



January 11, 2021

SENT VIA EMAIL: Tribal.Consult@treasury.gov

Treasury Tribal Advisory Committee
Department of the Treasury
1500 Pennsylvania Avenue NW, Room 1426G
Washington, D. C. 20220

Re: Comments regarding general welfare guidance under Code Section 139E

Dear TTAC GWE Subcommittee:

The Redding Rancheria ("Tribe") would like to offer three specific provisions for inclusion in guidance under the Tribal General Welfare Exclusion Act (the "Act" or "GWE"):

First, the Tribe would like to suggest guidance that will expressly confirm deference to tribal governments under the Act's statutory construction rule. We understand that IRS will be tasked with interpreting Code Section 139E compliance. However, the Tribal General Welfare Exclusion Act, Section 2(c), provides that ambiguities in Code Section 139E "shall be resolved in favor of Indian tribal governments and deference shall be given to Indian tribal governments for the programs administered and authorized by the tribe to benefit the general welfare of the tribal community." Because this appears in the Act and not in Code Section 139E itself, we think it is important to provide some practical guidance for IRS in implementing this key component of the General Welfare Exclusion Act. As the Act clearly vests discretion with tribal governments in interpreting Code Section 139E, we suggest that the final rule expressly confirm that Tribal decisions under Code Section 139E cannot be challenged or overturned except upon the showing of an abuse of discretion. This is consistent with the standards that apply to federal agencies when they are vested with discretion in interpreting a statute. Our specific suggestion for guidance in this regard is as follows:

Proposed Rule:

Rule of Construction:

(a) *General Rule.* Ambiguity under Code Section 139E shall be resolved in favor of Indian tribal governments and deference shall be given to Indian tribal governments for the programs administered and authorized by the tribe to benefit the general welfare of the tribal community. When implementing the foregoing rule of statutory construction, IRS shall take into account that Indian tribal governments are vested with the sovereign right and discretion to determine the types and amount of general welfare benefits best suited to promote the general welfare needs of each Tribe, as well as the means to implement and substantiate the use of such assistance.

(b) *Standard of Review; Presumptions and Burden of Proof.* An Indian tribal government will be presumed to have properly exercised its discretion under Code Section 139E if it can demonstrate that it has acted consistently with either written general welfare program guidelines or unwritten tribal custom or government practices (per Code Section 139E(c)(4)). Matters within the sovereign discretion of tribal governments under Code Section 139E shall not be challenged or overturned except upon the showing of an abuse of discretion. In audit, the Internal Revenue Service shall have the burden of proving an abuse of discretion by reference to the Tribe's written program guidelines (or unwritten tribal custom or government practices), as applicable, and the unique goals and statutory construction requirements of the Tribal General Welfare Exclusion Act.

Second, the Tribe would like to suggest guidance that will relieve tribes from the burden of collecting individual receipts. While we understand that tribes will be asked by IRS to demonstrate that program funds were used for eligible GWE purposes, securing receipts to prove that GWE assistance is used for an eligible program expense can present an administrative burden as well as cultural or traditional barriers to members otherwise seeking certain assistance. Many types of assistance also do not involve expenses that would give rise to a receipt. And the cost of tracking individual receipts can be unduly burdensome. Moreover, tribes can design their programs in a manner that promotes compliance without the need for collecting individual receipts. Our suggestion for guidance in this regard is as follows:

Proposed Rule:

An Indian tribal government shall not be required to collect receipts as a condition for favorable treatment of a tribal government program or Indian general welfare benefits under Internal Revenue Code Section 139E. Other measures reasonably designed to ensure that program funds are used to

further eligible program purposes may be implemented to satisfy Code Section 139E including, but not limited to:

- (1) Certification from recipients that program funds will be or were used for eligible program purposes;
- (2) Use of direct vendor pay arrangements;
- (3) Limiting benefits to amounts pre-determined by the Tribe as reasonably necessary to meet eligible GWE expenses. A Tribe's determination of amounts reasonably necessary to meet eligible GWE expenses will be presumed to satisfy this requirement if:
 - (i) The Tribe bases program benefits on member expense data corroborated by the Tribe through member surveys or other means designed to document the amount of eligible GWE expenses;
 - (ii) The Tribe bases program benefits on limits implemented by state or federal programs;
 - (iii) The Tribe bases program benefits upon objective state or federal government expense data such as but not limited to national and local living expense standards published by IRS for housing and utilities, transportation, and food, housekeeping supplies, apparel and personal care products.

Third, the Tribe would like to suggest guidance that will ensure prospective enforcement and an adequate time for tribes to make changes to their GWE programs in order to meet any new requirements set forth in the final rule. Our suggestion for guidance in this regard is as follows:

Proposed Rule:

Indian tribal government programs shall be deemed to comply with Code Section 139E prior to the effective date of the final rule so long as the tribe has designed and administered its program consistent with a good faith interpretation of Code Section 139E.

Enforcement based on the final rule shall be prospective only.

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The effective date of the final rule shall be a date which is no earlier than the first calendar year following 12 months after the final rule is published in the Federal Register. During the transition period between publication of the final rule and the effective date, tribes may continue administering their programs consistent with their pre-publication good faith interpretation of Code Section 139E.

We thank you for considering the Tribe's comments on this important topic.

Sincerely,

A handwritten signature in blue ink that reads "Tracy Edwards". The signature is fluid and cursive, with a long, sweeping underline.

Tracy Edwards
CEO