

TITLE 22 - TAXATION

CHAPTER 3 - GENERAL WELFARE

Legislative History: 22 T.O.C. Chapter 3, "General Welfare," was adopted by Resolution No. 07-030 effective January 24, 2007; amended by Resolution No. 16-485 (implements authority acknowledged by the Tribal General Welfare Exclusion Act of 2014 and incorporates safe harbor rule), effective October 10, 2016.

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ARTICLE I - DEFINITIONS

Section 3101 Definitions

For purposes of this Chapter, the following words and phrases shall have the meanings set forth below:

- (A) “Administrative Entity” – The District or the branch, department, or agency of the Nation’s government that is authorized and funded through a budget that is duly approved by the Legislative Council to administer and provide Assistance and to enforce applicable Program guidelines.
- (B) “Assistance” - Any Program benefits or payments that qualify for tax free treatment under the General Welfare Exclusion.
- (C) “Code” - The Internal Revenue Code of 1986, as amended.
- (D) “Disability” or “Disabled” - The term disability or disabled as used for purposes of Programs covered by this law shall refer to the inability of an individual to care for himself/herself due to physical or mental limitations in accordance with the Nation’s laws.
- (E) “District” – Any one of the political subdivisions of the Nation that is vested with certain powers under Article IX of the Constitution of the Tohono O’odham Nation and that is governed by a District Council.
- (F) “District Council” - The duly elected governing council of a District of the Nation which exists in accordance with the Nation’s Constitution and laws.
- (G) “General Welfare Exclusion” – Assistance shall be treated as non-taxable under federal income tax laws so long as it satisfies the requirements for exclusion under Code Section 139E, it is provided under a Safe Harbor Program, or it meets the General test.
- (H) “General Test” – Assistance will be treated as meeting the General Test under the General Welfare Exclusion if the benefits are: (1) paid by or on behalf of the Nation (including its political subdivisions) (2) under a social benefit program, (3) based on either needs of the Nation itself or upon individual needs of the recipient (which need not be financial in nature), and (4) are not compensation for services or per capita payments, based on common law standards established through court decisions and IRS guidance.
- (I) “Lavish” or “Extravagant” shall be determined by the Legislative Council in its sole discretion based on all facts and circumstances, taking into account needs unique to the Nation as well as the social purpose being served by the particular Assistance at hand.
- (J) “Legislative Council” - The duly elected governing body of the Tohono O’odham Nation,

a federally recognized Indian tribal government.

(K) “Member” – An enrolled member of the Tohono O’odham Nation in accordance with the laws of the Nation.

(L) “Nation” – The Tohono O’odham Nation and, if the context requires, shall include political subdivisions of the Nation.

(M) “Pay” or “paid” or “payment” means pay or reimburse in whole or in part.

(N) “Program” means any program established by or under authority of the Legislative Council, including any program authorized by a District Council through an approved annual budget, to provide Assistance under this Chapter. A program shall not fail to be treated as an Indian tribal government Program solely by reason of the Program being established by custom or government practices of the Nation.

(O) “Program Guidelines” – Approved Program descriptions, eligibility rules and limitations, along with application forms and procedures.

(P) “Promotion of the general welfare” or “Social benefit” should reflect a goal or goals established by and in the sole discretion of the Legislative Council, or a District Council with regard to District Programs authorized within an approved annual budget, for the promotion of the general welfare of the Nation, for example, in furtherance of self-determination, self-governance, culture and tradition. These determinations shall be made in accordance with Code Section 139E.

(Q) “Reservation” means the reservation of the Tohono O’odham Nation or, if the context so permits, any other Indian reservation as defined in Internal Revenue Code Section 162(j).

(R) “Safe Harbor Program” shall refer to a Program that meets the requirements of IRS Revenue Procedure 2014-35, as may be amended. Need shall be presumed for Assistance provided under a Safe Harbor Program.

(S) “Service area” has the same meaning as in 25 C.F.R. Section 20.100.

(T) “Service unit area” means an area designated for purposes of administration of Indian Health Service programs under 42 C.F.R. Section 136.21(l).

(U) “Self-determination” or “Self-governance” should be construed broadly to reflect traditional health, education and welfare programs as well as unique cultural and traditional based programs and economic development, including for example, (tax free business grants in part to promote on reservation employment in accordance with PLR 199924026).

ARTICLE II – ENACTMENT AND PURPOSE

Section 3201 Purpose

The Tohono O’odham Nation, a federally recognized tribal government, exercises its inherent rights of sovereignty to promote the general welfare of the Nation, its self-determination, self-governance, culture, and tradition, by providing general welfare assistance, including Indian general welfare benefits within the meaning of Internal Revenue Code Section 139E. Both the United States Congress, through its enactment of the Tribal General Welfare Exclusion Act of 2014, and the Internal Revenue Service, through its traditional application of the general welfare doctrine, has long recognized the sovereign right of governments to provide financial assistance to individuals under certain circumstances on a non-taxable basis. This law is intended to affirm the Nation’s sovereign right to promote the general welfare and provide qualifying Assistance on a non-taxable basis. The purpose of this Chapter is to memorialize the procedures used by the Nation in establishing programs for the promotion of the general welfare and in developing program guidelines for compliance with the general welfare exclusion and Internal Revenue Code Section 139E.

Section 3202 Ratification of Prior Acts; Intent of Legislation

- (A) The Legislative Council, acting as the legislative body of the Nation and through its duly-elected representatives, as well as District Councils, in administering budgets authorized by the Legislative Council, have traditionally exercised the Nation’s sovereign right to provide financial assistance to Members of the Nation in order to promote the general welfare and best interests of the Nation.
- (B) The enactment of this Chapter shall not be construed in a manner to invalidate the qualification of prior program expenditures under the General Welfare Exclusion to the extent consistent with prior policies, customs or government practices of the Nation.
- (C) The Legislative Council further directs that all financial assistance provided to promote the general welfare of the Nation is, and has been, intended to reflect the sovereign act of the Nation within the principles reflected under the General Welfare Exclusion.
- (D) This Chapter, therefore, does not create or establish welfare assistance rights, which are an inherent right of sovereignty vested with the Nation. Rather, this Chapter is intended to confirm, clarify, and codify the procedures used in awarding such assistance and continue enabling the Nation, District, Executive Branch department, and other Administrative Entities and approved Programs to make such awards.

Section 3203 General Welfare Doctrine

The general welfare benefits covered by this Chapter are intended to qualify for favorable tax treatment under the General Welfare Exclusion to the fullest extent permitted at law. Without limitation, the following benefits shall be treated as non-taxable under this Chapter: (1) benefits that satisfy the requirements for exemption under Code Section 139E, (2) benefits that are provided under an IRS Safe Harbor Program, (3) benefits that qualify for exclusion under the IRS General Test, or (4) benefits that meet another express exemption under the Internal

Revenue Code, such as the exemption provided for tribal medical expenses under Internal Revenue Code Section 139D, or that meet other recognized exemptions including, for, example, resource or land-based exemptions under 25 U.S.C. Sections 117a-b, 1407 and 1408.

Section 3204 Non-Resource Designation

Members have no contractual or other right to direct, compel, or alienate payments prior to actual receipt. Benefits paid under this Chapter are for the benefit of the Nation as a whole and not an individual benefit or right of any specific recipient. Benefits paid under this Chapter shall not be treated as a resource or asset of the recipient for any purpose, and shall not be counted against a recipient's eligibility (through income or resource criteria) for other governmental assistance of any kind. The Nation reserves the right to cancel, adjust, modify or revoke any benefits that are treated as a resource of the recipient.

Section 3205 Federal Trust Responsibility

The federal government, through its government-to-government relationship with the Nation, through its trust relationship with the Nation, and through statutes and executive orders, owes certain obligations to the Members of the Nation, much of which has been curtailed through budget shortfalls, which the Nation seeks to supplement, through acts of self-determination and self-governance, in part through this Chapter. The Nation reserves the right to provide Assistance including in circumstances where federal funding is insufficient to operate federal programs designed to benefit Members and when federal funding is insufficient to adequately and consistently fulfill federal trust obligations. The Nation's adoption of Programs under this Chapter is not intended to relieve or diminish the federal government of its funding and trust responsibilities. Nothing in this Chapter shall waive the Nation's right to seek to remedy funding shortfalls or to enforce the trust rights of the Nation and its Members.

Section 3206 Governing Law; Sovereignty

(A) All rights and liabilities associated with the enactment of this Chapter, or the welfare Assistance payments made pursuant to this Chapter, shall be construed and enforced according to the laws of the Nation.

(B) Nothing in this Chapter or the related Program Guidelines shall be construed

(1) to make applicable any laws or regulations which are inapplicable to the Nation or from which the Nation is entitled to exemption in accordance with its status as a sovereign Indian nation or

(2) as a waiver of the Nation's sovereign immunity, which is applicable to the Nation's Districts, agencies, and all employees thereof.

ARTICLE III - GENERAL WELFARE EXCLUSION

Section 3301 Indian General Welfare Benefits (Code Section 139E)

Programs that meet the following criteria for exemption under Code Section 139E shall be treated as non-taxable Assistance under the General Welfare Exclusion without the applicant having to demonstrate individual need:

(A) General Criteria for Qualification under Code Section 139E: Each payment made or service provided to or on behalf of a Member pursuant to a Program under this Chapter shall be treated as non-taxable Assistance under the General Welfare Exclusion so long as the following criteria are met:

- (1) The Program is administered under specified guidelines and does not discriminate in favor of the members of the governing body of the Nation;
- (2) Program benefits are available to any Member who meets such guidelines;
- (3) Program benefits are for the “promotion of the general welfare”;
- (4) Program benefits are not Lavish or Extravagant; and
- (5) Program benefits are not compensation for services.

(B) Ceremonial Activities: Any items of cultural significance, reimbursement of costs, or cash honorarium for participation in cultural or ceremonial activities for the transmission of tribal culture shall not be treated as compensation for services.

(C) Special Effective Dates: Code Section 139E is effective for Assistance in taxable years for which the period of limitations on a refund or credit under Code Section 6511 has not expired. If the period of limitation on a refund or credit resulting from the application of Code Section 139E (a) would otherwise expire before the one-year period beginning on the date of the enactment of Code Section 139E, a refund or credit (to the extent attributed thereto) may be made or allowed if a claim is filed before the close of such one-year period.

Section 3302 Internal Revenue Service Safe Harbor Programs

Programs that meet the following general criteria for safe harbor treatment, and provide qualifying safe harbor benefits shall be treated as non-taxable Assistance under the General Welfare Exclusion without the applicant having to demonstrate individual need:

(A) General Criteria for Safe Harbor Treatment. Each Safe Harbor Program shall satisfy the following general criteria:

- (1) The benefit is provided under a specific Approved Program of the Nation.
- (2) The Program has written guidelines specifying how Members may qualify for the benefit.

(3) The benefit is available to any Member who satisfies the Program guidelines, subject to budgetary restraints.

(4) The distribution of benefits from the Program does not discriminate in favor of the governing body of the Nation.

(5) The benefit is not compensation for services; and

(6) The benefit is not Lavish or Extravagant under the facts and circumstances.

(B) **Qualifying Safe Harbor Benefits:** The following benefits may be provided under a Safe Harbor Program. The benefits listed in the parenthetical language are illustrative only rather than an exhaustive list. Thus a benefit may qualify for exclusion from gross income as a Safe Harbor Program even though the benefit is not expressly described in the parenthetical language, provided that it meets all other requirements of this Section and Revenue Procedure 2014-35 (as it may be amended):

(1) **Housing programs.** Programs relating to principal residences and ancillary structures that are not used in any trade or business, or for investment purposes that--

(a) Pay mortgage payments, down payments, or rent payments (including but not limited to security deposits) for principal residences;

(b) Enhance habitability of housing, such as by remedying water, sewage, sanitation service, safety (including but not limited to mold remediation), or heating or cooling issues;

(c) Provide basic housing repairs or rehabilitation (including but not limited to roof repair and replacement); and

(d) Pay utility bills and charges (including but not limited to water, electricity, gas, and basic communications services such as phone, internet, and cable).

(2) **Educational programs.** Programs to—

(a) Provide students (including but not limited to post-secondary students) transportation to and from school, tutors, and supplies (including but not limited to clothing, backpacks, laptop computers, musical instruments, and sports equipment) for use in school activities and extracurricular activities;

(b) Provide tuition payments for students (including but not limited to allowances for room and board on or off campus for the student) to attend preschool, school, college or university, online school, educational seminars, vocational education, technical education, adult education, continuing education, or alternative education;

- (c) Provide for the care of member children away from their homes to help their member parents or other member relatives responsible for their care to be gainfully employed or to pursue education; and
 - (d) Provide job counseling and programs for which the primary objective is job placement or training, including but not limited to allowances for-- Expenses for interviewing or training away from home (including but not limited to travel, auto expenses, lodging, and food); Tutoring; and appropriate clothing for a job interview or training (including but not limited to an interview suit or a uniform required during a period of training).
- (3) Elder and disabled programs. Programs for Members who have attained age 55 or are mentally or physically disabled (as defined under applicable law, including but not limited to tribal government disability codes or laws) that provide—
- (a) Meals through home-delivered meals programs or at a community center or similar facility;
 - (b) Home care such as assistance with preparing meals or doing chores, or day care outside the home;
 - (c) Local transportation assistance;
 - (d) Improvements to adapt housing to special needs (including but not limited to grab bars and ramps).
- (4) Cultural and religious programs. Programs to—
- (a) Pay expenses (including but not limited to admission fees, transportation, food, and lodging) to attend or participate in an Indian tribe's cultural, social, religious, or community activities such as pow-wows, ceremonies, and traditional dances;
 - (b) Pay expenses (including but not limited to admission fees, transportation, food, and lodging) to visit sites that are culturally or historically significant for the Nation, including but not limited to other Indian reservations;
 - (c) Pay the costs of receiving instruction about an Indian tribe's culture, history, and traditions (including but not limited to traditional language, music, and dances);
 - (d) Pay funeral and burial expenses and expenses of hosting or attending wakes, funerals, burials, other bereavement events, and subsequent honoring events; and

- (e) Pay transportation costs and admission fees to attend educational, social, or cultural programs offered or supported by the Nation or another tribe.
- (5) Other qualifying assistance programs. Programs to--
- (a) Pay transportation costs such as rental cars, substantiated mileage, and fares for bus, taxi, and public transportation between the Reservation, Service area, or Service unit area and facilities that provide essential services to the public (such as medical facilities and grocery stores);
 - (b) Pay for the cost of transportation, temporary meals, and lodging of a Member while the Member is receiving medical care away from home;
 - (c) Provide assistance to Members in exigent circumstances (including but not limited to victims of abuse), including but not limited to the costs of food, clothing, shelter, transportation, auto repair bills, and similar expenses;
 - (d) Pay costs for temporary relocation and shelter for Members displaced from their homes (including but not limited to situations in which a home is destroyed by a fire or natural disaster);
 - (e) Provide assistance for transportation emergencies (for example, when stranded away from home) in the form of transportation costs, a hotel room, and meals;
 - (f) Pay the cost of nonprescription drugs (including but not limited to traditional Indian tribal medicines); and
 - (g) Pay for other items for services that fit within the intent and purpose of the safe harbor but may not be identified in a specific subcategory example, so long as (1) the expense is consistent with the purpose and intent of one or more of the specific safe harbor categories, and (2) all other criteria of the safe harbor and/or Code Section 139E are met.

(C) Compensation Safe Harbor: For Safe Harbor Programs, and subject to amendments to Revenue Procedure 2014-35 hereafter, the Nation will presume that individual need is met for religious leaders or spiritual officials or leaders (including but not limited to medicine men and medicine women) receiving the following benefits, and that the benefits do not represent compensation for services: benefits provided under an Indian tribal governmental Program that are items of cultural significance that are not lavish or extravagant under the facts and circumstances or nominal cash honoraria provided to religious or spiritual officials or leaders (including but not limited to medicine men and medicine women) to recognize their participation in cultural, religious, and social events (including but not limited to pow-wows, rite of passage ceremonies, funerals, wakes, burials, other bereavement events, and subsequent honoring events).

(D) **Safe Harbor Effective Dates:** Safe harbor treatment shall be afforded to any Program or benefit that otherwise satisfies the safe harbor rule as of or after December 6, 2012 or for any earlier taxable period for which the period of limitation on refund or credit under Internal Revenue Code Section 6511 has not expired.

(E) **Non-Safe Harbor Programs:** Nothing in this Chapter or the IRS safe harbor guidance shall limit the Nation's right to provide Assistance outside of the safe harbor rules.

(F) **Future Guidance; Construction: Changes to Revenue Procedure 2014-35:** In the event that Revenue Procedure 2014-35 is hereafter amended, revoked, or superseded, the Nation may continue to look to the above factors as guidance in interpreting the common law to the extent not inconsistent with future guidance or controlling law. The Ordinance shall incorporate by reference any future changes to Safe Harbor relief provided in Revenue Procedure 2014-35 to the extent such changes are more flexible or more permissive than the guidance appearing in Revenue Procedure 2014-35. The above Safe Harbor categories and program expenditures shall be construed to include additional assistance not expressly identified if (1) permitted under applicable rules of construction, and (2) if otherwise consistent with all substantive and procedural requirements of the Safe Harbor.

Section 3303 Programs Meeting the General Test

Programs that do not qualify for non-taxable treatment under Code Section 139E or under an IRS Safe Harbor, will nonetheless be treated as non-taxable if Program benefits meet the General Test, as defined above, for treatment under the General Welfare Exclusion.

Section 3304 Educational Assistance - Special Rules

The Nation has determined that support of Member education is a core need in promoting the general welfare and long term self-determination needs of the Nation. Programs designed to comply with traditional grant and scholarship rules, for example under Code Section 117, while helpful, have proven insufficient to address all needs of the Nation. The Nation intends that benefits, such as but not limited to, living expenses, assistance with child care costs to attend college, and other expenses addressed in Section 3302(B)(2), which may have been available only on a taxable basis in the past, should be afforded treatment under the General Welfare Exclusion to the fullest extent permitted at law. This includes amounts previously reported as taxable benefits to the extent consistent with Code Section 139E or the IRS Safe Harbor, and provided through a Program, government practice or custom of the Nation for any period reflected in Sections 3301(C) or 3302(D). Education assistance may include future service requirements designed to promote the general welfare of the Nation, provided that (1) Assistance benefits shall not be provided in lieu of taxable compensation that a Member may be entitled to for any services provided to the Nation, and (2) in no event will compensation for any such services be treated as a non-taxable benefit in violation of Code Section 139E.

Section 3305 Promotion of General Welfare

All Assistance disbursed pursuant to this Chapter, regardless of whether it is intended to satisfy Code Section 139E, a Safe Harbor, or the General Test, shall be designed to promote the

general welfare, self-determination, culture and tradition of the Nation. Program purposes designed to promote the general welfare may include, for example and not by way of limitation, assistance for burial expenses, clothing, health, education, medical care, shelter, food, subsistence, housing, elder and disabled care, cultural, traditional and religious needs of the Nation and its membership, assistance to promote self-sufficiency, self-determination, self-governance, tribal image and the maintenance of culture and tradition, entrepreneurship, and the employment of Members.

Section 3306 Other Tax Exemptions

Notwithstanding anything in this Chapter to the contrary, the Nation reserves the right to waive income limits or needs basis criteria, to the extent otherwise applicable, for expenditures that otherwise qualify for tax exemptions including tax exemptions under Titles 25 or 26 of the United States Code so long as the conditions for exemption are met. Without limitation, this includes Member medical benefits exempt under Section 9021 of the Patient Protection and Affordable Care Act of 2010 (Code Section 139D) and per capita expenses exempt under 25 U.S.C. Sections 1407 and 1408.

ARTICLE IV – ADMINISTRATION OF PROGRAMS

Section 3401 General

The designated Administrative Entities shall have the responsibility and authority to administer the welfare Assistance Programs covered under this Chapter. An Administrative Entity is empowered to take such actions as may be necessary for the proper administration of a Program, including the exercise of its discretion in construing Program eligibility and other terms and conditions to the extent not inconsistent with the requirements of this General Welfare Law. All decisions of the Administrative Entity upon all matters within the scope of its authority shall be binding and conclusive upon all persons.

Section 3402 Eligibility and Application Procedures

(A) Each approved Program shall set forth the specific eligibility rules and limitations applied to that Program, and shall be administered pursuant to application forms, procedures and Program Guidelines approved by the Chairperson of the Nation or his designee, or the District Council for a District Program.

(B) Program Guidelines may limit benefits to an identified group of Members. Only Program Guidelines that are approved in accordance with this Chapter are in force and effect.

(C) In the absence of specific Program Guidelines to the contrary, all Programs shall be deemed to incorporate eligibility criteria necessary for compliance with Code Section 139E.

Section 3403 Limited Use of Assistance; Substantiation

All Assistance disbursed pursuant to this Chapter must be used for a purpose consistent with this law. The Nation or a District or their designee, as applicable, shall keep books or

records deemed appropriate to demonstrate compliance with this Chapter. However, recipients of benefits under this Chapter are primarily responsible for maintaining books or records as may be required for substantiation to the IRS for individual income tax purposes. In the event that Assistance payments are used or pledged for a purpose inconsistent with the purpose of this law, such Assistance must be repaid.

ARTICLE V - FORFEITURE AND INALIENABILITY OF WELFARE ASSISTANCE

Section 3501 Forfeiture

(A) The Administrative Entity may forfeit Assistance benefits to any Member who is found by the Administrative Entity to have violated the terms of this Chapter or the Program Guidelines for any approved Program. The Administrative Entity may also forfeit Assistance benefits that are treated as a resource to the detriment of the Nation or a Member. In the event of any such forfeiture, all or a portion of the Assistance provided to or on behalf of a Member pursuant to this Chapter must be repaid and shall, subject to applicable Program Guidelines, be deemed a loan and shall be enforceable as such.

(B) Approved Program staff shall promptly notify the Administrative Entity in writing if there is evidence that Assistance is subject to forfeiture and/or repayment in accordance with Program Guidelines.

Section 3502 Anti-Alienation

A Member's right to apply for welfare Assistance under this Chapter is not subject to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, attachment or garnishment.

Section 3503 Annual Budgeting; Unfunded Program

(A) The Legislative Council shall approve annual budgets that provide or allow for the administration of Programs meeting the requirements of this Chapter. Subject to limitations established by the Legislative Council, Assistance may be funded from any sources permitted by the laws of the Nation.

(B) Notwithstanding anything to the contrary, the Assistance payments authorized under this Chapter shall be "unfunded" for tax purposes and no Member shall have an interest in or right to any funds budgeted for or set aside for Assistance payments until paid.

(C) Assistance benefits shall remain assets of the Nation or District until distributed, and the approved Programs shall be administered at all times to avoid the doctrines of constructive receipt and/or economic benefit.

ARTICLE VI – GOVERNMENT-TO-GOVERNMENT CONSULTATION RIGHTS

Section 3601 Government-to-Government Relationship; Executive Order 13175

Coordination with IRS and the United States Treasury Department on General Welfare matters shall be grounded on a government-to-government relationship that recognizes the unique relationship between the federal government and the Nation's government. All references to Executive Order 13175 shall include any future amendments thereto.

Section 3602 Privacy / Information Sharing

(A) The Nation will maintain records regarding sensitive tribal and Member matters including customs, religion and traditions confidential from third party disclosures to the fullest extent permitted at law.

(B) Individuals working on general welfare Program applications may be required to execute a confidentiality agreement on a form approved by Program administrator.