



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

October 27, 2022

via Email

Dear Tribal Leader:

As the Point of Contact for Tribal Consultation for the U.S. Department of the Treasury (Treasury), I invite you to consultations on the Tribal General Welfare Exclusion Act of 2014 and [the Treasury Tribal Advisory Committee's \(TTAC\) report on the Tribal General Welfare Exclusion Act](#). These consultations will be held virtually on Wednesday, December 14, 2022, 2pm-5pm EDT, Thursday, December 15, 2022, 2pm-5pm EDT, and Friday, December 16, 2022, 2pm-5pm EDT.

Background

The [Tribal General Welfare Exclusion Act of 2014](#), Pub. L. 113-168, 128 Stat. 1883 (2014) (Act) added [section 139E to the Internal Revenue Code](#) (26 U.S.C. 139E). Section 139E provides that gross income does not include the value of any Indian general welfare benefit paid to or on behalf of a member of an Indian tribe (or any spouse or dependent of such member) pursuant to an Indian tribal government program if all the following requirements are satisfied:

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

Section 139E provides further that any items of cultural significance, reimbursement of costs, or cash honorarium for participation in cultural or ceremonial activities for the transmission of tribal culture are not compensation for services.

To date, Treasury and the Internal Revenue Service (IRS) have not promulgated regulations implementing the Act. On June 6, 2014, Treasury and the IRS issued [Revenue Procedure 2014-35](#), which contained guidance for Tribal general welfare payments prior to the Act. On April 16, 2015, Treasury and the IRS released [Notice 2015-34](#), which generally provides guidance on the Act's effect on Revenue Procedure 2014-35 and confirms that §139E codifies, but does not supplant, the existing general welfare exclusion, and that taxpayers may continue to rely on Revenue Procedure

2014-35.

Treasury Tribal Advisory Committee

The Act further provided for the Secretary of the Treasury to establish the Treasury Tribal Advisory Committee to “advise the Secretary on matters relating to the taxation of Indians.” This seven-person committee was established on February 10, 2015, and in 2020 established a Subcommittee on the Tribal General Welfare Exclusion Act. In 2021 this Subcommittee issued the attached report for Tribal Consultation which provides the Subcommittee’s recommendations on the implementation of the Act.

Consultation Content

Pursuant to [Executive Order 13175](#), President Biden’s Presidential Memorandum for Tribal Consultation and Strengthening Nation to Nation Relationships, and Treasury’s Action Plan for Tribal Consultation and Collaboration, Treasury is commencing consultation (1) to inform the development of guidance to implement the Act; and (2) to obtain Tribal feedback on the TTAC’s draft report.

Specifically, Treasury requests the assistance of Tribal leaders in addressing the questions contained in the attachment to this letter.

[Register here](#) for one or more days of the consultation.

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

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

We will send out an Agenda and a list of registered speakers before or on December 9, 2022.

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

Sincerely,

Chief Lynn Malerba
Treasurer of the United States
Point of Contact for Tribal Consultation
U.S. Department of the Treasury

Attachment:

Tribal Consultation Questions

Section 139E Generally

1. What types of safe harbors would be most useful for purposes of determining whether a tribe has established and adopted an Indian general welfare program? For example, should the regulations include a safe harbor for programs that are established by tribal custom or government practice, and what requirements should apply for the safe harbor?
2. What criteria should regulations under section 139E of the Internal Revenue Code (Code) adopt to determine whether benefits or programs are “for the promotion of general welfare” for purposes of section 139E(b)(2)(B) of the Code? Please provide examples of benefits or programs that satisfy these criteria.
3. Please identify the provisions of section 139E of the Code that are ambiguous and warrant resolution in favor of and with deference to Indian tribal governments, in accordance with Section 2(c) of the Tribal General Welfare Exclusion Act?
 - a. Please explain the extent to which, if any, Section 2(c) of the Tribal General Welfare Exclusion Act differs from the tribal canon (that is, deference in the case of ambiguities).
4. What challenges have you encountered in implementing programs under the provisions of Rev. Proc. 2014-35?
5. What criteria should Treasury and the IRS consider in adopting regulations to determine what constitutes “lavish or extravagant” with respect to Indian general welfare benefits under section 139E of the Code?
 - a. Please provide examples of tribal benefits that are lavish and extravagant and examples of tribal benefits that are not lavish and extravagant.
6. What criteria should Treasury and the IRS consider in adopting regulations to determine what constitutes “cash honoraria in connection with cultural or ceremonial activities” described in section 139E(c)(5) of the Code, and what aspects of the cultural or ceremonial activities would be subject to deference?
 - a. Please provide examples of items with cultural significance provided as honoraria that should qualify under section 139E(c)(5) of the Code.
7. Please provide examples of payments to vendors or service providers that should be excluded from a tribal member’s income under section 139E(c)(5) of the Code and payments that should not be excluded from a tribal member’s income under that section?

8. Please provide contrasting examples of tribal programs that provide pro rata payments to tribal members that are subject to Federal income tax, whether under the Indian Gaming Regulatory Act (IGRA) or under another comparable Federal statutory provision, and pro rata payments to tribal members that would be excluded from the tribal member's income under section 139E of the Code.
9. To the extent not discussed above, please discuss any outstanding issues, concerns, or other topics related to section 139E of the Code that may require guidance.

TTAC's Draft Proposed Section 139E Regulations

1. TTAC's proposed regulation § 1.139E-2 references the discretion of the Indian tribal government in connection with section 139E(c)(4) of the Code (relating to programs not failing qualification solely by being established by tribal custom or government practice). Please provide examples of Indian general welfare benefits that would constitute an abuse of such discretion.
2. Please provide illustrative examples of general welfare programs established by a tribe that would provide for deferred receipt and accumulation of benefits, whether via trusts or via other mechanisms.
 - a. What is the source of the funding for such programs and who are the potential beneficiaries?
 - b. Would interest income or capital gains earned on funds set aside for the benefit of the tribal members be similarly excluded from gross income upon distribution to the tribal members?
 - c. Please describe the legal authority and framework under which these types of programs are established.
3. Please provide examples of situations in which tribal governments have determined that assistance payments were warranted in connection with a disaster or similar event not covered by a Federal or state declaration.
4. To the extent not discussed above, please discuss any outstanding issues or concerns related to TTAC's proposed section 139E regulations.