also supported an amendment to the TGWEA to confirm that GWE benefits are not income and are excluded from income determinations for other needs-based federal assistance.

12. Items of Cultural Significance, Reimbursement of Costs and Honorariums:

Issue:

The TGWEA provides that any items of cultural significance, reimbursement of costs, or cash honorarium for participation in cultural or ceremonial activities for the transmission of tribal culture shall not be treated as compensation for services.

Possible Guidance Solution:

- (1) Consider guidance that confirms that IRS must defer to tribal determinations on what it means to participate in cultural or ceremonial activities for the transmission of tribal culture.
- (2) Consider guidance that recognizes the Congressional decision to eliminate the qualifier that honorariums must be “nominal” cash value as per Revenue Procedure 2014-35. A Tribe’s determination of the proper amount of honorarium should be presumptively reasonable and fair value.

Appendix Proposed Regulatory Language: TTAC Prop. Treas. Reg. § 1.139E-4. Cash Honoraria, Items of Cultural Significance for Transmission of Tribal Culture.

Tribal Comment Summary:

Same as possible guidance solution.

13. Disaster Relief and Similar Assistance:

Issue:

Tribal governments provide disaster relief and similar assistance to promote the welfare and address emergencies as well as the public health and safety. While rulings on disaster relief were referenced in prior IRS safe harbor guidance, disaster relief itself was not expressly identified.

Proposed Guidance Solution:

- (1) Expressly recognize disaster relief and similar assistance as a presumed GWE benefit.
- (2) Clarify that disaster relief and similar assistance paid with funds from the CARES Act or American Rescue Plan Act qualify as appropriate uses of those funds.

Regulatory Language for Consideration: TTAC Proposed Treas. Reg. § 1.139E-7.
Disaster Relief and Similar Assistance.

Tribal Comment Summary:

Many commenters stated that their Tribes have disaster relief programs which have been critical during the pandemic and during natural disasters which are increasing due to climate change.

14. Rules of Construction:

Issue:

The TGWE includes a special rule of construction requiring ambiguity to be construed in favor of tribes, but this rule is in Code Section 139E.

Proposed Guidance Solution:

- (1) Add regulatory requirements for IRS to comply with the TGWEA special rule of construction.
- (2) Add a rule of deference and burden standards to implement the rule of construction.

Regulatory Language for Consideration: TTAC Prop Treas. Reg. § 1.139E-2. Rules of Construction.

Tribal Comment Summary: Same as possible guidance solution.

APPENDIX A

The TTAC recommends that Treasury not rely on *United States of America v. Sally Jim, Miccosukee Tribe of Indians of Fla., Intervenor*, 891 F.3d 1242 (11th Cir. 2018) in developing guidance under the TGWEA because: (1) The case addressed tax years that predated Code Section 139E, (2) the case is limited to unique facts that are not generally applicable, and (3) rulings in private litigation do not reflect government-to-government consultation and informed rulemaking.

APPENDIX B

DRAFT IRC 139E TTAC PROPOSED REGULATIONS

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TTAC PROPOSED REGULATIONS:

TTAC Prop Treas. Reg. § 1.139E-0. Core Principles. In administering the Tribal General Welfare Exclusion Act (the “Act”) and Internal Revenue Code (the “Code”) Section 139E, the IRS shall take into account certain core principles reflected in the legislative history to the Act, including:

(a) *flexibility* for Indian tribal governments to design and administer programs to meet the circumstances, needs, customs, culture, traditions and government practices unique to each Indian tribal government,

(b) *deference* to Indian tribal governments consistent with the tribal canon of construction set forth in Section 2(c) of the Act,

(c) *purpose* of the Act to promote tribal traditions, culture, custom and government practices, as well as the promotion of self-determination and self-governance,

(d) *expand* and build upon rather than supplant the sovereign right of each Indian tribal government to provide general welfare under the common law and Revenue Procedure 2014-35,

(e) *prospective* enforcement following notice, comment and tribal consultation, as well as the opportunity of tribal governments to amend programs to meet new regulatory requirements or other subsequent guidance under the Act,

(f) *relative* nature and uniqueness of each tribe recognized when determining what is “lavish or extravagant”, and

(g) *safe harbors* are optional and not a limitation on the statutory rights that individual Indian tribal governments have under the Act or Code Section 139E.

TTAC Prop. Treas. Reg. § 1.139E-1. Suspension of Audits; Prospective Enforcement.

(a) *Suspension of Audits.* The Secretary shall suspend all audits and examinations of Indian tribal governments, members of Indian tribal governments, and qualified nonmembers to the extent such an audit or examination relates to the reporting or exclusion of Indian general

welfare benefits, until satisfaction of the requirements for prospective enforcement under subparagraph (b).

(b) *Prospective Enforcement.* Once the training and guidance prescribed by Section 3(b)(2) the Act is completed, the Secretary shall publish notice in the Federal Register. The notice shall stipulate that Indian tribal governments have one year to modify their programs as necessary to comply with such guidance before general welfare audits or examinations of Indian tribal governments, members of Indian tribal governments, and qualified nonmembers commence. Once audits commence, they shall only relate to periods beginning on or after the one-year period referred to in the previous sentence has passed.

TTAC Prop. Treas. Reg. § 1.139E-2. Rules of Construction.

(a) *General Rule.* Ambiguity under Code Section 139E shall be resolved in favor of Indian tribal governments and deference shall be afforded to Indian tribal governments for the programs administered and authorized by the tribe to benefit the general welfare of the tribal community. When implementing the foregoing rule of statutory construction, IRS shall take into account that Indian tribal governments are vested with the sovereign right and discretion to determine the types and amount of general welfare benefits best suited to promote the general welfare needs of each tribe, as well as the means to implement and substantiate the use of such assistance.

(b) *Standard of Review; Presumptions and Burden of Proof.* An Indian tribal government will be presumed to have properly exercised its discretion under Code Section 139E if it can demonstrate that it has acted consistently with either written general welfare program guidelines or unwritten tribal custom or government practices (per Code Section 139E(c)(4)). Matters within the sovereign discretion of tribal governments under Code Section 139E shall not be challenged or overturned except upon the showing of an abuse of discretion. In audit, the IRS shall have the burden of proving an abuse of discretion by reference to the Indian tribal government's written program guidelines (or unwritten tribal custom or government practices), as applicable, and the unique goals and statutory construction requirements of the Act.

TTAC Prop. Treas. Reg. § 1.139E-3. Lavish or Extravagant.

(a) *Relative Term.* "Lavish or extravagant" is a relative term that depends on the unique circumstances of each tribal community and the type of benefit provided. Relevant circumstances include, without limitation, an Indian tribal government's economic conditions or factors, culture and cultural practices, history, geographic areas, traditions, resources, and other considerations such as a tribe's process to meet goals and objectives for general welfare purposes.

(b) *Rebuttable Presumption.* Tribal governments are best situated to determine what constitutes “lavish or extravagant.” Accordingly, the Secretary shall defer to a tribal government’s interpretation of the term. Any rebuttal must overcome the rule of statutory construction set forth in Section 2(c) of the Act and Section 1.139E-2 (Rules of Construction), and must rely on the specific purposes of the Act.

(c) *Reasonably Calculated.* Program amounts that have been reasonably calculated in accordance with Section 1.139E-9 (Substantiation) shall not by definition be considered lavish or extravagant. Nothing within this subsection shall relieve IRS’ burden of proof as set forth in subsection (b).

TTAC Prop. Treas. Reg. § 1.139E-4. Cash Honoraria, Items of Cultural Significance for Transmission of Tribal Culture.

Any items of cultural significance, reimbursement of costs, or cash honorarium for participation in cultural or ceremonial activities for the transmission of tribal culture shall not be treated as compensation for services. The Secretary shall defer to the tribal government in determining which activities constitute participating in cultural or ceremonial activities for the transmission of tribal culture.

TTAC Prop. Treas. Reg. § 1.139E-5. Continued Reliance on Rev Proc 2014-35.

(a) *General Rule.* Without limiting any additional rights that an Indian tribal government may have under the Act or Code Section 139E, each tribal government shall be entitled to continued reliance on programs that meet the safe harbor requirements of Revenue Procedure 2014-35.

(b) *Qualified nonmembers.* The phrase “on behalf of” under Code Section 139E(b) shall be read broadly to achieve the purposes and goals of the Indian tribal government program, and associated Indian general welfare benefits, including, without limitation, benefits for qualified nonmembers per Revenue Procedure 2014-35.

(c) *Expansion of Safe Harbors.* The expense categories addressed in Section 1.139E-7 (parity), Section 1.139E-8 (disaster relief and similar assistance), and Section 1.139E-10 (wellness and health-related programs) shall be treated as if identified as separate safe harbor categories in Revenue Procedure 2014-35. The safe harbors in Revenue Procedure 2014-35 shall be read as examples and not as a list of limitation. Tribes may expand these safe harbors, and establish new ones, to the extent consistent with the Act.

TTAC Prop. Treas. Reg. § 139E-6. Flexible Safe Harbor Programs.

(a) *General Rule.* Indian tribal governments may offer flexible programs that allow tribal recipients to select from among tribal pre-approved Indian general welfare benefits. Pre-approved benefits may include, but are not limited to IRS safe harbor benefits under Revenue Procedure 2014-35, tribal programs described in Sections 1.139E-5(c) (expansion of safe harbors), or other Indian tribal programs approved by a tribe under Code Section 139E.

(b) *Deferred Benefits; Accumulation.* Indian tribal governments may establish programs that allow Indian general welfare benefits to be deferred and accumulated for larger safe harbor and other general welfare purposes approved by the tribe such as, by way of example and not limitation, home ownership, catastrophic care, assisted living and nursing homes, and college tuition and associated expenses.

(c) *Elections Flexibility.* Each Indian tribal government may make the determination on the methods and timing for benefit elections and deferrals based on the unique needs of each tribe. Deferral of tax exempt benefits under Code Section 139E shall not be limited by constructive receipt and economic benefit restrictions that apply to the deferral of taxable income or benefits.

TTAC Proposed Treas. Reg. § 1.139E-7. Disaster Relief and Similar Assistance.

(a) *General Rule.* Disaster relief and similar assistance provided by an Indian tribal government in response to tribal, national, state or local government declarations of emergency shall be deemed to satisfy Code Section 139E.

(b) *Coordination with CARES Act and American Rescue Plan Act.* Disaster relief and similar assistance that satisfies Code Section 139E shall qualify as an appropriate use of Coronavirus Relief Funds provided to tribal governments pursuant to Title V of the Coronavirus Aid, Relief, and Economic Security Act, and Coronavirus Fiscal Recovery Funds provided pursuant to Section 9901 of the American Rescue Plan Act.

TTAC Prop. Treas. Reg. § 1.139E-8. Substantiation.

(a) *General Rule.* Substantiation should be presumed when an Indian tribal government can show that (a) Indian general welfare benefits are reasonably calculated to meet

general welfare needs/purposes; and (b) the method of distribution is reasonably expected to achieve program goals.

(b) *Reasonableness of Amount Presumed.* An Indian tribal government shall be presumed to have established benefits in an amount reasonably calculated to meet general welfare needs/purposes by relying on data or studies corroborating such expenses. Without limitation, this would include national or regional studies, member surveys, tribal, national, state or local agency living expense data, or amounts based on federal, state or local government program guidelines per Section 1.139E-7.

(c) *Achievement of Program Goals Presumed.* An Indian tribal government shall be presumed to have established a method of distribution that is reasonably expected to achieve program goals by establishing reasonable verification procedures such as, but not limited to: payments made directly to a vendor or service provider, applications in which recipients agree to specified program requirements, and/or end of year certifications.

(d) *Exempt Programs.* Further substantiation is not required for Indian general welfare benefits approved by a tribe to promote tribal culture, traditions and religion. Nor is further substantiation required for Indian general welfare benefits approved by a tribe to address historical need or economic deprivation such as, but not limited to, elder benefits designed to make up for historic barriers to economic or employment opportunities, and the associated lack of social security or retirement savings.

TTAC Prop. Treas. Reg. § 1.139E-9. Wellness and Health-Related Programs; Coordination With Section 139D

(a) *Wellness and Health-Related Programs.* Wellness and health-related programs, including wellness programs and/or incentive payments, qualify as Indian general welfare benefits.

(b) *Coordination With Code Section 139D.* The exclusion for wellness and health-related programs under Code Section 139E is independent of, and not limited by, Code Section 139D.

TTAC Prop Treas. Reg. § 1.139E-10. Coordination with IGRA; Presumptions.

(a) *Presumptions:* Amounts allocated by an Indian tribal government for general welfare purposes shall be treated presumptively as Indian general welfare benefits, rather than

taxable per capita payments under the Indian Gaming Regulatory Act (IGRA), when paid under programs designed to address specific needs and purposes in promoting the general welfare.

(b) *Reliance on Revenue Allocation Plan.* An Indian tribal government shall be entitled to rely upon its approved Revenue Allocation Plan in determining what gaming revenues will be treated as a per capita distributions or general welfare payments eligible for treatment under Code Section 139E.

(c) *Perceived Conflicts with Revenue Allocation Plan; Consultation.* The IRS shall not take enforcement actions contrary to an Indian tribal government's approved Revenue Allocation plan contrary to this paragraph (c). In the event of a perceived conflict between IGRA or the Indian tribal government's Revenue Allocation Plan and Code Section 139E, the IRS shall consult with the tribe in an effort to resolve the perceived conflict on a government-to-government basis. Any subsequent enforcement contrary to an approved Revenue Allocation Plan will be prospective only, and with sufficient time for the Indian tribal government to secure changes and government approvals of the Revenue Allocation Plan, as necessary. All consultation shall take into account the purposes of the Act, including the special rule of statutory construction set forth in Section 2(c) of the Act and Section 1.139E-2. In the event that the Indian tribal government and IRS are not able to agree, all Tribal appeal and litigation rights are reserved.

TTAC Prop. Treas. Reg. § 1.139E-11. Trusts; Health Education and Other Welfare Payments.

(a) *General welfare payments.* An Indian tribal government may pay Indian general welfare benefits from trust arrangements including, without limitation, payments set aside for the health, education and welfare of trust beneficiaries under IGRA.

(b) *Determination Upon Payment.* General welfare determinations are made at the time of payment from a trust based solely on whether the payments meet Code Section 139E. Treatment under Code Section 139E is not limited because contributions are made into the trust on a per capita basis.

TTAC Prop. Treas. Reg. § 1.139E-12. Deferred Benefits.

(a) *Deferral.* Indian tribal governments may establish general welfare programs which allow individual beneficiaries to defer and accumulate benefits for future payment. Deferred amounts which meet the requirements of Section 1.139E-3 (lavish or extravagant) upon

funding by the tribe will be treated as meeting the requirements of Code Section 139E when distributed to the individual tribal member beneficiary.

(b) *Elections Flexibility.* Each Indian tribal government may make the determination on the methods and timing for benefit elections and deferrals based on the unique needs of each tribe. Deferral of tax exempt benefits under Code Section 139E shall not be limited by constructive receipt and economic benefit restrictions that apply to the deferral of taxable income or benefits.

TTAC Prop. Treas. Reg. § 1.139E-13. Coordination with SSI and Other Federal “Needs Based” Programs.

Need shall be presumed for all Indian general welfare benefits that meet the requirements of Code Section 139E. The Secretary and IRS shall, to the fullest extent possible, coordinate with other federal agencies to ensure that Indian general welfare benefits are not counted as income or a disqualifying resource for purposes of program eligibility, including, without limitation, supplemental security income benefits under 42 U.S.C. § 1381 et seq.