



# *Mille Lacs Band of Ojibwe Indians*

*Executive Branch of Tribal Government*

*Office of the Chief Executive*

*Transmittal via e-mail to [tribal.consult@treasury.gov](mailto:tribal.consult@treasury.gov)*

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December 17, 2024

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U.S. Department of the Treasury  
1500 Pennsylvania Avenue NW  
Washington, DC 20220

Re: Mille Lacs Band of Ojibwe's Response to Dear Tribal Leader Letter Regarding Tribal Consultation on Tribal General Welfare Benefits (REG-106851-21)

Dear Director Abbas:

On behalf of the Mille Lacs Band of Ojibwe (the "**Band**"), we thank you for the opportunity to provide written comments on the proposed regulations for Section 139E of the Internal Revenue Code of 1986 (the "**Code**") regarding Tribal General Welfare Benefits (REG-106851-21) (the "**Proposed Regulations**"). Overall, we commend the United States Department of the Treasury ("**Treasury**") and the Internal Revenue Service (the "**IRS**") for drafting Proposed Regulations that reflect feedback provided by Tribal governments and the Treasury Tribal Advisory Committee ("**TTAC**"). The Proposed Regulations demonstrate the importance of TTAC's work and the value of Tribal consultation in the development of the Proposed Regulations. We urge Treasury and the IRS to continue working closely with TTAC and its General Welfare Exclusion Subcommittee in developing final guidance and in the training of IRS agents. Below we highlight a few of the provisions and aspects of the Proposed Regulations we find particularly important, and further below we share information about the Band and offer our responses to the questions posed in the Dear Tribal Leader Letter dated September 13, 2024.

## **HIGHLIGHTS OF THE PROPOSED REGULATIONS**

The Band believes the Proposed Regulations mark an important milestone for Tribal governments. We thank Treasurer Malerba, Treasury, the Office of Tribal and Native Affairs, and the IRS for their valuable work and attention to feedback received from TTAC, the General Welfare Exclusion Subcommittee, and Tribal Consultation. The Band believes that, overall, the deference provided to Tribes in the Proposed Regulations and preamble to the Proposed Regulations (the "**Preamble**") is critical and reflects the core principles of Tribal sovereignty

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and self-determination. In particular, we applaud Treasury and the IRS for expressly confirming in Proposed Regulation Section 1.139E-1(d)(2) that “[a]n 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.” We also thank Treasury and the IRS for including the following key principles and provisions in the Proposed Regulations:

Deference to Tribes Regarding “Lavish or Extravagant” Standard. We commend Treasury and the IRS for including critical language in Proposed Regulation Section 1.139E-1(d)(4) regarding “lavish or extravagant.” Specifically, the Proposed Regulations confirm that “[w]hether 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” and include a presumption that a benefit under a written general welfare program is not lavish or extravagant. As Tribes have implemented and administered general welfare programs over the last ten years, the uncertainty surrounding the “lavish or extravagant” standard loomed large. In particular, the Band and other Tribes have been concerned that Treasury and the IRS would develop an approach that did not take into consideration the facts and circumstances under which the benefit was provided. By recognizing relevant facts and circumstances and creating a presumption in favor of Tribes, the proposed language provides the deference to Tribes that we believe is necessary and appropriate in order for Tribes to administer general welfare programs. Although we discuss below our recommendations for further refining this language, we do not want our comments to be perceived as a lack of support for the clarification that the Proposed Regulations already provide on this important topic.

Confirmation There is No Limitation on Source of Funds and That Benefits Can Be Provided in Equal Amounts. We thank Treasury and the IRS for responding to feedback from TTAC and Tribal comments by including Proposed Regulation Section 1.139E-1(c)(5), which provides that “[b]enefits under the Indian Tribal Government Program may be funded by any source of revenue or funds.” The source of funds is irrelevant for consideration of how the funds are used under a general welfare program, and we appreciate that this clarification will be formally made by regulation. We also appreciate the confirmation in Proposed Regulation Section 1.139E-1(d)(2) that Tribal general welfare benefits may be provided on a uniform or pro-rata basis.

Deference to Tribes Regarding Participation in Cultural or Ceremonial Activities. We believe the language in Proposed Regulation Section 1.139E-1(e) provides important clarification on cultural or ceremonial activities. We particularly thank Treasury and the IRS for listening to TTAC and Tribal comments by including language to confirm that a 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 that the IRS will defer to these determinations. In addition, we appreciate the language in Proposed Regulation Section 1.139E-1(e)(1), which confirms that benefits provided to Tribal Program Participants for participation in cultural or ceremonial activities is not compensation for services; particularly, we note our

appreciation for the expanded definition of “Tribal Program Participant” for purposes of this section to include members or citizens of other Tribes.

*Confirmation the General Welfare Exclusion Does Not Include a “Need” Requirement.*

We thank Treasury and the IRS for responding to feedback from TTAC and Tribal comments by clarifying that the General Welfare Exclusion does not include a “need” requirement. The Proposed Regulations provide sole discretion to Tribes as to whether to consider financial or other individual need or not in designing a general welfare program. The Band believes this language is consistent with Congressional intent and maximizes Tribal sovereignty and self-determination.

### **BACKGROUND ON THE BAND**

Located in East-Central Minnesota, the Band has approximately 5,000 members. The Band is responsible for providing critical services to community members such as healthcare, public safety, land management, housing, and education on its 61,000-acre Reservation. The Band primarily has utilized the General Welfare Exclusion (“GWE”) to establish a basic living program designed to provide benefits to all members.

### **FEEDBACK ON PROPOSED REGULATIONS**

Treasury’s Dear Tribal Leader Letter dated September 13, 2024, poses a series of questions on both operational and substantive highlights of the Proposed Regulations Treasury has identified. Operational highlights are certain technical aspects of the Proposed Regulations to which Treasury has chosen to call attention. The Dear Tribal Leader Letter poses operational questions on whether: (1) the Regulations should include more examples; (2) Revenue Procedure 2014-35 (i.e. the “safe harbor”) should be obsoleted; and (3) guidance is needed under Section 139E of the Code or other Code sections to address the tax treatment of deferred benefits or benefits paid from trust arrangements. Substantive highlights are focused on the content of the Proposed Regulations in areas Treasury would like feedback. The Dear Tribal Leader Letter poses substantive questions on whether Tribes have questions or comments regarding: (1) the criteria on a program’s establishment, guidelines, or non-discrimination requirements; (2) the criteria for benefits under the program; and (3) anything else related to the Notice of Proposed Rulemaking. We address each of these questions below.

#### **I. Responses to Operational Highlights in the Dear Tribal Leader Letter.**

- 1. The Notice of Proposed Rulemaking seeks to balance Tribal requests for examples against Tribal concerns about how such examples would be used. Should Treasury include more examples in the Final Rules, and if so, what topics should be addressed?**

The Band generally recommends that Treasury and the IRS refrain from adding more examples to the Regulations.

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To the extent that Treasury and the IRS decide to include additional examples in the Regulations, we caution that you use extreme care to make clear that they are merely examples and are not intended to impose limitations on Tribal governments' sovereign discretion to develop and administer GWE programs. For instance, and as further discussed below we believe there are some areas for potential confusion under the existing examples. In addition, the Band recommends against including any examples of "lavish or extravagant."

*No examples of lavish or extravagant.* The Band asks that Treasury and the IRS not include examples of "lavish or extravagant" in the Regulations. Proposed Regulation Section 1.139E-1(d)(4) provides that whether a benefit is lavish or extravagant depends on the facts and circumstances at the time the benefit is provided, and establishes that a benefit will be presumed to not be lavish or extravagant if it is described in, and provided in accordance with a GWE program. As further discussed below, we generally agree with how "lavish or extravagant" is defined in the Proposed Regulations and believe providing examples in the Regulations could create confusion with respect to the deference provided to Tribes, and the highly individualized nature of this analysis.

In the Preamble, Treasury and the IRS note that some Tribal comments have emphasized the importance of not using examples that may suggest limitations on the eligibility of program benefits. We agree with these concerns. The Preamble also states that some commenters suggested that it would be helpful to include examples of benefits that are not considered lavish or extravagant. **We urge Treasury and the IRS to refrain from adding these examples.** Given how individualized the analysis is for each benefit provided by each Tribe, we believe any examples in the Regulations would be unnecessarily limiting and could cause confusion.

*Other Examples.* Proposed Regulation Section 1.139E-1(d)(2)(ii) contains several examples that are drawn from Revenue Procedure 2014-35. Although the Band generally agrees with the decision to include these examples, we urge Treasury and the IRS to modify them to reflect the legislative intent to "expand rather than restrict the safe harbor provisions in Revenue Procedure 2014-35." It would be consistent with this legislative intent to retain the examples while broadening them where appropriate. Specifically, the Band's position is that the examples in Revenue Procedure 2014-35 do not need to be included word-for-word in the Proposed Regulations. For instance, the Band recommends clarifying Example 4 in Proposed Regulation Section 1.139E-1(d)(2)(ii)(D). This example provides:

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.

In the above example, we recommend deleting “substantiated” before the word “mileage.” It is appropriate to remove the word “substantiated” because it could be read to imply that mileage is only permitted if it is substantiated. A Tribal government may have other methods to determine mileage costs such as a standard or average rate. Similarly, the references in the example to an “Indian reservation” and “facilities that provide essential services the public” could be viewed as unnecessarily limiting. In the Band’s view, the origin and destination of the trips are not relevant to the analysis. Based on our comments above, we would revise the example as follows:

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, mileage, and fares for bus, taxi, and public transportation. The payments made by G under H are for the promotion of general welfare as described in paragraph (d)(2)(i) of this section.

Although we have focused our comment on Example 4, the Band would support similar revisions intended to broaden the other examples provided in Proposed Regulation Section 1.139E-1(d)(2)(ii).

**2. Treasury proposes to obsolete and supersede Revenue Procedure 2014-35 after the final regulations are applicable because the Act is broader. Should Treasury pursue this obsolescence? Please provide details if you support or disagree with this recommendation.**

The Band encourages Treasury and the IRS to expressly state in the Regulations that Revenue Procedure 2014-35 is obsoleted. In doing so, we recommend clarifying that, consistent with Congressional intent in the Tribal General Welfare Exclusion Act, the Regulations are to be interpreted more broadly than Revenue Procedure 2014-35 and offer greater flexibility and deference to Tribes. We believe that if Revenue Procedure 2014-35 is not obsoleted, then this could result in confusion with respect to the status of certain aspects such as the safe harbors under Revenue Procedure 2014-35 when compared to the deference provided to Tribes under the Proposed Regulations; however, we also believe it is important that the Regulations make clear that current guidance is intended to be more favorable to Tribes.

**3. The Notice of Proposed Rulemaking does not address deferred benefits, including minor’s trusts. Is available guidance on this issue unclear and what guidance is needed under section 139E or other Code sections to address the tax treatment of deferred benefits or benefits paid from trust arrangements? What specific fact patterns should also be addressed?**

Existing guidance on trusts is out of date, and updated guidance is critical. Many Tribes such as the Band have established trusts that hold funds for minors, and legally incompetent Tribal members until they reach adulthood or are no longer legally incompetent. The Band believes that a significant part of the distributions members receive through its minor's trust are used to pay for general welfare expenses. *The Regulations should confirm that GWE benefits may be provided through a minor's trust, or Treasury and the IRS should issue updated minor's trust guidance that confirms GWE benefits can be provided through a minor's trust.* Clarification that GWE benefits can be provided through a minor's trust would allow the Band and other Tribes to ensure that their youngest adults are receiving the maximum benefits without losing a significant portion of the benefits they receive to tax as they, in most cases, for the first time in their lives take on the responsibility of paying for their own general welfare needs. The guidance should also recognize that the source of GWE distributions from a minor's trust could be gaming revenue, so long as such distributions are not per capita distributions (as that term is defined in the Revenue Allocation Plan regulations and the Tribal government's Revenue Allocation Plan).

The Band has a Minor's Trust Agreement (the "**Agreement**") that allows for contributions to be made to an account for each eligible beneficiary pursuant to the Band's gaming revenue allocation plan. The Agreement allows for certain advance distributions for purposes of an unforeseeable emergency or other necessity involving the health, education, or welfare of the Beneficiary. In addition, the Agreement includes specific procedures related to how and when such early distributions may be granted by the Trustee (i.e., the individuals currently serving on the Band Assembly, or their successors). The Agreement also provides for different distribution schedules based on an individual's educational attainment. For instance, upon reaching eighteen (18) years of age, a member will receive distributions under a five (5) year distribution schedule; and attaining an associate or technical degree or a bachelor's degree will each result in accelerated distribution schedules. Those members who do not meet the eligibility criteria for the five (5) year distribution schedule by the time they reach twenty (20) years of age will generally receive distributions under a ten (10) year distribution schedule. The Band anticipates that when the minors gain access to these distributions they will be starting to live on their own or away from their families and have new expenses such as for rent, food, and education. Further, the Band recognizes this period of transition occurs when young adults typically have limited earning potential in the workforce and may also be enrolled in school. Thus, the Band believes that much of the funds provided through its minor's trust are used for general welfare purposes. However, there is currently no clear IRS guidance to expressly allow creating a GWE program through a minor's trust, potentially subjecting the Band's trust distributions not only to tax but to the Kiddie Tax. This is unfortunately the case even for a distribution with a clear general welfare purpose, such as one to help pay for a child's braces.

The most recent IRS guidance regarding Tribal minor's trusts is more than a decade old and found in Revenue Procedure 2011-56. While the guidance is helpful, it is incomplete and in need of modernization. In particular, by limiting the safe harbor to per capita distributions of gaming revenue, the guidance fails to recognize that many Tribes have diversified their investments beyond gaming, and some Tribes have no gaming revenue at all. Sources of revenue

for these Tribes could include income from businesses, trust resources, and investments. The IRS minor's trust guidance should recognize and encourage these diverse revenue sources rather than restricting trust contributions to gaming revenue. The type of asset in the trust is immaterial to the tax deferral offered by Revenue Procedure 2011-56, which turns on control of the trust assets by the Tribe until distribution—not on the sources of those assets. Although we recognize that the Band could form a trust outside of the contours of the safe harbor, this carries a degree of uncertainty and risk that could be mitigated with modernized guidance.

It is also important for IRS guidance on minor's trusts to recognize that different types of revenue have different tax characterizations. For example, a distribution of per capita gaming revenue would be taxable while a distribution of trust resources revenue would not be taxable. So long as the Tribe separately tracks these sources, the IRS should respect the tax characterization upon distribution from the trust. Moreover, the guidance should recognize that the interest and earnings on tax-exempt sources of revenue are also tax-exempt.

Modernizing the safe harbor is also important because state and federal agencies often view Revenue Procedure 2011-56 as the law as opposed to a safe harbor, and this can lead to unnecessary hurdles for Tribes administering minor's trusts. This is particularly critical with respect to agencies such as the Social Security Administration as they look to Revenue Procedure 2011-56 in determining whether assets in a minor's trust count as resources available to a beneficiary for purposes of determining eligibility for important benefits. *Thus, Treasury and the IRS should include language in the Regulations to modernize guidance regarding minor's trusts, or issue an updated safe harbor to take into account these concerns.*

## **II. Responses to Substantive Highlights in the Dear Tribal Leader Letter.**

### **1. What questions or comments do Tribes have regarding the criteria on a program's establishment, guidelines, or non-discrimination requirements?**

We recommend against adding further specifications in the Regulations on a GWE program's establishment and guidelines. Currently, the Proposed Regulations provide the appropriate deference to Tribes; for instance, the Proposed Regulations provide “[a]n 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 Tribal government's determination that a benefit is for the promotion of general welfare.”

However, we also urge Treasury to revise its discrimination standard so that it does not cause unintended consequences. Specifically, the Proposed Regulations provide:

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 defray costs otherwise borne by members of the governing body fails to satisfy the requirements of this paragraph.

It is extremely unlikely that any Tribal government would establish a program to provide benefits solely to the governing body of the Tribe or the children of members of the governing body. However, in a given year, the children of members of a Tribe's governing body could disproportionately benefit from a program (such as tuition assistance) that is available to all members of the Tribe. Programs like this one should not be considered to violate the prohibition on discrimination simply because they disproportionately benefit certain individuals in one snapshot of time. Programs should be evaluated based on their structure and historical administration, not on impacts that could vary from year to year. So long as a program is designed and administered to avoid discrimination in favor of a Tribe's governing body (*e.g.*, the program is available to all the Tribe's members), it should satisfy this requirement.

On this point, we note that the Preamble contains important clarifying language that is not captured in the proposed regulatory language. Specifically, the Preamble states that:

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.*

The italicized language above makes clear that discrimination occurs if the governing body is favored due to their status as members of the governing body. In the situation we highlight above, despite the fact that benefits may be disproportionate in a particular year, it is clear that the governing body has not been favored due to their status as members of the governing body. Accordingly, we recommend including similar clarifying language in the Regulations.

**2. What questions or comments do Tribes have regarding the criteria for benefits under a program, including the standards on lavish and extravagant and/or compensation for services?**

**a. Lavish or Extravagant.**

The Band has developed a GWE program that is designed to provide basic living assistance to its members. Under this program, GWE benefits are available to all members and may be used for various specified general welfare purposes. As discussed elsewhere in this Comment, the Band has also developed a modified GWE program to provide basic living assistance to certain vulnerable members without jeopardizing their Supplemental Security Income benefits and certain state Medicare benefits in Minnesota. The benefits provided under the GWE program are therefore established after the Band analyzes and determines what the overall need is for members. The amount of the GWE benefit provided to members is less than

the level of need that the Band has determined members have annually. This determination of need takes into consideration the relevant facts and circumstances.

The Proposed Regulations reflect that Treasury and the IRS have listened to TTAC and Tribal Comments by offering deference to Tribes with respect to whether a benefit is lavish or extravagant. The Band applauds Treasury and the IRS for providing appropriate deference to Tribes in Proposed Regulation Section 1.139E-1(d)(4) by stating that “[w]hether 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.” In addition, the Band appreciates the presumption under the Proposed Regulations that a benefit will be presumed not to be lavish or extravagant if it is described in, and provided in accordance with, a written GWE program. However, the Band fears that, without further clarity, the “lavish or extravagant” standard could hinder its general welfare program. In particular, while the Band appreciates the presumption, the Proposed Regulations are unclear how—if at all—the presumption could be rebutted. It is also unclear the depth and breadth of the information the IRS may request from the Band or Tribal Program Participants in order to determine whether the presumption could be rebutted.

To address these concerns and maximize Tribal sovereignty and self-determination, we recommend that the Regulations establish a complete presumption that a GWE benefit based on the facts and circumstances provided in 1.139E-1(d)(4) and administered in good faith is not lavish or extravagant. Specifically, if the amount of a benefit provided in good faith under a Tribe’s written GWE program is based on a Tribe’s culture and cultural practices, history, geographic area, traditions, resources, and economic conditions or factors, the IRS should conclusively presume that the benefit is not lavish or extravagant. The conclusive presumption we advocate for is a natural extension of the presumption Treasury and the IRS have provided in the Proposed Regulations and would provide further clarity to Tribal governments.

**b. Compensation for Services/Taxable Prizes/Community Services.**

The Band appreciates the clarification in the Proposed Regulations that a Tribe can provide a GWE benefit to members of another Tribe in connection with a cultural or ceremonial activity. We recommend that the Regulations also include specific provisions regarding powwow prizes to confirm that these benefits may be provided under a GWE plan and are not compensation for services or otherwise taxable as a prize; moreover, and as discussed below, the Band respectfully requests the IRS remove any contradictory statements from its website.

A powwow is a Native American tradition that brings together many different Tribes and communities for a cultural celebration that includes dancing, singing, socializing, crafts, arts, and food. The Tribe hosts powwow events at which we will sometimes offer cash prizes for winning cultural contests in categories such as drumming. The Proposed Regulations provide that a benefit is not compensation for services if “[t]he 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 Tribal government (including, but not limited to, powwows, rite of passage ceremonies, funerals, wakes, burials, other bereavement events, and honoring

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events).” We believe that providing powwow prizes as a cultural, general welfare benefit is consistent with the Proposed Regulations and ask that this be specifically addressed in the Regulations. Specifically, powwow prizes are designed to reward and encourage participation and foster the exchange of Tribal culture and traditions. Further, although prize amounts may differ, the prizes are available to all participants based on established guidelines.

Although we believe powwow prizes are within the scope of the GWE, there is contradictory IRS guidance on the issue. For instance, the IRS website currently states that, “Prizes won by contestants at a powwow are taxable. You report prizes that aggregate \$600 or more in a calendar year on Form 1099-MISC, Miscellaneous Income PDF, in block 3 as ‘other income.’ In order to fill out the form correctly, you must obtain the winner’s taxpayer identification number (TIN).”<sup>1</sup> We believe that clarifying the language in the Regulations to allow for powwow prizes to be provided under GWE programs and removing contradictory language from the IRS website will offer much-needed clarity on this issue.

We would also appreciate clarification that community services performed as part of a GWE program are not considered “compensation for services.” Specifically, some Tribal governments include community service requirements as part of their GWE programs. These programs are designed to foster kinship and encourage involvement in the community. For example, in order to receive a housing benefit, a program may require a member to perform a few hours of community service. Although the member is not compensated for the community service, we are concerned that, without clarifying guidance, the GWE benefit could be viewed as compensation for these important community services.

The Band is also confused by the examples in the Preamble involving “an employment or contracted-vendor relationship.” The Preamble states that a corporation owned by a Tribal member who contracts to cater a Tribal ceremony is not within the cultural exception for compensation for services. However, the preamble states that a Tribal member that receives an honorarium for volunteering to make traditional foods for a Tribal ceremony would be within the scope of the exception. It is unclear from these examples whether the critical factor is that the individual performs the services directly (i.e., not through a corporation) or as a volunteer. Many Tribal governments have agreements with spiritual leaders, fluent Native speakers, and others to provide their expertise at cultural events. These individuals should not be treated as receiving compensation for services simply because their relationship with the Tribal government has been memorialized in a contract or other agreement.

**c. “Benefits Must Be Available.”**

The Band believes the language in Proposed Regulation Section 1.139E-1(d)(3) provides important clarification regarding the discretion of Tribes in developing GWE programs and we thank Treasury and the IRS for including it. In particular, we note that we find it critical to clarify that Tribes (1) may provide benefits subject to budgetary constraints and separately (2)

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<sup>1</sup> “Powwow prizes are taxable,” IRS, [https://www.irs.gov/government-entities/indian-tribal-governments/powwow-prizes-are-taxable#:~:text=Prizes%20won%20by%20contestants%20at,taxpayer%20identification%20number%20\(TIN\).](https://www.irs.gov/government-entities/indian-tribal-governments/powwow-prizes-are-taxable#:~:text=Prizes%20won%20by%20contestants%20at,taxpayer%20identification%20number%20(TIN).)

may also determine the category of individuals who qualify as Tribal Program Participants under a particular GWE program. For example, many Tribes have GWE programs that provide benefits specifically to Veterans or other groups such as students or elders. The Band also appreciates the broad definition of a “Tribal Program Participant” under the Proposed Regulations and recommends no changes to it.

**3. What other questions or comments do Tribes have regarding this notice of proposed rulemaking?**

**a. The Regulations Should Clarify Critical Information Regarding Audits.**

The Band asks that the Regulations become effective immediately, and that the Regulations expressly provide that (1) any audits will be prospective only, beginning on the date audits commence; and (2) audits will not begin until at least one year after the Regulations are effective. Specifically, we suggest including the following italicized language to Proposed Regulation Section 1.139E-1(f):

*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, but under no circumstance will audits begin prior to one (1) year after the effective date of this section.*

In addition, the Band asks that the Regulations provide that in the first year audits are performed, they are only conducted for the purpose of helping Tribes to comply with the Regulations. We believe the first year should focus on educating Tribes about GWE requirements under the Regulations as opposed to imposing penalties.

We thank Treasury and the IRS for acknowledging in the Proposed Regulations the statutory obligation to consult with TTAC with respect to the training and education of internal revenue field agents. The Band further recommends memorializing in the Regulations that the audit moratorium will only be lifted once Treasury has confirmed that TTAC is satisfied with the method and amount of training conducted.

***Prospective Audits.*** In the more than ten years since the passage of the Tribal General Welfare Exclusion Act, Tribal governments have implemented numerous general welfare exclusion programs using a variety of approaches. These programs and approaches were developed in good faith and in the absence of IRS guidance on the Act. The Act correctly imposed a moratorium on IRS audits of GWE issues until final guidance is released and the required training of IRS field agents is completed.

Once the moratorium is lifted, any enforcement and all audits of GWE programs and benefits should be **prospective only**. This is because Tribes implemented their programs in good faith without the benefit of IRS guidance. It would not be fair to Tribes for the IRS to hold them to a standard that was not in place when the Tribes implemented their programs. It is critical that

this prohibition on audits is not simply an unwritten administrative practice. Rather, it should be a requirement included in the Regulations and training materials. This would provide comfort and certainty to Tribal governments that have implemented and administered GWE programs in good faith since 2014.

The Band urges Treasury and the IRS to clarify in the Regulations that only Tribal governments will be audited with respect to benefits provided under GWE programs and individual Tribal Program Participants will not be audited. GWE programs will provide the appropriate substantiation for the benefits provided and therefore a Tribe should be the party in any audit where the IRS is asking questions about GWE benefits. Auditing individuals would place an unnecessary burden on Tribal Program Participants. Such a burden would include the time involved and potential legal or other costs associated with responding to such an audit. Moreover, it would not be efficient for the IRS to audit individuals because this could lead to numerous individual audits when the question is about a single program administered by the same Tribe. We also urge Treasury and the IRS include language in the Regulations and training materials that requires IRS agents to consult with the IRS's Indian Tribal Governments ("ITG") division on audits involving GWE issues. The individuals in the ITG division are the IRS employees that have the expertise, experience, and understanding of the federal government's trust and treaty relationship with Tribes required to handle GWE issues.

**b. The Proposed Regulations Should Clarify There Are No Individual Substantiation Requirements.**

The Band urges Treasury and the IRS to clarify in the Proposed Regulations that there is no requirement for individual Tribal Program Participants to retain receipts or otherwise substantiate GWE benefits. We believe Tribes should be allowed to determine for themselves whether to impose substantiation obligations on Tribal Program Participants. Further, as discussed above, under no circumstance should the IRS audit a Tribal Program Participant regarding benefits received under a GWE program.

Tribes have long operated with the understanding that there is no substantiation obligation for individual Tribal Program Participants and therefore many GWE programs have been developed with this framework. As discussed above, the Band has developed a GWE program that is designed to provide basic living assistance to its members. Under this program, GWE benefits are available to all members and may be used for various specified general welfare purposes. Before disbursing funds under this program, the Band has already determined what the need is for members, and the amount provided under the program is less than the general welfare expenses that the Band has determined members have. Therefore, the Band does not impose a substantiation requirement on members, nor does the Band believe it would be appropriate to do so under a basic living assistance program. Requiring individual members to document their use of the funds would serve no purpose for the Band because it is already known that individuals have general welfare expenses in excess of the benefit provided. The Band also believes there are instances in the future where it may determine it is more appropriate to require Tribal Program Participants to maintain receipts or other documentation of how GWE funds

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were spent. The IRS's request for receipts or other documentation from individuals related to GWE benefits would be an unnecessary burden for individuals under any type of GWE program. The IRS should focus on reviewing a Tribe's GWE program—*not individual spending*—because the GWE program will account for how the Tribe has determined individuals have used the GWE funds appropriately.

We believe Treasury and the IRS agree with our position that individual Tribal Program Participants should not be required to maintain documentation to substantiate the use of GWE benefits and we urge you to memorialize this position in the Regulations. The Preamble states in part:

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.

When drafting language in the Regulations, we ask Treasury and IRS to expressly clarify that Tribal governments may substantiate benefits through the specific guidelines of a program, and therefore individual Tribal Program Participants are not required to maintain documentation to substantiate the general welfare use of benefits received. This clarification is important for several reasons. ***First, it clarifies that individuals do not have the burden of substantiation. Second, this clarification would be consistent with Treasury and the IRS's statement in the Preamble—with which the Band agrees—that the General Welfare Exclusion does not include a "need" requirement.*** If there is no requirement of need to receive a general welfare benefit, there should also be no federally imposed requirement that individual Tribal Program Participants prove they spent the program benefit on a particular purpose.

It is critical that Treasury and the IRS make clarifying changes on these points because there are conflicting statements in the Proposed Regulations about substantiation. In particular, the Preamble states that "Tribal governments should keep . . . records in the manner they deem appropriate in order to substantiate that the program qualifies as an Indian Tribal government program." However, the Preamble also states that the guidance does not change the generally applicable recordkeeping requirement under Section 6001 of the Code.

It should be up to the individual Tribal government—not the IRS—whether to require substantiation, and the amount and form of any substantiation required. Accordingly, we further ask that the Regulations clarify that, although a Tribe is not required to, it *may* impose a substantiation requirement on individuals if expressly stated as a requirement in a GWE program. However, such substantiation would only be provided to the Tribe as part of the GWE

program. Therefore, we further request that the Regulations clarify that maintenance of any such Tribe-imposed substantiation under a GWE program does not establish a requirement that individuals maintain documentation for purposes of providing it to the IRS, nor could the IRS request such documentation from the Tribe or a Tribal Program Participant during an audit.

**c. Clarification Regarding State and Federal Needs-Based Assistance Programs.**

An issue greatly impacting the Band’s members is the inclusion of income for certain federal needs-based assistance programs. This is an urgent issue, and often directly results in the loss of eligibility for state programs that base eligibility on federal programs or otherwise rely on the legal and administrative interpretations of federal agencies in the administration of their own programs. Thus, even modest benefits under a GWE program can cause a significant and damaging impact on a Tribal member’s ability to qualify for certain state *and* federal needs-based assistance programs.

The Band thanks Treasury and the IRS for responding in the Preamble to the TTAC report on the General Welfare Exclusion and many Tribal Comments on the issue of whether a Tribal general welfare benefit is taken into account for purposes of determining other Federal benefits. The Band recognizes Treasury and IRS’s position that this issue is outside their authority, and therefore beyond the scope of the Proposed Regulations. We also acknowledge that the Preamble states that Treasury 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.” However, we encourage Treasury and IRS to take a more active role on this issue because it is causing direct and immediate harm to the most vulnerable Tribal members in our communities. The Band urges Treasury and the IRS to actively engage in this important effort to ensure vulnerable Tribal members may continue to receive GWE benefits without losing eligibility for critical state and federal benefits.

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Thank you for taking the time to consider our recommendations and the needs of the Band and all other Tribes. Should you have further questions, please contact Adam Candler by e-mail at [adam.candler@millelacsband.com](mailto:adam.candler@millelacsband.com).

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