



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 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. In addition, there are statutory and regulatory requirements for states to consult with federally recognized tribes and in some instances, to obtain the advice and input from Indian health providers. It is important for states to work closely with tribes on issues related to Medicaid, Children's Health Insurance Program (CHIP), Health Insurance Marketplaces, and other CMS-related issues to promote the participation of eligible American Indian and Alaska Natives (AI/AN) in these programs.

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. This relationship is grounded in the U.S. Constitution, numerous treaties, statutes, federal case law, regulations and executive orders that establish and define a unique and special relationship with Indian tribes. This government-to-government relationship recognizes the right of tribes to tribal sovereignty, self-government and self-determination. This relationship is derived from the political and legal relationship that Indian tribes have with the federal government and is not based upon race. Laws that provide certain exemptions or protections for Indian tribes or affirm the special relationship between the federal government and tribes include, but are 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, Pub. L. 111-148, 124 Stat. 119 (Mar. 23, 2010) as amended by the Health Care and Education Reconciliation Act of 2010;
- The Snyder Act; and,
- Titles XVIII, XIX, and XXI of the Social Security Act.

3. PURPOSE

3.1 The Centers for Medicare & Medicaid Services (CMS), an agency within the U. S. Department of Health and Human Services (HHS), and Indian tribes share the goal to establish clear policies to further the government-to-government relationship between the federal government and Indian tribes. An integral element of the government-to-government relationship is that consultation occurs with Indian tribes. 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. Each office, center, operating unit and regional office within CMS shares in the responsibility to consult with Indian tribes and to comply with this policy.

3.2 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 (TTAG);
- Input from tribes to ensure a consultation policy that reflects the goals of all partners involved; and,
- Input from CMS components and CMS regional offices.

4. OBJECTIVES

In order to fully effectuate this consultation policy, CMS will:

- 4.1** Formalize CMS' policy to seek consultation and the participation of Indian tribes in the development of policies and program activities that impact Indian tribes;
- 4.2** Create opportunities for Indian tribes to raise issues with CMS, and for CMS to seek consultation with Indian tribes and communication with TTAG and Indian organizations when new issues arise;
- 4.3** Establish a minimum set of requirements and expectations with respect to consultation and participation for CMS management;

- 4.4 Conduct tribal consultation regarding CMS' policies and actions that have tribal implications;
- 4.5 Establish improved communication channels with Indian tribes, TTAG and Indian organizations to increase knowledge and understanding of CMS programs;
- 4.6 Coordinate with the Indian Health Service (IHS) and other HHS divisions on issues of mutual concern;
- 4.7 Coordinate among CMS regional offices and Central Office to assure consistent policy interpretations and interactions of all levels of CMS with Indian tribes;
- 4.8 Enhance partnerships with Indian tribes that will include technical assistance and access to CMS programs and resources.

5. TRIBAL CONSULTATION PRINCIPLES

- 5.1 CMS and Indian tribes share the goals of eliminating health disparities for AI/ANs and ensuring that access to critical health services, including those made available through Medicare, Medicaid, CHIP and the Health Insurance Marketplace is maximized, and to advance or enhance the social, physical and economic status of American Indians. 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.
- 5.2 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.
- 5.3 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 IHS, tribal health programs operating under the Indian Self-Determination and Education Assistance Act, Pub. L. 93- 638, as amended, and 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, CHIP and the Health Insurance Marketplace.
 - Tribal governments operate businesses, are employers, and are health care providers, through administration of hospitals, clinics and other health programs.

- 5.4** 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. Congress amended titles XVIII and XIX of the Social Security Act to authorize IHS and tribal health programs to bill Medicare and Medicaid for services provided in these facilities. Many 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 resources to IHS and tribal health programs, and to contribute to overall improved health outcomes for American Indians.
- 5.5** An action that triggers consultation is any policy that will significantly impact Indian tribes. Although determined on a case-by-case basis, such issues could arise in any policy area for which CMS has responsibility, such as program eligibility standards, changes in provider payment and reimbursement methodologies, or changes in services covered by CMS programs.
- 5.6** To the extent permitted by law, when undertaking to formulate and implement policies that have tribal implications, CMS shall:
- Encourage Indian tribes to develop their own policies to achieve program objectives;
 - Where possible, defer to Indian tribes to establish standards; and,
 - In determining whether to establish federal standards, consult with tribal officials as to the need for federal standards and any alternatives that would limit the scope of federal standards or otherwise preserve the prerogatives and authority of Indian tribes.
- 5.7** To the extent practicable and permitted by law, CMS shall not promulgate any regulation that has tribal implications, 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; and,
 - 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*, 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.

5.9 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, tribal governor, an elected or appointed tribal leader, or their authorized representative(s).
- CMS Administrator, CMS Deputy Administrator, CMS center leadership, CMS regional leadership, or their designee.

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

6.1 Roles within CMS

- 6.1.1 CMS:** All of the components within CMS 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.
- 6.1.2 Division of Tribal Affairs:** Within CMS Central Office, the Division of Tribal Affairs (DTA), Intergovernmental and External Affairs Group, Center for Medicaid and CHIP Services, advises the CMS Administrator, senior staff, and other CMS components on matters affecting AI/AN health, including tribal consultation. DTA 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 impact Indian tribes. DTA will assist in coordination of consultation between Indian tribes and various CMS components, including the Office of Strategic Operations and Regulatory Affairs. DTA will be responsible for notifying the Indian tribes and responding to requests for consultation and other tribal correspondence.
- 6.1.3 CMS Regional Offices:** The 10 CMS regional offices share in the Department-wide responsibility to consult, coordinate and communicate with Indian tribes on issues that impact Indian tribes and HHS programs, services and resources available to Indian tribes through states. Through

the regional offices, CMS assists Indian tribes by establishing or maintaining regular communication regarding Medicare, Medicaid, CHIP and the Health Insurance Marketplace; 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.

As with all CMS components, CMS regional leadership will also promote and comply with the requirements of this policy and work closely with the respective Indian tribes and state governments to ensure continuous coordination and communication between tribes and states.

6.2 Roles that Support CMS

6.2.1 Tribal Technical Advisory Group: In September 2003, CMS established the TTAG comprised of representatives of tribal governments and national Indian organizations based in Washington DC. TTAG was codified by statute in the American Recovery and Reinvestment Act (ARRA) in 2009, under which representatives from a National Urban Indian Organization and IHS were added. TTAG serves as an advisory body to CMS, providing expertise on policies, guidelines, and programmatic issues impacting the delivery of health care for AI/ANs served through programs funded in whole or part by CMS. Interaction by CMS with 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. TTAG plays an integral role in CMS' consultation process by identifying critical events and by providing technical assistance on complex issues faced by tribal governments.

6.3 Role Outside CMS

The following entities play an integral role in the identification of policies with substantial direct effect on tribes and in providing advice and input on complex technical issues. Their input assists CMS in determining the impact of the critical event and the extent of and format for tribal consultation by CMS.

In addition, states are required to seek advice from Indian health providers, which includes IHS, tribal health programs (whether operated directly by a tribe or by a tribal organization), and urban Indian organizations that operate health programs, prior to the submission of SPAs and requests for waivers. *See*, Section 8 regarding state consultation requirements.

6.3.1 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 IHS programs to a tribal organization. To the extent this has occurred, CMS will 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.

6.3.2 Indian Health Providers: Indian health providers, which include IHS, tribal health programs, and urban Indian health programs, deliver culturally appropriate direct and purchased health care for AI/ANs, and often serve as critical rural health care providers in communities with few, if any, other health care providers. While communication with Indian health providers is critical, it does not substitute for tribal consultation.

6.3.3 Indian Health Service: IHS has a unique historical understanding and role that requires close coordination with CMS. CMS is committed to working closely with IHS on tribal issues in the administration of CMS programs. This is achieved through HHS processes, TTAG, as well as direct communication between IHS and CMS. While the communication with IHS is critical, it does not substitute for tribal consultation.

6.3.4 Indian Organizations: At times, it is useful that CMS communicate with Indian organizations to solicit advice and recommendations from Indian tribes. 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 tribes, 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.

6.3.5 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 TTAG. While communication with urban Indian organizations is critical, it does not substitute for tribal consultation.

7. CMS TRIBAL CONSULTATION PROCESS

7.1 Identification of Need. 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 tribes and tribal organizations.
- CMS will respond to tribal consultation requests by tribes and tribal organizations in a timely manner consistent with the requirements of CMS and HHS policies.

7.2 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 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 CMS and Indian tribes;
- Roundtables;
- Annual HHS Tribal Budget and Policy Consultation Sessions; and,
- Other regular or special program level consultation sessions.

7.3 Communication Timelines: The determination of the critical event and the level of consultation mechanism to be used shall be communicated to affected/potentially affected Indian tribes and tribal organizations using methods appropriate to the issue and with as much advance notice as practicable. DTA will respond to consultation requests in a timely manner using one of the following methods below.

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

7.5 Meeting(s): CMS shall convene a meeting, which may occur by teleconference, webinar, or face-to-face, with affected/potentially affected Indian tribes and tribal organizations 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.

- 7.6 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 tribes and tribal organizations using all appropriate methods including mailing, broadcast e-mail, notice in the *Federal Register* and other outlets as appropriate. The *Federal Register* is the most formal CMS form of notice used for consultation.
- 7.7 Receipt of Tribal Comment(s):** CMS shall develop and use all appropriate methods to communicate clear and explicit instructions on the means and time frames for Indian tribes and tribal organizations to submit comments on the critical event, whether in person, by teleconference, and/or in writing.
- 7.8 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 and tribal organizations posted on the CMS AI/AN webpage, and linked to appropriate Indian organization websites.

8. STATE-TRIBAL CONSULTATION

8.1 Applicable Law.

The state tribal consultation process for the submission of new and renewals of Medicaid and CHIP 1115 demonstrations and other Medicaid waivers, the State Based Marketplace (SBM) and State Partnership Marketplace (SPM) are driven by federal law and regulations and/or guidance issued by CMS.

- 8.1.1 Section 5006(e) of the American Recovery and Reinvestment Act:** AARA requires any state with one or more Indian health providers to obtain advice and input on a regular and ongoing basis prior to submission of any Medicaid or CHIP Medicaid State Plan Amendments (SPAs), waiver request or proposal for a demonstration project that is likely to have a direct effect on Indians and Indian health providers. This requirement applies even if no federally recognized tribes are located within the state. States are required to submit a Medicaid SPA in order to document its process for such consultation.

In assessing, evaluating and monitoring state-Tribal consultation, CMS will encourage states to be as responsive as possible to the issues and concerns expressed by the tribes during the consultation process.

For more information, see the January 22, 2010 State Medicaid Director (SMD) Letter, #10-001, <http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SMD10001.PDF> and at <http://www.cms.gov/Outreach-and-Education/American-Indian-Alaska-Native/AIAN/StateTribal-RelationsonHealthcare.html>

8.1.2 Section 1115 Transparency Regulations: CMS regulations, at 42 CFR 431.408(b), require states to consult with federally recognized Indian tribes and seek advice from Indian health providers prior to submission of an application to CMS for a new demonstration project or extension that has or would have a direct effect on Indian tribes or Indian health providers. Under these regulations, the state must conduct consultation consistent with the process outlined in the July 17, 2001 SMD letter #01-024 (July 2001 SMD letter) or the state's approved Medicaid state plan. The state must document its consultation activities as part of its demonstration application and must demonstrate that it has consulted with tribes and has sought advice from Indian health providers prior to submitting the demonstration project or extension.

8.1.3 July 17, 2001 State Medicaid Director Letter #01-024: The July 2001 SMD letter describes the tribal consultation process that states must employ prior to submitting any Section 1915 and 1115 waiver request. The SMD requires states to consult with all federally recognized tribal governments maintaining a primary office and/or major population in the state at least 60 days before the state intends to submit a Medicaid waiver request or waiver renewal to CMS, or to follow the consultation state plan if the state plan addresses government-to-government consultation with tribes. For example, because consultation is on a government-to-government basis, tribal consultation is required in those instances when there is a major population or concentration of tribal members (without a tribal governmental office) on one side of a state border that utilizes tribal governmental services on the other side of the state border. In that instance, the state where the major population resides would be required to consult with the tribal government under this policy.

The notification required by the July 2001 SMD letter must describe the purpose of the waiver or renewal and its anticipated impact on tribal members. In order for tribal governments to understand the impact on its tribal members, the notification should include the actual language from the demonstration waiver or renewal that has tribal implications and should not be in summary or outline form. In reviewing whether the notification requirements have been met, CMS will review the description of the demonstration waiver or renewal submitted to CMS to determine if it differs in material respects from the description of the demonstration waiver or renewal provided in the notification to tribal governments.

8.1.4 CMS Regulations regarding State Based/Partnership Marketplace: CMS regulations at 45 CFR § 155.130(f) require that the Federally Facilitated Marketplace and State-based Marketplace must regularly consult on an ongoing basis with stakeholders, including federally recognized tribes that are located within the Marketplace's geographic area.

8.2 CMS' Role in the State Tribal Consultation Process:

- 8.2.1 Initial CMS Review.** During the agency's review of Medicaid Section 1915 and Section 1115 waivers and SPAs, CMS will review the documents submitted by the state to determine if the state has consulted with tribes or has sought the advice of Indian health providers. CMS will review the state's notification process, entities involved in the consultation, dates and locations of the consultation, issues raised, and outcome resulting from the consultation. CMS will provide notice to the federally recognized tribes, Indian health programs and urban Indian Organizations in the state submitting the waiver request that the state has submitted the waiver request and provide the information provided by the state with regard to the tribal consultation process. If it is determined that the state did not adequately consult with tribes or obtain advice from Indian health providers, the waiver or SPA will be deemed incomplete and CMS will notify the state and affected tribes that the SPA or waiver has been deemed incomplete.
- 8.2.2 Changes during CMS Review.** If during consideration of a SPA or waiver request by a state, CMS or the state, proposes amendments to the SPA or waiver that would cause the proposal to have a direct effect on Indian health providers or federally recognized tribes or an effect different than that about which consultation was initially sought, CMS will initiate directly or require the state to initiate a renewed consultation with such Indian health providers and tribes.
- 8.2.3 Prior to Final Approval by CMS.** At any time during the waiver or SPA process, a tribe or tribal organization may invoke the CMS Tribal Consultation Policy and request consultation with CMS directly before a final decision to approve the waiver or SPA is made by the agency. CMS encourages tribes or tribal organizations to complete its consultations with the state before requesting consultation with CMS, as the state could rule favorably on behalf of the tribe and no consultation would be needed by CMS. However, tribes maintain the right to request tribal consultation with CMS at any time.

9. 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 tribal specific funding priorities and amounts recommended by tribal leaders and TTAG, including the recommendations in the "American Indian and Alaska Native Strategic Plan."

10. 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 provide TTAG with a copy of HHS' annual Tribal Consultation Report.

11. MEETING RECORDS AND ADDITIONAL REPORTING.

11.1 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 upon request and/or posted online.

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

12. 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 HHS for failure to comply with this policy.

13. 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 AI/AN or entities under federal law.

Tribal sovereignty is based on the special government-to-government relationship between the federal government and Indian tribes, established in 1787, based on the U.S. Constitution, and has been given form and substance by numerous treaties, laws, U.S. Supreme Court decisions, and executive orders, and reaffirms the right of Indian tribes to self-government and self-determination. Indian tribes exercise inherent sovereign powers over their citizens and territory. The U.S. shall continue to work with Indian tribes on a government-to-government basis to address issues concerning tribal self-government, tribal trust resources, tribal treaties and other rights. Tribal self-government has been demonstrated to improve and perpetuate the government-to-government relationship and strengthen tribal control over federal funding that it receives and over its internal program management. Indian tribes participation in the development of public health and human services policy ensures locally relevant and culturally appropriate approaches to public issues.

14. 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.

15. EFFECTIVE DATE.

This policy is effective on the date of signature by the CMS Administrator

16. 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 identified by CMS, TTAG, Indian tribes or tribal organizations that has or may have a substantial direct effect on Indian tribes, e.g., CMS guidance, policies or budgets.

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 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. For purposes of the Marketplace, American Indians are members of federally recognized tribes. For purposes of Medicare, Medicaid, and CHIP, the definition of American Indian is defined at 42 CFR 447.51.

Indian Health Provider - means IHS, tribal health programs, and urban Indian organizations.

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 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.

State-Tribal Consultation - *See* Section 8 of the CMS Tribal Consultation Policy.

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 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.

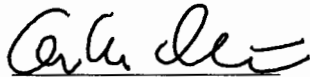
Tribal Officials - Elected or duly appointed officials of Indian tribes or tribal organizations.

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.



Andrew M. Slavitt
Acting Administrator, CMS

DEC 10 2015

Date