

Centers for Medicare & Medicaid Services Tribal Consultation Policy

1. INTRODUCTION

On November 5, 2009, President Obama signed an Executive Memorandum reaffirming the government to government relationship between the Indian Tribes and the Federal Government, and directing each executive department and agency to engage in regular and meaningful consultation and collaboration with Tribal officials in the development of Federal policies that have Tribal implications and a substantial direct effect on Indian Tribes. The importance of consultation with Indian Tribes was affirmed through Presidential Memoranda in 1994, 2004 and 2009, and Executive Order (EO) 13175 in 2000.

2. BACKGROUND

Since the formation of the Union, the United States (U.S.) has recognized Indian Tribes as sovereign nations. A unique government-to-government relationship exists between Indian Tribes and the Federal Government and this relationship is grounded in the U.S. Constitution, numerous treaties, statutes, Federal case law, regulations and executive orders that establish and define a trust relationship with Indian Tribes. This relationship is derived from the political and legal relationship that Indian Tribes have with the Federal Government and is not based upon race. This special relationship is affirmed in statutes and various Presidential Executive Orders including, but not limited to:

- Older Americans Act of 1965, Pub. L. 89-73, as amended;
- Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, as amended
- The Indian Health Care Improvement Act, Pub. L. 94-437, as amended;-Native Americans Programs Act of 1974, Pub. L. 93-644, as amended
- Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193
- Presidential Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, November 6, 2000;
- Presidential Memorandum, Government-to-Government Relationship with Tribal Governments, September 23, 2004;
- Presidential Memorandum, Tribal Consultation, November 5, 2009;
- American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 115 (Feb. 17, 2009);
- Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. 111-3, 123 Stat. 8 (Feb. 4, 2009);
- Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, 124 Stat. 119 (Mar. 23, 2010).

3. PURPOSE

An integral element of the government to government relationship is that consultation occurs with Indian Tribes. In recognition of this special relationship, the Department of Health and Human Services (HHS) revised its Tribal Consultation Policy on December 14, 2010. Under the HHS Consultation Policy every operating Division of HHS shares the Department-wide responsibility to consult with Indian Tribes. The Centers for Medicare & Medicaid Services (CMS) Tribal Consultation policy hereby incorporates and fully adheres to the HHS Policy as revised on December 14, 2010. The purpose of the CMS Tribal Consultation policy is to build meaningful relationships with Indian Tribes and to establish a clear,

concise and mutually acceptable process through which consultation can take place between CMS and Tribes.

The CMS Tribal Consultation Policy was developed based upon:

- Presidential Executive Order 13175 (2000) and Executive Memorandum on Tribal Consultation (November 5, 2009)
- HHS Tribal Consultation Policy (December 14, 2010)
- Input from the CMS Tribal Technical Advisory Group (CMS TTAG)
- Input from Tribes to ensure a consultation policy that reflects the goals of all partners involved
- Input from the CMS components and CMS regional offices

4. OBJECTIVES

In order to fully effectuate this Consultation Policy, CMS will:

- Formalize CMS' policy to seek consultation and the participation of Indian Tribes in the development of policies and program activities that impact Indian Tribes;
- Create opportunities for Indian Tribes to raise issues with CMS and for CMS to seek consultation with Indian Tribes and communication with the TTAG and Indian organizations when new issues arise;
- Establish a minimum set of requirements and expectations with respect to consultation and participation for the levels of CMS management;
- Conduct Tribal consultation regarding CMS's policies and actions that have tribal implications;
- Establish improved communication channels with Indian Tribes, TTAG, and Indian organizations to increase knowledge and understanding of CMS' programs;
- Coordinate with IHS and other Divisions of HHS on issues of mutual concern;
- Coordinate among CMS Regional Offices and Central Office to assure consistent policy interpretations and interactions of all levels of CMS with Indian Tribes;
- Enhance partnerships with Indian tribes that will include technical assistance and access to CMS programs and resources.

5. TRIBAL CONSULTATION PRINCIPLES

CMS and Indian Tribes share the goals of eliminating health disparities for American Indians and Alaska Natives (AI/AN) and of ensuring that access to Medicare, Medicaid, the Children's Health Insurance Program (CHIP) and Exchanges is maximized. To achieve these goals, and to the extent practicable and permitted by law, it is essential that CMS and Indian Tribes engage in open, continuous and meaningful consultation.

Consultation is an enhanced form of communication that emphasizes trust, respect, and shared responsibility. It is an open and free exchange of information and opinion among parties, which leads to mutual understanding and comprehension. Consultation is integral to a deliberative process that results in effective collaboration and informed decision-making with the ultimate goal of reaching consensus on issues and better outcomes.

To establish and maintain a positive government to government relationship, communication and consultation must occur on an ongoing basis so that Indian Tribes have an opportunity to provide meaningful and timely input on issues that may have a substantial direct effect on Indian Tribes. Consultation with Tribal Governments is especially important in the context of CMS programs because Indian Tribes serve many roles in their tribal communities:

- Tribal members are beneficiaries of services provided by the Indian Health Services (IHS), by tribal health programs operating under the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, as amended, and by urban Indian health programs operating under Title V of the Indian Health Care Improvement Act.
- Tribal members are also eligible to enroll in Medicare, Medicaid, the Children's Health Insurance Program (CHIP) and Exchanges.
- Tribal governments operate businesses, are employers, and are health care providers, through administration of hospitals, clinics, and other health programs.

In 1976, Congress recognized the need for AI/ANs to have access to Medicare and Medicaid services in IHS and Tribal facilities located in Tribal communities and amended titles XVIII and XIX of the Social Security Act to authorize the IHS and Tribal health programs to bill Medicare and Medicaid for services provided in these facilities. Many of the IHS and Tribal facilities are located in remote and isolated locations, experience difficulty in recruitment and retention of health professionals, and endure challenging socio-economic conditions. The involvement of Indian Tribes in the development of CMS policy is crucial for mutual understanding and development of culturally appropriate approaches to improve greater access to CMS programs for AI/ANs, to enhance health care payment and resources to IHS and Tribal health providers, and to contribute to overall improved health outcomes for Indian people.

An action that triggers consultation is any policy that will significantly affect Indian Tribes. Although determined on a case by case basis, such issues could arise in any policy area for which the CMS has responsibility, such as program eligibility standards, changes in provider payment and reimbursement methodologies, or changes in services covered by CMS programs.

To the extent practicable and permitted by law, CMS shall not promulgate any regulation that has Tribal implications, or that imposes substantial direct compliance costs on Indian Tribe(s), or that is not required by statute, unless:

- Funds necessary to pay the direct costs incurred by the Indian Tribe or Indian health provider in complying with the regulation are provided by the Federal Government; or
- CMS, prior to the formal promulgation of the regulation,
 - Consulted with Indian Tribes throughout all stages of the process of developing the proposed regulation;

- Made available to the Administrator any written communications submitted to CMS by Tribal officials and Indian health providers;
- Provided a Tribal summary impact statement in a separately identified portion of the preamble to the regulation as it is to be issued in the *Federal Register* (FR), which consists of a description of the extent of CMS's prior consultation with Indian Tribes, a summary of the nature of their concerns and CMS's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of Tribal officials have been met; and

To the extent practicable and permitted by law, CMS shall not promulgate any regulation that has Tribal implications and that preempts Tribal law, unless CMS, prior to the formal promulgation of the regulation,

- Consulted with Tribal officials throughout all stages of the process of developing the proposed regulation;
- Made available to the Administrator any written communications submitted to CMS by Tribal officials.
- Provided a Tribal summary impact statement in a separately identified portion of the preamble to the regulation as it is to be issued in the FR, which consists of a description of the extent of CMS's prior consultation with Tribal officials, a summary of the nature of their concerns and CMS's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of Tribal officials have been met.

Nothing in this policy waives the Government's deliberative process privilege.

6. ROLES

The government-to-government relationship between the U.S. and Federally recognized Indian Tribes dictates that the principal focus for consultation by CMS is with Indian Tribes, individually or collectively. Consultation parties are:

- Indian Tribes represented by the Tribal President, Tribal Chair, or Tribal Governor, or an elected or appointed Tribal Leader, or their authorized representative (s).
- CMS Administrator, CMS Deputy Administrator, CMS Regional Administrators, or their designee.

Each party will identify his/her authorized representatives with delegated authorities to negotiate on his/her behalf.

CMS Central Office: All of the components at CMS Central Office play a major role in the Department-wide responsibility to consult, coordinate and communicate with Indian Tribes on issues that affect Indian Tribes and CMS programs, services and resources available to Indian Tribes. Within CMS Central, the Tribal Affairs Group, Office of Public Engagement, advises the CMS Administrator, senior staff, and other CMS components on matters affecting American Indian and Alaska Native health, including tribal consultation. The Tribal Affairs Group is the point of contact for compliance with the CMS tribal consultation policy and serves as a resource to assist CMS components and the Administrator in

determining whether a new or proposed change in policy or regulations could significantly affect Indian Tribes. The Tribal Affairs Group will assist in coordination of consultation between Indian tribes and various CMS components, including the Office of Strategic Operations and Regulatory Affairs.

CMS Regional Offices: The ten (10) CMS Regional Offices share in the Department-wide responsibility to consult, coordinate and communicate with Indian Tribes on issues that affect Indian Tribes and HHS programs, services and resources available to Indian Tribes through States. Through Regional Offices, CMS assists Indian Tribes by establishing or maintaining regular communication regarding Medicare, Medicaid, CHIP and Exchanges, policy development and implementation and operational issues, including eligibility, scope of covered services and providers, billing and reimbursement, adequacy of resources, effect of the program on improving health status, and other issues. Further, the CMS Regional Administrators work closely with the respective Indian Tribes and State Governments to ensure continuous coordination and communication between Tribes and States.

While not a substitute for Tribal Consultation, the following entities play an integral role in the identification of policies with substantial direct effect and in providing advice and input on complex technical issues that could assist CMS in determining and understanding the impact and scope of the critical event and the extent of and format for Tribal Consultation.

Tribal Organizations: Pursuant to the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, as amended, Indian Tribes have the authority to delegate their right to carry out programs of the Indian Health Service to a Tribal organization. To the extent this has occurred, as practicable and permitted by law, CMS may provide such Tribal organizations an opportunity to fully participate in Tribal consultation under this policy. Such participation will not substitute for direct consultation with Indian Tribes, but shall occur in addition to consultation with Indian Tribes.

Indian Organizations: At times it is useful that CMS communicate with Indian organizations to solicit Indian Tribe(s) advice and recommendations. These organizations represent the interest of Indian Tribes when authorized by those Tribes. These organizations by the sheer nature of their business serve and advocate Indian Tribal issues and concerns that might be negatively affected if these organizations were excluded from the process. Even though some of the organizations do not represent federally recognized Indian Tribe(s), CMS may communicate with these groups as part of the consultation process. While communication and interaction with Indian organizations is critical, it does not substitute for tribal consultation.

Urban Indian Organizations: Urban Indian organizations are funded under Title V of the Indian Health Care Improvement Act to provide health services to eligible Indians living in urban areas. As health care providers these organizations advocate for and provide services (directly and through referral) to urban Indians. Urban Indian organizations are represented on the TTAG. While communication with Urban Indian organizations is critical, it does not substitute for tribal consultation.

Tribal Technical Advisory Group: (TTAG): The TTAG serves as an advisory body to CMS, providing expertise on policies, guidelines, and programmatic issues affecting the delivery of health care for AI/ANs served through programs funded in whole or part by CMS. Interaction by CMS with the TTAG does not substitute for Tribal consultation, but assists CMS to make consultation more effective including advising on the type of consultation needed on particular issues. The TTAG plays an integral role in the CMS consultation process by providing technical assistance on complex issues faced by Tribal Governments.

7. CMS TRIBAL CONSULTATION PROCESS

Upon identification of a policy that has tribal implications and a substantial direct effect on Indian Tribes or on the relationship between Tribes and the Federal Government, CMS will initiate consultation regarding the policy. In order to initiate and conduct consultation, the following serves as a guideline to be utilized by CMS and Indian Tribes:

- Identify the applicable program, policy, rule, regulation, statute and authorizing legislation;
- Identify how the policy has Tribal implications and a substantial direct effect on one or more Indian Tribes or on the relationship between Tribes and the Federal Government or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.
- Identify affected/potentially affected Indian Tribe(s).

Determine Consultation Mechanism – Upon determination by CMS that consultation is required, CMS will evaluate the nature of the critical event that may have a substantial impact on Indian Tribes to determine the appropriate level of and mechanism for consultation. Such evaluation should include, but is not limited to, a review of the complexity, implications, and time constraints at issue that may impact on policy, funding and/or budget development, programs, services, functions and activities. Consultation mechanisms include but are not limited to one or more of the following:

- Mailings;
- Teleconferences;
- Face-to-face meetings at the local, regional and national levels between the CMS and Indian Tribes;
- Roundtables
- Annual HHS Tribal Budget and Policy Consultation Sessions.
- Other regular or special program level consultation sessions.

Communication Methods: The determination of the critical event and the level of consultation mechanism to be used shall be communicated to affected or potentially affected Indian Tribe(s) using methods appropriate to the issue and with as much advance notice as practicable. These methods include but are not limited to the following:

Correspondence: Written communications exchanged between CMS and Indian Tribes that clearly provide affected/potentially affected Indian Tribe(s) with details of the critical event, and the manner and timeframe in which to identify concerns and potential impacts, and an opportunity to propose alternatives and other comments.

Meeting(s): CMS shall convene a meeting, which may occur by teleconference, webinar, or face-to-face, with affected/potentially affected Indian Tribe(s) to discuss all pertinent issues in a national, regional, and/or local forum, or as appropriate, to the extent practicable and permitted by law, when the critical event is determined to have substantial impact.

Official Notification: Upon the determination of the consultation mechanism, proper notice of the critical event and the consultation mechanism utilized shall be communicated to affected/potentially affected Indian Tribe(s) using all appropriate methods including mailing, broadcast e-mail, Federal Register, and other outlets as appropriate. The FR is the most formal CMS form of notice used for consultation.

Receipt of Tribal Comment(s): The CMS shall develop and use all appropriate methods to communicate clear and explicit instructions on the means and time frames for Indian Tribe(s) to submit comments on the critical event, whether in person, by teleconference, and/or in writing.

Reporting of Outcome: CMS shall report on the outcomes of the consultation within 90 calendar days of final consultation. Once the consultation process is complete and a proposed policy is approved and issued, the final policy must be broadly disseminated to Indian Tribes, posted on the CMS AI/AN webpage, and linked to appropriate Indian organization websites.

8. BUDGET FORMULATION

HHS conducts an annual, Department-wide Tribal budget consultation session to give Indian Tribes the opportunity to present their budget recommendations to the Department to ensure Tribal priorities are addressed. CMS will comply with section 11 of the HHS Tribal Consultation Policy regarding Budget Formulation.

CMS will fully consider all recommendations for funding priorities and amounts established by the TTAG in its annual plan. The TTAG develops and updates an American Indian and Alaska Native Strategic Plan which focuses on specific policy and annual budget priorities.

9. TRIBAL CONSULTATION PERFORMANCE EVALUATION

CMS is responsible for evaluating its performance under this Tribal Consultation Policy. To effectively evaluate the results of the consultation process and the ability of CMS to incorporate Tribal recommendations, CMS will assess its performance on an annual basis based on the reporting requirements outlined in Section 12 of the HHS consultation policy. CMS will include the Tribes and TTAG in this annual review process.

10. MEETING RECORDS AND ADDITIONAL REPORTING.

Meeting Records. CMS is responsible for making and keeping records of its Tribal consultation activity. All such records shall be made readily available to Tribes through the Annual HHS consultation report. CMS shall make and keep records of all TTAG proceedings and recommendations and will have these records readily available.

Reports to Tribes. CMS will comply with HHS annual reporting requirements as outlined in section 13 of the HHS Consultation Policy.

11. CONFLICT RESOLUTION.

The intent of this policy is to promote a partnership with Indian Tribes that enhances CMS' ability to address issues, needs and problem resolution. Nothing in this Policy shall be construed to preclude Indian Tribes from raising issues to responsible officials outside of the consultation process. Nothing in the Policy creates a right of action against CMS or the Department of Health and Human Services for failure to comply with this Policy.

12. TRIBAL SOVEREIGNTY

CMS will fully comply with Section 3 of the HHS Tribal Consultation Policy on Tribal Sovereignty. This policy does not waive any Tribal Governmental rights and authority, including treaty rights, sovereign immunities or jurisdiction. Additionally, this policy does not diminish any rights or protections afforded other American Indians or Alaskan Natives (AI/AN) or entities under Federal law.

13. TRIBAL WAIVER.

CMS will fully comply with Section 15 of the HHS Tribal Consultation Policy on Tribal waivers and process all requests routinely received for waivers under existing program authorities with the statutorily set timeframes.

14. EFFECTIVE DATE.

This Policy is effective on the date of signature by the CMS Administrator.

15. DEFINITIONS

Agency - Any authority of the United States that is an “agency” under 44 USC 3502(1) other than those considered to be independent regulatory agencies, as defined in 44 USC 3502 (5).

Communication – The exchange of ideas, messages, or information, by speech, signals, writing, or other means.

Consultation – An enhanced form of communication, which emphasizes trust, respect and shared responsibility. It is an open and free exchange of information and opinion among parties which leads to mutual understanding and comprehension. Consultation is integral to a deliberative process, which results in effective collaboration and informed decision making with the ultimate goal of reaching consensus on issues.

Coordination and Collaboration – Working and communicating together in a meaningful government-to-government effort to create a positive outcome.

Critical Events – Planned or an unplanned event that has or may have a substantial impact on Indian Tribe(s), e.g., issues, polices, or budgets which may originate within CMS.

Deliberative Process Privilege – Privilege exempting the government from disclosure of government agency materials containing opinions, recommendations, and other communications that are part of the decision-making process within the agency.

Executive Order – An order issued by the Government’s executive on the basis of authority specifically granted to the executive branch (as by the U.S. Constitution or a Congressional Act).

Federally Recognized Tribal governments – Indian Tribes with whom the Federal Government maintains an official government-to-government relationship; usually established by a Federal treaty, statute, executive order, court order, or a Federal Administrative Action. The Bureau of Indian Affairs (BIA) maintains and regularly publishes the list of Federally recognized Indian Tribes.

Indian – Indian means a person who is a member of an Indian Tribe as defined in 25 U.S.C. 479a. Throughout this policy, Indian is synonymous with American Indian/Alaska Native.

Indian Organizations -Those Federally recognized tribally constituted entities that have been designated by their governing body to facilitate CMS communications and consultation activities. Any regional or national organizations whose board is comprised of Federally recognized Tribes and elected/appointed Tribal leaders. The government does not participate in government-to-government consultation with these entities; rather these organizations represent the interests of Tribes when authorized by those Tribes.

Indian Tribe –an Indian or Alaska Native Tribe, Band, Nation, Pueblo, Village or Community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

Policies with Tribal Implications - Refers to regulations, statutes, legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes.

Self-Government – Government in which the people who are most directly affected by the decisions make decisions, including Indian Tribes exercising self-determination and self-governance pursuant to the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, as amended.

Sovereignty – The ultimate source of political power from which all specific political powers are derived.

Substantial Direct Compliance Costs – Those costs incurred directly from implementation of changes necessary to meet the requirements of a Federal regulation. Because of the large variation in Tribes, “substantial costs” is also variable by Indian Tribe. Each Indian Tribe and CMS, working through HHS, shall mutually determine the level of costs that represent “substantial costs” in the context of the Indian Tribe’s resource base.

To the Extent Practicable and Permitted by Law – Refers to situations where the opportunity for consultation is limited because of constraints of time, budget, legal authority, etc.

Treaty – A legally binding and written agreement that affirms the government-to-government relationship between two or more nations.

Tribal Government – An American Indian or Alaska Native Tribe, Band, Nation, Pueblo, Village or Community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 USC 479a.

Tribal Officials – Elected or duly appointed officials of Indian Tribes or Tribal organizations.

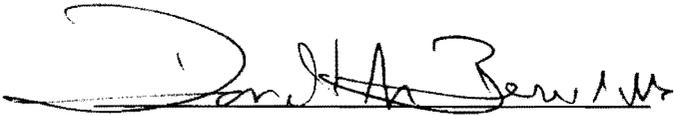
Tribal Organization – The recognized governing body of any Indian Tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: Provided, That in

any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian Tribe, the approval of each such Indian Tribe shall be a prerequisite to the letting or making of such contract or grant.

Tribal Resolution – A formal expression of the opinion or will of an official Tribal governing body which is adopted by vote of the Tribal governing body.

Tribal Technical Advisory Group – An advisory group comprised of individuals who are elected Tribal officials (and/or Tribal employees acting on their behalf), who provide advice and input on policies, guidelines, and programmatic issues affecting the delivery of health care for AI/ANs served by titles XVIII, XIX, and XXI of the Social Security Act or any other health program funded by CMS.

Urban Indian Organization – A program funded under title V of the Indian Health Care Improvement Act.



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Date