Treasury Tribal Advisory Committee, GWE Sub-committee  
Subject: General Welfare Exclusion  

July 8, 2020  

Dear Tribal Leader:  

The Treasury Tribal Advisory Committee (“TTAC”), Subcommittee on General Welfare Exclusion (“GWE”) (the “GWE Subcommittee”) is seeking input from Tribal governments before making recommendations to the TTAC on guidance under the Tribal General Welfare Exclusion Act (the “Act”) and related provisions under Internal Revenue Code (the “Code”) Section 139E.  

The TTAC was created by the Act and is expressly tasked with advising the Secretary of the U.S. Department of Treasury (“Treasury”) on the taxation of Indians and the implementation of the Act. The GWE Subcommittee was formed in 2019 to provide the TTAC with technical expertise on recommendations for the implementation of the Act.  

The GWE Subcommittee is committed to transparency and believes that it is important to seek additional information as to how Tribes are currently implementing their GWE programs. Any GWE Subcommittee guidance needs to reflect existing GWE programs as well as provide guidance and possible best practices.  

This letter will begin with an initial set of core GWE principles for consideration and further input. The letter also provides a summary of broader topics and concepts derived from public input and comments received by the TTAC as well as GWE Subcommittee deliberations since the last TTAC public meeting on March 31, 2020.  

I. Core GWE principles for consideration and further input:  

Based on input and deliberations to date, the GWE Subcommittee has established a set of initial proposed core principles that it believes will be helpful in developing future guidance. At this time, we are asking for input on: (1) whether Tribes are in agreement with the following proposed core principles as a foundation for future GWE guidance, and (2) whether Tribes feel that additional core principles would be helpful.  

1. Flexibility: GWE guidance must be flexible to allow individual Tribal governments to design, develop and operate programs specific to their unique needs, customs, culture, traditions and government practices. GWE definitions must not be used to narrow or restrict tribal rights otherwise provided under the Act.  

2. Deference: GWE guidance must reflect the canon of construction set forth in Section 2(c) of the General Welfare Exclusion Act: that ambiguities in Code Section 139E shall be resolved in favor of Tribal governments and deference shall be given to Tribal governments for the programs administered and authorized by the Tribe to benefit the general welfare of the tribal community.
3. **Purpose:** GWE guidance must reflect the Act’s purpose in promoting tribal traditions, culture, custom and government practices, as well as the promotion of self-determination and self-governance. Tribal budget dollars reserved for promoting the general welfare shall not be diminished by the payment of taxes or costs on compliance.

4. **Expansion of the Common Law:** GWE guidance must reflect the Act’s intent to build upon rather than supplant the common law. Thus, Tribes should be able to continue to rely upon the common law as reflected in Revenue Procedure 2014-35 as well as Code Section 139E.

5. **Prospective Enforcement:** GWE guidance must confirm that it will 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 temporary suspension is lifted.

6. **The Term “lavish or extravagant” is Relative:** GWE guidance must recognize that “lavish or extravagant” is a relative term that depends on the unique demographics of each tribal community.

7. **Use of “Safe Harbors”:** GWE guidance must confirm that the use of “safe harbors” is optional and not a limitation on the statutory rights that Tribes have under the Act or Code Section 139E.

II. **Survey of Program Design Features:**

In addition to input on the above proposed core principles for GWE guidance, we are seeking additional information on key program design issues to ensure that future guidance reflects the types of features that Tribal governments have found helpful in developing GWE programs in practice. The following is a non-exhaustive list of program features which have been brought to the attention of the TTAC:

1. **Uniform Assistance versus “Per Capita” Payments.** We understand that many Tribes seek to provide equal citizen assistance when possible. While Indian Gaming Regulatory Act ("IGRA") “per capita” payments are subject to tax, the IGRA regulations provide that per capita does not include:

   “payments which have been set aside by the tribe for special purposes or programs, such as payments made for social welfare, medical assistance, education, housing or other similar, specifically identified needs.” 25 CFR § 290.2.

The Act does not include any express prohibitions against uniform GWE benefits. Based on this, input on the following items would be extremely helpful:

- Does your Tribe make equal GWE payments to each Tribal citizen?
• If so, does the Tribe take steps to determine whether each citizen had qualifying needs up to that amount?
• Does the Tribe set the amount based on an individual need assessment or survey of citizenship needs?
• Does your Tribe set its GWE budget “up to” an equal amount per citizen?
• If a citizen does not incur qualifying expenses of at least the declared amount, must the citizen return excess? Or is the excess reported as taxable?
• For benefits paid from IGRA funds, what do you do to ensure that equal GWE payments are not considered per capita payments?

2. Minors Trusts. We understand that many Tribes have established minor(s) trusts. Under IGRA, such trusts may allow for early payment for the “health, education or welfare” of the minor. We are interested in input from Tribes that are now designing these programs to hold and pay general welfare funds rather than only deferred per capita benefits.

• For any IGRA minor(s) trusts maintained by your Tribe, can the Tribe direct that a portion be set aside for specific GWE program purposes?
• What do you do to ensure that such payments are not considered deferred IGRA “per capita” payments?

3. Substantiating GWE Expenses. A recurring question is what steps a Tribe (or citizens) must take to substantiate that GWE program funds were used for a qualifying purpose.

• How does your Tribe substantiate GWE expenses? Here is a non-exclusive list of possible substantiation methods that have been shared with the GWE Subcommittee to date:
  ✓ establishing “presumed” assistance amounts based on citizen surveys of need (similar to a “per diem”)?
  ✓ Citizen certifications?
  ✓ Looking to outside published data for your Tribe or region to establish “presumed” assistance or “per diem” amount?
  ✓ Parity with other State and Federal programs?
  ✓ Receipts or other form of proof?

• How do you address when program expenses are not substantiated?
  ✓ Report excess as taxable?
  ✓ Require return of excess?
  ✓ Other?
4. **GWE benefits for Tribal citizens and their families.** The Act contemplates assistance to "or on behalf of" a citizen (spouse) or dependent. Revenue Procedure 2014-35 contemplates assistance to "qualified non-members" including non-citizen descendants, ancestors and extended families.

   - Does your GWE cover a Tribal citizen’s extended family?

5. **Flexible “Safe Harbor” Plans:** Some Tribes have indicated that they have adopted “safe harbor” plans that allow citizens to determine what safe harbor needs that they or their families will use budgeted GWE funds to meet.

   - Does your Tribe have a flexible program that allows Tribal citizens to select from among pre-approved GWE program purposes subject to budget limits and program guidelines?
   - Is this flexibility important to your Tribe?

6. **Compensation for Services.** The Act states that GWE is not compensation for services. However, some Tribes have indicated that community service is an important aspect of culture and tradition and should not be treated as violating the GWE rules. Some Tribes have also pointed to training programs (like the Workforce Improvement Act) that are not considered compensation for services.

   - Does your Tribe include community service as a part of any of its GWE programs? If so, Why?
   - Does your Tribe provide GWE payments as part of a training program or other community service?
   - Why should community service ties not be considered “compensation for services”?

7. **Lavish and Extravagant.** What are your thoughts on when GWE benefits are “lavish and extravagant”?

8. **SSI/Needs-Based Assistance Limits.** How does your Tribe design GWE programs to safeguard their Tribal Citizens’ continuing eligibility for Supplemental Social Security Income or other federal/state needs-based financial assistance?

9. **Other GWE programs.** Does your Tribe provide GWE benefits for any of the following non-exclusive list of programs?

   - Wellness and health related programs?
   - Accumulated or deferred GWE benefits?
   - Items of cultural significance, honorariums or cost reimbursements?
   - Disaster relief or similar assistance?
III.  Additional Input:

Please feel free to address any additional issues that you think the TTAC or the GWE Subcommittee should include in future discussions. All input should be submitted, by September 14, 2020 at 5:00pm EST, to the following GWE Subcommittee technical advisors: Fatima Abbas, fabbas@ncai.org; and Emery Realbird, emery@nafoa.org.

The GWE Subcommittee consists of tribal leaders and practitioners and understands the confidentiality of GWE programs. The purpose of this solicitation is solely to inform the GWE Subcommittee’s recommendations to the TTAC. As a result, the GWE Subcommittee intends to take the following steps to maintain the confidentiality of submissions:

1. Technical advisors will remove identifying information from all submissions and assign them a unique ID. Original identifying submissions will then be deleted.
2. These anonymized submissions will then be shared with only the GWE Subcommittee for the purpose of informing their guidance recommendations to the TTAC.
3. The submissions will not be shared with Treasury or the IRS.

The GWE Subcommittee hopes these good faith efforts will facilitate tribal engagement on the development of our guidance recommendations.

Thank you in advance for assisting the GWE Subcommittee to better refine its guidance.

Sincerely,

W. Ron Allen, GWE Subcommittee Co-Chair
Chair/CEO, Jamestown S’Klallam Tribe

Sharon Edenfield, GWE Subcommittee Co-Chair
Council, Confederated Tribes of Siletz Indians