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Tribal General Welfare Exclusion Proposed Regulations Are an Overdue Win for Indian Country

Kenneth W. Parsons and Rachel T. Provencher*

In this article, the authors discuss long-awaited proposed regulations on the Tribal General Welfare Exclusion Act of 2014 released recently by the U.S. Department of the Treasury and Internal Revenue Service, which reflect many priorities of Indian Country, including substantial deference to Tribes as they create and implement general welfare exclusion programs. However, the authors add, work remains to improve clarity of the guidance and address unresolved issues.

The U.S. Department of the Treasury and the Internal Revenue Service (IRS) have issued Proposed Regulations on the Tribal General Welfare Exclusion Act of 2014 (the Act).¹ The Proposed Regulations are an overdue win for Indian Country, demonstrating the value of meaningful Tribal consultation and the importance of the work of the Treasury Tribal Advisory Committee (TTAC), for which general welfare exclusion (GWE) guidance was a key issue. The Proposed Regulations are one of several Tribal tax guidance projects prioritized during the impactful tenure of the first Native American Treasurer of the United States, Chief Lynn Malerba, and the first director of the Treasury Department's recently established Office of Tribal and Native Affairs, Fatima Abbas.

Throughout the Proposed Regulations and Preamble, the Treasury Department and IRS express a willingness to largely defer to Tribes in their formation and implementation of GWE programs. The Treasury Department and IRS also incorporated several of the recommendations they received from the TTAC, as well as feedback from Tribes on how the Act should be implemented through regulations.

However, as further discussed below, there is still work to be done. The Treasury Department and IRS did not agree with all of the recommendations they received from the TTAC and Tribes and

left ambiguities in the Proposed Regulations that Tribes should help resolve before the guidance is finalized.

What Is the GWE?

Although taxpayers must generally include all items of income when computing gross income, the IRS has long recognized an exception for Tribal members who receive Tribal government program benefits for the promotion of general welfare and not as compensation for services. However, questions as to where the line was between taxable distributions and nontaxable general welfare benefits led to disputes between Tribal governments and the IRS. In order to minimize controversies, the IRS agreed to consult with Tribal governments and issue more tailored guidance, which culminated with Revenue Procedure 2014-35,² also known as the IRS Safe Harbor, in June 2014.

The Revenue Procedure offers a series of safe harbors applicable to specific types of Tribal programs under which the IRS will presume that the program is “for the promotion of the general welfare.” In addition, the Revenue Procedure describes specific types of qualifying benefits, including elder and disabled programs, education programs, housing programs, burial and funeral assistance, and certain other qualifying assistance programs.

The Act created Internal Revenue Code Section 139E (Section 139E), which includes similar requirements to those found in the Revenue Procedure, although the Act was intended to be broader than the IRS Safe Harbor and applies to any Tribal benefit for the promotion of general welfare.

Under both the IRS Safe Harbor and the Act, benefits are excluded from income—and tribes do not issue Form 1099s—if a program meets certain requirements, including:

- The benefits provided are available to all Tribal members who meet the eligibility requirements in the program’s guidelines,
- Distribution of benefits does not discriminate in favor of the Tribe’s governing body,
- The benefits are not compensation for services, and
- The benefits are not lavish or extravagant.

The Act imposed a moratorium on IRS audits of GWE issues. Prior to resuming audits, the Treasury Department must issue final guidance, as well as provide training and education on the guidance to IRS field agents and Tribal finance officers. The Act requires this training and education to be done in consultation with the TTAC.

What Has Happened Since the Act Was Passed?

Over the past decade, several steps have been taken toward the issuance of these Proposed Regulations, including soliciting and receiving feedback from Tribes and Tribal leaders:

- *Treasury Tribal Advisory Committee.* Establishment of the TTAC was mandated by the Tribal General Welfare Exclusion Act of 2014. The purpose of the TTAC is to advise the Treasury Secretary and IRS on matters relating to the taxation of Indians, training of IRS field agents, and provision of training and technical assistance to Tribal financial officers. The TTAC held its first public meeting on June 20, 2019.
- *IRS Notice 2015-34.* On April 16, 2015, the IRS issued Notice 2015-34,³ which states that Section 139E of the Internal Revenue Code codifies, but does not supplant, the GWE and that taxpayers may continue to rely on the Revenue Procedure. The IRS also notes that the Revenue Procedure is broader than Section 139E in some respects and, for benefits described in the safe harbors, provides certainty that the “need requirement” of the GWE is satisfied.
- *TTAC’s Tribal GWE Subcommittee.* In 2019, the TTAC established the GWE Subcommittee, which is charged with providing the TTAC recommendations on (1) implementation of the substantive provisions of the Act, and (2) implementation of the training provisions set forth in the Act.
- *Subcommittee Report.* The GWE Subcommittee solicited feedback from Tribes on an initial set of core principles for the GWE and surveyed Tribes on their general welfare programs. The GWE Subcommittee then prepared a GWE Subcommittee Report⁴ and its version of proposed regulations (TTAC Proposed Regulations). These documents

contain recommended guidance to the Treasury Department and IRS on various aspects of the interpretation and implementation of the GWE. On June 16, 2021, the GWE Subcommittee submitted the GWE Subcommittee Report and TTAC Proposed Regulations to the Treasury Department. The TTAC referred these documents to the Treasury Department on October 26, 2022, for Tribal consultation and comment.

- *Dear Tribal Leader Letter.* On October 27, 2022, the Treasury Department issued a Dear Tribal Leader Letter⁵ announcing consultations and soliciting comments on the Act, GWE Subcommittee Report, and TTAC Proposed Regulations. The Dear Tribal Leader Letter also requested responses to certain questions related to the interpretation of particular provisions of Section 139E. In response to the Dear Tribal Leader Letter, the Treasury Department received 65 written comments from Tribes and two Tribal organizations (Tribal Comments).
- *Consultation Process.* On December 14-16, 2022, the Treasury Department hosted Tribal consultations on the Act, the GWE Subcommittee Report and TTAC Proposed Regulations. The Treasury Department and IRS also consulted with the TTAC and GWE Subcommittee throughout 2023 and 2024.

What Are Key Features of the Proposed Regulations?

- *Benefits Must Be for the Promotion of the General Welfare.* The Preamble provides that an Indian Tribal government 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. The Proposed Regulations would provide that an Indian Tribal government has sole discretion to determine whether a benefit is for the promotion of general welfare and that the IRS will defer to the Indian Tribal government's determination that a benefit meets this requirement.
- *Definition of Tribal Program Participant.* The Preamble states that the Treasury Department and IRS agreed with

the GWE Subcommittee report and Tribal Comments that an expansive definition of eligible individuals to receive Tribal general welfare benefits is appropriate. The definition in Proposed Regulation Section 1.139E-1(b)(8) 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.

- *Program Must Be Established Under Specified Guidelines.* The Proposed Regulations would provide that a GWE program must include, at a minimum:

1. A description of the program to provide Tribal general welfare benefits,
2. The benefits provided by the program, including how benefits are determined,
3. The eligibility requirements for the program, and
4. The process for receiving benefits under the program.

The Treasury Department and IRS agreed with the GWE Subcommittee Report and Tribal Comments that Section 139E does not require the specified guidelines of the program to be memorialized in a written document. However, several features in the Proposed Regulations incentivize Tribal governments to put their GWE programs in writing.

- *No Limitation on Source of Funds.* The Preamble confirms that the Treasury Department and IRS agree with the GWE Subcommittee Report and Tribal Comments that Section 139E does not prohibit an Indian Tribal government from funding a general welfare program with net gaming revenues or revenues from any other particular source. Proposed Regulation Section 1.139E-1(c)(5) would provide that benefits under the Indian Tribal government program may be funded by any source of revenue or funds, including net gaming revenues. However, gaming Tribes with a Revenue Allocation Plan (RAP) should ensure that their GWE programs are consistent with the terms of their RAP. Under the Indian Gaming Regulatory Act (IGRA), per capita distributions of gaming revenue are subject to tax. The Proposed Regulations do not change this rule.
- *Benefits Cannot Be Lavish or Extravagant.* The Proposed Regulations offer deference to Tribes and incorporate

a presumption that a written GWE program is not lavish or extravagant. Under Proposed Regulation Section 1.139E-1(d)(4), whether a benefit is lavish or extravagant would be based on the facts and circumstances at the time the benefit is provided. Relevant facts and circumstances would include a Tribe's culture and cultural practices, history, geographic area, traditions, resources, and economic conditions or factors.

- *Participation in Cultural or Ceremonial Activities.* The Treasury Department and IRS generally agreed with Tribal Comments regarding ceremonial activities under Section 139E(c)(5). Proposed Regulation Section 1.139E-1(e) would provide deference to Indian Tribal governments on whether an activity is a cultural or ceremonial activity for the transmission of Tribal culture.

Although recommend by the GWE Subcommittee Report and Tribal Comments, the Proposed Regulations do not address grants to Indian-owned enterprises or trust arrangements (such as minor's trusts) with deferred benefits.

Public Comments

The Treasury Department and IRS requested comments on all aspects of the Proposed Regulations and specifically the following four issues:

1. Should additional examples be included in the final regulations and, if so, what specific fact patterns or rules should be addressed by the additional examples?
2. Should Revenue Procedure 2014-35 be obsoleted when the final regulations become applicable? If not, why is there a continuing need for it after the publication of final regulations?
3. Do Indian Tribal governments anticipate needing any transition relief to adjust existing general welfare programs to satisfy these Proposed Regulations before they are finalized? If yes, please explain the nature of the transition relief needed and provide recommendations as to what relief would be helpful to Indian Tribal governments.

4. Is additional guidance needed under Section 139E or other Internal Revenue 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?

Next Steps

The GWE offers a unique opportunity for Tribes to provide important benefits to members without creating a tax liability. Tribes should consider developing new GWE programs or revising existing ones to incorporate the flexibility and other favorable features of the Proposed Regulations. Although the guidance is not final, Tribal governments are free to utilize aspects of the Proposed Regulations that they find helpful.

Takeaways

- In the absence of GWE guidance, over the past 10 years, many Tribes have charted their own path by creating and administering GWE programs through various approaches. These approaches have included application-based programs such as housing, equal GWE distributions, and hybrid programs that combine elements of both. The Proposed Regulations largely validate these approaches.
- The Treasury Department and IRS have substantially improved on elements of the IRS Safe Harbor such as by providing complete deference to Tribes for the determination of whether a program “promotes the general welfare.” This provides clear flexibility for Tribal governments to establish programs outside of the IRS Safe Harbor.
- Since 2014, arguably the most significant question on GWE implementation has been how the Treasury Department would handle the “lavish or extravagant” requirement. Tribal governments were adamant in their comments that the standard needs to be flexible and provide great deference to Tribal governments. In response to these comments, the Proposed Regulations create a presumption that a written GWE program is not lavish or extravagant. This is a standard very favorable to Tribal governments.

However, the Proposed Regulations are unclear how—if at all—the Treasury Department and IRS could rebut this presumption. This will be a critical issue to be resolved in the final regulations and in the training of IRS agents.

- Although the Proposed Regulations represent a positive development for Indian Country, issues remain. For instance, the substantiation requirements are unclear. The Proposed Regulations also do not address trusts. Guidance on trusts is critical as Tribes move away from distribution structures that are solely focused on per capita payments. For example, the most recent public guidance on minor's trusts is Revenue Procedure 2011-56,⁶ which addresses only IGRA trusts. This guidance is in need of modernization not only due to GWE but because of the diversification of Tribal economies beyond gaming.
- The TTAC and GWE Subcommittee will work with the Treasury Department and IRS to improve the guidance before it is finalized.
- The Proposed Regulations do not change the federal income tax treatment of per capita distributions of gaming revenue. Tribal governments may need to explore RAP amendments to help ensure that their GWE programs comply with IGRA.
- The Proposed Regulations also do not address the treatment of GWE benefits for Supplemental Security Income, Medicaid, Supplemental Nutrition Assistance Program, and other public benefits such as those administered by the U.S. Department of Housing and Urban Development and U.S. Department of Veterans Affairs. These programs often determine eligibility using income tests that do not exclude GWE. Although workaround solutions may be available, they are imperfect and impermanent. A legislative solution⁷ may be required.

Notes

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1. <https://www.federalregister.gov/documents/2024/09/17/2024-20826/tribal-general-welfare-benefits>.

2. <https://www.irs.gov/pub/irs-drop/rp-14-35.pdf>.

3. <https://www.irs.gov/pub/irs-drop/n-15-34.pdf>.

4. https://home.treasury.gov/system/files/226/GWE_Subcommittee_Report_October2022.pdf.
5. <https://home.treasury.gov/system/files/226/DTLL-GWE-Tribal-Consultation-Notice.pdf>.
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