

# 17<sup>th</sup> Annual Indian Law Conference

Spokane County Bar Association

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## General Welfare Exclusion Act – Final Regulations

***Presenter:***

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# IRS / GENERAL WELFARE

## 25 Year Journey to GWE Guidance

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- 2000-2011: IRS Audits of Tribes
  - IRS efforts at administrative guidance:
    - 11/15/2011: Notice 2011-94 – opening consultation
    - 12/5/2012: Notice 2012-75 – initial safe harbor relief
    - 6/3/2014: Rev Proc 2014-35 – final safe harbors
  - 9/26/2014: General Welfare Exclusion Act of 2014 signed into law
  - 6/20/2019: Initial TTAC meeting
  - 6/16/2021: TTAC report on proposed guidance
  - 9/17/24: Proposed Regulations published
  - 12/16/2025: Final Regulations published
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# IRS / GENERAL WELFARE

## The “Safe Harbor” Approach RP 2014-35

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### □ Basic Criteria:

- Specific Indian tribal government program
- Written guidelines
- Available to any tribal member or qualified nonmember who satisfies the guidelines
- Does not discriminate in favor of members of the governing body of the tribe
- Benefit is not compensation for services
- Benefit is not lavish or extravagant

### □ Safe Harbors:

- Housing; Education; Elder/Disabled; Culture/Religion; Other

# IRS / GENERAL WELFARE

## General Welfare Exclusion Act of 2014

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- ❑ Established the TTAC
- ❑ Enacted a temporary suspension of audits
- ❑ Ambiguity construed in favor of Tribes
- ❑ Applies to any Indian general welfare benefit:
  - To or on behalf of a member, spouse or dependent
  - Administered under specified guidelines
  - Do not discriminate in favor of the governing body
  - Available to any member who meets the guidelines
  - Are for the promotion of the general welfare
  - Cannot be lavish or extravagant
  - Not compensation for services

# GWE Final Treasury Regulations Overview

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- ❑ Largely Adopts Proposed Regulations: The final regulations largely adopt the substantive positions in the proposed regulations, favorable to Tribes.
- ❑ Retains Broad Definition of “Program Participants”: Tribe’s citizens, spouses, dependents, ancestors, descendants, former spouses, widows(ers), domestic partners, and/or any individual with Tribal caregiver under state/Tribal law.
- ❑ Reaffirms that Uniform Cash Distributions are Permitted: GW may be structured as uniform cash payments.
- ❑ Clarifies that Tribes have “Sole Discretion” in Identifying What Promotes the General Welfare: GW categories are not limited to IRS Safe Harbor. Tribes have sole discretion to determine what promotes the general welfare
- ❑ No Source Restrictions: subject to RAP and grant terms; gaming revenues, grants and all other sources of funds may be used to fund GW benefits

# GWE Final Treasury Regulations

## Key Changes / Clarifications from the Proposed Rule

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- ❑ GW may include economic development
- ❑ Tribes may pay GW from grantor trusts
- ❑ Trusts that were initially designed for “deferred per capita” may be amended to pay benefits in the form of GW
- ❑ Several examples were clarified and expanded
- ❑ IRS/Treasury responded to comments on “substantiation and receipts”
- ❑ IRS/Treasury responded to comments on the re-starting of audits (riming, prospective, retroactive)
- ❑ The Final rule provides a one-year transition (effective 1/1/27)
- ❑ The old “safe harbor” ruling will be obsoleted as of January 1, 2027
- ❑ Alaska Natives will be provided separate guidance, but may look to the final regulations until then

# GWE Final Treasury Regulations

## Comments Not Adopted in the Final Rule: (1 of 3)

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- Program Participants: IRS/Treasury declined to expand the definition of Tribal program participant to individuals that are unenrolled members of the Tribal community.

### However:

- The final rule extended coverage to individuals for whom a Tribal member is a caregiver authorized under Tribal or State law.
- The final rule extended the broad “program participant” rules to members of other Tribes when participating in cultural/traditional activities

- Compensation: IRS/Treasury declined to adopt broad exemptions to what is treated as “compensation”.

### However:

- The final rule clarifies the existing compensation exemption for participation in cultural/traditional activities
- The final rule includes several new examples that are favorable.

# GWE Final Treasury Regulations

## Comments Not Adopted in the Final Rule: (2 of 3)

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- Non-Discrimination: IRS/Treasury declined to specifically address whether benefits to former council members for loss of Social Security credits would trigger the nondiscrimination rule. **However:**
  - The final rule emphasizes that these decisions will be based on the totality of the facts and circumstances.
- Constructive Receipt: IRS/Treasury declined to confirm that the constructive receipt doctrine should be inapplicable to deferred general welfare benefits. **However:**
  - IRS/Treasury noted that “a program participant's election to defer a Tribal general welfare benefit that is made before the Tribal program participant would have rights to [the] benefit under Tribal law would not be treated as constructively received ... for Federal income tax purposes.” (emphasis added).

# GWE Final Treasury Regulations

## Comments Not Adopted in the Final Rule: (3 of 3)

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- Lavish & Extravagant: IRS/Treasury declined “to provide a conclusive presumption on the issue of whether a benefit is lavish or extravagant.” **However:**
  - IRS/Treasury confirmed that “an Indian Tribal government program is afforded deference on the attestations of the facts and circumstances” in support of benefit amounts
  - “This deference is intended to reflect that the Tribe is in the best position to determine which factors and attestations of fact were considered when determining benefits.”
  - “In particular the Tribe is in the best position to determine which facts and circumstances are specific to its culture and cultural practices, history, geographic area, traditions, resources, and economic conditions.”

# GWE Final Treasury Regulations

## New / Changed Examples:

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- ❑ The education programs example now includes textbooks as an example of school supplies.
- ❑ Transportation example removed the word “substantiated” before “mileage”
- ❑ Also removed language in the transportation example that would have limited fares for public transportation to specific origins and destinations.
- ❑ Removed reference to benefits that may not be used for any trade or business from the housing example.
- ❑ Removed narrow definition of Indian reservation from the cultural and religious programs example.
- ❑ Added “community service or work-training programs connected to Tribal culture and tradition”.
- ❑ Added “Tribal community service events, such as neighborhood clean-ups or youth woodcutting programs to benefit elders; participation in training in traditional construction techniques; and Tribal language education.”

# GWE Final Treasury Regulations

“Substantiation” – quotes from the preamble (1 of 2)

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## What must taxpayers show upon audit?

- ❑ Taxpayers “are required to maintain records sufficient to establish the amount of gross income or other matters required to be shown by them” IRS section 6001
- ❑ “These final regulations do not impose **additional** recordkeeping requirements on Tribal program participants.”
- ❑ “**However**, section 6001 and § 1.6001-1 **generally require a taxpayer to maintain records** to establish the amount of gross income reported on the taxpayer's tax return.”
- ❑ “This requirement is independent of the exclusion provided under section 139E.”

# GWE Final Treasury Regulations

“Substantiation” – quotes from the preamble (2 of 2)

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## Are receipts required? What other “proof” would work?

- “**Notwithstanding** the previous sentence [the general requirements under IRC 6001], the Treasury Department and the IRS confirm that individuals **are not required to maintain personal receipts** to substantiate that a benefit provided under an Indian Tribal government program was used by the recipient for the purpose for which it was provided.”
- “the Treasury Department and the IRS do not prescribe any specific types of documentation that a Tribal program participant would be required to retain...”
- “**Nonetheless**, corroborating program documentation, such as a written description of the Indian Tribal government program, an application or acceptance letter into the program, or any year-end compliance certificates of the Indian Tribal government may satisfy the requirements of section 6001...”

# GWE Final Treasury Regulations

## Preamble quotes on Trusts

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### **The Final Rule expressly addresses trusts to pay GW**

- ❑ “where an IGRA trust ... is treated as owned by the Indian Tribal government, the Indian Tribal government may subsequently determine distributions from the trust are for general welfare purposes ... to the extent that DOI approval is otherwise received to modify a RAP or IGRA trust, as applicable...”
- ❑ “the date of distribution from the IGRA trust is the relevant time at which to determine whether the payment is a Tribal general welfare benefit or a per capita payment.”
- ❑ “The Indian Tribal government, subject to DOI approvals of RAPs or IGRA trusts, has sole discretion to determine whether a payment is a per capita payment for purposes of section 139E and these regulations.”

# GWE Final Treasury Regulations

## Preamble quotes on discretion for GW

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### **The Final Rule recognizes significant discretion/deference:**

- ❑ “an Indian Tribal government has sole discretion to determine whether a benefit is for the promotion of general welfare”
  - ❑ “the IRS will defer to the Indian Tribal government's determination that a benefit is for the promotion of general welfare.”
  - ❑ “an Indian Tribal government program may provide Tribal general welfare benefits on a uniform or pro-rata basis to Tribal program participants.”
  - ❑ “a program that provides a benefit in an unequal amount, such as providing different benefit amounts to larger families than smaller families, would be permitted.”
  - ❑ “Tribal general welfare benefits may be provided without regard to financial or other need of Tribal program participants and may be provided on a uniform or pro-rata basis.”
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# GWE Final Treasury Regulations

## Preamble quotes on economic development

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### **Business grants / economic development as GW:**

- “an Indian Tribal government program may provide benefits to support, develop, operate, expand, or start certain trades or businesses.”
- “[However] an Indian Tribal government program may not provide benefits under the program to an entity, regardless of whether it is owned by a Tribal program participant.”

# GWE Final Treasury Regulations

## Preamble quotes on attestation of facts (1 of 2)

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### **Lavish & Extravagant; The Importance of Factual Findings:**

- “an Indian Tribal government is uniquely qualified to evaluate its culture and cultural practices, history, geographic area, traditions, resources, and economic conditions [and] deference should be provided to an Indian Tribal government's attestation of the facts and circumstances at the time the benefit is provided to a Tribal program participant.”
- “the IRS will defer to an Indian Tribal government's attestations of facts and circumstances, regardless of whether the program is in writing, at the time the benefit is provided to the Tribal program participant.”
- “the proper time to test whether a benefit is lavish or extravagant is at the time the benefit is provided.”
- This “does not mean that facts and circumstances involving prior years ... cannot be taken into account in the determination made at the time the benefit is provided.”

# GWE Final Treasury Regulations

## Preamble quotes on attestation of facts (2 of 2)

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### **Lavish & Extravagant – Limits to factual deference:**

- “**However**, the deference ... does not preclude the IRS from determining that a benefit is lavish or extravagant”
- “while the IRS would respect the Indian Tribal government's attestations of fact and circumstances ... the IRS may also consider facts and circumstances not included in the Indian Tribal government's attestations...”

# GWE Final Treasury Regulations

## Preamble quotes on audits

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### **Will audits be retroactive?**

- No certain answer. But this is what IRS says in the preamble:
  - “it would be in the interest of sound tax administration for IRS audits and examinations ... under section 139E and these final regulations to be prospective in nature.”
  - “it would be counterproductive for IRS audit and examinations of issues under section 139E and these final regulations to apply to taxable years for which there was no guidance interpreting section 139E.”
  - “in the interest of sound tax administration, once the suspension of audits and examination is lifted, the IRS does not intend to open audits or examinations (except in certain circumstances such as, for example, in the case of fraud) ... for taxable years ending before December 16, 2025.”

# GWE Final Treasury Regulations

## Next Steps

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- ❑ Review Revenue Allocation Plans
- ❑ Consider updates to program guidelines
- ❑ Consider substantiation
- ❑ Develop attestations of facts and circumstances
- ❑ Consider changes to GW ordinances
- ❑ Consider changes to minors and adult trusts
- ❑ Consider new programs
- ❑ Stay active with TTAC efforts – an education plan must still be developed...
- ❑ Stay active with efforts to coordinate other federal and state benefits with Tribal GWE
- ❑ Get things in order for the final rule effective date: January 1, 2027