



## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

#### [REG-106851-21]

#### RIN 1545-BQ95

### Tribal General Welfare Benefits

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking and notice of public hearing.

**SUMMARY:** This document contains proposed regulations regarding the exclusion from gross income of certain Tribal general welfare benefits. The proposed regulations address the requirements that would apply to determine whether the benefits that an Indian Tribal government program provides qualify as Tribal general welfare benefits. These proposed regulations would affect Indian Tribal governments, agencies or instrumentalities of such governments, Federally-recognized Tribes, members of such Tribes, such members' spouses and dependents, and other Tribal program participants. This document also requests comments on certain provisions and provides a notice of a public hearing on the proposed regulations that will be in addition to Tribal consultation on the proposed regulations.

**DATES:** *Comments:* Electronic or written comments on this proposed rule from the public must be received by **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

*Public Hearing:* The public hearing is scheduled to be held on January 13, 2025, at 10 a.m. Eastern time (ET). Requests to speak and outlines of topics to be discussed at the public hearing must be received by **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. If no outlines are received by

**[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, the public hearing will be cancelled. Requests to attend the public hearing must be received by 5 p.m. ET on January 9, 2025. Requests for special assistance during the hearing must be received by 5 p.m. ET on January 8, 2025. See the Comments and Public Hearing section of the **SUPPLEMENTARY INFORMATION** for additional information.

**ADDRESSES:** Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at <https://www.regulations.gov> (indicate IRS and REG-106851-21) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish any comments to the IRS's public docket. Send paper submissions to: CC:PA:PR:01 (REG-106851-21), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, D.C. 20044.

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, Jonathan A. Dunlap of the Office of Associate Chief Counsel (Income Tax and Accounting), (202) 317-4718 (not a toll-free number); concerning submissions of comments or outlines, the hearing, or any questions to attend the hearing by teleconferencing, Publication and Regulations Section at (202) 317-6901 (not a toll-free number) or preferably by email to [publichearings@irs.gov](mailto:publichearings@irs.gov). If emailing, please include the following information in the subject line: Attend, Testify, or Question and REG-106851-21.

**SUPPLEMENTARY INFORMATION:**

**Authority**

This document contains proposed amendments to the Income Tax Regulations

(26 CFR part 1) under section 139E of the Internal Revenue Code (Code). Section 139E(c)(3) provides an express delegation of authority for the Secretary of the Treasury or her delegate (Secretary) to, “in consultation with the Tribal Advisory Committee (as established under section 3(a) of the Tribal General Welfare Exclusion Act of 2014), establish guidelines for what constitutes lavish or extravagant benefits with respect to Indian tribal government programs.” The proposed regulations are also issued under the express delegation of authority under section 7805(a) of the Code.

## **Background**

This notice of proposed rulemaking contains proposed amendments to the Income Tax Regulations (26 CFR part 1) to implement section 139E of the Internal Revenue Code (Code).

Section 61 of the Code provides that, except as otherwise provided by law, the term “gross income” means all income from whatever source derived. The term “income” is broadly defined as “instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.” *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). As a general rule, exclusions from income are construed narrowly, and taxpayers must bring themselves within the clear scope of the exclusion for the exclusion to apply. *Commissioner v. Schleier*, 515 U.S. 323, 328-329 (1995). Tribal members are subject to the same requirement to pay Federal income taxes as non-Tribal members, unless exempted by a treaty or agreement between the United States and the Tribal member’s Tribe or an Act of Congress dealing with Indian affairs. *Squire v. Capoeman*, 351 U.S. 1, 6 (1956).

Generally, if the provision of a benefit satisfies the requirements of section 139E (discussed in part IV of this Background), section 139E will apply to exclude the value of the benefit from the recipient’s gross income. If section 139E does not apply to exclude a benefit from a recipient’s gross income, the benefit may, depending on the facts and

circumstances, separately qualify for exclusion from the recipient's gross income under another Code provision or the administrative general welfare exclusion (discussed in part I of this Background), which pre-dates the enactment of section 139E. See Notice 2015-34 (2015-18 I.R.B. 942), discussed in part V of this Background.

#### I. Administrative General Welfare Exclusion

The IRS generally has determined that payments made to or on behalf of individuals by governmental units under legislatively provided social benefit programs for the promotion of the general welfare are not includible in an individual recipient's Federal gross income; this concept is referred to in this preamble as the "administrative general welfare exclusion." See, e.g., Rev. Rul. 78-170, 1978-1 C.B. 24 (concluding that amounts paid under the laws of the State of Ohio to low-income elderly and disabled persons to help alleviate their cost of winter energy consumption are made for the promotion of general welfare, and are not includible in the recipients' gross income for Federal income tax purposes); see *also* Rev. Rul. 76-395, 1976-2 C.B. 16 (applying the general welfare exclusion to home rehabilitation grants to low-income families to correct substandard conditions).

To qualify under the administrative general welfare exclusion, payments must (1) be paid from a governmental fund, (2) be for the promotion of the general welfare (that is, based on the need of the individual or family receiving such payments), and (3) not represent compensation for services absent a specific Federal income tax exclusion. See Notice 2023-56, 2023-38 I.R.B. 824.

Payments that are based on some criteria other than individual or family need do not qualify for the administrative general welfare exclusion. Compare Rev. Rul. 76-395, 1976-2 C.B. 16 (home rehabilitation grants received by low-income homeowners residing in a defined area of a city under the city's community development program funded under the Housing and Community Development Act of 1974 are in the nature of

general welfare and are not includible in their gross income) *with* Rev. Rul. 76-131, 1976-1 C.B. 16 (payments made by the State of Alaska to individuals at least 65 years of age who have maintained an Alaska domicile for at least 25 years to encourage them to continue their residence in the State did not qualify under the general welfare exclusion because the payments were made to residents regardless of financial status, health, educational background, or employment status).

The administrative general welfare exclusion does not generally apply to permit a business to exclude payments from gross income because such payments are not based on individual or family need. See *Bailey v. Commissioner*, 88 T.C. 1293, 1300-1301 (1987), acq. 1989-2 C.B. 1; Revenue Ruling 2005-46 (2005-2 C.B. 120).

## II. Application of the Administrative General Welfare Exclusion to Indian Tribal Governments

Indian Tribal governments have a unique legal status. They have sovereignty that pre-dates the United States and therefore have a government-to-government relationship with the United States. Indian Tribal governments have developed a broad range of programs to address their unique social, cultural, and economic issues. The administrative general welfare exclusion applies to benefits provided by Indian Tribal governments no less favorably than it applies to benefits provided by Federal, State, or local governments. Thus, benefits provided by Indian Tribal governments qualify for the administrative general welfare exclusion if the benefits are (1) made pursuant to a governmental program of the Tribe; (2) for the promotion of general welfare (that is, based on individual or family need); and (3) not compensation for services.

## III. Revenue Procedure 2014-35

In 2014, the Treasury Department and the IRS issued Revenue Procedure

2014-35 (2014-26 I.R.B. 1110),<sup>1</sup> which provides safe harbors under which the IRS conclusively presumes that the individual need requirement of the administrative general welfare exclusion is met for benefits provided under Indian Tribal governmental programs that meet the safe harbor requirements. The revenue procedure provides that the IRS will not assert that recipients of benefits under a safe harbor must include the value of those benefits in gross income or that the benefits are subject to the information reporting requirements of section 6041 of the Code. The safe harbors apply if the following requirements are met: (1) the benefit is provided pursuant to a specific Indian Tribal government program, (2) the program has written guidelines specifying how the individual qualifies for the benefit; (3) the benefit is available to any Tribal member and certain other individuals who satisfy the program's guidelines; (4) the program does not discriminate in favor of members of the governing body; (5) the benefit is not lavish or extravagant under the circumstances, and (6) the benefit is not compensation for services. See section 5.02(1) of Revenue Procedure 2014-35. Categories of qualifying benefits include housing, education, elder and disabled person care, and cultural activities. See section 5.02(2) of Revenue Procedure 2014-35. In addition, nominal cash honoraria and items of cultural significance that are not lavish or extravagant provided to religious or spiritual officials or leaders in connection with their participation in cultural, religious, and social events, are not treated as compensation for services (and therefore are not gross income) under the revenue procedure. See section 5.03 of Revenue Procedure 2014-35.

#### IV. The Tribal General Welfare Exclusion Act of 2014

On August 2, 2013, H.R. 3043, 113<sup>th</sup> Cong. (2013), whose short title was the

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<sup>1</sup> Revenue Procedure 2014-35 was preceded by Notice 2012-75 (2012-51 I.R.B. 715). The IRS received over 40 comments in response to Notice 2012-75, which informed the drafting of Revenue Procedure 2014-35.

Tribal General Welfare Exclusion Act of 2013, was introduced in the United States House of Representatives and referred to the Committee on Ways and Means. On that same date, an identical bill was introduced in the United States Senate and referred to the Committee on Finance. On September 16, 2014, after its short title was revised to the “Tribal General Welfare Exclusion Act of 2014,” H.R. 3043 was passed by the House of Representatives after a floor debate (House Debate). See Cong. Rec. H7599-7603 (September 16, 2014). On September 17, 2014, after being received by the Senate, H.R.3043 was the subject of a colloquy (Senate Colloquy). See Cong. Rec. S5686-5687 (September 17, 2014). On September 18, 2024, H.R. 3043 was passed by the Senate by unanimous consent. See Cong. Rec. S5862 (September 18, 2014). On September 26, 2014, the President of the United States approved the United States Congress’s enactment of the Tribal General Welfare Exclusion Act of 2014 (Act), Public Law 113-168, 128 Stat. 1883 (2014).

The Act, among other things, amended the Code by adding section 139E. Under section 139E, gross income does not include the value of any “Indian general welfare benefit,” which this notice of proposed rulemaking refers to as a “Tribal General Welfare Benefit.” Section 139E(b) defines a Tribal general welfare benefit as any payment made or services provided to or on behalf of a member of a Tribe (or any spouse or dependent of such a member) pursuant to an Indian Tribal government program, but only if: (1) the program is administered under specified guidelines and does not discriminate in favor of members of the governing body of the Tribe, and (2) the benefits provided under such program are (A) available to any Tribal member who meets such guidelines, (B) for the promotion of general welfare, (C) not lavish or extravagant, and (D) not compensation for services. Further, section 139E(c)(5) 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.”

Section 2(c) of the Act provides that ambiguities in section 139E are to be resolved in favor of Indian Tribal governments. Section 2(c) of the Act also 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 2(d)(1) of the Act provides that section 139E shall apply to taxable years for which the period of limitation on refund or credit under section 6511 of the Code of 1986 has not expired. Section 2(d)(2) of the Act provides that if the period of limitation on a credit or refund resulting from the enactment of section 139E expires before the end of the 1-year period beginning on the date of the enactment of the Act, refund or credit of such overpayment (to the extent attributable to such amendments) may, nevertheless, be made or allowed if claim therefor is filed before the close of such 1-year period.

Section 3 of the Act requires the Secretary of the Treasury to establish a Tribal Advisory Committee. The Department of the Treasury Tribal Advisory Committee (TTAC) held its inaugural meeting on June 20, 2019. Under section 3(b) of the Act, the TTAC’s mandate is to advise the Secretary of the Treasury on matters relating to the taxation of Indians, and the Secretary of the Treasury is required to consult with the TTAC to establish and require training and education for internal revenue field agents who administer and enforce internal revenue laws. This includes (A) training and education with respect to Federal Indian law and the Federal Government’s unique legal treaty and trust relationship with Indian Tribal governments, and (B) training of such internal revenue field agents, and provision of training and technical assistance to Tribal financial officers, about implementation of the Act and the amendments made by the Act.

Section 4(a) of the Act requires the Secretary of the Treasury to temporarily



suspend “all audits and examinations of Indian Tribal governments and members of Tribes (or any spouse or dependent of such a member), to the extent such an audit or examination relates to the exclusion of a payment or benefit from an Indian Tribal government under the general welfare exclusion” until the training and education described above is completed. Section 4(a) further provides that the period of limitation under section 6501 of the Code is suspended during the period of suspension.

#### V. Notice 2015-34

Following the addition of section 139E to the Code, the IRS published Notice 2015-34 (2015-18 I.R.B. 942), providing guidance to taxpayers regarding the effect of section 139E on Revenue Procedure 2014-35. Notice 2015-34 provides that section 139E codifies (but does not supplant) the administrative general welfare exclusion for certain benefits provided under Indian Tribal government programs. Notice 2015-34 provides that taxpayers can rely on Revenue Procedure 2014-35 for the safe harbors under which certain benefits provided by Indian Tribal government programs may be excluded from gross income under the administrative general welfare exclusion.

Additionally, Notice 2015-34 requested comments on (1) what guidelines may be helpful to Indian Tribal governments to determine whether benefits are lavish or extravagant under section 139E(b); (2) what Tribal customs or government practices may establish an Indian Tribal government program administered through specific guidelines under section 139E(b)(1) and (c)(4) and how such programs may be identified; and (3) how items of cultural significance, cash honoraria, and cultural or ceremonial activities for the transmission of Tribal culture under section 139E(c)(5) should be defined.

#### VI. TTAC Report and Tribal Consultations on Section 139E

Members of the TTAC formed a Subcommittee on the Act’s General Welfare Exclusion (GWE Subcommittee) in 2019 to provide the TTAC with technical expertise on recommendations for the implementation of the Act. On June 16, 2021, the GWE

Subcommittee submitted to the TTAC a report (TTAC Report) containing the GWE Subcommittee's interpretation of the core principles underlying section 139E, and an Appendix containing draft proposed regulations interpreting section 139E (TTAC draft proposed regulations), consistent with those core principles. On October 26, 2022, the TTAC formally recommended and approved the TTAC Report to be submitted for the record and published for Tribal comment.

The Treasury Department sent a Tribal consultation letter, dated October 27, 2022 (Dear Tribal Leader Letter), to Tribal leaders to request consultation on the Act and the TTAC Report. The Dear Tribal Leader Letter announced consultation meetings to be held on December 14, 15, and 16, 2022 (December 2022 Consultations), to discuss the Act and the TTAC Report. The Dear Tribal Leader Letter also requested responses to certain questions related to the interpretation of particular provisions of section 139E, as well as comments on the TTAC Report. In response to the Dear Tribal Leader Letter, and after the December 2022 Consultations, the Treasury Department received 65 written comments from Tribes and two Tribal organizations (collectively, Tribal Comments).

The Tribal Comments were broadly supportive of the recommendations in the TTAC Report,<sup>2</sup> including the TTAC draft proposed regulations. In general, the Tribal Comments emphasized that the Act, particularly section 2(c) of the Act, requires the Treasury Department to recognize the sovereignty of Tribes by granting broad deference to Indian Tribal governments in the design and implementation of their general welfare programs, as well as with respect to any ambiguities in the statute. Deference to Indian Tribal governments was a guiding principle in the Tribal Comments addressing each of the questions for which the Treasury Department requested

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<sup>2</sup> However, a few Tribal Comments argued that Congress has not specifically directed the Treasury Department and the IRS to publish regulations under section 139E.

comment. For example, many Tribal Comments stated that any Treasury Department and IRS guidance imposing specific requirements for a general welfare program, such as what constitutes “the promotion of the general welfare,” what is a “lavish or extravagant” benefit, or what are “cultural or ceremonial activities,” would infringe upon Indian Tribal sovereignty. Many Tribal Comments urged that section 2(c) of the Act be expressly cited in the proposed regulations.

Another area of significant concern raised in the Tribal Comments was ensuring that the regulations under section 139E do not presumptively treat benefits as outside the scope of section 139E solely because the benefits are provided to all eligible recipients in an equal amount, or that the benefits are funded from gaming revenues. This concern was primarily raised in relation to amounts that are set aside and paid from net gaming revenues to provide for the general welfare of the Indian Tribe and its members. See 25 U.S.C. 2710(b).

Finally, the Tribal Comments addressed various other issues, including the effective date of the proposed regulations, training of IRS agents, and coordination with other Federal agencies. After considering these and other Tribal Comments and the TTAC Report, and after consultation with the TTAC and the GWE Subcommittee, the Treasury Department and the IRS propose to adopt new §1.139E-1 to provide guidance under section 139E (proposed §1.139E-1). The following Explanation of Provisions discusses the Tribal Comments in more detail in relation to each proposed provision in proposed §1.139E-1.

### **Explanation of Provisions**

The proposed regulations would provide that the gross income of a Tribal program participant does not include the value of any Tribal general welfare benefit provided by an Indian Tribal government program.

The provisions of proposed §1.139E-1 would provide (1) definitions of terms

used in section 139E and proposed §1.139E-1 (see proposed §1.139E-1(b)); (2) requirements for a program to qualify as an “Indian Tribal Government Program” (see proposed §1.139E-1(c)); (3) requirements for a benefit to qualify as a “Tribal General Welfare Benefit” (see proposed §1.139E-1(d)); (4) special rules related to cultural or ceremonial activities (see proposed §1.139E-1(e)); (5) clarification of the audit suspension required by section 4(a) of the Act (proposed §1.139E-1(f)); and (6) the proposed date of applicability of the final regulations (see proposed §1.139E-1(g)). The Treasury Department and the IRS will publish final regulations under section 139E after consideration of oral and written comments received in connection with Tribal consultation on these proposed regulations, consideration of any other comments received in response to the proposed regulations, and further consultation with the TTAC, including through the GWE Subcommittee.

#### I. Section 139E Definitions

Section 139E(a) provides that gross income does not include the value of any Tribal general welfare benefit. Section 139E(b) defines a Tribal general welfare benefit, in relevant part, as any payment made or services provided to or on behalf of a member of a Tribe (or any spouse or dependent of such a member) pursuant to a program that is established by an Indian Tribal government and that satisfies specified requirements. Proposed §1.139E-1(b) would define an Indian Tribal government, a Tribe, and the individuals, including a Tribal member, spouse, and dependent, who may be determined by the Indian Tribal government to be eligible for a general welfare benefit under section 139E.

#### A. Definition of Indian Tribal government

Section 139E(c)(1) provides that the term “Indian Tribal government” includes any agencies or instrumentalities of an Indian Tribal government and any Alaska Native regional or village corporation, as defined in, or established pursuant to, the Alaska

Native Claims Settlement Act (ANCSA) (43 U.S.C. 1601 et seq.) (Alaska Native Corporations). Revenue Procedure 2014-35 provides that the term “Indian Tribal government” has the same meaning as in section 7701(a)(40)(A) but for purposes of the revenue procedure includes agencies or instrumentalities of the Indian Tribal government. The TTAC Report and the Tribal Comments did not provide any recommendations on the definition of Indian Tribal government and did not specifically address Alaska Native Corporations.

If used in a provision of the Code and not otherwise distinctly expressed or manifestly incompatible with the intent thereof, section 7701(a)(40)(A) defines the term “Indian Tribal government” to mean the governing body of any Tribe, band, community, village, or group of Indians, or (if applicable) Alaska Natives, which is determined by the Secretary, after consultation with the Secretary of the Interior, to exercise governmental functions. Under the Federally Recognized Indian Tribe List Act of 1994, Public Law 103-454, 108 Stat. 4791 (List Act), the Secretary of the Interior is required to publish annually a list of all Federally-recognized Tribes. In Revenue Procedure 2008-55 (2008-39 I.R.B. 768), after consultation with the Department of Interior (DOI), the Treasury Department and the IRS determined that the Indian Tribal entities that appear on the current or future lists of Federally-recognized Tribes published annually under the List Act by the DOI, Bureau of Indian Affairs, are designated as Indian Tribal governments for purposes of section 7701(a)(40). See 89 FR 944 (January 8, 2024) for the most current list published by the DOI, Bureau of Indian Affairs.

Proposed §1.139E-1(b)(4) would define the term “Indian Tribal Government” by reference to section 7701(a)(40). In addition, in accordance with section 139E(c)(1), the definition of Indian Tribal government for purposes of proposed §1.139E-1(b)(4) also would include agencies and instrumentalities of the Indian Tribal government. This definition is consistent with Revenue Procedure 2014-35.

Although the definition of Indian Tribal government under section 139E(c)(1) includes Alaska Native Corporations, these proposed regulations would not include Alaska Native Corporations in the definition of Indian Tribal government for purposes of these rules and instead reserve proposed §1.139E-2 for the rules to apply section 139E to benefits provided by Alaska Native Corporations. The Treasury Department and the IRS intend on holding consultation before issuing future guidance on issues related to the application of section 139E to benefits provided by Alaska Native Corporations.

#### B. Definition of Tribe

Section 139E does not define the term “Indian Tribe,” but section 4(c)(2) of the Act defines it by cross-reference to that term as defined in section 45A(c)(6) of the Code. Revenue Procedure 2014-35 also defines “Indian Tribe” by cross-reference to section 45A(c)(6). The TTAC Report and the Tribal Comments did not provide any recommendations on the definition of “Indian Tribe,” which, for purposes of these proposed regulations, is referred to as simply “Tribe.”

Section 45A relates to the Indian employment credit, which was applicable for taxable years prior to January 1, 2022. Section 45A(c)(6) defines “Indian Tribe” to mean any Indian Tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native village, or regional or village corporation, as defined in, or established pursuant to, ANCSA that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Proposed §1.139E-1(b)(7) generally would define “Tribe” using the definition of Indian Tribe in section 45A(c)(6). However, for ease of readability and to prevent confusion arising from citing to an expired Code provision, the proposed regulations would recite the language of section 45A(c)(6) rather than incorporating the definition by cross-reference. As noted, proposed §1.139E-2 is reserved because the Treasury

Department and the IRS intend to issue future guidance under section 139E applicable to benefits provided by Alaska Native Corporations. Accordingly, the proposed regulations would exclude section 45A(c)(6)'s reference to Alaska Native regional and village corporations as defined in and established pursuant to ANCSA for purposes of these rules.

C. Definition of Tribal program participant

Section 139E(b) provides that a Tribal general welfare benefit means any payment made or services provided to or on behalf of a member of the Tribe (or any spouse or dependent of such a member) pursuant to a program that satisfies specified requirements. Revenue Procedure 2014-35 allows benefits to be provided to a member of the Tribe, as well as a "qualified nonmember," meaning a spouse, former spouse, legally recognized domestic partner or former domestic partner, ancestor, descendant, or dependent of a member of a Tribe.

The TTAC Report and many Tribal Comments recommend that the proposed regulations provide that individuals eligible for benefits not be limited to Tribal members and their spouses and dependents, instead supporting the use of the more expansive term "qualified nonmember" from Revenue Procedure 2014-35. The TTAC Report and many Tribal Comments state that using this more expansive definition of "qualified nonmember" would be consistent with the House Debate and Senate Colloquy that explain the Act, and that section 139E should be viewed no less favorably than Revenue Procedure 2014-35. Moreover, several Tribal Comments suggest that the language "to or on behalf of" in section 139E(b) is ambiguous and thus supports the proposed regulations adopting the definition of "qualified nonmember" from Revenue Procedure 2014-35. In addition, the TTAC Report explains that depending on Tribal culture, custom, or tradition, a member of a Tribe may have obligations to care for extended family, and that existing Tribal general welfare programs may provide

assistance to these extended family members.

The Treasury Department and the IRS have considered the TTAC Report and the Tribal Comments and agree that an expansive definition of eligible individuals is appropriate. Accordingly, proposed §1.139E-1(b)(8) 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 Indian Tribal government 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.

The Treasury Department and the IRS note that the phrase “on behalf of” in section 139E(b) does not make the section 139E exclusion applicable to the direct recipient of a payment which was made by the Indian Tribal government “on behalf of” the Tribal program participant. For example, a Tribal program participant who receives a Tribal general welfare benefit from an Indian Tribal government program to provide rental assistance can exclude the payment from the Tribal program participant's gross income under section 139E regardless of whether the assistance is paid directly to the Tribal program participant or paid to the landlord on behalf of the Tribal program participant. In either case, however, section 139E does not apply to permit the landlord to exclude the rental assistance payment from the landlord's gross income.

#### D. Definition of Tribal member

Section 139E does not define who is a “member of an Indian Tribe” or “Tribal member.” Revenue Procedure 2014-35 defines who is a member of a Tribe by cross-



reference to 25 CFR 290.2, which defines a member of a Tribe as an individual who meets the requirements established by applicable Tribal law for enrollment in the Tribe and (1) is listed on the Tribal rolls of that Tribe if such rolls are kept, or (2) is recognized as a member by the Tribal governing body if Tribal rolls are not kept. The TTAC Report and the Tribal Comments did not provide any recommendations on the definition of a member of a Tribe.

Proposed §1.139E-1(b)(9) would define the term “Tribal Member” in a manner similar to Revenue Procedure 2014-35’s definition of “member of an Indian Tribe.” The proposed regulations would adopt the same definition but, for ease of readability, would incorporate the language from 25 CFR 290.2 rather than providing a cross-reference. Thus, the proposed regulations would define “Tribal Member” as an individual who is a member or citizen of the Tribe that establishes or maintains the Indian Tribal government program because the individual meets the requirements established by applicable Tribal law for enrollment in the Tribe and (1) is listed on the Tribal rolls of that Tribe if such rolls are kept, or (2) is recognized as a member by the Tribal governing body if Tribal rolls are not kept. In addition, the Treasury Department and the IRS are aware that some Tribes temporarily close their rolls for enrollment or do not enroll children until they reach a certain age. These Tribes may provide benefits to an individual on the basis that the individual may be eligible for benefits, even though not formally a Tribal member. In particular, Tribes may provide benefits to an Indian child under the Indian Child Welfare Act of 1978, Public Law 95-608, 92 Stat. 3069 (1978), codified at 25 U.S.C. 1903(4). The Indian Child Welfare Act defines “Indian child” as any unmarried person who is under age eighteen and is either (a) a member of a Tribe or (b) is eligible for membership in a Tribe and is the biological child of a member of a Tribe. To ensure that Indian Tribal governments may provide general welfare benefits to an Indian child under section 139E, the proposed regulations also would include in

the definition of Tribal member an “Indian child” as defined in 25 U.S.C. 1903.

The Treasury Department and the IRS recognize that an Indian Tribal government generally develops programs with the intention of providing general welfare benefits to or for the benefit of its own Tribal members. The Treasury Department and the IRS interpret section 139E(b) as providing a relationship nexus between the Indian Tribal government providing the general welfare benefit and the individual receiving the benefit. Thus, the proposed regulations would define the term Tribal member to mean a member of the Tribe that establishes or maintains the Indian Tribal government program. However, solely for purposes of the rule in section 139E(c)(5) relating to benefits provided for participation in ceremonial or cultural activities, proposed §1.139E-1(b)(8)(ii) would provide that the recipient of such benefits may be a member of a Tribe that is different from the Tribe that establishes or maintains the program.

#### E. Definition of spouse

Section 139E does not define the term “spouse,” nor does Revenue Procedure 2014-35. The TTAC Report and the Tribal Comments did not provide any recommendations on the definition of spouse for purposes of section 139E.

Section 301.7701-18(a) of the Procedure and Administration Regulations (26 CFR part 301) provides that, for Federal tax purposes, the term spouse means an individual lawfully married to another individual. Section 301.7701-18(b) generally provides that a marriage of two individuals is recognized for Federal tax purposes if the marriage is recognized by the state, possession, or territory of the United States in which the marriage is entered into, regardless of domicile. Section 301.7701-18(a) does not specifically refer to a marriage recognized under Tribal law because Tribal lands are not states, possessions or territories of the United States or foreign jurisdictions. However, the term "spouse" would include individuals married under Tribal law if the marriage would be recognized under the laws of any state, possession,

or territory of the United States. See also 1 U.S.C. 7.

Because §301.7701-18(a) defines spouse for Federal tax purposes, that definition applies for purposes of section 139E and would apply by default under proposed regulations. However, as noted in part I.C. of this Explanation of Provisions section, the proposed regulations would include in the definition of Tribal program participant the spouse of a Tribal member, as determined under applicable Tribal law, whether or not recognized under §301.7701-18(a) and 1 U.S.C. 7.

#### F. Definition of dependent

Section 139E(c)(2) defines the term “dependent” to mean a dependent as defined in section 152 of the Code, determined without regard to section 152(b)(1), (b)(2), and (d)(1)(B). Revenue Procedure 2014-35 does not define dependent, and the TTAC Report and the Tribal Comments did not provide any recommendations on the definition of dependent for purposes of section 139E.

Section 152(a) defines dependent to mean an individual who is a qualifying child or qualifying relative of the taxpayer. Section 152(b) provides that an individual who is a qualifying child or a qualifying relative of a taxpayer is not a taxpayer’s dependent in certain circumstances. Section 152(b)(1) provides that if an individual is a dependent of a taxpayer, that individual is treated as having no dependents. Section 152(b)(2) provides that, to be a dependent of a taxpayer, an individual must not have filed a joint return with his or her spouse. Section 152(d)(1)(B) provides that qualifying relative does not include an individual whose income is not less than the exemption amount set forth in section 151(d) of the Code.<sup>3</sup> For purposes of section 139E, an individual who for the year is a dependent of a taxpayer who is him or herself a dependent, who files a joint return with the individual’s spouse, or whose income is not less than the applicable limit

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<sup>3</sup> For taxable years in which the exemption amount is zero, the section 151(d) exemption amount is generally the inflation-adjusted section 152(d)(1)(B) exemption amount in the annual revenue procedure setting forth inflation-adjusted items that is published in the Internal Revenue Bulletin.

for section 152(d)(1)(B) (\$5,050 for 2024) is a dependent of a Tribal member if the other requirements of section 152 are satisfied, pursuant to section 139E(c)(2).

Proposed §1.139E-1(b)(10) would define the term “dependent” in accordance with the definition in section 139E(c)(2). However, for ease of readability, the proposed regulations would not cite the specific Code sections, but instead would describe the rules for determining who is a dependent under section 152 without regard to section 152(b)(1), (b)(2), and (d)(1)(B).

## II. Indian Tribal Government Program

Under section 139E(b), a benefit is a Tribal general welfare benefit if it meets certain requirements and is provided pursuant to an Indian Tribal government program, but only if the program is administered under specified guidelines and does not discriminate in favor of members of the governing body of the Tribe. Section 139E(c)(4) provides that a program will not fail to be treated as an Indian Tribal government program solely by reason of the program being established by Tribal custom or government practice. Revenue Procedure 2014-35 provides that, to qualify for the safe harbors provided therein, there must be a specific Tribal program, the program must have written guidelines specifying how an individual qualifies for the benefit, and the program cannot discriminate in favor of members of the governing body.

Some Tribal Comments suggest that programs established by Tribal custom or government practice without written documentation (that is, programs established under oral and unwritten customs or traditions) should satisfy the statutory requirement in section 139E(b)(1) that the program be administered under specified guidelines. These Tribal Comments recommend that the proposed regulations allow Indian Tribal governments to demonstrate the existence of “specified guidelines” for these programs through statements, affidavits, or declarations that describe how the Tribe has operated the program in the past. Other Tribal Comments argue that section 139E(b)(1) neither

specifies who establishes the “specified guidelines” nor defines the term “specified,” and that the proposed regulations should presume that a program administered by or pursuant to Tribal resolution or other action by a Tribe’s governing body is “administered under specified guidelines.” The TTAC Report and the Tribal Comments did not specifically address the requirement that the program not discriminate in favor of members of the governing body.

The Treasury Department and the IRS read section 139E(b) as requiring both that a program be established by an Indian Tribal government, and that the program be administered under specified guidelines. This reading is similar to the requirements in Revenue Procedure 2014-35 that there must be a specific Tribal program, and that the program must have guidelines specifying how an individual qualifies for the benefit. Proposed §1.139E-1(c) generally would adopt these two requirements and would explain how an Indian Tribal government program can meet these requirements. The proposed regulations also would address the requirement that the program not discriminate in favor of members of the governing body.

A. Program must be established

Proposed §1.139E-1(c)(2) would provide that a program must be established by an Indian Tribal government and that the program may be established by Tribal custom, government practice, or formal action of the Indian Tribal government under applicable Tribal law. The proposed regulations also would provide that to the extent permitted by applicable Tribal law, an Indian Tribal government may delegate authority to establish general welfare programs to a designated individual or entity of the Indian Tribal government.

While an Indian Tribal government may find it helpful to set forth the creation of a program through a written document, the proposed regulations would not specifically require a written document to memorialize the establishment of the program. However,

the proposed regulations would refer to applicable Tribal law to determine whether a writing is required for formal actions of the Indian Tribal government. For example, if Tribal law requires all formal actions of the Indian Tribal government to be in writing, then proposed §1.139E-1(c)(2) would also require the establishment of the program to be in writing. If written documentation of the Indian Tribal government program is not required under Tribal law, and the Indian Tribal government does not provide written documentation of the Indian Tribal government program, the use of affidavits or Indian Tribal government declarations, whether oral or written, may be used to substantiate the establishment of the program. For example, the transcript of the minutes of an Indian Tribal government session that describe the creation of the program may be sufficient to establish an Indian Tribal government program under these proposed regulations.

**B. Program must be administered under specified guidelines**

Proposed §1.139E-1(c)(3) would provide the requirements for the administration of the program under specified guidelines. In general, the specified guidelines of the program represent the framework for the program's operations. Thus, the proposed regulations would provide that 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.

The Treasury Department and the IRS agree with the TTAC Report and the Tribal Comments that section 139E does not require the specified guidelines of the program to be memorialized in a written document. However, Indian Tribal governments are encouraged to set forth the specified guidelines in writing to assist recipients in determining whether a benefit received under the program is excludable from gross income under section 139E. In particular, recipients of Tribal general welfare benefits who are contacted by the IRS will need to substantiate that the benefit

is excludable from gross income under section 139E and may not have any written documentation in their possession to do so. If the Indian Tribal government has documented in writing the specific guidelines of the program, the individual recipient of the benefit may use the written documentation to substantiate that the benefit received is intended to be a Tribal general welfare benefit that is excludable from gross income under section 139E.

C. Program cannot discriminate in favor of members of the governing body

In accordance with section 139E(b)(1), proposed §1.139E-1(c)(4) would provide that one of the requirements for an Indian Tribal government program is that the program not discriminate in favor of members of the governing body of the Tribe (non-discrimination requirement). Proposed §1.139E-1(c)(4)(i) would generally define a governing body as the legislative body of the Tribe, such as the Tribal Council, or the representative equivalent of the legislative body of the Tribe. However, the Treasury Department and the IRS are aware that the form and membership of the governing body of a Tribe may vary between Tribes. For example, a Tribe may form its governing body to include all Tribal members, known as a general council Tribe. To ensure that a general council Tribe is not prevented from satisfying this requirement, proposed §1.139E-1(c)(4)(ii) 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.

Proposed §1.139E-1(c)(4)(iii) would provide a facts and circumstances test to determine whether a program, either by its terms or in its administration, discriminates in favor of members of the governing body of the Tribe. For example, the administration of a program would discriminate in favor of members of the governing body if, based on the facts and circumstances, the benefits provided during the taxable year disproportionately favor members of the governing body of the Tribe because of their

status as members of the governing body. Thus, for example, a program established to provide benefits solely to the children of members of the governing body of the Tribe (unless the Tribe is a general council Tribe) and thus defrays costs otherwise borne by members of the governing body would fail to satisfy the non-discrimination requirement.

D. No limitation on source of funds

Section 139E does not provide restrictions on how an Indian Tribal government may fund an Indian Tribal government program. Section 2.03 of Revenue Procedure 2014-35 provides that revenues that the Indian Tribal government derives from levies, taxes, service fees, tribally-owned businesses, or other sources are permissible to fund a Tribal general welfare program.

The TTAC Report and the Tribal Comments argue that the source of funds used for general welfare benefits does not matter for compliance with section 139E. The TTAC Report and the Tribal Comments request that the proposed regulations confirm that the source of funding is irrelevant and, in particular, that a Tribe's gaming revenues may be used to fund Tribal general welfare benefits under an Indian Tribal government program.

The Treasury Department and the IRS agree with the TTAC Report and the 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. Thus, proposed §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, an Indian Tribal government is permitted to restrict the source and amount of funds available to provide benefits under an Indian Tribal government program.

E. Benefits funded by net gaming revenues

Under the Indian Gaming Regulatory Act, 25 U.S.C. 2701-2721 (IGRA), a



Federally-recognized Tribe is permitted to engage in gaming activities and provide net gaming revenues to its members. See 25 U.S.C. 2710(b). Section 25 CFR 502.16 defines “net gaming revenue” as gross gaming revenues of an “Indian gaming operation” less: (a) amounts paid out as, or paid for, prizes; and (b) total gaming-related operating expenses, including all those expenses of the gaming operation commonly known as operating expenses and non-operating expenses consistent with professional accounting pronouncements, excluding management fees. IGRA allows Tribes to use their net gaming revenues consistent with one or more of the following purposes: (1) to fund Tribal government operations or programs; (2) to provide for the general welfare of the Tribe or its members; (3) to promote Tribal economic development; (4) to donate to charitable organizations; or (5) to help fund operations of local government.

IGRA also allows Tribes to use their net gaming revenues to distribute per capita payments. See 25 U.S.C. 2710(b)(3). Under 25 CFR 290.2, “per capita payment” means the distribution of money or other thing of value to all members of the Tribe, or to identified groups of members, which is paid directly from the net revenues of any Tribal gaming activity, but does not include payments that have been set aside by a Tribe for special purposes or programs, such as payments made for social welfare, medical assistance, education, housing, or other similar, specifically identified needs.

Under IGRA, a Tribe cannot distribute per capita payments unless it has a Revenue Allocation Plan (RAP) that is approved by the DOI prior to distributing per capita payments. See 25 U.S.C. 2710(b)(3) and 25 CFR 290.11. A Tribe does not need a RAP if no per capita payments are made or planned to be made to its members. See 25 CFR 290.10. Thus, no RAP is required if a Tribe intends to use its gaming revenues solely for special purposes or programs, such as payments made for social welfare, medical assistance, education, housing, or other similar, specifically

identified needs. These types of payments are not per capita payments as defined under IGRA.

Section 25 U.S.C. 2710(b)(3)(D) provides that net revenues may be used to make per capita payments to members of the Tribe only if the per capita payments are subject to Federal taxation and Tribes notify members of such tax liability when payments are made. Under section 6041 and §1.6041-1, the Tribe generally is required to report per capita payments of \$600 or more in any taxable year on Form 1099-MISC, *Miscellaneous Information*.

Section 3402(r)(1) requires every person, including an Indian Tribe, making a payment to a member of an Indian Tribe from the net revenues of any class II or class III gaming activity conducted or licensed by such tribe to deduct and withhold from such payment a tax in an amount equal to such payment's proportionate share of the annualized tax. A payment that constitutes a per capita payment under IGRA is gross income under section 61 and continues to be subject to withholding under section 3402(r)(1) to the extent not otherwise excepted. See 25 U.S.C. 2701-2721 and 25 CFR part 290. These provisions, which are intended to ensure adequate withholding on gross income arising from the distribution of class II and class III gaming activity, are not intended to and do not extend the scope of what is gross income. Thus, withholding under section 3402(r) is not imposed merely by reason of the payment being sourced in class II or class III gaming activities but rather by reason of the payment being gross income and made in the form described in section 3402(r). Accordingly, if a payment is made under an Indian Tribal government program and meets the requirements to qualify as an excludable Tribal general welfare benefit under section 139E and these proposed regulations, then such payment is not subject to the withholding requirements of section 3402(r).

Section 139E does not address IGRA or the Federal tax treatment of per capita

payments. Revenue Procedure 2014-35, however, specifically provides that per capita payments are gross income under section 61, and are subject to the information reporting and withholding requirements of sections 6041 and 3402(r). Thus, under the revenue procedure, per capita payments are not excludable from income under the administrative general welfare exclusion.

The TTAC Report argues that a distribution with a general welfare purpose under IGRA should be presumed to be a Tribal general welfare benefit under section 139E and not be treated as a taxable per capita payment under IGRA. In addition, the TTAC Report provides that a Tribe's RAP should be relied upon when determining whether a payment is a per capita payment or a general welfare payment under section 139E. Finally, the TTAC Report states that the IRS should not be allowed to challenge an approved RAP with respect to any perceived conflict with IGRA and section 139E. Rather, the TTAC Report argues, the IRS must engage in consultation with the Tribe to resolve the perceived conflict. Finally, the TTAC Report requests that any enforcement by the IRS contrary to the RAP be prospective only, and that Tribes be given time to amend their RAPs with the DOI.

Some Tribal Comments argue that IGRA makes clear that not all equal distributions of gaming revenue are necessarily "per capita payments" to the extent that they are set aside for social welfare, medical assistance, education, housing, or similar purposes. Some Tribal Comments recommend that the proposed regulations focus on the purpose and methodology used to calculate the distributions, rather than the source of the funding or the value of the benefit. Finally, some Tribal Comments request that the IRS defer to a Tribe's RAP and not recharacterize general welfare payments as per capita payments.

The Treasury Department and the IRS are of the view that IGRA defines per capita payments and provides that those payments are includible in gross income for

Federal income tax purposes. However, the Treasury Department and the IRS agree with the TTAC Report and the Tribal Comments noting that IGRA distinguishes between taxable per capita payments and other types of payments, such as general welfare payments. The Treasury Department and the IRS also are of the view that Indian Tribal governments are in the best position to determine whether net gaming revenues should be used to fund per capita payments or general welfare payments.

The Treasury Department and the IRS do not agree with the TTAC Report that a distribution with a general welfare purpose under IGRA should be presumed to be a Tribal general welfare benefit under section 139E. Even if a payment is treated as having a general welfare purpose under IGRA, as designated in a RAP or otherwise, that purpose, by itself, is not sufficient to conclude that the payment is excludable from gross income under section 139E. Instead, the Indian Tribal government program must satisfy the requirements of section 139E (or other exclusion provision) for the payment to be excluded from the recipient's gross income.

Accordingly, proposed §1.139E-1(c)(5)(ii) would provide that benefits under the Indian Tribal government program may be funded by net gaming revenues as permitted under IGRA. However, per capita payments, as defined under IGRA, are subject to Federal taxation under IGRA and are not excludable from gross income under section 139E or these proposed regulations. Proposed §1.139E-1(c)(5)(ii) would further provide that, for purposes of section 139E and the proposed regulations, a payment is a per capita payment if it is identified by the Indian Tribal government as a per capita payment in a RAP that is approved by the DOI. This language is intended to mean that, if the Indian Tribal government has an approved RAP, the provisions of the RAP determine whether a payment is a per capita payment for purposes of Federal income taxation. In contrast, if the Indian Tribal government does not have a RAP, the determination of the Indian Tribal government that payments are not per capita payments is controlling for

Federal income tax purposes. Whether or not the Indian Tribal government has a RAP, deference will be given to the Indian Tribal government's determination of whether net gaming revenues are being used to make payments. The DOI is the Federal agency with sole authority to approve the use of net gaming revenues by an Indian Tribal government, including whether per capita payments may be made under a RAP.

In drafting these proposed regulations, the Treasury Department and the IRS have considered recent litigation addressing per capita payments made by one Tribe to its members. In *United States v. Jim*, 891 F.3d 1242 (2018), the 11th Circuit affirmed the district court's conclusion that section 139E did not apply to exclude per capita payments from a Tribal member's gross income. The court held that per capita payments are taxable under IGRA, a specific statute addressing Tribal net gaming revenues. The court also held that section 139E, a more general statute, does not control or nullify IGRA. The Treasury Department and the IRS agree that section 139E does not control or nullify IGRA, and that per capita payments under IGRA cannot be excluded from gross income under section 139E. However, as noted in parts II.D and III.A.3 of this Explanation of Provisions, there is no prohibition in section 139E on Tribal general welfare benefits being paid from net gaming revenues, nor is there is a prohibition on Tribal general welfare benefits being paid in equal amounts to Tribal members. Thus, an Indian Tribal government 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 Indian Tribal government, and (2) they otherwise meet the requirements in section 139E. For example, to be an excludable Tribal general welfare benefit, the benefit cannot be lavish or extravagant and must be provided under a program that is established by the Indian Tribal government and administered under specified guidelines.

### III. Tribal General Welfare Benefits

Under section 139E(b), benefits provided under an Indian Tribal government program are Tribal general welfare benefits only if the benefits (1) are for the promotion of general welfare; (2) are available to any Tribal member who meets the guidelines; (3) are not lavish or extravagant; and (4) are not compensation for services. Proposed §1.139E-1(d) would describe each of these requirements.

#### A. Benefits must be for the promotion of general welfare

##### 1. Deference to Tribes in Determining Promotion of General Welfare

Section 139E(b)(2)(B) requires that a benefit provided under an Indian Tribal government program be for the promotion of general welfare but does not define “promotion of general welfare.” The TTAC Report recommends that promotion of general welfare should be presumed when the Indian Tribal government can substantiate that the benefit meets general welfare needs or purpose, and the method of distributing the benefit is expected to achieve program goals. Further, the TTAC Report states that an Indian Tribal government may substantiate that benefits meet general welfare needs or purposes by relying on data or studies corroborating the expenses. In addition, the TTAC Report recommends that an Indian Tribal government may show that the method of distribution is expected to achieve program goals by establishing Indian Tribal government-approved verification procedures such as direct pay arrangements, applications in which recipients agree to specified program requirements, or end-of-year certifications. Finally, the TTAC Report states that Indian Tribal governments must be afforded flexibility with regard to substantiating expenses that relate to Tribal cultural traditions, religious expenses, or historical need (such as benefits paid to elders to make up for historic economic deprivation and shorter life expectancy).

Many Tribal Comments request that deference be given to Tribes and Indian

Tribal governments on whether the types and amounts of benefits are for the promotion of general welfare. These Tribal Comments state that the Indian Tribal government is best suited to address the unique needs of its members, with many insisting that such discretion should be unfettered. The Tribal Comments noted that many programs may not reflect how the Treasury Department and the IRS would traditionally view general welfare, including benefits such as wellness centers, health coaches, and access to dietitians.

Other Tribal Comments state that an official determination by the Indian Tribal government, such as a Tribal resolution or other formal action, should be sufficient to demonstrate that a benefit or program is for the promotion of general welfare. With respect to benefits provided, some Tribal Comments request that the regulations defer to Indian Tribal governments on determining whether benefits provided to Tribal members are considered “for the promotion of general welfare,” particularly when the Indian Tribal government relies on its own data or other empirical data (for example, private studies, or based on Federal or state statistics). Many Tribal Comments argue that the Treasury Department and the IRS should avoid listing specific criteria required for a benefit to satisfy the promotion of general welfare requirement.

The Treasury Department and the IRS agree with the TTAC Report and the Tribal Comments that deference should be given to the Indian Tribal government in determining whether a benefit is for the promotion of the general welfare of its Tribal members or other eligible individuals. The 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. As a result, these proposed regulations 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, proposed §1.139E-1(d)(2) would provide deference to the

Indian Tribal government 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. Proposed §1.139E-1(d)(2) would provide further 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 is for the promotion of general welfare. These proposed rules would be consistent with the specific language in section 2(c) of the Act, which 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.

## 2. No Need Requirement

The administrative general welfare exclusion requires that payments be for the promotion of general welfare, which the IRS has interpreted to require a showing of individual or family need, notably financial need. This interpretation generally applies regardless of whether the benefits are provided by a Federal, State, or local government or by an Indian Tribal government. However, Revenue Procedure 2014-35 provides that the individual need criterion of the administrative general welfare exclusion is presumed to be met for certain benefits provided under an Indian Tribal government program. Section 139E(b)(2)(B) requires that a benefit be for the promotion of general welfare but does not specifically define that term nor mention whether it incorporates a needs-based requirement.

The TTAC Report and majority of the Tribal Comments contend that the proposed regulations should not incorporate a needs-based requirement for the promotion of general welfare requirement in section 139E(b). The Tribal Comments note that section 139E is silent on an individual need requirement. Also, the Tribal Comments point to the language in Revenue Procedure 2014-35, which conclusively



presumed individual need was satisfied, as support for not including a requirement for the showing of individual need in section 139E.

As noted in part III.A.1 of this Explanation of Provisions, proposed §1.139E-1(d)(2) 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 is for the promotion of general welfare. Consistent with this approach, Indian Tribal Governments thus would have sole discretion as to whether to consider individual need or not in designing a general welfare program. In addition, the Treasury Department and the IRS agree with the TTAC Report and the Tribal Comments that section 139E was intended by Congress to generally codify Revenue Procedure 2014-35, which conclusively presumed that individual need was satisfied if the program met certain requirements. This conclusion is also consistent with the legislative history of section 139E. See House Debate, at H7601 (Representative Devin Nunes stating "that the IRS will not interpret the statute as requiring individualized determinations of financial need where a tribal government has established a program consistent with the statute"); see also Senate Colloquy, at S5686 (Senator Jerry Moran asking Senator Ron Wyden, and Senator Wyden agreeing, that the IRS will "in no event require an individualized determination of financial need" if a Tribal program meets the other requirements of section 139E).

Accordingly, proposed §1.139E-1(d)(2) specifically states that Tribal general welfare benefits may be provided without regard to the financial or other need of Tribal program participants. However, Indian Tribal governments have broad discretion to establish and administer general welfare programs and may choose to limit a program or its benefits to Tribal program participants based on a showing of individual need.

3. Benefits may be in Equal Amounts

Section 139E does not address whether Tribal general welfare benefits may be provided to recipients in equal amounts. However, in considering the enactment of section 139E, Representative Nunes expressed an intent that section 139E apply to pro rata payments. In addressing the IRS's frequent insistence that Tribal benefits be based on a stipulation based on individualized financial need, he stated, "This stipulation prevents the general welfare exclusion from covering programs designed to provide substantially equal benefits to all qualifying members of a tribe or to provide benefits based on determinations of needs that are not financial in nature." See House Debate, at H7601. Revenue Procedure 2014-35 does not directly address this issue of whether general welfare benefits under its safe harbors could be provided equally to all eligible individuals, but states that per capita payments to Tribal members of Tribal gaming revenues that are subject to IGRA are gross income under section 61, are subject to the information reporting and withholding requirements of sections 6041 and 3402(r), and are not excludable from gross income.

The TTAC Report correctly notes that section 139E does not prohibit general welfare benefits from being distributed in uniform amounts. The Tribal Comments recommend that the Treasury Department and the IRS defer to Tribes in determining whether pro rata payments (that is, uniform payments to each recipient) are appropriate. In general, several Tribal Comments, when referring to net gaming revenues under IGRA, argue that IGRA does not treat all pro rata payments as taxable, but instead looks to the purpose and methodology used to calculate the payments.<sup>4</sup> The Tribal Comments also request that the proposed regulations permit pro rata payments under an Indian Tribal government program, as several Tribal Comments emphasized that distributing benefits in equal amounts is often the most efficient method to provide

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<sup>4</sup> See part II.E. of this Explanation of Provisions for a fuller discussion of IGRA and general welfare payments made from net gaming revenues.

benefits, such as for health and wellness and broadband internet access.

The Treasury Department and the IRS agree with the TTAC Report and the Tribal Comments that section 139E does not prohibit an Indian Tribal government program from providing Tribal general welfare benefits to recipients in equal amounts. Accordingly, proposed §1.139E-1(d)(2) would provide that Tribal general welfare benefits may be provided on a uniform or pro-rata basis to Tribal program participants.

#### 4. Specific Types of Benefits

The TTAC Report and the Tribal Comments recommend clarification on whether payment of benefits for disaster relief and similar assistance qualify under section 139E. In addition, both the TTAC Report and many Tribal Comments request that an Indian Tribal government disaster declaration qualify to establish the existence of a disaster for purposes of identifying relief payments under section 139E.

Section 139 generally provides an exclusion from gross income for qualified disaster relief payments. Qualified disaster relief payments generally include certain amounts paid to or for the benefit of an individual in connection with a qualified disaster, including a Federally declared disaster. Specifically, section 139(b)(4) includes as a qualified disaster relief payment an amount paid by a Federal, State, or local government, or agency or instrumentality thereof, in connection with a qualified disaster in order to promote the general welfare. Section 139(b)(4) was enacted to codify the administrative general welfare exclusion for certain disaster relief payments, but does not supplant it. See Notice 2002-76 (2002-2 C.B. 917). Thus, benefits paid by Indian Tribal governments to individuals affected by a disaster may be excluded from the individuals' gross income if the requirements of the administrative general welfare exclusion are met. Similarly, these disaster relief benefits may be excluded from gross income if they qualify as Tribal general welfare benefits under section 139E.

The Treasury Department and the IRS recognize that Indian Tribal governments

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, proposed §1.139E-1(d)(2) would include as a permissible general welfare purpose “assistance for disasters or emergency situations.” The Indian Tribal government need not make a specific Tribal disaster declaration.

In addition, the TTAC Report requests that the proposed regulations specifically provide that wellness and health-related programs may be Tribal general welfare benefits. The TTAC Report acknowledges that section 139D applies to certain health care expenses but requests clarification that section 139E operates independent of, and is not limited by, section 139D of the Code. In particular, the concern is that wellness and health-related programs may not fall within the section 139D exclusion.

Section 139D generally provides an exclusion from gross income for any qualified Indian health care benefit. Qualified Indian health care benefits include medical care provided by an Indian Tribe or Tribal organization, or coverage under insurance or a plan provided by an Indian Tribe or Tribal organization for medical care. See section 139D(b)(2)-(4). For purposes of section 139D, “medical care” has the same meaning as when used in section 213 of the Code. Amounts paid for benefits that are merely beneficial to the general health of an individual, such as certain wellness and health-related programs, as well as care by an unlicensed spouse or relative, are not amounts paid for medical care and thus are not excluded under section 139D. See section 213(d) and §1.213-1(e)(1)(ii).

The Treasury Department and the IRS agree that section 139E operates independently of, and is not limited by, section 139D. Thus, in accordance with the deference provided to Indian Tribal Governments in proposed §1.139E-1(d)(2), an Indian Tribal Government may determine that wellness and health-related programs are for the promotion of general welfare under section 139E.

B. Benefits must be available to any Tribal program participant

Section 139E(b)(2) provides, in relevant part, that a benefit provided under the program must be available to any Tribal member who meets the specified guidelines of the program. Revenue Procedure 2014-35 requires that the benefit be available to any eligible individual who satisfies the program guidelines, subject to budgetary constraints. The TTAC Report and the Tribal Comments do not specifically address this requirement.

The Treasury Department and the IRS have determined that this requirement should be interpreted in a manner similar to Revenue Procedure 2014-35. Thus, proposed §1.139E-1(d)(3) would provide that a benefit under the Indian Tribal government program must be available to any Tribal program participant who meets the specified guidelines of the program, subject to budgetary constraints.

C. Benefits cannot be lavish or extravagant

Section 139E(b)(2) provides, in relevant part, that benefits provided under the program cannot be lavish or extravagant. Section 139E(c)(3) provides that the Secretary, in consultation with the TTAC, must establish guidelines for what constitutes lavish or extravagant benefits with respect to Indian Tribal government programs. The Treasury Department and the IRS have consulted with the TTAC during the drafting of these proposed regulations. In addition, the Treasury Department and the IRS will hold Tribal consultation before finalizing the proposed regulations.

Like section 139E, Revenue Procedure 2014-35 prohibits benefits that are lavish or extravagant. It does not define “lavish or extravagant” but does provide that the benefits cannot be “lavish or extravagant under the facts and circumstances.”

The TTAC Report recommends that the term “lavish or extravagant” be defined as a relative term that depends on the unique circumstances of the Tribe, and also depends on the type of benefit being provided (such as, one-time payment or monthly

assistance). The TTAC Report sets forth a non-exclusive list of circumstances that should be considered when determining if a benefit is lavish or extravagant: an Indian Tribal government's economic circumstances or factors, culture and cultural practices, history, geographic area, traditions, and resources. The TTAC Report recommends deference to Indian Tribal governments and proposes a rebuttable presumption that the benefit is not lavish or extravagant if the Indian Tribal government program meets general welfare needs or purposes, and the method of distribution is expected to achieve program goals.

Several Tribal Comments recommend that the proposed regulations defer to the Tribes or their Indian Tribal governments for determining whether a benefit is lavish or extravagant. Most Tribal Comments provide that the term is relative and depends on the unique circumstances of each Tribe and the type of benefit provided. Some Tribal Comments recommend deference to an Indian Tribal government's definition of lavish or extravagant as established by official actions, such as Tribal ordinances, resolutions, and policies. In addition, some Tribal Comments propose that a facts and circumstances standard, similar to Revenue Procedure 2014-35, be applied to define lavish or extravagant. Under such a standard, a benefit would not be lavish or extravagant if based upon a particular Tribe's political, socio-economic and cultural facts and circumstances as determined by that Tribe. Some Tribal Comments argue that the definition should be subject to the Tribal canon, as opposed to the traditional canons of statutory construction, and that any ambiguity be construed in favor of the Tribe.

Some Tribal Comments describe what the proposed regulations should not do when defining lavish or extravagant. For example, some Tribal Comments urge that the proposed regulations should define lavish or extravagant in a way that targets egregious abuse but otherwise does not affect Indian Tribal government programs that are designed and administered in good faith. Other Tribal Comments suggest that the term

lavish or extravagant not be defined by reference to dollar amounts, and specifically highlighted cost of living variations (for example, geographic differences). Some Tribal Comments emphasize that the proposed regulations should not use examples that may suggest limitations on the eligibility of program benefits. Specifically, these commenters suggest that it would be more helpful to include examples of benefits that are not considered lavish or extravagant. Finally, some Tribal Comments argue that the Treasury Department and the IRS should not refer to other Code provisions for guidance on interpreting the phrase “lavish or extravagant” under section 139E.

The Treasury Department and the IRS generally agree with the TTAC Report and the Tribal Comments. Accordingly, proposed §1.139E-1(d)(4) would provide a facts and circumstances test to determine whether a Tribal general welfare benefit is lavish or extravagant under section 139E. Under proposed §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. A facts and circumstances test is consistent with Revenue Procedure 2014-35, as well as the TTAC Report and the Tribal Comments suggesting that the Tribe’s unique circumstances should be considered when evaluating whether the Indian Tribal government determined a Tribal general welfare benefit to be lavish or extravagant at the time the benefit is provided. However, proposed §1.139E-1(d)(4) also 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 Indian Tribal government program.

The TTAC Report and some Tribal Comments mention that the frequency of benefit (for example, lump sum or monthly payment) should be considered when evaluating whether a program’s benefit is lavish or extravagant. The Treasury

Department and the IRS agree 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, an Indian Tribal government may establish a program that provides the types of benefits, including frequency of payment, that best meet the needs of its Tribal members.

D. Benefits cannot be compensation for services

Section 139E(b)(2)(D) provides that a Tribal general welfare benefit paid under an Indian Tribal government program cannot be compensation for services, with exceptions discussed in part IV of this Explanation of Provisions.<sup>5</sup> Section 139E(b)(2)(D) does not provide a specific definition for the term compensation for services for purposes of section 139E. Revenue Procedure 2014-35 also provides that benefits under the safe harbors cannot be compensation for services but does not specifically define compensation for services. The prohibition on compensation for services is a long-standing core principle of the administrative general welfare exclusion. See Revenue Ruling 75-246 (1975-1 C.B. 24).

The TTAC Report acknowledges that section 139E prohibits compensation for services from being treated as Tribal general welfare benefits. The TTAC Report and the Tribal Comments do not recommend a specific definition of compensation for services, but the TTAC Report recommends that the proposed regulations confirm that (1) a benefit in connection with Tribal custom or tradition regarding community service is not compensation for services; (2) compensation for services does not include cultural or ceremonial gifts and payments, as determined by the Tribe; and (3) payments as part of training programs are not compensation for services. Similar to this third issue, one

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<sup>5</sup> Section 139E(c)(5) provides an exception under which 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.” This exception to the general prohibition on compensation for services is addressed in part IV of this Explanation of Provisions.



Tribal Comment argues that on-the-job training, apprenticeships, and other classes for job skills for which participants receive payment should not be treated as compensation for services. Finally, one Tribal Comment argues that the rule in section 139E(b)(2)(D) should be read narrowly to cover services that are traditionally provided under an employment or contracted-vendor relationship.

The first two issues raised in the TTAC Report overlap with the rules in section 139E(c)(5), which provides that certain benefits provided for participation in cultural or ceremonial activities are not treated as compensation for services. These issues from the TTAC Report are addressed in part IV of this Explanation of Provisions. The third issue, relating to whether payments made to individuals in various types of training programs are compensation for services, is addressed under section 61 and current law relating to gross income generally.

Section 61(a) generally provides that, except as otherwise provided in the Code, gross income means all income from whatever source derived, and this includes compensation for services, including fees, commissions, fringe benefits, and similar items, whether paid in money or property. Section 1.61-2(a)(1) of the Income Tax Regulations provides additional examples of payments that are included in gross income because they are compensation for services, such as wages, salaries, and commissions paid salesmen. However, compensation for services also includes amounts that are not paid in an employment or contracted-vendor relationship. Thus, 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.

In the context of training, apprenticeships, and other skills training programs, existing IRS guidance on the administrative general welfare exclusion provides assistance on how to distinguish whether a payment is a general welfare payment or is

compensation for services. See Revenue Ruling 63-136 (1963-2 C.B. 19) (excluding from income the payments for on-the-job career training or retraining where such payments are “intended to aid the recipients in their efforts to acquire new skills that would enable them to obtain better employment opportunities”); Revenue Ruling 65-139 (1965-1 C.B. 31) (as clarified by Revenue Ruling 66-240 (1966-2 C.B. 19)). In general, the determination as to whether payments under training programs are includible in a participant’s gross income rests on whether the activity for which the payments are received is in exchange for the performance of services (compensation for services) or is for participation in a training program that promotes the general welfare (general welfare payment). Revenue Ruling 75-246 (1975-1 C.B. 24).

Because existing guidance addresses the long-standing distinction between compensation for services and general welfare payments, the Treasury Department and the IRS have determined that the proposed regulations should define compensation for services by reference to current law. Thus, proposed §1.139E-1(d)(5) 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.

#### IV. Exception to Prohibition on Compensation for Services

As noted in part III.D. of this Explanation of Provisions, section 139E(b)(2)(D) generally provides that a Tribal general welfare benefit cannot be compensation for services. However, section 139E(c)(5) contains an exception to that general rule and 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 will not be treated as compensation for services. Accordingly, such items may, if the other requirements of section 139E are satisfied, be Tribal general welfare benefits that are excluded from gross income.

Revenue Procedure 2014-35 contains a similar exception. Specifically, section 5.03 of the revenue procedure provides that the safe harbors apply to “benefits provided under an Indian Tribal governmental program that are items of cultural significance that are not lavish or extravagant under the facts and circumstances, or nominal cash honoraria provided to religious or spiritual officials or leaders. . . to recognize their participation in cultural, religious, and social events.”

A. Participation in cultural or ceremonial activities

The exception in section 139E(c)(5) applies only if specific benefits are “for participation in cultural or ceremonial activities for the transmission of tribal culture.” Revenue Procedure 2014-35 contains a similar exception, but that exception is limited to specific benefits “provided to religious or spiritual officials or leaders (including but not limited to medicine men, medicine women, and shamans) to recognize their participation in cultural, religious, and social events (including but not limited to pow-wows [sic], rite of passage ceremonies, funerals, wakes, burials, other bereavement events, and honoring events).” As the TTAC Report points out, Revenue Procedure 2014-35 refers only to event participation by religious or spiritual leaders and does not describe larger Indian Tribal-wide cultural, ceremonial, and community service general welfare programs. The TTAC Report recommends that the proposed regulations provide that the IRS must defer to Tribal determinations on what it means to participate in cultural or ceremonial activities for the transmission of Tribal culture. Some Tribal Comments request that the exclusion apply to attendance at Tribal gatherings and participation in community service or tribal meetings. Some Tribal Comments provide examples of services that should not be considered compensation for services, such as blessings provided by Tribal members, preparation of traditional foods at events, support for sponsoring Tribal events, and the activities of traditional healers performed at or for official Tribal events like ceremonial or traditional gatherings. Finally, some

Tribal Comments state that the proposed regulations should apply the section 139E(c)(5) exception to services that are traditionally provided through employment or contracted-vendor arrangements.

The Treasury Department and the IRS recognize that the language in section 139E(c)(5) is broader than Revenue Procedure 2014-35 in that the section 139E(c)(5) exception is not limited to religious or spiritual officials or leaders. The Treasury Department and the IRS also agree with the TTAC Report that Tribes are in the best position to determine what it means to participate in cultural or ceremonial activities for the transmission of Tribal culture. Thus, proposed §1.139E-1(e) would provide that the Indian Tribal government determines what it means to participate in cultural or ceremonial activities for the transmission of Tribal culture and would include the list of examples from Revenue Procedure 2014-35 (powwows, rite of passage ceremonies, funerals, wakes, burials, other bereavement events, and honoring events). It would further provide that the IRS will defer to the Indian Tribal government's determination of whether an activity is a cultural or ceremonial activity for the transmission of Tribal culture.

The Treasury Department and the IRS do not agree with the Tribal Comments stating that the exception in section 139E(c)(5) broadly applies to services that are traditionally provided under an employment or contracted-vendor relationship because section 139E is an exclusion from gross income for individuals and families, not businesses. For example, a corporation owned by a Tribal member that contracts with the Indian Tribal government to cater a Tribal ceremony is not within the section 139E(c)(5) exception. In this case, any payment received by the corporation from the Tribe to provide catered food at a Tribal ceremony is business income. However, a Tribal member that volunteers to make traditional foods for a Tribal ceremony and receives an item of cultural significance, cash honorarium, or reimbursement of costs is

within the exception of section 139E(c)(5).

**B. Items of cultural significance**

Section 139E(c)(5) provides, in part, that “items of cultural significance” that are provided for participation in cultural or ceremonial activities for the transmission of Tribal culture are not treated as compensation for services. Revenue Procedure 2014-35 also contains an exception for items of cultural significance that are not lavish or extravagant under the facts and circumstances. The term “items of cultural significance” is not defined in section 139E or in Revenue Procedure 2014-35. The TTAC Report and the Tribal Comments recommend that deference should be given to Indian Tribal governments and Tribes to determine what are items of cultural significance for their Tribe. One Tribal Comment provides a list of examples of items with cultural significance, including blankets, cash, food, regalia items, fabric, beads, drums, pelts, feathers, artwork, baskets, clothing, household items, tobacco, gift cards, animals, and vehicles.

The Treasury Department and the IRS agree that Indian Tribal governments are in the best position to determine items of cultural significance. Thus, proposed §1.139E-1(e)(2) would provide that the Indian Tribal government determines items of cultural significance and that the IRS will defer to the Indian Tribal government’s determination. Unlike the similar rule in Revenue Procedure 2014-35, the proposed regulations would not limit the items of cultural significance to those that are not lavish or extravagant. However, the prohibition on lavish or extravagant benefits in proposed §1.139E-1(d)(4) would apply broadly to all Tribal general welfare benefits, including those that are provided under section 139E(c)(5) for participation in cultural or ceremonial activities. In addition, the Treasury Department and the IRS do not view cash, gift cards, or vehicles themselves as items with cultural significance, although such items may be used to reimburse costs for participation in cultural or ceremonial

activities without being considered compensation for services.

#### C. Cash honorarium

Section 139E(c)(5) provides, in part, that cash honoraria provided for participation in cultural or ceremonial activities for the transmission of Tribal culture is not treated as compensation for services. Revenue Procedure 2014-35 contains a similar exception, although it is limited to nominal cash honoraria. The term “cash honoraria” is not defined in section 139E or in Revenue Procedure 2014-35. The TTAC Report and the Tribal Comments request that the proposed regulations recognize Congress’s decision to eliminate the qualifier that honoraria be “nominal” and provide that a Tribe’s determination of the proper amount of the honorarium should be presumed to be reasonable and fair.

The Treasury Department and the IRS agree with the TTAC Report and the Tribal Comments that section 139E is broader than Revenue Procedure 2014-35 by not limiting the exception to the compensation for services requirement to nominal cash honoraria. Thus, proposed §1.139E-1(e) would not provide that the compensation for services exception in section 139E(c)(5) is limited to nominal cash honoraria.

#### D. Reimbursement of costs

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. Revenue Procedure 2014-35 does not contain a similar exception. Section 139E(c)(5) does not define the term “reimbursement of costs.” However, the Treasury Department and the IRS expect 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 Indian Tribal government to an individual to reimburse specific amounts paid by the individual to participate in the cultural or ceremonial activity.

## E. Members of other Tribes

As noted in part I.D. of this Explanation of Provisions, the proposed regulations generally would define the term Tribal member to mean a member of the Tribe that establishes or maintains the Indian Tribal government program. Some Tribal Comments highlight that some Tribes may provide benefits to individuals who are Tribal members of a different Tribe than the one establishing the general welfare program. For example, an Indian Tribal government may provide benefits to a cultural, spiritual, or ceremonial leader of another Tribe who teaches shared Tribal cultural practices or ceremonial functions.

The Treasury Department and the IRS agree 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. Thus, proposed §1.139E-1(b)(8)(ii) would provide that, solely for purposes of proposed §1.139E-1(e), the definition of Tribal program participant may include a member of a Tribe that is different from the Tribe that establishes the Indian Tribal government program and provides the Tribal general welfare benefit. For example, if a cultural leader from one Tribe performs at another Tribe's powwow, a cash honorarium given to the cultural leader is not compensation for services under section 139E(c)(5).

## V. Issues Not Addressed in Proposed Regulations

### A. Interaction with other Federal programs

The TTAC Report requests that the proposed regulations provide that individual need be presumed for all Tribal general welfare benefits that meet the requirements of section 139E. Moreover, the TTAC Report and many Tribal Comments request that the Treasury Department and the IRS coordinate with other Federal agencies, including the Social Security Administration, to ensure that Tribal general welfare benefits are not

treated as income or a disqualifying resource for purposes of program eligibility, such as supplemental security income benefits under 42 U.S.C. 1381 et seq.

The Treasury Department and the IRS have 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 Treasury Department and the IRS, and therefore beyond the scope of these proposed regulations. The Treasury Department and the IRS are 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.

#### B. Grants to Indian-owned enterprises

The TTAC Report requests that the proposed regulations provide that grants to establish or expand Indian-owned enterprises are excludible from gross income under section 139E. The TTAC Report cites Revenue Ruling 77-77 (1977-1 C.B. 11), for the proposition that non-reimbursable grants made under the Indian Financing Act of 1974 to Indians to expand profit-making Indian-owned economic enterprises on or near reservations are excludable from gross income under the administrative general welfare exclusion. The TTAC Report also requests that the guidance clarify that “expanding” a business includes assistance to help a business remain in operation or recover from losses, and also to allow the Tribe to be able to determine what it means to be an Indian-owned enterprise. One Tribal Comment also requests that grants for establishing and assisting Indian-owned enterprises should be excluded from gross income.

The administrative general welfare exclusion generally does not apply to payments made to businesses, including sole proprietors. Instead, the exclusion is



intended to address benefits that promote the general welfare of families and individuals. See also Revenue Procedure 2014-35, which applies only to individuals and not to businesses. Section 139E also applies only to individuals and not to businesses. Thus, these proposed regulations do not address grants to Indian-owned enterprises. However, these proposed regulations do not affect the validity of Revenue Ruling 77-77, which provides a limited exception to the rule that the administrative general welfare doctrine does not apply to businesses. Under that revenue ruling, a grant made by an Indian Tribal government to a Tribal member to expand an Indian-owned business on or near a reservation is excluded from the Tribal member's gross income under the administrative general welfare exclusion.

#### C. Trust arrangements and deferred benefits

The TTAC Report states that an Indian Tribal government program may distribute general welfare benefits from trust arrangements, including payments that are set aside for the health, education, and welfare of trust beneficiaries under IGRA. The TTAC Report recommends that the proposed regulations provide that the determination of whether a payment is a general welfare benefit is made at the time the trust distributes the payment to the beneficiary from the trust. Some Tribal Comments asked that the proposed regulations expressly recognize that health, education, and welfare payments under a minor's trust can be structured in a way to qualify payments for exclusion under section 139E.

The TTAC Report requests that the proposed regulations provide that an Indian Tribal government program may permit Tribal members and other recipients to defer and accumulate benefits for future payment. The TTAC Report suggests that if the amount is not lavish or extravagant at the time the beneficiary defers receipt of the payment, then section 139E is satisfied at the time the Indian Tribal government distributes the funds to the beneficiary. The TTAC Report also recommends that

section 139E not be limited by constructive receipt and economic benefit restrictions on the deferral of taxable income or benefits. Many Tribal Comments support the TTAC Report on the issue of deferred benefits, and request that the proposed regulations provide examples of deferred benefits.

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. 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 this preamble, the Treasury Department and the IRS request 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.

#### D. Advance rulings

Some Tribal Comments propose that the Treasury Department and the IRS allow Tribes to request advance rulings at the option of the Tribe to address the tax status of

general welfare programs. These comments request, however, that any procedure involving advance rulings requests must be implemented with narrow parameters to avoid becoming a de facto audit of Tribal programs. In addition, these Tribal Comments suggest that these advance rulings be binding on states and other Federal agencies. The Treasury Department and the IRS appreciate that Indian Tribal governments 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). If an Indian Tribal government or a Tribal member receives a letter ruling from the IRS, the ruling generally is binding on the IRS. However, a letter ruling would address only Federal tax law and would not be binding in any way on any other Federal agency or any state agency.

As discussed in part VIII of this Explanation of Provisions, section 4(a) of the Act requires the IRS to suspend all audits or examinations to the extent the audit or examination relates to the exclusion from gross income of benefits under the general welfare exclusion. After soliciting public comments and holding Tribal consultation on these proposed regulations, the Treasury Department and the IRS intend to issue final regulations that provide clear and helpful guidance on Tribal general welfare benefits. Further, in accordance with section 3(b)(2) of the Act, the Secretary of the Treasury, in consultation with the TTAC, will establish certain training and education, which specifically includes the provision of training and technical assistance to Tribal financial officers about implementation of section 139E. The Treasury Department and the IRS will continue to work with the TTAC and Tribes throughout this rulemaking process to

ensure that the final rules are comprehensive and provide as much clarity and certainty as possible within the parameters of the section 139E.

## VI. Safe Harbors and Examples

The Tribal Comments were not uniform on whether it would be helpful for the proposed regulations to provide examples of benefits that qualify as Tribal general welfare benefits. Some Tribal Comments recommend examples to help Indian Tribal governments identify what types of benefits would be considered for promotion of general welfare. In contrast, some Tribal Comments express concern that a list of examples of permissible benefits would over time be viewed as an exhaustive list of permissible benefits.

The TTAC Report requests that Indian Tribal governments be given the ability to rely on programs that meet the safe harbor requirements of Revenue Procedure 2014-35. Some Tribal Comments argue that the safe harbors in Revenue Procedure 2014-35 were arbitrarily limiting and state that the proposed regulations should refrain from using safe harbors to avoid establishing similar limitations under section 139E. However, many other Tribal Comments recommend incorporating the safe harbors from Revenue Procedure 2014-35 into the proposed regulations or expanding the safe harbors to include payments from net gaming revenue, payments under section 139E(c)(5), and programs developed pursuant to official determinations by Indian Tribal governments. The Tribal Comments also request 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.

Revenue Procedure 2014-35 contains numerous safe harbors under which the IRS will conclusively presume that the individual need requirement of the administrative general welfare exclusion is met. As a revenue procedure, this guidance represents an official statement of a procedure by the IRS that affects the rights or duties of taxpayers

under Federal tax law, rather than an official statement of IRS position on a substantive tax issue like the administrative general welfare exclusion. See §601.601 of the Statement of Procedural Rules (25 CFR part 601). Thus, the safe harbors in Revenue Procedure 2014-35 do not represent examples of the application of the administrative general welfare exclusion, but instead are fact patterns for which the IRS is required to presume that the need requirement of the administrative general welfare exclusion is met. Accordingly, taxpayers may rely upon the safe harbors in Revenue Procedure 2014-35, but the revenue procedure does not have the force and effect of Treasury regulations.

The enactment of section 139E provides authority for the Treasury Department and the IRS to issue regulations to interpret section 139E. Regulations are the most authoritative form of published guidance and generally include substantive rules interpreting the statute. 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 proposed regulations would provide examples of benefits that are for the promotion of general welfare under section 139E(b)(2)(B). The Treasury Department and the IRS agree that the examples in these proposed regulations are illustrations of benefits that are for the promotion of general welfare and are not intended to represent an exhaustive list of qualifying benefits. The examples in the proposed regulations also would incorporate the safe harbors in Revenue Procedure 2014-35. 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, consistent with the intent of Congress reflected in the House Debate and Senate Colloquy in enacting the Act. Therefore, the general welfare programs described as

safe harbors in Revenue Procedure 2014-35 would also be programs that satisfy the promotion of general welfare requirement under section 139E(b)(2)(B). Thus, these proposed regulations 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. As described in the Comments and Public Hearing section of this preamble, the Treasury Department and the IRS request comments on whether additional examples are necessary.

#### VII. Proposed Obsolescence of Revenue Procedure 2014-35

Revenue Procedure 2014-35 generally provides principles for applying the administrative general welfare exclusion and provides safe harbors under which the IRS conclusively presumes that the individual need requirement of the administrative general welfare exclusion is met for benefits provided under Indian Tribal government programs that are described under section 5.02 or 5.03 of the revenue procedure. In Notice 2015-34, the Treasury Department and the IRS announced that section 139E codified (but does not supplant) the administrative general welfare exclusion for certain benefits provided under Indian Tribal government programs, and that “Revenue Procedure 2014-35 may be broader than section 139E in some instances.”

Many Tribal Comments argue that the safe harbors in Revenue Procedure 2014-35 were superseded by section 139E. Some Tribal Comments express the preference that Revenue Procedure 2014-35 be expanded to explicitly incorporate the concept of deference to the Tribe.

The Treasury Department and the IRS are of the view that the proposed regulations, 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 Indian Tribal governments may have no further need to rely on Revenue Procedure 2014-35.

In addition, the Treasury Department and the IRS expect that Indian Tribal governments would benefit by having a single set of rules that apply specifically 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 Treasury Department and the IRS propose to obsolete and supersede Revenue Procedure 2014-35 after the final regulations are applicable. As described in the Comments and Public Hearing section of this preamble, the Treasury Department and the IRS request comments on this issue.

#### VIII. Audit Suspension and IRS Training

Section 4 of the Act directs the Secretary of the Treasury to suspend all audits and examinations of Indian Tribal governments and members of Tribes (or any spouse or dependent of such a member) to the extent such an audit or examination relates to the exclusion of a payment or benefit from an Indian Tribal government under the general welfare exclusion, until the education and training prescribed by section 3(b)(2) of the Act is completed. Section 3(b)(2) of the Act directs the Secretary of the Treasury, in consultation with the TTAC, to establish and require (A) training and education for internal revenue field agents who administer and enforce internal revenue laws with respect to Tribes on Federal Indian law and the Federal Government's unique legal treaty and trust relationship with Indian Tribal governments, and (B) training of such internal revenue field agents, and provision of training and technical assistance to Tribal financial officers, about implementation of the Act and the amendments made thereby.

The TTAC Report requests that the proposed regulations refer to the audit suspension provided in section 4 of the Act. Specifically, the TTAC Report requests that the proposed regulations provide that all audits and examinations of Indian Tribal governments, Tribal members, and qualified nonmembers (as defined in Revenue Procedure 2014-35) to the extent that an audit or examination relates to the reporting or

exclusion of a Tribal general welfare benefit are suspended until a specified time related to prospective enforcement of the final regulations. The TTAC Report further requests that enforcement of the final regulations be delayed for one year after the training and guidance required by section 3(b)(2) of the Act is completed (the compliance date), and that when examinations commence, they relate only to the periods beginning on or after the one-year period beginning on or after the compliance date. The TTAC Report further states that guidance under section 139E must 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 audit suspension is lifted. Many Tribal Comments agree with the TTAC Report.

The Treasury Department and the IRS acknowledge that section 4 of the Act provides a temporary suspension of audits and examinations of Indian Tribal governments 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 an Indian Tribal government under the general welfare exclusion. The Treasury Department and the IRS expect that the audit suspension 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 Treasury Department and the IRS contemplate that the education and training described in section 3(b)(2) of the Act, which requires training to the 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 Treasury Department and the IRS, 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 Treasury Department and the IRS 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.

#### IX. Information Reporting

If section 139E applies to exclude the value of a benefit from the Tribal program participant's gross income, then there is no requirement to file with the IRS or furnish to the Tribal program participant an information return on Form 1099-MISC, *Miscellaneous Information*, for that benefit. Indian Tribal governments should not include the amount of any benefit that qualifies for exclusion under section 139E on a Form 1099-MISC that is filed with the IRS and furnished to the Tribal program participant. Including such amounts on a Form 1099-MISC when such amounts are not required to be reported on the Tribal program participant's individual tax return could result in IRS compliance activity, such as inquiries from the IRS automated underreporting (AUR) program.

#### X. Tribal Consultation

Some Tribal Comments request that the Treasury Department and the IRS engage in consultation with Tribes throughout the development and implementation of the regulations, and any additional guidance. In addition, several of these Tribal Comments request additional consultation before the proposed regulations are published in the ***Federal Register***.

The Treasury Department and the IRS agree with the Tribal Comments and expect that consultation will continue throughout the rulemaking process that will culminate with the publication of final regulations in the ***Federal Register***. As noted in the Background section of this preamble, the Treasury Department and the IRS held consultation on the Act and the TTAC Report on December 14, 15, and 16, 2022, and also received comments pursuant to that consultation. These proposed regulations

reflect the input from the TTAC Report and the comments received through consultation. The Treasury Department and the IRS also plan to hold consultation after these proposed regulations are issued and will consider comments from that consultation when drafting final regulations. This consultation is in addition to the standard notice and comment process for proposed regulations, which will include the opportunity to participate in a public hearing and to provide comments through <https://www.regulations.gov>. Comments received during these processes will be considered and addressed in the final regulations. Finally, the Treasury Department and the IRS expect to continue discussions with the GWE Subcommittee and the TTAC on all aspects of section 139E.

### **Proposed Applicability Date**

These regulations are proposed to apply to taxable years of Tribal Program Participants that begin on or after the date of publication of the final regulations in the ***Federal Register***.

### **Comments and Public Hearing**

Before these proposed amendments to the regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in the preamble under the **ADDRESSES** section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. In addition, the Treasury Department and the IRS request comments on the following specific 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 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?

Any comments submitted will be made available at <https://www.regulations.gov> or upon request. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn.

A public hearing will be held on January 13, 2025, beginning at 10 a.m. ET, in the Auditorium at the Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. Pursuant to Announcement 2023-16, 2023-20 I.R.B. 854 (May 15, 2023), the public hearing is scheduled to be conducted in person, but the IRS will provide a telephonic option for individuals who wish to attend or testify at the hearing by telephone.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit an outline of the topics to be discussed as well as the time to be devoted to each topic by **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. A period of ten minutes will be allocated to each person for making comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available free of charge at the hearing.

If no outlines of the topics to be discussed at the hearing are received by **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, the public hearing will be cancelled. If the public hearing is cancelled, a notice of cancellation of the public hearing will be published in the ***Federal Register***.

Individuals who want to testify in person at the public hearing must send an email to [publichearings@irs.gov](mailto:publichearings@irs.gov) to have your name added to the building access list. The subject line of the email must contain the regulation number REG-106851-21 and the language TESTIFY In Person. For example, the subject line may say: "Request to TESTIFY In Person at Hearing for REG-106851-21."

Individuals who want to testify by telephone at the public hearing must send an email to [publichearings@irs.gov](mailto:publichearings@irs.gov) to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG-106851-21 and the language TESTIFY Telephonically. For example, the subject line may say: "Request to TESTIFY Telephonically at Hearing for REG-106851-21."

Individuals who want to attend the public hearing in person without testifying must also send an email to [publichearings@irs.gov](mailto:publichearings@irs.gov) to have your name added to the building access list. The subject line of the email must contain the regulation number (REG-106851-21) and the language ATTEND In Person. For example, the subject line may say: "Request to ATTEND Hearing In Person for REG-106851-21." Requests to attend the public hearing must be received by 5 p.m. ET on January 9, 2025.

Individuals who want to attend the public hearing telephonically without testifying must send an email to [publichearings@irs.gov](mailto:publichearings@irs.gov) to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number (REG-106851-21) and the language ATTEND Hearing Telephonically. For example, the subject line may say: "Request to ATTEND Hearing Telephonically for REG-106851-21." Requests to attend the public hearing must be received by 5 p.m. ET

on January 9, 2025.

The hearing will be made accessible to people with disabilities. To request special assistance during the hearing, contact the Publications and Regulations Branch of the Office of Associate Chief Counsel (Procedure and Administration) by sending an email to [publichearings@irs.gov](mailto:publichearings@irs.gov) (preferred) or by telephone at (202) 317-6901 (not a toll-free number) at least January 8, 2025.

## **Special Analyses**

### **I. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments**

Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments) prohibits an agency from publishing any rule that has Tribal implications if the rule either imposes substantial, direct compliance costs on Indian Tribal governments and is not required by statute, or preempts Tribal law, unless the agency meets the consultation and funding requirements of section 5 of the Executive order. These proposed regulations have a substantial direct effect on one or more Federally-recognized Indian Tribes and do impose substantial direct compliance costs on Indian Tribal governments within the meaning of the Executive order. As a result, the Treasury Department intends to comply with section 5(b)(2)(A)-(B) of Executive Order 13175. In compliance with section 5(b)(2)(A) of Executive Order 13175 and in response to Tribal leader requests for proposed regulations, the Treasury Department and the IRS held consultations with Tribal leaders on December 14, 15, and 16, 2022, requesting assistance in addressing questions related to the Act and the TTAC Report, which informed the development of these proposed regulations. The Treasury Department and the IRS also intend to conduct Tribal consultation on these proposed regulations.

### **II. Regulatory Planning and Review**

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations

under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6(b) of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

### III. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) generally requires that a Federal agency obtain the approval of the Office of Management and Budget (OMB) before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

These proposed regulations would include third-party disclosures and recordkeeping requirements that are required to substantiate that the value of a Tribal General Welfare Benefit is excluded from a recipient's gross income. These collections of information would generally be used by the IRS for tax compliance purposes and by taxpayers to facilitate proper substantiation of the gross income exclusion. The likely respondents to these collections are Indian Tribal governments and individuals.

The recordkeeping requirements in proposed §1.139E-1(c)(3) would provide that Indian Tribal government programs must be administered under specified guidelines and would provide general requirements on the content of those guidelines. Under proposed §1.139E-1(c)(3), the specified guidelines would need to, at a minimum, describe the program, the benefits provided, the eligibility requirements of the program, and the process for receiving benefits. Written specified guidelines would not be required. However, Indian Tribal governments may keep records of affidavits or declarations of how the program operates. These proposed regulations would not prescribe the specific method of keeping these records. Indian Tribal governments should keep these records in the manner they deem appropriate in order to substantiate

that the program qualifies as an Indian Tribal government 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 under section 139E and these proposed regulations. Additionally, Indian Tribal governments should keep records they deem appropriate to substantiate that the Tribal general welfare benefits are distributed without discriminating in favor of the governing body of the Tribe, as described in proposed §1.139E-1(c)(4), are not lavish or extravagant, as described in proposed §1.139E-1(d)(4), and are not compensation for services, as described in proposed §1.139E-1(d)(5). This information will generally be used by the IRS for tax compliance purposes to ensure that Indian Tribal governments are distributing Tribal general welfare benefits in accordance with proposed §1.139E-1.

The recordkeeping requirements in proposed §1.139E-1(d)(4) would provide that whether a benefit is lavish or extravagant is based on the facts and circumstances at the time the benefit is provided. Proposed §1.139E-1(d)(4) would provide that a benefit will be presumed not to be lavish or extravagant if the Indian Tribal government establishes the program in writing and provides the benefit in accordance with the program's written specified guidelines. This presumption in proposed §1.139E-1(d)(4) for a benefit provided in accordance with the program's written specified guidelines would be an optional rule and an Indian Tribal government may choose not to apply such rule. This information will generally be used by the IRS for tax compliance purposes to ensure that Indian Tribal governments are distributing Tribal general welfare benefits in accordance with proposed §1.139E-1(d)(4).

The third-party disclosure requirement may apply to Indian Tribal governments that choose to provide notification to Tribal program participants that an Indian Tribal government program exists for which Tribal program participants may apply for benefits. These proposed regulations would not prescribe a specific method that Indian Tribal

governments must use to announce the existence of a program. An Indian Tribal government may announce Indian Tribal government programs in any manner it deems appropriate.

These proposed regulations would not impose any additional recordkeeping requirements on Tribal program participants. However, Tribal program participants are required to maintain records under section 6001 sufficient to show that the value of a Tribal general welfare benefit received from an Indian Tribal government program is excludible from gross income. These records are required for the IRS to validate that taxpayers have met the regulatory requirements for a Tribal general welfare benefit, and that taxpayers are entitled to exclude the value of the benefit from gross income. The burden associated with maintaining tax records is already approved under OMB number 1545-0074 that is used for Form 1040, *Individual Tax Return*. These proposed regulations would not create or change the general recordkeeping requirement under section 6001.

There is limited data to calculate the burden estimates for these proposed regulations. The Treasury Department and the IRS estimate the burden based on the list of 574 Federally-recognized Tribes published by the Department of Interior, and estimate an upper bound of 2,296 Indian Tribal governments, including their agencies or instrumentalities. The estimate is based on an upper bound assumption that Indian Tribal government programs are set up by each Indian Tribal government of a Federally-recognized Tribe and by 3 separate agencies or instrumentalities of each such Indian Tribal government. A summary of the Paperwork Reduction Act burden estimates for the collections are as follows:

Indian Tribal governments (third-party disclosure and recordkeeping burden for Tribal entities):

*Estimated Number of Respondents: 2,296*



*Estimated Time per Response: 2 hours*

*Estimated Frequency of Response: Once or on occasion*

*Estimated Total Burden Hours: 4,592 hours*

The collections of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act. Commenters are strongly encouraged to submit public comments electronically. Written comments and recommendations for the proposed information collection should be sent to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain), with copies to the Internal Revenue Service. Find this particular information collection by selecting "Currently under Review - Open for Public Comments" then by using the search function. Submit electronic submissions for the proposed information collection to the IRS via email at [pra.comments@irs.gov](mailto:pra.comments@irs.gov) (indicate REG-106851-21 on the subject line). Comments on the collection of information should be received by **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Comments are specifically requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility; the accuracy of the estimated burden associated with the proposed collection of information; how the quality, utility, and clarity of the information to be collected may be enhanced; how the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) (PRA) generally requires that a Federal agency obtain the approval of OMB before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or

retain a benefit. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

#### IV. Regulatory Flexibility Act

The Secretary of the Treasury hereby certifies that the proposed regulations would not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6). These proposed regulations would affect Indian Tribal governments that establish and administer Tribal general welfare programs and that distribute Tribal general welfare benefits to certain individuals. The Treasury Department and the IRS have no reliable data to determine whether Tribal general welfare programs may be established and administered through small entities, such as not-for-profit entities. Although data is not readily available about the number of small entities that would potentially be affected by these proposed regulations, it is possible that a substantial number of small entities may be affected. However, any impact on those entities would not be economically significant and therefore a regulatory flexibility analysis under the Regulatory Flexibility Act is not required.

The impact of these proposed regulations can be described in the following categories. First, proposed § 1.139E-1(c) would provide guidance on what criteria a program must meet in order to be an “Indian Tribal Government Program.” Specifically, proposed §1.139E-1(c) would provide that the program must be established by the Indian Tribal government; administered under specified guidelines; and not discriminate in favor of members of the governing body of the Tribe. Even assuming that these provisions would affect a substantial number of small entities, they would not have a significant economic impact. Section 139E(b) imposes the burden of what is needed to create an Indian Tribal government program. These proposed regulations would

provide deference to Indian Tribal governments on the types of general welfare programs established, and generally defer to Indian Tribal governments on the form of the program's specified guidelines and the specific records they should maintain. As such, it is expected that the proposed regulations would have a minimal economic impact on Indian Tribal governments.

Second, proposed §1.139E-1(d) would provide guidance on whether a benefit is a "Tribal General Welfare Benefit" that is excluded from an individual's gross income. Specifically, proposed §1.139E-1(d) would require that the benefit be provided pursuant to an Indian Tribal government program; be for the promotion of general welfare; be available to any eligible Tribal program participant; not be lavish or extravagant; and, except as provided in section 139E(c)(5), not be for compensation for services. Proposed §1.139E-1(d) would provide deference to Indian Tribal governments 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. It would also provide that a benefit is presumed to not be lavish or extravagant if it is described in, and provided in accordance with, the written specified guidelines of an Indian Tribal government program. As such, it is expected that the proposed regulations would have a minimal economic impact on Indian Tribal governments.

Third, proposed § 1.139E-1(e) would permit an Indian Tribal government program to provide to Tribal program participant benefits that are items of cultural significance, reimbursement of costs, or cash honoraria for their participation in certain cultural or ceremonial activities. Indian Tribal governments have broad discretion to determine whether or not these benefits are provided. Even assuming that this provision affects a substantial number of small entities, it would not have a significant economic impact

because benefits that are items of cultural significance, reimbursement of costs, and cash honoraria are only a few types of the benefits that are permitted to be provided under section 139E and proposed §1.139E-1. An Indian Tribal government is not required to provide these types of benefits.

For the reasons stated, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required. The Treasury Department and the IRS invite comments on the impact of the proposed regulations on small entities.

Pursuant to section 7805(f), this notice of proposed rulemaking has been submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on its impact on small business.

#### V. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Indian Tribal government, in the aggregate, or by the private sector, of \$100 million (updated annually for inflation). These proposed regulations do not include any Federal mandate that may result in expenditures by State, local, or Indian Tribal governments, or by the private sector in excess of that threshold.

#### VI. Executive Order 13132: Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. These proposed regulations do not have federalism implications and do not impose substantial direct compliance costs on State and local governments

or preempt State law within the meaning of the Executive order.

## **Statement of Availability of IRS Documents**

Guidance cited in this preamble is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <https://www.irs.gov>.

## **Drafting Information**

The principal authors of these proposed regulations are Lisa Mojiri-Azad, Jonathan Dunlap, and Dominic DiMattia, Office of Associate Chief Counsel (Income Tax & Accounting). However, other personnel from the Treasury Department and the IRS participated in their development.

## **List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

## **Proposed Amendments to the Regulations**

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 1 as follows:

### **PART 1--INCOME TAXES**

**Paragraph 1.** The authority citation for part 1 is amended by adding an entry for §§ 1.139E-1 and 1.139E-2 in numerical order to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

\* \* \* \* \*

Sections 1.139E-1 and 1.139E-2 also issued under 26 U.S.C. 139E.

\* \* \* \* \*

**Par. 2.** Sections 1.139E-0 through 1.139E-2 are added to read as follows:

\* \* \* \* \*

Sec.

1.139E-0 Table of contents.

1.139E-1 Tribal general welfare benefits.

1.139E-2 [Reserved]

\* \* \* \* \*

### **§1.139E-0 Table of contents.**

This section lists the major captions for §§1.139E-1 and 1.139E-2.

#### *§1.139E-1 Tribal general welfare benefits.*

- (a) Overview.
- (b) Definitions.
  - (1) Act.
  - (2) Benefit.
  - (3) Code.
  - (4) Indian Tribal Government.
  - (5) Indian Tribal Government Program.
  - (6) Tribal General Welfare Benefit.
  - (7) Tribe.
  - (8) Tribal Program Participant.
  - (9) Tribal Member.
  - (10) Dependent.
- (c) Indian Tribal Government Program.
  - (1) In general.
  - (2) Program must be established.
  - (3) Program must be administered under specific guidelines.
  - (4) Program cannot discriminate in favor of members of the governing body of the Tribe.
  - (5) No limitation on source of funds.
- (d) Tribal General Welfare Benefits.
  - (1) In general.
  - (2) Benefits must be for the promotion of general welfare.
  - (3) Benefits must be available.
  - (4) Benefits cannot be lavish or extravagant.
  - (5) Benefits cannot be compensation for services.
- (e) Cultural or ceremonial activities.
  - (1) In general.
  - (2) Application
  - (3) Examples.
- (f) Audit suspension.
- (g) Applicability date.

#### *§1.139E-2 [Reserved]*

### **§1.139E-1 Tribal general welfare benefits.**

(a) *Overview.* Under section 139E of the Code and this section, the gross income of a Tribal Program Participant for the taxable year does not include the value of any Tribal General Welfare Benefit provided by an Indian Tribal Government Program

during the year to or on behalf of the Tribal Program Participant. Paragraph (b) of this section provides definitions that apply for purposes of this section. Paragraph (c) of this section provides the requirements that any program must satisfy to qualify as an Indian Tribal Government Program for purposes of this section. Paragraph (d) of this section provides the requirements that any benefit provided to or on behalf of a Tribal Program Participant must satisfy to qualify as a Tribal General Welfare Benefit for purposes of this section. Paragraph (e) of this section provides special rules related to cultural or ceremonial activities solely for purposes of this section. Paragraph (f) of this section describes the audit suspension provisions in section 4(a) of the Act. Paragraph (g) of this section provides the date of applicability of this section.

(b) *Definitions.* The following definitions apply for purposes of this section—

(1) *Act.* The term *Act* means the Tribal General Welfare Exclusion Act of 2014, Public Law 113–168, 128 Stat. 1883 (2014).

(2) *Benefit.* The term *benefit* means any money, property, services, or other item of value provided to or on behalf of an individual.

(3) *Code.* The term *Code* means the Internal Revenue Code.

(4) *Indian Tribal Government.* The term *Indian Tribal Government* means an Indian Tribal Government as defined by section 7701(a)(40) of the Code and includes any agencies or instrumentalities of such an Indian Tribal Government.

(5) *Indian Tribal Government Program.* The term *Indian Tribal Government Program* means a program that satisfies the requirements of paragraph (c) of this section.

(6) *Tribal General Welfare Benefit.* The term *Tribal General Welfare Benefit* means any benefit provided to or on behalf of a Tribal Program Participant that satisfies the requirements of paragraph (d) of this section for exclusion from gross income as an “Indian general welfare benefit” under section 139E of the Code.

(7) *Tribe*. The term *Tribe* means any Indian Tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native village as defined in 43 U.S.C. 1602(c), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(8) *Tribal Program Participant*--(i) *In general*. The term *Tribal Program Participant* means a Tribal Member, spouse of a Tribal Member within the meaning of §301.7701-18 of this chapter, spouse of a Tribal Member under applicable Tribal law, dependent of a Tribal Member, or other individual who has been determined by the Indian Tribal Government 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.

(ii) *Special rule for ceremonial or cultural activities*. Solely for purposes of paragraph (e) of this section, the term *Tribal Program Participant* may include a member or citizen of a Tribe that is different from the Tribe that establishes or maintains the Indian Tribal Government Program that provides the Tribal General Welfare Benefit.

(9) *Tribal Member*. The term *Tribal Member* means an individual who is a member or citizen of the Tribe that establishes or maintains the Indian Tribal Government Program because the individual meets the requirements established by applicable Tribal law for enrollment in the Tribe, and:

- (i) Is listed on the Tribal rolls of the Tribe if such rolls are kept;
- (ii) Is recognized as a member by the Tribe if Tribal rolls are not kept; or
- (iii) Is an Indian child as defined in 25 U.S.C. 1903.

(10) *Dependent*. The term *dependent* means an individual who—

(i) Is a qualifying child, as defined in section 152 of the Code, of a Tribal Member for the taxable year;



(ii) Is a qualifying relative, as defined in section 152, of a Tribal Member for the taxable year;

(iii) Is a qualifying child or qualifying relative of a Tribal Member described in paragraph (b)(10)(i) or (ii) of this section for the taxable year of the Tribal Member beginning in a calendar year without regard to whether the Tribal Member was a qualifying child or qualifying relative, each as defined in section 152, of another taxpayer for a taxable year of the other taxpayer beginning in that calendar year;

(iv) Is a qualifying child or qualifying relative of a Tribal Member described in paragraph (b)(10)(i) or (ii) of this section for the taxable year of the Tribal Member beginning in a calendar year without regard to whether the individual filed a joint return with the individual's spouse (as defined in section 6013 of the Code) for the taxable year beginning in that calendar year; or

(v) Is a qualifying relative of a Tribal Member described in paragraph (b)(10)(ii) of this section for the taxable year of the Tribal Member beginning in a calendar year without regard to the individual's gross income for the calendar year in which the individual's taxable year begins.

(c) *Indian Tribal Government Program--(1) In general.* A program is an Indian Tribal Government Program only if the program:

(i) Is established by the Indian Tribal Government, as described in paragraph (c)(2) of this section;

(ii) Is administered under specified guidelines, as described in paragraph (c)(3) of this section; and

(iii) Does not discriminate in favor of members of the governing body of the Tribe, as described in paragraph (c)(4) of this section.

(2) *Program must be established--(i) In general.* A program must be established by an Indian Tribal Government. A program established by Tribal custom or

government practice, or by formal action of the Indian Tribal Government, is a program established by the Indian Tribal Government. Formal action means authorization of the program pursuant to applicable Tribal law. The formal action must be in writing to the extent such writing is required under applicable Tribal law. For example, written documentation that evidences the formal action of the Indian Tribal Government to establish the program is required if such written documentation is required under applicable Tribal law. Similarly, no written documentation of the formal action of the Indian Tribal Government to establish the program is required if, under applicable Tribal law, no written documentation of such action is required. As an additional example, a program may be established by a voice vote if such voice vote would otherwise constitute formal action of the Indian Tribal Government under applicable Tribal law. To the extent permitted under applicable Tribal law, an Indian Tribal Government may delegate the authority for establishing a program to a designated individual or entity of the Indian Tribal Government.

(ii) *Examples.* The requirements of paragraph (c)(2) of this section are illustrated by the following examples:

(A) *Example 1.* A, a Tribe, operates under the direction of its Indian Tribal Government (the Council). According to the laws of A, all expenditures of A must be approved by a majority of the Council at the Council's annual meeting or by written unanimous consent if the action is taken without a meeting. During the annual meeting of A's Council, a majority of the Council vote to approve establishing a program. A's Council has established the program under paragraph (c)(2)(i) of this section.

(B) *Example 2.* Same facts as in paragraph (c)(2)(ii)(A) of this section (*Example 1*), except that, based on a recommendation from the Tribal Education office, A's Council determines to provide funding for a scholarship program to pay 100% of education related expenses for any Tribal Member who graduates from high school or receives a GED during the calendar year. Because the next Council meeting is scheduled in December 2024, and to avoid potential impact on eligible students, in February 2024, Council adopts by unanimous written consent the following education program:

- (1) Approving \$X of funding for the 2024 year for the scholarship program; and
- (2) Authorizing the director of the Tribal Education office to use the approved funds for the scholarship program. A's Council has established the education program

under paragraph (c)(2)(i) of this section.

(C) *Example 3.* Same facts as in paragraph (c)(2)(ii)(B) of this section (*Example 2*) except that A's Council approves \$X of annual funding to be provided for the education program, and delegates to the Tribal Education office authority to establish a scholarship program. A's Council has established the education program under paragraph (c)(2)(i) of this section.

(3) *Program must be administered under specified guidelines.* A program must be administered under specified guidelines. The specified guidelines 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. A program is administered under specified guidelines if the program is operated in accordance with such guidelines. Indian Tribal Governments may choose to, but are not required to, set forth the specified guidelines of the program in writing.

(4) *Program cannot discriminate in favor of members of the governing body of the Tribe--(i) In general.* Except in the case of a program described in paragraph (c)(4)(ii) of this section, a program cannot discriminate in favor of members of the governing body of the Tribe. For the purposes of this paragraph (c)(4), a governing body means the legislative body of the Tribe, such as the Tribal Council, or the representative equivalent of the legislative body of the Tribe.

(ii) *General council Tribes.* A program is treated as being in compliance with this paragraph (c)(4) if the governing body of a Tribe consists of the entire adult membership of the Tribe.

(iii) *Facts and circumstances test.* Except in the case of a program described in paragraph (c)(4)(ii) of this section, a program fails to satisfy the requirements of this paragraph (c)(4) if based on all the facts and circumstances the program either by its terms or in its administration discriminates in favor of members of the governing body of the Tribe. Accordingly, a program discriminates in favor of the members of the

governing body of the Tribe if the program by its terms is available only to members of the governing body. Additionally, the administration of a program discriminates in favor of members of the governing body of the Tribe if, based on the facts and circumstances, the benefits provided during the year disproportionately favor members of the governing body. Thus, for example, a program established to provide benefits solely to the children of members of the governing body of the Tribe (unless the Tribe is a general council Tribe) and thus defrays costs otherwise borne by members of the governing body fails to satisfy the requirements of this paragraph (c)(4).

(5) *No limitation on source of funds*—(i) *In general*. Benefits under the Indian Tribal Government Program may be funded by any source of revenue or funds. For example, an Indian Tribal Government may use funds derived from levies, taxes, and service fees; settlements; revenues from tribally-owned businesses, including casino revenues; funds from Federal, State, or local governments; and funds from other sources, including grants and loans, to provide benefits under an Indian Tribal Government Program.

(ii) *Benefits funded by net gaming revenues*. Benefits under the Indian Tribal Government Program may be funded by net gaming revenues as permitted under the Indian Gaming Regulatory Act, 25 U.S.C. 2701-2721 (IGRA). However, per capita payments, as defined under IGRA, are subject to Federal taxation under IGRA and are not excludable from gross income under section 139E or this section. For purposes of section 139E and this section, a payment is a per capita payment if it is identified by the Indian Tribal Government as a per capita payment in a Revenue Allocation Plan that is approved by the Department of the Interior. See 25 U.S.C. 2710(b)(3) and 25 CFR 290.11.

(d) *Tribal General Welfare Benefits*—(1) *In general*. A benefit does not qualify as a Tribal General Welfare Benefit unless the benefit is:

(i) Provided pursuant to an Indian Tribal Government Program, as described in paragraph (c) of this section;

(ii) Provided for the promotion of general welfare, as described in paragraph (d)(2) of this section;

(iii) Available to any eligible Tribal Program Participant, as described in paragraph (d)(3) of this section;

(iv) Not lavish or extravagant, as described in paragraph (d)(4) of this section;  
and

(v) Not compensation for services, as described in paragraph (d)(5) of this section.

(2) *Benefits must be for the promotion of general welfare--(i) In general.* Tribal General Welfare Benefits must be for the promotion of general welfare. For purposes of section 139E and this paragraph (d)(2), the Indian Tribal Government determines that a benefit is for the promotion of general welfare at the time it establishes the Tribal General Welfare Program meeting the requirements of paragraph (c) of this section. An Indian Tribal Government has sole discretion to determine whether a benefit is for the promotion of general welfare and the Internal Revenue Service will defer to the Indian Tribal Government's determination that a benefit is for the promotion of general welfare. Benefits may be provided without regard to the financial or other need of Tribal Program Participants and may be provided on a uniform or pro-rata basis to Tribal Program Participants. Thus, for example, an Indian Tribal Government determines whether benefits are for the promotion of general welfare under programs such as cultural programs, housing assistance programs, programs to provide education benefits, programs for training or retraining to acquire new skills or to obtain better employment opportunities, programs to provide assistance for disasters or emergency situations, funeral or burial assistance programs, legal aid programs, wellness and health-related

programs, or any programs that provide benefits to specific categories of individuals, such as elderly individuals or minors.

(ii) *Examples.* The requirements of paragraph (d)(2)(i) of this section are illustrated by the following examples. For the examples in this paragraph (d)(2)(ii), assume the Indian Tribal Government has determined that the benefits provided are for the promotion of general welfare.

(A) *Example 1: Housing programs.* Indian Tribal Government A administers a program, B, pursuant to which the following benefits are provided in connection with A's Tribal Members' principal residences and ancillary structures which are not used in any trade or business: payments for Tribal Members to use to make mortgage payments, down payments, and rent payments (including but not limited to security deposits); payments for Tribal Members to enhance habitability of housing, such as by remedying water, sewage, sanitation service, safety (including but not limited to mold remediation), and heating or cooling issues; payments for Tribal Members to provide for basic housing repairs or rehabilitation (including but not limited to roof repair and replacement); and payments to Tribal Members to pay utility bills and charges (including but not limited to water, electricity, gas, and basic communications services such as phone, internet, and cable). The payments made by A under B are for the promotion of general welfare as described in paragraph (d)(2)(i) of this section.

(B) *Example 2: Educational programs.* Indian Tribal Government C administers a program, D, pursuant to which the following benefits are provided: provision to students (including but not limited to post-secondary students) of transportation to and from school, tutors, and supplies (including but not limited to clothing, backpacks, laptop computers, musical instruments, and sports equipment) for use in school activities and extracurricular activities; tuition payments for students (including but not limited to allowances for room and board on or off campus for the student, spouse, domestic partner, and dependents) to attend preschool, school, college or university, online school, educational seminars, vocational education, technical education, adult education, continuing education, or alternative education; provision of care of children away from their homes to help their parents or other relatives responsible for their care to be gainfully employed or to pursue education; and provision of job counseling and programs for which the primary objective is job placement or training, including but not limited to allowances for expenses for interviewing or training away from home (including but not limited to travel, auto expenses, lodging, and food), tutoring, and appropriate clothing for a job interview or training (including but not limited to an interview suite or a uniform required during a period of training). The payments made by C under D are for the promotion of general welfare as described in paragraph (d)(2)(i) of this section.

(C) *Example 3: Elder and disabled programs.* Indian Tribal Government E administers a program, F, pursuant to which the following benefits are provided to Tribal Members who have attained age 55 or are mentally or physically disabled (as defined under applicable law, including but not limited to an Indian Tribal Government's disability laws): meals through home-delivered meals programs or at a community center or similar facility; home care such as assistance with preparing meals or doing

chores, or day care outside the home; local transportation assistance; and improvements to adapt housing to special needs (including but not limited to grab bars and ramps). The payments made by E under F are for the promotion of general welfare as described in paragraph (d)(2)(i) of this section.

(D) *Example 4: Transportation programs.* Indian Tribal Government G administers a program, H, pursuant to which the following benefits are provided: payment of transportation costs such as rental cars, substantiated mileage, and fares for bus, taxi, and public transportation between an Indian reservation (as defined in section 168(j)), service area (as defined in 25 CFR 20.100), or service unit area (meaning an area designated for purposes of administration of Indian Health Service programs under 42 CFR 136.21(1)) and facilities that provide essential services to the public (such as medical facilities and grocery stores). The payments made by G under H are for the promotion of general welfare as described in paragraph (d)(2)(i) of this section.

(E) *Example 5: Medical programs.* Indian Tribal Government J administers a program, K, pursuant to which the following benefits are provided: payments for the cost of transportation, temporary meals, and lodging of a Tribal Program Participant while the individual is receiving medical care away from home, or to pay the cost of nonprescription drugs (including but not limited to traditional Tribal medicines). The payments made by J under K are for the promotion of general welfare as described in paragraph (d)(2)(i) of this section.

(F) *Example 6: Emergency programs.* Indian Tribal Government L administers a program, M, pursuant to which the following benefits are provided: assistance to individuals in exigent circumstances (including but not limited to victims of abuse), including but not limited to the costs of food, clothing, shelter, transportation, auto repair bills, and similar expenses; payment of costs for temporary relocation and shelter for individuals involuntarily displaced from their homes (including but not limited to situations in which a home is destroyed by a fire or natural disaster); and assistance for transportation emergencies (for example, when stranded away from home) in the form of transportation costs, a hotel room, and meals. The payments made by L under M are for the promotion of general welfare as described in paragraph (d)(2)(i) of this section.

(G) *Example 7: Cultural and religious programs.* Indian Tribal Government N administers a program, P, pursuant to which the following benefits are provided: payment of expenses (including but not limited to admission fees, transportation, food, and lodging) to attend or participate in a Tribe's cultural, social, religious, or community activities, such as powwows, ceremonies, and traditional dances; payment of expenses (including but not limited to admission fees, transportation, food, and lodging) to visit sites that are culturally or historically significant for the Tribe, including but not limited to other Indian reservations (as defined in section 168(j)); payment of the costs of receiving instruction about a Tribe's culture, history, and traditions (including but not limited to traditional language, music, and dances); payment of funeral and burial expenses and expenses of hosting or attending wakes, funerals, burials, other bereavement events, and subsequent honoring events; and payment of transportation costs and admission fees to attend educational, social, or cultural programs offered or supported by the Tribe or another Tribe. The payments made by N under P are for the promotion of general welfare as described in paragraph (d)(2)(i) of this section.

(3) *Benefits must be available.* The benefits provided under an Indian Tribal

Government Program must be available to any Tribal Program Participant who meets the specified guidelines of the program required under paragraph (c)(3) of this section, subject to budgetary constraints. However, the Indian Tribal Government has discretion to determine the category of individuals who are Tribal Program Participants under the Indian Tribal Government Program, provided that such determination is consistent with the specified guidelines described in paragraph (c)(3) of this section and subject to the prohibition on discrimination under paragraph (c)(4) of this section. Thus, for example, an Indian Tribal Government is permitted to limit eligibility for an Indian Tribal Government Program to dependents of Tribal Members who have attained a specified age, or, as another example, to a Tribal Member's household.

(4) *Benefits cannot be lavish or extravagant.* The benefit provided by an Indian Tribal Government Program cannot be lavish or extravagant. Whether a benefit is lavish or extravagant for purposes of this section is based on the facts and circumstances at the time the benefit is provided. Relevant facts and circumstances include a Tribe's culture and cultural practices, history, geographic area, traditions, resources, and economic conditions or factors. 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 an Indian Tribal Government Program.

(5) *Benefits cannot be compensation for services.* Except as provided in paragraph (e) of this section, a Tribal General Welfare Benefit does not include benefits that are provided as compensation for services to any person. Under section 61(a) of the Code, compensation for services includes fees, commissions, fringe benefits, and similar items, whether paid in money or property.

(e) *Cultural or ceremonial activities--(1) In general.* For purposes of section 139E and paragraph (d)(5) of this section, a benefit is not compensation for services if:

(i) The benefit is provided to a Tribal Program Participant for their participation in



cultural or ceremonial activities for the transmission of Tribal culture as determined by the Indian Tribal Government (including, but not limited to, powwows, rite of passage ceremonies, funerals, wakes, burials, other bereavement events, and honoring events); and

(ii) The benefit consists of an item of cultural significance as determined by the Indian Tribal Government, the reimbursement of costs, or a cash honorarium.

(2) *Application.* Except as otherwise provided in this paragraph (e)(2), an Indian Tribal Government has sole discretion to determine whether an item is an item of cultural significance and whether an activity is a cultural or ceremonial activity, and the Internal Revenue Service will defer to these determinations by the Indian Tribal Government. However, cash, gift cards, or vehicles are generally not items of cultural significance.

(3) *Examples.* The application of this paragraph (e) is illustrated by the following examples:

(i) *Example 1: Benefits for cultural or ceremonial activities not compensation for services.* Tribe B regularly holds a gathering during the fall season to celebrate its cultural traditions. During the gathering, Tribal Members of B, as well as Tribal members of other Tribes from around the region, are invited to participate. The Indian Tribal Government of B (ITG-B) allocates funds for the gathering, some of which are used for the following payments:

(A) *Tribal Member of B.* Individual 1, a Tribal Member of B, provides traditional blessings on the first and final days of the gathering. ITG-B gives Individual 1 a cash honorarium in recognition of providing the blessings. The cash honorarium that Individual 1 receives from ITG-B is not compensation for services under this paragraph (e).

(B) *Tribal Member of different Tribe.* Individual 2, a Tribal Member of Tribe C, participates as a drummer for a ceremonial dance on the second day of the gathering. ITG-B gives Individual 2 a piece of culturally significant jewelry. Under paragraph (a)(7)(ii) of this section, Individual 2 is a Tribal Program Participant solely for purposes of this paragraph (e). The jewelry that Individual 2 receives from ITG-B is not compensation for services under this paragraph (e).

(ii) *Example 2: Benefits for cultural or ceremonial activities not compensation for services.* Tribe C operates a language preservation center in which Individual 3, a Tribal Member of C, who speaks the traditional language that is common to C and other regional Tribes, volunteers to come in every Saturday to discuss and teach the

traditional language of C to other Tribal Members of C. The Indian Tribal Government of C (ITG-C), reimburses Individual 3 for travel expenses and teaching supplies used in Individual 3's language lessons. The reimbursement of costs that Individual 3 receives from ITG-C is not compensation for services under this paragraph (e).

(f) *Audit suspension.* After [date of publication of the final regulations in the *Federal Register*], the Department of the Treasury and the Internal Revenue Service (IRS) will, in consultation with the Treasury Tribal Advisory Committee, establish and require the education and training prescribed in section 3(b)(2) of the Act. The temporary suspension of audits and examinations described in section 4(a) of the Act will not be lifted until the education and training prescribed by section 3(b)(2) of the Act is completed.

(g) *Applicability date.* This section applies to taxable years of Tribal Program Participants that begin on or after [date of publication of the final regulations in the *Federal Register*].

**§1.139E-2 [Reserved]**

**Douglas W. O' Donnell,**

*Deputy Commissioner.*

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