



DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C. 20220

September 13, 2024

Via Email

Dear Tribal Leader:

On behalf of the U.S. Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) (collectively the “Department”), I invite you to consultations on a [Notice of Proposed Rulemaking](#) (“NPRM” or “Proposed Rule”) entitled “Tribal General Benefits” (REG-106851-21). The proposed rule would implement section 139E of the Internal Revenue Code (Code) relating to Tribal general welfare benefits. Under section 139E, Tribal general welfare benefits are excluded from a recipient’s gross income for Federal income tax purposes. For background on this proposed rule, please see our [Tribal Consultation Summary and Federal Response](#) and [Tribal Fact Sheet](#).

[You may register for one or more of the Tribal consultations here.](#)

The consultations will be held virtually on November 18, 19, and 20, 2024, from 1:00 p.m. ET, each day. Additionally, the Department will accept written or electronic comments received by December 17, 2024, 11:59 p.m. Alaska Time.

## A. BACKGROUND

The Tribal General Welfare Exclusion Act of 2014 (Act)<sup>1</sup> added section 139E to the Internal Revenue Code (26 U.S.C. 139E). Section 139E provides that gross income does not include the value of any Indian general welfare benefit paid to or on behalf of a member of an Indian tribe (or any spouse or dependent of such member) pursuant to an Indian tribal government program if all the following requirements are satisfied:

- The program is administered under specific guidelines and does not discriminate in favor of members of the governing body of the Tribe; and
- The benefits provided under the program are:
  - available to any Tribal member who meets the guidelines;
  - for the promotion of general welfare;
  - not lavish and extravagant; and
  - not compensation for services.

Section 139E provides further 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 are not compensation for services. Section 139E generally was intended to codify,

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<sup>1</sup> Pub. L. 113-168, 128 Stat. 1883 (2014).



and be at least as favorable as, Revenue Procedure (Rev. Proc.) 2014-35, which addresses the administrative general welfare exclusion.<sup>2</sup>

Section 2 of the Act provides that ambiguities in section 139E are to be resolved in favor of Indian Tribal governments and requires that deference be given to Indian Tribal governments for the programs administered and authorized by the Tribe to benefit the general welfare of the Tribal community.

Section 3 of the Act established the Treasury Tribal Advisory Committee (TTAC), whose mandate is to advise the Secretary of the Treasury on matters relating to the taxation of Indians. Section 3 of the Act also requires the Secretary of the Treasury to consult with the TTAC to establish and require training and education for IRS field agents and Tribal financial officers. Until this training is complete, section 4 of the Act requires the Internal Revenue Service to suspend all audits and examinations of Indian Tribal governments and members of Tribes (or any spouse or dependent of such a member) that are related to the exclusion of a payment or benefit from an Indian Tribal government under the general welfare exclusion.

## **B. OVERVIEW OF PROPOSED RULE**

The NPRM incorporates feedback gathered during the December 14, 15, 16, 2022, Tribal consultations and received through the TTAC.

### **1. Operational Highlights**

The NPRM addresses key operational items in the following categories:

**Support for Tribal Deference:** The NPRM seeks to incorporate the principle that ambiguities should be resolved in favor of a Tribe, by expressly incorporating Tribal deference into the substantive provisions of the NPRM as described below.

**Definitions:** The NPRM defines the following terms: Indian Tribal government,<sup>3</sup> Tribe, Tribal program participant, Tribal member, spouse, and dependent. The NPRM uses the term Tribal Program Participant to include the broader definition from Rev. Proc. 2014-35,<sup>4</sup> add a widow or

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<sup>2</sup> Section 61 of the Code provides that, except as otherwise provided by law, gross income means all income from whatever source derived. However, the Internal Revenue Service (IRS) generally has held that payments made to or on behalf of individuals by governmental units for the promotion of the general welfare are not includible in an individual recipient's gross income (the "administrative general welfare exclusion").

<sup>3</sup> The proposed rule does not include Alaska Native Corporations (ANCs) in the definition of Indian Tribal government and instead reserves a separate regulation section for future guidance on ANCs.

<sup>4</sup> This list includes an ancestor, descendant, former spouse, widow or widower, or legally recognized domestic partner or former domestic partner.



widower of a Tribal member, add a spouse under Tribal law, and provide that a Tribal member includes a child that is eligible for enrollment.

**Source of Revenue:** The NPRM provides that benefits under a Tribe's program may be funded by any source of revenue or funds, including net gaming revenues.

**Equal Payments:** A Tribe may use net gaming revenues to provide benefits, whether or not uniform, to Tribal members. Those benefits may be excluded from gross income as Tribal general welfare benefits if (1) they are not designated, including under a RAP, as per capita payments by the Tribe, and (2) they otherwise meet the requirements in section 139E. The NPRM recognizes that Tribes are in the best position to determine whether net gaming revenues should be used to fund per capita payments or general welfare payments.

**Use of Examples:** The NPRM includes illustrative examples to demonstrate support for Tribal flexibilities and confirms that any examples are non-exhaustive and do not create de facto rules. The Department requests comments on whether additional examples should be included in the final regulations and, if so, what specific fact patterns or rules should be addressed by the additional examples.

**Audit Suspension:** The NPRM confirms that the Act's audit suspension will not be lifted until after final regulations are issued and the required training is completed in consultation with the TTAC.

**Proposed Obsolescence of Revenue Procedure:** The NPRM provides rules that are at least as favorable as the safe harbors provided under Revenue Procedure 2014-35. In addition, the Department expects that Tribes would benefit by having a single set of rules that specifically apply to their general welfare benefit programs, rather than having to analyze their programs under both Revenue Procedure 2014-35 and the section 139E final regulations. Thus, the Department proposes to obsolete and supersede Revenue Procedure 2014-35 after the final regulations are applicable but requests comments on whether there would be a continuing need for it after publication of the final regulations.

**Deferred Benefits:** These proposed rules do not address deferred benefits or minors trusts as there is existing authority outside of section 139E on these topics. The Department requests comments on whether additional guidance is needed under section 139E or other Code sections to address the tax treatment of deferred benefits or benefits paid from trust arrangements and, if so, what specific fact patterns should be addressed.

**Applicability Date:** The rules will be effective for taxable years of Tribal Program Participants that begin on or after the date of publication of the final regulations in the Federal Register.

## **2. Substantive Highlights**



The below summary highlights the Tribal flexibilities in the NPRM according to the Act's statutory requirements.

**a. Criteria Regarding Program's Foundation**

**i. Program Establishment**

The NPRM provides that a program may be established by an Indian Tribal government by Tribal custom, government practice, or by formal action of the Indian Tribal government under applicable Tribal law. A program does not have to be in writing unless required pursuant to a Tribe's law.

**ii. Guidelines**

The specified guidelines of the program must include, at a minimum, a description of the program to provide Tribal general welfare benefits, the benefits provided by the program (including how benefits are determined), the eligibility requirements for the program, and the process for receiving benefits under the program.

**iii. Non-Discrimination**

The statutory nondiscrimination requirement would be subject to a facts and circumstances test to determine whether a program discriminates in favor of members of the governing body of the Tribe. The NPRM would provide that a program is treated as being in compliance with the non-discrimination requirement if the governing body of the Tribe consists of the entire adult membership of the Tribe.

**b. Criteria Regarding Benefits Provided Under the Program**

**i. Availability of Benefit**

Similar to Revenue Procedure 2014-35, the NPRM provides that a benefit under a Tribe's program must be available to any Tribal program participant who meets the specified guidelines of the program, subject to budgetary constraints.

**ii. Promotion of General Welfare**

The NPRM would provide deference to the Tribe to determine, at the time the program is established, whether a benefit is for the promotion of general welfare of its Tribal members or other eligible individuals. The NPRM also does not impose a needs-based requirement.

**iii. Lavish or Extravagant**

The NPRM recognizes that each Tribe is unique and therefore applies a facts and circumstances test to evaluate whether a benefit is lavish or extravagant. This test takes into account a Tribe's culture and cultural practices, history, geographic area, traditions, resources, and economic conditions or factors. Further, the NPRM provides that a benefit will be presumed to not be



lavish or extravagant if it is described in, and provided in accordance with, the written specified guidelines of a Tribe's program.

#### **iv. Not Compensation for Services**

Section 139E provides that a benefit cannot be compensation for services, except for certain benefits (cash honoraria, reimbursement of costs, or items of cultural significance) provided for participation in cultural or ceremonial activities for the transmission of Tribal culture. The NPRM provides that a Tribe has sole discretion to determine whether an item is of cultural significance and whether an activity is a cultural or ceremonial activity, and that the IRS will defer to these determinations.

#### **Consultation and Listening Session Content**

Pursuant to Treasury's [Tribal Consultation and Coordination with Tribal Nations Policy](#), the Department is commencing consultation on this NPRM.

Specifically, Treasury requests assistance of Tribal Leaders, or their designees, in addressing the following topics:

#### *Operational Highlights:*

1. The NPRM seeks to balance Tribal requests for examples against Tribal concerns about how such examples would be used. Should the Department include more examples in the Final Rules, and if so, what topics should be addressed?
2. The Department proposes to obsolete and supersede Revenue Procedure 2014-35 after the final regulations are applicable because the Act is broader. Should the Department pursue this obsolescence? Please provide details if you support or disagree with this recommendation.
3. This NPRM does not address deferred benefits, including minors' trusts. Is available guidance on this issue unclear and what guidance is needed under section 139E or other Code sections to address the tax treatment of deferred benefits or benefits paid from trust arrangements? What specific fact patterns should also be addressed?

#### *Substantive Highlights:*

1. What questions or comments do Tribes have regarding the criteria on a program's establishment, guidelines or non-discrimination requirements?
2. What questions or comments do Tribes have regarding the criteria for benefits under a program, including the standards on lavish and extravagant and/or compensation for services?
3. What other questions or comments do Tribes have regarding this NPRM?



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We respectfully request that each Tribe register one person to participate in the consultation. All others are welcome to register as listen-only participants.

In addition to Tribal consultation and listening session, Treasury is accepting written or electronic comments received by December 17, 2024, at 11:59 p.m. Alaska Time. Written comments should be sent to [tribal.consult@treasury.gov](mailto:tribal.consult@treasury.gov).

**Please note that consultations and listening sessions are off the record and not for press purposes.**

We will send out an agenda and a list of registered speakers before the consultation.

We hope that you will be able to join us for this important discussion and value your participation.

Sincerely,

Chief Lynn Malerba  
Treasurer  
U.S. Department of the Treasury