



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

Tribal Consultation Summary & Federal Response
Tribal General Welfare Exclusion Act of 2014 & the Treasury Tribal Advisory Committee's Report
September 13, 2024

Background

On December 14, 15, and 16, 2022, the U.S. Department of the Treasury (Treasury) held a consultation on the Tribal General Welfare Exclusion Act of 2014 and on a report by the Treasury Tribal Advisory Committee (TTAC).

The Tribal General Welfare Exclusion Act of 2014, Pub. L. 113-168, 128 Stat. 1883 (2014) (Act) 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.

The Act further provided for the Secretary of the Treasury to establish the TTAC to advise the Secretary on the content of the Act's regulations, including training provisions and to also "advise the Secretary on matters relating to the taxation of Indians." This seven-person committee first met in 2019 and established a Subcommittee on the Tribal General Welfare Exclusion (GWE) Act. In 2021, the TTAC issued [a report](#) for Tribal Consultation which provides the GWE Subcommittee's recommendations on the implementation of the Act.

Details about the topics of conversation for the consultation can be found in the [Dear Tribal Leader Letter](#) that was published on October 27, 2022. Treasury held three consultations virtually to maximize Tribal participation across Indian Country. Over 500 attendees joined the consultation, and 65 comment letters were received. The comment period ended on January 13, 2023.

On September 13, 2024, a [Notice of Proposed Regulations](#) ("NPRM") under section 139E was filed for public inspection by the Office of the Federal Register. Also on that date, Treasury noticed [Tribal consultation](#) on these regulations and published a [Fact Sheet](#) describing the NPRM.

Pursuant to [Treasury's Tribal consultation policy](#), below is a summary of the feedback received in Tribal consultation prior to the NPRM's publication and the Federal response to this feedback.

Broad Feedback



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Recognition of Tribal Self-Determination and Self-Governance: The majority of commenters requested that these regulations reflect support for Tribal self-determination and self-governance consistent with Federal Indian policy. Commenters explained that decisions related to whether a Tribe provides a GWE benefit, to whom, and for how much, all entail governmental decisions that differ for each Tribe. Long-standing Federal policy has deferred to Tribes in determinations regarding their internal self-governance decisions. Commenters requested that these regulations incorporate those principles through application of deference to Tribal decision-making and interpretation of ambiguities in favor of Tribes.

Federal Response: The Department agrees with Tribal and TTAC comments that incorporation of Tribal self-determination and support for Tribal self-governance are consistent with the goals of the statute and the Department's priorities. Thus, the NPRM provides deference to Tribes on the types of benefits that promote the general welfare, the individuals who are eligible for benefits, and whether benefits are provided in exchange for participation in certain cultural or ceremonial activities under section 139E(c)(5) and these proposed regulations. As explained below, the NPRM also adopts Tribal and TTAC recommendations regarding the unique circumstances that should be taken into account to assess whether a benefit is lavish or extravagant.

Use of Examples for Illustrative Purposes: Many commenters expressed support for the use of examples for illustrative purposes to help Tribes understand how a regulatory standard could be applied. However, commenters equally expressed concern that examples could be converted into an exhaustive list of allowable uses or become a de facto rule through negative inferences.

Federal Response: Treasury regulations often include examples in the regulatory text to illustrate specific provisions of the regulation. These examples describe how the regulatory rule applies to a set of facts, but examples cannot be the source of the rule itself. The preamble to the NPRM clarifies that the examples in these proposed regulations are illustrations of benefits that are for the promotion of general welfare. They are not intended to represent an exhaustive list of qualifying benefits. Additionally, as described in the Comments and Public Hearing section of the preamble, 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.

Continuation of the Consultative Process: Many commenters requested that the Department continue to engage in consultation with Tribes through the development and implementation of the regulations and any additional guidance.

Federal Response: The Department agrees that the Tribal consultation process is critical to the development of these regulations. As described above, we held three Tribal consultations prior to developing these rules, and also consulted with the TTAC. As described in the [Dear Tribal Leader Letter](#) accompanying this NPRM, we will similarly hold consultation with Tribes and the TTAC before finalizing these rules. We also intend to continue further Tribal and TTAC consultations on the Act's training requirements.

Tribal Responses to Consultation Questions

Section 139E Generally

- 1. What types of safe harbors would be most useful for purposes of determining whether a Tribe has established and adopted an Indian general welfare program? For example, should**



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the regulations include a safe harbor for programs that are established by Tribal custom or government practice, and what requirements should apply for the safe harbor?

Some commenters requested that the regulations should not include safe harbors and, instead, asked that the regulations provide deference to Tribes in adoption of their GWE programs. Other commenters recommended that the regulations adopt flexible safe harbor standards that allow for Tribes to establish their own safe harbors which would have the same status and effect as the safe harbors in Rev. Proc 2014-35. These commenters also believe the regulations should allow for the inclusion of safe harbor programs that are established by Tribal customs or government practices.

Other commenters propose that the Department allow Tribes to request advance rulings to address the tax status of general welfare programs. However, these commenters explained that any procedure involving advance rulings should be implemented with narrow parameters to avoid becoming a de facto audit of Tribal programs. In addition, the commenters suggest that these advance rulings be binding on state and the other Federal agencies.

Lastly, regarding types of safe harbors, responding commenters listed several types of safe harbors but cautioned the Department to ensure that any examples provided were identified as non-exhaustive. Further, commenters requested that the proposed regulations expressly state that a safe harbor is not intended to limit the types of general welfare programs otherwise permitted under section 139E.

Federal Response: The NPRM would provide that a program may be established by Tribal custom, government practice, or formal action of the Tribe under applicable Tribal law. The NPRM also would provide that to the extent permitted by applicable Tribal law, a Tribe may delegate authority to establish general welfare programs to a designated individual or the Tribe's entity. The NPRM also would not specifically require a written document to memorialize the establishment of the program. However, the NPRM would refer to applicable Tribal law to determine whether a writing is required for formal actions of the Tribe.

Regarding safe harbors, Section 139E was intended generally to codify Revenue Procedure 2014-35, and these proposed regulations are intended to be no less favorable than Revenue Procedure 2014-35. Therefore, this NPRM would include the list of programs described in section 5.02(2) of Revenue Procedure 2014-35 as a non-exhaustive list of the types of programs that would satisfy the general welfare requirement in section 139E and these proposed regulations.

Regarding comments on advance rulings, the Department appreciates that Tribes have been awaiting guidance under section 139E and have concerns about how the IRS may view existing general welfare programs. The IRS has a general process in place for entities and individuals to request a letter ruling on the tax treatment of a particular transaction or program, but that process generally does not apply if the request presents an issue that cannot be readily resolved before a regulation, or any other published guidance is issued. See Revenue Procedure 2024-1 (2024-1 I.R.B. 1). A letter ruling from the IRS is generally binding only on the IRS and would address only Federal tax law. Such a ruling would not be binding on Federal or state agencies.

- 2. What criteria should regulations under section 139E of the Internal Revenue Code (Code) adopt to determine whether benefits or programs are “for the promotion of general welfare” for purposes of section 139E(b)(2)(B) of the Code? Please provide examples of benefits or programs that satisfy these criteria.**



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Many commenters requested that the Department defer to Tribal determinations as to whether benefit programs are for the promotion of the general welfare, with commenters explaining that Tribes are best suited to determine and address the unique needs of their members. Some commenters added that final regulations should not incorporate a “needs-based” requirement in the definition of “for the promotion of general welfare.” Additionally, commenters cautioned that final regulations should avoid listing exclusive criteria that could limit the applicability of the statute, but that non-exclusive illustrative examples could help Tribes develop and establish compliant programs.

Federal Response: The Department agrees with Tribal and TTAC comments that a Tribe is in the best position to determine which general welfare benefits are best suited to meet the needs of its Tribal members and other eligible individuals. As a result, the NPRM would not define the term “for the promotion of general welfare” or specifically provide requirements that a benefit must meet in order to satisfy section 139E(b)(2)(B). Instead, 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.

3. Please identify the provisions of section 139E of the Code that are ambiguous and warrant resolution in favor of and with deference to Indian tribal governments, in accordance with Section 2(c) of the Tribal General Welfare Exclusion Act?

Commenters stated that any ambiguities in the statute should be interpreted with deference to Tribes and requested that Section 2(c) of the Act be expressly included in the regulations. Regarding statutory ambiguities, other commenters noted that it is unclear what is required for a program to be “administered under specified guidelines” under section 139E(b)(1) and requested that these clauses be interpreted to defer to Tribes to the greatest extent possible. Others requested that Tribal oral customs satisfy 139E(b)(1) and that Tribes be able to demonstrate the existence of “specified guidelines” for these programs through a range of documents such as resolutions, statements, affidavits, or declarations that describe how the Tribe has operated the program in the past. Additionally, some commenters requested that the regulations not be limited to Tribal members, their spouses and dependents because the “to or on behalf of” language in the Act may be inclusive of Tribal descendants and domestic partners.

a. Please explain the extent to which, if any, Section 2(c) of the Tribal General Welfare Exclusion Act differs from the tribal canon (that is, deference in the case of ambiguities).

Some commenters recommend that the regulations highlight that the “traditional” canons of tax law (that is, that the taxpayer is presumed liable for taxation and carries the burden of proving tax immunity; that the law is read broadly in determining taxable income and narrowly when construing exemptions) do not apply to Tribes and their general welfare benefit programs. Rather, these commenters request the regulations affirm that ambiguities are to be resolved in favor of the Tribes.

Federal Response: As described above, the Department incorporated the deference principle contained in Section 2(c) of the Act into express deference provisions in the regulations. Questions related to the specified guidelines and oral programs are answered in our Federal Response to Question 1.

Regarding the definitions of eligible individuals for GWE programs, the NPRM would define the term “Tribal Program Participant” to mean a Tribal member, spouse of a Tribal member (including a spouse of a Tribal member within the meaning of §301.7701-18, or a spouse of a Tribal member under applicable



Tribal law), dependent of a Tribal member, or other individual who has been determined by the Tribe to be eligible for a Tribal general welfare benefit because such individual is, with respect to a Tribal member, an ancestor, descendant, former spouse, widow or widower, or legally recognized domestic partner or former domestic partner. This definition is intended to encompass the categories of “qualified nonmember” that are covered by Revenue Procedure 2014-35, with the clarification that a spouse may be a spouse under applicable Tribal law.

4. What challenges have you encountered in implementing programs under the provisions of Rev. Proc. 2014-35?

Commentors provided a range of feedback regarding Rev. Proc. 2014-35. Several commentors requested that Rev. Proc. 2014-35 be withdrawn because, in their view, it was superseded by the Act which is broader than Rev. Proc. 2014-25. Other commentors shared that safe harbors under Rev. Proc. 2014-35 are too narrow and arbitrarily limit a Tribe’s ability to fully provide for their members without fear of violating section 139E. A commenter pointed to the prohibition in Rev. Proc. 2014-35 on applying the general welfare exclusion to Tribal dividends from gaming revenues, stating that the Act does not impose such a prohibition. Other commentors noted no issues with Rev. Proc. 2014-35 and appreciated its safe harbors. Other commentors requested that Rev. Proc. 2014-35 be expanded to allow for safe harbor treatment beyond the list included in the guidance by incorporation of express deference to Tribes. Some commentors shared that other Federal agencies have included general welfare benefits provided pursuant to Rev. Proc. 2014-35 as income, disqualifying Tribal members from Federal needs-based programs, such as Supplemental Security Income (SSI). Commentors further asked that the regulations state that nontaxable general welfare benefits are not counted as income or a disqualifying resource under SSI.

Federal Response: The Department is of the view that the NPRM, if finalized, generally would provide rules that are at least as favorable as the safe harbors provided under Revenue Procedure 2014-35 and therefore, that Tribes may have no further need to rely on 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.

Regarding other Federal programs, the Department has authority to interpret and provide rules under section 139E to determine whether a benefit is excludible from gross income for Federal income tax purposes. However, the issue of whether a Tribal general welfare benefit is taken into account for purposes of determining other Federal benefits is outside the authority of the Department, and therefore beyond the scope of these proposed regulations. The Department is willing to work with the TTAC and Tribes to confer with other Federal agencies and provide advice on how the Federal tax law applies to Tribal general welfare benefits.

5. What criteria should Treasury and the IRS consider in adopting regulations to determine what constitutes “lavish or extravagant” with respect to Indian general welfare benefits under section 139E of the Code?

A majority of commentors recommend that the regulations defer to Tribes for determining whether a benefit is “lavish or extravagant,” pointing out that the term is relative and depends on the unique circumstances of each Tribe and the type of benefit provided. Commentors further stated that Tribal



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deference would respect Tribal socio-economic circumstances, culture, and history as these factors influence Tribal definitions and many commenters supported the list of factors recommended by the TTAC. Some commenters supported the TTAC's recommendation that the frequency of a benefit be taken into consideration.

Other commenters requested that the Tribal canons of construction be applied, and any ambiguity be construed in favor of the Tribe. Some commenters further recommended that the regulations defer to a Tribe's definitions of "lavish or extravagant" as established by official actions such as Tribal ordinances, resolutions, and policies and consider the reasoning and explanations provided when such official action was taken.

Lastly, some commenters proposed that a facts and circumstances standard, similar to Revenue Procedure 2014-35, be applied to define lavish or extravagant.

a. Please provide examples of Tribal benefits that are lavish and extravagant and examples of Tribal benefits that are not lavish and extravagant.

Some commenters stated that the regulation should use examples for illustrative purposes and not to limit the eligibility of benefit programs. Specifically, these commenters believe that examples of benefits that are not considered "lavish or extravagant" would be most helpful. Commentors further stated that examples should not be tied to particular dollar amounts due to the varied cost of living throughout Indian Country.

Federal Response: The Department generally agrees with Tribal and TTAC comments. Accordingly, the NPRM provides a facts and circumstances test, at the time the benefit is provided, to determine whether a Tribal general welfare benefit is lavish or extravagant under section 139E. Relevant facts and circumstances would include a Tribe's culture and cultural practices, history, geographic area, traditions, resources, and economic conditions or factors.

Further, the NPRM would provide a presumption that a benefit is not lavish or extravagant if it is described in, and provided in accordance with, the written specified guidelines of the Tribe's program. The Department agrees that the frequency of payment should be considered when determining whether a Tribal general welfare benefit is lavish or extravagant. Under a facts and circumstances test, a Tribe may establish a program that provides the types of benefits, including frequency of payment, that best meet the needs of its Tribal members.

6. What criteria should Treasury and the IRS consider in adopting regulations to determine what constitutes "cash honoraria in connection with cultural or ceremonial activities" described in section 139E(c)(5) of the Code, and what aspects of the cultural or ceremonial activities would be subject to deference?

Many commentors recommend that the regulations avoid the qualifier that honorariums must be 'nominal' cash value that is contained in Rev. Proc. 2014-35. Instead, commentors recommend that the regulations should defer to Tribal determinations of the proper amount of honorarium because Tribal culture and customs vary, and no list or category could encompass the breadth of Tribal culture and customs. Some commenters also supported adoption of the TTAC's proposals concerning this term. Other commenters highlight that some cash honoraria may be provided by Tribes to an individual who is not an enrolled member of the Tribe making the payment but a member of a different Tribe. These commenters explained that such individual may be a cultural, spiritual, and ceremonial leader who leads and/or



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teaches shared cultural practices or ceremonial functions for other Tribes. One commenter recommended that the definition of these items includes payments made to members for their community service and civic participation in Tribes.

a. Please provide examples of items with cultural significance provided as honoraria that should qualify under section 139E(c)(5) of the Code.

Some commenters shared examples of items of cultural significance. Other commenters encouraged the use of examples in the regulations regarding cash honoraria while others expressed concern that examples could become a list of eligible categories.

Federal Response: The Department agrees with Tribal and TTAC comments and thus the NPRM would provide that the compensation for services exception in section 139E(c)(5) is not limited to nominal cash honoraria. Regarding deference on items of cultural significance, the Department also agrees that Tribes are in the best position to determine items of cultural significance. Thus, the NPRM would provide that the Tribe determines items of cultural significance and that the IRS will defer to the Tribe's determination. Lastly, the NPRM provides that solely for purposes of the exception in section 139E(c)(5) relating to benefits provided for participation in ceremonial or cultural activities, the recipient may be a member of a Tribe that is different from the Tribe that establishes or maintains the program.

7. Please provide examples of payments to vendors or service providers that should be excluded from a Tribal member's income under section 139E(c)(5) of the Code and payments that should not be excluded from a Tribal member's income under that section?

Some commenters noted that it was unclear if this question involved payments to vendors for their services or general welfare payments to a Tribal member as a vendor or service provider. Regarding the latter, commenters requested that compensation for services not be construed to include member services to a Tribal citizen including general welfare payments to members that provide those services to a Tribal member or payments to Tribal members as vendors.

One commenter requested that compensation for services be read narrowly to cover only services that are traditionally provided under an employment or contracted-vendor relationship. Another commenter provided a "non-exhaustive" list of examples of excludable services: blessing provided by Tribal citizens at ceremonial or official tribal events, preparation of traditional foods at events, and support for sponsoring traditional gatherings and events. Another commenter gave an example of Tribes providing honorarium for traditional healers for their "services" as an example of a payment that should not be considered "compensation for services." Commentors again noted that regulations should explicitly state that listed examples, if included in the regulation, are non-exhaustive.

Federal Response: The proposed regulations do not adopt the Tribal comment arguing that compensation for services should be read narrowly to cover only services that are traditionally provided under an employment or contracted-vendor relationship. As explained further in the preamble, because existing guidance addresses the long-standing distinction between compensation for services and general welfare payments, the Department has determined that the proposed regulations should define compensation for services by reference to current law. Thus, the NPRM would define the term compensation for services by referring to the rules in section 61(a). These rules encompass all the regulations and other IRS guidance under section 61(a) that interpret the meaning of compensation for services.



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- 8. Please provide contrasting examples of Tribal programs that provide pro rata payments to Tribal members that are subject to Federal income tax, whether under the Indian Gaming Regulatory Act (IGRA) or under another comparable Federal statutory provision, and pro rata payments to Tribal members that would be excluded from the Tribal member's income under section 139E of the Code.**

Commentors requested that the regulations recognize that Tribes may provide general welfare benefits in equal amounts and that such programs may be funded with gaming revenue. These commentors requested that, consistent with the Department of Interior's existing practices, the regulations defer to Tribes on what constitutes Tribal general welfare. Commentors also explained that pursuant to the Indian Gaming Regulatory Act and its implementing regulations, Tribal general welfare is recognized as separate from per-capita payments under IGRA which requires a Revenue Allocation Plan (RAP). Some commentors supported adoption of the TTAC's proposal concerning uniform payments. Other commentors recommended the regulations clearly distinguish between taxable per capita payments and nontaxable GWE benefits by focusing on the Tribe's purposes for making the payments to its members as the basis for GWE income exclusion rather than focusing on the source of the funding. In addition, these commentors contend the value of such payments should be irrelevant to a determination as to whether a benefit qualifies under the GWE.

Federal Response: The Department agrees with Tribal and TTAC comments that section 139E does not prohibit a Tribe's program from providing Tribal general welfare benefits to recipients in equal amounts and may fund a GWE program from gaming revenue. We also agree with Tribal and TTAC comments noting that IGRA distinguishes between taxable per capita payments and other types of payments, such as general welfare payments. We are of the view 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.

Thus, a Tribe may use net gaming revenues to provide benefits, whether or not uniform, to Tribal members. Further, 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.

- 9. To the extent not discussed above, please discuss any outstanding issues, concerns, or other topics related to section 139E of the Code that may require guidance.**

i. Prospective Implementation

Some commentors recommend that once the moratorium on IRS examinations is lifted, any enforcement and audits of general welfare programs under section 139E should be prospective. Other commentors requested that the moratorium on audits not be lifted until the TTAC is satisfied with the method and amount of training referenced in the statute. Other commentors requested that Tribes have a grace period for at least one year after the moratorium is lifted before enforcement begins to allow for Tribes to review guidance and approve changes to their programs. These commentors also believe that once audits resume, they should initially be focused on educating Tribes on the new guidance and not on penalizing Tribes for noncompliance.

Federal Response: The Department acknowledges that section 4 of the Act provides a temporary suspension of audits and examinations of Tribes and Tribal members (or any spouse or dependent of such member) to the extent that the audit or examination relates to the exclusion of a payment or benefit from a Tribe under the general welfare exclusion. The Department also expects that the audit suspension



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described in section 4 of the Act will continue until all the requirements of section 3(b)(2) of the Act are satisfied.

In particular, the Department contemplates that the education and training described in section 3(b)(2) of the Act, which requires training for Internal revenue field agents and to Tribal financial officers about implementation of section 139E, cannot and will not take place until final regulations are issued under section 139E. Thus, once final regulations under section 139E are issued, the Department, in consultation with the TTAC, will conduct the required education and training under section 3(b)(2) of the Act. Only after that education and training is complete will the audit suspension be lifted. These proposed regulations do not address the education and training that will be required to be complete before the audit suspension is lifted, but the Department will consult with the TTAC on the requirements of section 3(b)(2) of the Act before the commencement of the required education and training and will provide further guidance after that consultation.

ii. Reimbursement

Some commenters request that the regulations clarify that a Tribal member or qualified nonmember may be reimbursed for a past expense pursuant to a general welfare program. These commenters point to language in Rev. Proc. 2014-35 which defines “pay” to mean “pay or reimburse in whole or part.” These commenters highlight that Tribes have developed general welfare programs that include both payments and reimbursements pursuant to Rev. Proc. 2014-35.

Federal Response: Section 139E(c)(5) provides, in part, that reimbursement of costs provided for participation in cultural or ceremonial activities for the transmission of Tribal culture is not treated as compensation for services. Section 139E(c)(5) does not define the term “reimbursement of costs.” However, the Department expects that the usual usage of the term applies for purposes of section 139E. Thus, the reimbursement of costs generally would include amounts paid by the Tribe to an individual to reimburse specific amounts paid by the individual to participate in the cultural or ceremonial activity.

iii. Deferred Benefit Rules

Some commenters recommend that the regulations do not restrict elections or deferrals using restrictive deferred compensation rules as the GWE is neither “compensation” or taxable per capita. Instead, the commenters suggest guidance should afford Tribes the maximum flexibility to design programs that allow members to defer or disclaim benefits and select from among general welfare benefits made available through Tribal approved programs. Some commenters specifically request that the regulations do not allow the IRS to apply the concepts of constructive receipt and economic benefit to general welfare program benefits.

Federal Response: Section 139E does not specifically address trust arrangements or deferred benefits. Section 139E addresses whether a benefit that is generally includible in gross income under section 61 may be excluded from gross income under section 139E. It does not address the taxable year in which a benefit may be includible in gross income, in particular if a benefit is put into a trust or its receipt is deferred through some other arrangement. Most individuals use the cash receipts and disbursements method of accounting, which incorporates numerous rules addressing when amounts must be included in gross income. Those rules generally apply in determining when a benefit must be included in the gross income and include the concepts of constructive receipt and economic benefit.



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In addition, there is existing authority addressing trusts under IGRA that is not affected by these proposed regulations. See Revenue Procedure 2011-56 (2011-49 I.R.B. 834), which provides a safe harbor under which the IRS treats a Tribe as the grantor and owner of a trust for the receipt of Tribal gaming revenues under IGRA for the benefit of minors and certain other individuals. However, as described in the Comments and Public Hearing section of the preamble, 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.

iv. Opt-in/Opt-out Approaches to Benefits

Some commenters highlight that sometimes Tribal members prefer to receive taxable per capita distributions rather than a general welfare benefit payment or elect only a portion of the amount of a benefit payment for which the Tribe has determined the member is eligible. The commenters state that some of the reasons for this request include a preference for the status quo, a lack of familiarity with and understanding of Tribal general welfare payments, and a desire for unrestricted funds. As such, these commenters recommend that the regulations allow for members to opt into or out of the GWE as well as elect amounts to be excluded under the GWE when the total amount available for distribution has been reasonably determined by the Tribe.

Other commenters state that the guidance should allow members to disclaim per capita benefits in favor of participation in qualified general welfare benefit programs when consistent with the Tribe's approved revenue allocation plan.

Federal Response: The proposed rules do not limit a Tribe's ability to choose to provide a taxable per-capita payment or an excludable general welfare benefit to its members.

v. Substantiation

Some commenters state that the method for substantiation of general welfare program benefits should be up to the Tribe administering the program while others commented that a substantiation requirement is not included in the Act. Other commenters shared a list of categories that should satisfy a substantiation requirement and noted that receipts are administratively burdensome. Some commenters also supported the TTAC's recommendations.

Federal Response: The recordkeeping requirements in the NPRM would provide that a Tribe's program must be administered under specified guidelines and would provide general requirements on the content of those guidelines. Written specified guidelines would not be required. However, Tribes may keep records of affidavits or declarations of how the program operates. The NPRM would not prescribe the specific method of keeping these records. Tribes should keep these records in the manner they deem appropriate in order to substantiate that the program qualifies as program under section 139E and these proposed regulations, and to assist Tribal program participants with determining that a Tribal general welfare benefit may be excluded from gross income.

vi. Source of Funds

Commenters recommended that the regulations not restrict the source of funding for general welfare benefit programs, including gaming, non-gaming, and interest from trust investments.



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Federal Response: The Department agrees and the NPRM would provide that benefits under a Tribe’s program may be funded by any source of revenue or funds, including net gaming revenues.

vii. Disaster Relief

Many commenters believe that the regulations should not limit disaster relief benefits to those events declared by Federal or state governments but rather defer to the Tribes as to when payments qualify as disaster relief payments for certain events, including Tribal declarations.

Federal Response: The Department recognizes that Tribes have broad discretion to provide benefits to individuals who are affected by a disaster or other emergency situation that does not meet the requirements of a qualified disaster under section 139. Thus, the NPRM would include as a permissible general welfare purpose “assistance for disasters or emergency situations.” The Tribe need not make a specific Tribal disaster declaration.

TTAC’s Draft Proposed Section 139E Regulations

- 1. TTAC’s proposed regulation § 1.139E-2 references the discretion of the Indian tribal government in connection with section 139E(c)(4) of the Code (relating to programs not failing qualification solely by being established by Tribal custom or government practice). Please provide examples of Indian general welfare benefits that would constitute an abuse of such discretion.**

Commenters expressed concerns over attempting to define what constitutes an ‘abuse of discretion’ within the regulations. Commenters that supported the TTAC’s proposal recommended that the regulations place the burden of proof on the IRS when auditing a general welfare program to establish that a Tribe has abused its discretion. These commenters requested that abuse of discretion should only be shown by reference to a Tribe’s written program guidelines (or unwritten tribal custom or government practices) and the unique goals and statutory construction requirements of the Act.

Federal Response: The Department did not adopt an abuse of discretion standard because, as discussed above, it included deference to Tribal decision-making in numerous sections of the NPRM.

- 2. Please provide illustrative examples of general welfare programs established by a Tribe that would provide for deferred receipt and accumulation of benefits, whether via trusts or via other mechanisms.**

Some commenters noted housing, college tuition, and minor’s trusts as examples of programs that would provide deferred receipt and accumulation of benefits. The commenters recommend the regulations allow for a Tribe to make determinations as to the method and timing for benefit elections and deferrals based on the unique needs of their Tribe and that the deferral of such tax-exempt benefits should not be limited by constructive receipt and economic benefit restrictions. Specifically, these commenters suggest that Tribal general welfare benefits provided through a minor’s trust should not constitute a violation of Rev. Proc. 2011-56, the safe harbor for Tribal minor’s trusts.

Some commenters support TTAC’s recommendations which provide that GWE benefits can be deferred and accumulated for future distribution. These commenters add that distributions from the deferred plan should not be treated as “lavish or extravagant,” especially in light of the fact they were not lavish or extravagant when deposited into the deferred plan on behalf of the member. These commenters highlight



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that many Tribes are currently establishing deferred per capita plans consistent with PLR 199908606, and that these programs are utilizing the deferred compensation model to establish deferral trusts that also rely on similar safe harbor rules for trusts such as those for IGRA or minors. These commenters recommend the regulations provide a safe harbor for deferred per capita.

a. What is the source of the funding for such programs and who are the potential beneficiaries?

Commentors point out that source of funding will vary by Tribe and depend on each Tribe's particular circumstances. The commenters provide that, for example, some Tribes may use gaming revenue to fund deferred and accumulated amounts.

b. Would interest income or capital gains earned on funds set aside for the benefit of the tribal members be similarly excluded from gross income upon distribution to the tribal members?

Commentors stated that that interest income and capital gains earned on funds marked for general welfare benefit programs should be exempt from tax as the Tribe fully controls the assets until distribution.

c. Please describe the legal authority and framework under which these types of programs are established.

Commentors highlighted that the legal authority and framework for accumulated and deferred benefits would depend on the type of benefit. Commentors note that Tribal laws guide how GWE programs are established and that GWE distributions often occur monthly or annually, adding that lump sum distribution of GWE benefits should not be considered "lavish or extravagant."

Federal Response: The Department appreciates the feedback that was received on Question 2.a-c; please see our responses in question 9.iii above.

3. Please provide examples of situations in which Tribal governments have determined that assistance payments were warranted in connection with a disaster or similar event not covered by a Federal or state declaration.

Commentors expressed support for the recommendations contained in TTAC's proposed regulation and noted that Tribes presently provide support to Tribal members during Tribally-declared disasters that are an exercise of a Tribe's sovereign decision-making. As non-exhaustive examples, Tribes listed seasonal flooding and climate change related disasters.

Federal Response: The Department appreciates the feedback that was received, please see our responses in question 9.vii above



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4. To the extent not discussed above, please discuss any outstanding issues or concerns related to TTAC's proposed section 139E regulations.

Overall, many commenters broadly expressed support for the principles in TTAC's Report and the proposed regulations.

Federal Response: The Department agrees that the TTAC's report and proposed regulations were a helpful resource and, accordingly, the NPRM reflects significant inclusion of the TTAC's feedback.