

Tribal Technical Advisory Group

to the Centers for Medicare and Medicaid Services

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April 4, 2007

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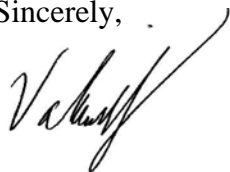
Dear Ms. Norwalk,

On behalf of the Tribal Technical Advisory Group (TTAG), I want to thank you for your dedication and willingness to work with us to better address Medicare and Medicaid issues affecting American Indian and Alaska Natives. In efforts to improve tribal relations with the Centers for Medicare & Medicaid Services (CMS), the TTAG Subcommittee on Tribal Consultation Policy has prepared a CMS Tribal Consultation Policy, enclosed, for CMS review.

As the policy explains, a unique government-to-government relationship exists between Indian tribes and the Federal Government which is grounded in numerous treaties, statutes, executive orders as well as political, legal, moral, and ethical principles. Implementation of this CMS Tribal Consultation Policy would recognize this unique relationship, which is quite distinct from a relationship based upon race. The TTAG strongly believes that executing the CMS Tribal Consultation Policy would greatly improve our relationship and partnership with CMS.

We invite you to join us at our next TTAG meeting to further discuss the CMS Tribal Consultation Policy. The meeting is tentatively scheduled for August 1-2, 2007 in Washington, DC.

Sincerely,



Valerie Davidson, Chair
Tribal Technical Advisory Group

Cc: Herb Kuhn, Acting CMS Deputy Administrator
Dr. Charles Grim, Director of the Indian Health Service
CMS Tribal Affairs Staff
TTAG

CMS Tribal Consultation Policy
Prepared by TTAG Consultation Policy Subcommittee to Address Comments
March 12, 2007
FOR CMS REVIEW

1. Introduction

The Centers for Medicare & Medicaid Services (CMS) and Indian Tribes share the goals of eliminating health disparities of American Indians and Alaska Natives (AI/AN) and ensuring that access to Medicare, Medicaid, and State Children's Health Insurance programs (SCHIP) is maximized. To achieve these goals, and to the extent practicable and not prohibited by law, it is essential that federally recognized Indian Tribes and CMS engage in open, continuous, and meaningful consultation. Effective consultation leads to information exchange, mutual understanding, and informed decision-making.

The commitment of the United States government to consultation with Indian Tribes has been affirmed in Presidential Memoranda in 1994 and 2004, in Executive Orders issued by the President in 1998 and 2000, directives from the White House Domestic Policy Council Working Group on Indian Affairs, and in recommendations from the Department of Health and Human Services (HHS) Working Group on Consultations with American Indians and Alaska Natives.

The Department of Health and Human Services (HHS) adopted a Tribal Consultation Policy on January 14, 2005. Under the HHS Consultation Policy every operating unit of HHS shares in the Department-wide responsibility to coordinate communicate and consult with Indian Tribes on issues that affect these governments and their citizens. All operating Divisions, including CMS, are responsible for conducting tribal consultation on policies, including the promulgation of regulations, that have impact on Indian Tribes.

This CMS policy on consultation complies with the Presidential Domestic Policy Council and HHS policies regarding consultation with tribal governments.

2. Background

Since the formation of the Union, the United States 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 numerous treaties, statutes, and executive orders as well as political, legal, moral, and ethical principles. This relationship is not based upon race, but rather, is derived from the government-to-government relationship. The Federal Government has enacted numerous regulations that establish and define a trust relationship with Indian Tribes. An integral element of this government-to-government relationship is that consultation occurs with Indian Tribes. The implementation of this CMS Consultation Policy is in recognition of this special relationship.

This special relationship is affirmed in statutes and various Presidential Executive Orders including, but not limited to:

- The Snyder Act, P.L. 67-85;
- Older Americans Act of 1965, P.L. 89-73, as amended;
- Indian Self-Determination and Education Assistance Act, P.L. 93-638, as amended;

- Native Americans Programs Act of 1974, P.L. 93-644, as amended;
- Indian Health Care Improvement Act, P.L. 94-437, as amended;
- Social Security Act, Titles IXX, XX, XXI;
- Unfunded Mandates Reform Act of 1995, P.L. 104-4;
- Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P. L. 104-193;
- Presidential Executive Memorandum to the Heads of Executive Departments dated April 29, 1994;
- Presidential Executive Order 13084, *Consultation and Coordination with Indian tribal Governments*, May 14, 1998;
- Presidential Executive Order 13175, *Consultation and Coordination with Indian tribal Governments*, November 6, 2000; and
- Presidential Memorandum, Government-to-Government Relationship with tribal Governments, September 23, 2004.

3. Tribal Sovereignty

This policy does not impair any rights of Indian Tribes, including treaty rights, sovereign immunities or jurisdiction. Additionally, this policy does not diminish any rights or protections afforded to American Indian/Alaska Native (AI/AN) persons or other AI/AN entities under federal law.

The United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian Tribes to self-government and self-determination. Indian Tribes exercise inherent sovereign powers over their members and territory. The United States continues 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. The constitutional relationship among sovereign governments is inherent in the very structure of the Constitution, and is formalized in and protected by Article I, Section 8.

Increasingly, this special relationship has emphasized self-determination and meaningful involvement for Indian Tribes in federal decision-making (consultation) where such decisions have impact on Indian Tribes. The involvement of Indian Tribes in the development of public health and human services policy allows for locally relevant and culturally appropriate approaches to public issues. 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 its internal program management.

4. Policy

The guiding principle of this policy is to ensure that, pursuant to the special relationship between the United States and Indian Tribes, and to the greatest extent practicable and not prohibited by law, broad based input is sought by CMS prior to taking actions that have impact on Indian Tribes.

Such actions refer to policies, including the promulgation of regulations, that have impact on Indian Tribes and 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. Nothing in this policy waives the Federal Government's deliberative process privilege. For example, in instances where the CMS is specifically requested by Members of Congress to respond to or report on proposed legislation, the development of such responses and of related policy is a part of the Executive Branch's deliberative process privilege and should remain confidential. In specified instances where Congress requires CMS to work with Tribes on the development of recommendations that may require legislation, such reports, recommendations or other products are developed independent of CMS position, the development of which is governed by Office of Management and Budget (OMB)-Circular A-19.

4.1. CMS's consultation process will ensure meaningful and timely input by tribal officials in the development of policies that have impact on Indian Tribes.

4.2. CMS shall not promulgate any regulation that has impact on Indian Tribes or that imposes substantial direct compliance costs on Indian Tribe(s), unless:

4.2.1. It is required by statute;

4.2.2. Funds necessary to pay the direct costs incurred by the Indian Tribe in complying with the regulation are provided by the Federal Government; or

4.2.3 CMS, prior to the formal promulgation of the regulation, consulted with tribal officials early and throughout the process of developing the proposed regulation as guided by these policies; and a separately identified portion of the preamble to the regulation as it is to be issued in the *Federal Register* (FR), provides a tribal summary impact statement, which consists of a description of the extent of the prior consultation with tribal officials, a summary of the nature of their concerns and the agency'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 makes available to the Administrator any written communications regarding the proposed regulations submitted to CMS by tribal officials.

4.3. CMS shall not promulgate any regulation that has impact on Indian Tribes or that preempts tribal law unless, CMS, prior to the formal promulgation of the regulation, has

4.3.1. consulted with tribal officials early and throughout the process of developing the proposed regulation;

4.3.2. in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provided a tribal summary impact statement, which consists of a description of the extent of the prior consultation with tribal officials, a summary of the nature of their concerns and the CMS 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

4.3.3. made available to the Administrator any written communications submitted to the agency by tribal officials.

4.4. On issues relating to tribal self-governance, tribal self-determination, tribal trust resources,

or tribal treaty and other rights, CMS should explore, and where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

4.5. The special “Tribal-Federal” relationship is based on the government-to-government relationship. Other statutes and policies exist that allow communication with urban Indian organizations. Even though urban Indian organizations are not Indian Tribes, CMS is able to communicate with these organizations individually. If CMS wants to include organizations that do not represent a specific federally recognized tribal government on advisory committees or workgroups then Federal Advisory Committee Act (FACA) requirements must be followed.

5. CMS Core Values

The Centers for Medicare & Medicaid Services are guided by a set of core values: Public Service, Integrity, Accountability, Excellence and Respect. These core values embody CMS’ commitment to its programs and pledge to quality services and responsiveness to beneficiaries, health care professionals, and partners. The federal delivery of health services and funding of programs to maintain and improve the health of AI/ANs are consonant with and required by the Federal Government's historical and unique legal relationship between Indian tribes and the United States. This relationship has resulted in a government-to-government relationship that is embodied in tribal consultation.

The attainment of CMS’s core values cannot be achieved without effective tribal consultation. A desired outcome of such consultation is acceptance of the tribal position on issues that have impact on Indian Tribes to the extent not prohibited by law.

6. Objectives

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

- 6.1.** Establish improved communication channels with tribal officials and other AI/AN organizations, as necessary, to increase knowledge and understanding of CMS’s programs; Medicare, Medicaid, and State Children’s Health Insurance Program;
- 6.2.** Create opportunities for Indian Tribes to raise issues with CMS and for CMS to seek consultation with Indian Tribes and communication with Indian organizations when new issues arise;
- 6.3.** Establish a minimum set of requirements and expectations with respect to consultation and participation for the levels of CMS management;
- 6.4.** Conduct tribal consultation when CMS’s policies have impact on Indian Tribes;
- 6.5.** To the extent not prohibited by law, require States to consult with Indian Tribes in the development of waivers and other changes in programs funded in whole or in part by CMS.
- 6.6.** Coordinate with IHS on issues of mutual concern.

6.7. Coordinate among CMS Regional Offices and Central Office to assure consistent policy interpretations, interaction of all levels of CMS with Indian Tribes, and direction to State Agencies regarding issues that have impact on Indian Tribes; and

6.8. Enhance partnerships with Indian Tribes that will include technical assistance and access to CMS programs and resources.

7. Roles

Achievement of the goals and objectives of this Consultation Policy requires clear definition of the roles of the entities involved.

7.1 American Indian/Alaska Native

7.1.1. Indian Tribe(s): The government-to-government relationship between the United States and Indian Tribes dictates that the principal focus of CMS consultation is with individual Indian Tribes.

7.1.2. 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, 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.

7.1.3. Other Indian Organization(s). It is frequently necessary that the CMS communicate with Indian Organization(s) and/or committees to solicit consensual tribal advice and recommendations. Although, the special “Tribal-Federal” relationship is based on the government-to-government relationship with Indian Tribe(s), other statutes and policies exist that allow for consultation with Indian Organization(s). These organizations by the nature of their business serve and represent Indian Tribe(s) issues and concerns that might be affected if these organizations were excluded from the consultation process. Even though some of the organizations/committees do not represent federally recognized Indian Tribe(s), CMS is able to communicate with these groups.

7.2. CMS

7.2.1. Central Office. The CMS Central Office has oversight responsibility for the Regional Office consultations, and will as necessary identify issues on which the Regional Offices will consult and otherwise help Regional Offices to carry out their consultative responsibilities. The Central Office will also address issues arising out of the consultation process that require a new policy or clarification of a policy or the establishment of a new policy as a result of statutory changes. The Central Office will seek advice from the Tribal Technical Advisory Group (TTAG) on the consultative approach to be used and will use the TTAG in policy deliberations to the extent practicable and not prohibited by law.

7.2.2. Regional Offices. The Regional Offices will have primary responsibility for

carrying out tribal consultations on an ongoing basis at least once a year. The CMS Regional Administrator will ensure that CMS' consultation process is carried out in accordance with this Tribal Consultation Policy with the Indian Tribe(s) in that region. To this end, the Regional Offices will engage in and facilitate open and meaningful consultation with Indian Tribe(s) to the extent practicable and not prohibited by law. These consultations will lead to information exchange, mutual understanding, and informed decision-making.

7.2.3. Tribal Technical Advisory Group. The CMS Tribal Technical Advisory Group (TTAG) is comprised of representatives of Tribal Governments and Washington, D.C. based national Indian organizations that have been authorized by tribal leaders. The TTAG will serve 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 effective. The TTAG operates according to a Charter, which was initially adopted in 2003 and that has been and may further be amended, that broadly defines the scope of issues about which the TTAG advises CMS and the TTAG's participation in policy development, implementation and consultation. TTAG activities include:

7.2.3.1. Proposing clarifications and other recommendations and solutions to address issues raised at tribal, regional and national levels;

7.2.3.2. Identifying priorities and providing advice on appropriate strategies for tribal consultation on issues at the tribal, regional and/or national levels; and

7.2.3.3. Coordinating with CMS Regional Offices' tribal consultation initiatives.

8. Tribal Consultation Principles

8.1. Trust among CMS, IHS and Indian Tribe(s) is an indispensable element in establishing a good consultative relationship. To establish and maintain trust, consultation must occur on an ongoing basis. Both CMS and Tribe(s), directly and through the TTAG, must be able to raise issues that need to be addressed. The degree and extent of consultation will vary depending on the identified event and will be guided by advice from the TTAG. All levels of CMS management, in collaboration with the TTAG, shall follow these steps to determine the nature and extent of consultation that should occur to ensure that the requirements of this Policy are satisfied.

8.1.1. Identify the issue that triggers the need for consultation, including the complexity, implications on funding, time constraints, policy and programs that have impact on Indian Tribes;

8.1.2. Identify affected/potentially affected Indian Tribe(s) or Indian organizations;

8.1.3. Identify impacted/potentially impacted Indian Tribe(s).

8.2. Identify the consultation process after considering the issue and Indian Tribe(s) impacted/potentially impacted.

8.3. Consultation occurs whenever the CMS Administrator and tribal official(s), and/or their designees, meet or exchange written correspondence to discuss any issue(s) concerning either party. Consultation with a single Indian Tribe will not substitute for consultation with all Indian Tribes on issues that may affect more than one Indian Tribe. All CMS staff who have a role in the development or implementation of policy affecting AI/ANs or Indian Tribes shall participate in training on this CMS Tribal Consultation Policy, its expectations, and its outcomes. The TTAG shall participate in the development and review of the curricula and materials for such training.

9. Consultation Process

CMS engages in consultation with Tribes about policy issues at a variety of levels through a variety of methods to facilitate tribal consultation on policies that have impact on Indian Tribes.

9.1. Direct Consultation by CMS

9.1.1. New or Changing Policy or Program Implementation

9.1.1.1. When new policy, budgetary, or implementation issues are identified on which tribal views have not been previously obtained, CMS will conduct national tribal consultation to solicit official tribal comments and recommendations. Such consultations will be initiated by a written communication directed to tribal leaders and Indian health programs explaining the background, describing the proposed action or request for guidance, and requesting a response.

9.1.1.2. Face-to-face consultation sessions are encouraged. These may be scheduled as a single national meeting, through a series of specially convened regional meetings, or in conjunction with other national and regional meetings. Whenever possible, Indian Tribes will be consulted at the earliest appropriate stage in the development of a new or changing policy or program implementation.

9.1.2. Ongoing Consultation.

9.1.2.1. Annually, through national and regional consultation processes, CMS will provide opportunities for Indian Tribes to identify budgetary, policy and implementation issues that the Tribes believe need to be addressed. CMS will participate in all HHS regional and national consultations, and, as requested in consultation meetings sponsored by other HHS agencies or Indian Tribes.

9.1.2.2. CMS will provide an opportunity for submission of written comments during any period of ongoing consultation.

9.1.2.3. Through its regional offices, CMS also meets regularly with Indian Tribes. To the extent issues of general application are discussed in such meetings, reports will be provided to CMS Central Office and the TTAG for follow-up, as appropriate.

9.1.3. Consultation with One or More Individual Indian Tribes. An Indian Tribe may meet one-on-one or correspond with CMS to address, or provide consultation to CMS

regarding, issues specific to that Indian Tribe. Such communications constitute consultation under this policy, but may not substitute for broader consultation as provided in this policy when the issue may impact other Indian Tribes.

9.1.4. Follow-up to Consultation.

9.1.4.1. CMS, upon completion of a consultation session, will document and follow-up on any unresolved issues that would benefit from ongoing involvement of Indian Tribes in implementation and evaluation.

9.1.4.2. CMS will post all materials developed in follow-up to consultation on the CMS AI/AN website homepage and make these and other materials produced under this Consultation Policy available to the National Indian Health Board (NIHB), which may also post the material and distribute it more widely.

9.2. States. Certain programs of CMS, such as Medicaid and SCHIP, are carried out in partnership with States based on statute, regulation, or CMS policy. However, CMS retains a responsibility to strongly encourage consultation with Indian Tribes occurs and, to the extent not prohibited by law, that program changes that will affect AI/ANs and Indian Tribes do not occur without consultation having occurred.

9.2.1. CMS will assist States to develop models for meaningful consultation with Indian Tribes consistent with the CMS Tribal Consultation Policy.

9.2.2. CMS will recommend that States include meaningful tribal consultation in their State Medicaid Plans. CMS will provide States with technical assistance in developing these plans.

9.2.3. Through its Regional Offices CMS will assist States and Indian Tribes with establishing and/or maintaining regular communication regarding State 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.

9.2.4. As appropriate, CMS will communicate the information it acquires through CMS/tribal direct tribal consultations to States. CMS will work through State/Tribal committees, CMS Regional Offices, and other vehicles to facilitate State/Tribal collaboration in responding to the input received through consultation.

9.2.5. CMS will invite, and include, State governmental and health and human services experts in the Annual Regional tribal consultation sessions whenever Indian Tribes indicate that State/Tribal dialogue would enhance or strengthen CMS programs.

9.2.6. CMS will, to the extent practicable and not prohibited by law, assure that Indian Tribes are given notice of any State Plan amendment or waiver request that will have impact on Indian Tribes.

9.2.7. CMS will address State plans in situations where the evaluation has identified deficiencies in the consultation process as set forth in this Policy, and work closely with States to strengthen consultation necessary for CMS programs. When CMS Central Office or a Regional Office foresees the possibility of a conflict between Tribal and State laws and Federally protected interests within its area of regulatory responsibility, CMS shall consult, to the extent practicable and not prohibited by law, with appropriate Indian Tribes and/or States in an effort to resolve the conflict.

9.2.8. Regional Administrators and Regional Offices will measure and report on their interaction with States to facilitate and provide tribal consultation technical assistance to States and Indian Tribes. CMS will describe its efforts in the HHS IGA Annual Tribal Consultation Report.

9.2.9. CMS and its regional offices will encourage consideration of best examples of state-tribal consultation and collaboration when working with states and tribes.

9.3. Regional Tribal Consultation

9.3.1. The HHS Regional Tribal Consultation Sessions are designed to solicit Indian Tribes' priorities and needs on health and human services and programs. The Sessions will provide an opportunity for Indian Tribes to articulate their comments and concerns on budgets, regulations, legislation and HHS health and human services policy matters.

9.3.2. Regional Offices/Directors and Divisions will work collaboratively with the Indian Tribes in their respective Regions on the development of consultation meetings, roundtables and annual sessions.

9.3.3. Regional Offices/Directors and Divisions will work with the Indian Tribes to identify regional tribal and Indian organizations that assist in representing the Indian Tribes in planning tribal consultation sessions.

9.3.4. Regional Offices/Directors and Divisions will work collaboratively with the Indian Health Service Area Directors in communicating and coordinating on issues and concerns of Indian Tribes in those respective regions or areas.

9.3.5. Regional Offices/Directors and Divisions will work collaboratively to facilitate Tribal-State relations as they impact Indian Tribes and AI/ANs.

10. Joint Tribal/Federal Workgroups and Task Forces

10.1. Joint Tribal/Federal Workgroups and Task Forces.

After discussion, or in collaboration, with the TTAG, CMS may establish or participate in workgroups, task forces or other groups or committees with Indian Tribes and others to address issues affecting AI/ANs and Indian Tribes. CMS will abide by the HHS Consultation Policy with regard to the establishment and conduct of such workgroups and task forces. Reports on the work of such bodies will be made available.

10.2. Limitations. Neither interaction with the TTAG, nor with other workgroups, task forces or committees, take the place of tribal consultation. Instead, they enhance the consultation process by gathering individuals with extensive knowledge of particular policy, practice, issue or concern to work collaboratively and offer recommendations for consideration by CMS. Consultation as provided for in this Policy will occur regarding the work products, recommendations, or other outcomes of TTAG or other workgroup activity.

11. CMS Budget Formulation

11.1. Annual Budget Consultation. 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 work with:

11.1.1. Regional Offices to identify tribal budget priorities at the local level and communicate these to Central Office;

11.1.2. The TTAG to identify national program budget priority recommendations; and

11.1.3. CMS Centers to pursue funding of priorities as identified by Tribes and the TTAG.

11.2. Timeframe. In order to ensure Indian Tribes are able to provide meaningful input for the CMS budget request, CMS will utilize the following timeframe to coincide with the HHS schedule.

11.2.1. January – CMS Office of Operations Management (OOM) will notify Regions and Centers to submit budget requests for tribal activities.

11.2.2. February – CMS will compile budget requests.

11.2.3. April – CMS will present budget request summary to TTAG for review, comment and prioritization. TTAG will have the opportunity to add additional requests based on their Strategic Plan priorities. The TTAG will submit final budget recommendations to CMS as to budget priorities.

11.2.4. Annually – The TTAG may present national priorities and recommendations to the national HHS tribal performance budget formulation and consultation session. CMS will provide Tribes and TTAG the budget related information on an annual basis.

12. CMS Tribal Consultation Performance Evaluation

12.1. Evaluation of Implementation and Outcome.

12.1.1. 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 the following on an annual basis:

12.1.1.1. The consultation process and associated activities resulting in a meaningful outcome for the IHS and affected Tribe(s);

12.1.1.2. The extent of participation by Tribes and tribal representatives;

12.1.1.3. The extent of participation in consultation sessions by all levels of CMS management;

12.1.1.4. The qualitative effectiveness of CMS's internal measures related to the tribal consultation process;

12.1.1.5. The effectiveness of collaboration with Indian Organization(s), other Federal agencies, States, and other entities who complement the consultation process;

12.1.1.6. The extent to which CMS policy was influenced by comments received by Tribes through the TTAG and during tribal consultations; and

12.1.1.7. The level of CMS and tribal satisfaction with the consultation process.

12.1.2. Evaluation of Outcomes. The truest measure of the success of tribal consultation is that it results in improvements in access to and quality of care provided to AI/ANs and ultimately in improvements in health status of AI/ANs. To the extent feasible, CMS, in consultation with the TTAG, will:

12.1.2.1. Develop reliable measures of outcome;

12.1.2.2. Work with IHS and other agencies of HHS to improve the availability of reliable data to measure outcomes; and

12.2. CMS Report to HHS. CMS will report on its evaluation of implementation and outcomes of tribal consultation based on the criteria established by HHS as follows:

12.2.1. Tribal budget consultation activities. Describe tribal budget consultation activities conducted by CMS in accordance with HHS policy.

12.2.2. Other tribal consultation activities. Describe other tribal consultation activities conducted, including a description of where the consultation event took place, the purpose of the consultation and who was in attendance (tribal, federal and other participants) and their roles (i.e. Crow tribal elected officials were in attendance).

12.2.2.1. Describe the outcomes or accomplishments that resulted from these sessions. Focus the response on how CMS responded to the requests and priorities raised by Indian Tribes at these consultation sessions.

12.2.2.2. Identify specific Indian Tribes and Indian Organizations impacted by the activities and include brief description of each activity, names of the Indian Tribe(s) and/or Indian organizations, and any CMS resources made available.

12.2.3. Compliance with the HHS consultation policy. Describe assistance to states in the development and implementation of mechanisms for consultation with Indian Tribes and Indian Organizations before taking actions that affect these governments and/or the Indian people residing in their state. If none, state so.

12.2.4. Budget summary. Identify CMS' expenditures for Indian Tribes, Tribal Organizations and Indian health activities, including funds expended indirectly for the benefit of Indian health.

13. Meeting Records and Additional Reporting

13.1. 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.

13B. Reports to Tribes. In addition to the reports required in follow-up to consultation under Section 9.1.4 and those made to HHS under Section 12.2, CMS will annually prepare and submit a report to Indian Tribe(s) and Tribal Organization(s) outlining the consultation process implemented and subsequent outcome related to a particular issue upon completion of the process. The report will address each of the items identified in Section 12.2.

13C. CMS Website. All documents developed to communicate decisions arrived at through tribal consultation and the report to Indian Tribes will be posted on the CMS and/or NIHB website.

14. Conflict Resolution

The intent of this policy is to provide increased ability to solve problems. However, inherent in the government-to-government relationship is the right of Indian Tribe(s) to elevate an issue of importance to a higher decision-making authority. CMS will establish a clearly defined conflict resolution process in collaboration with Indian Tribe(s), under which Indian Tribe(s): (a) bring forward concerns which have a substantially direct effect; and (b) apply for waivers of statutory and regulatory requirements that are subject to waiver by CMS.

15. Effective Date

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

16. Summary

CMS views tribal consultation as an evolving process. The joint effort between the Central Office and Regional Offices will provide for implementation of this Tribal Consultation Policy. Together they will ensure implementation of the Policy, make recommendations for revisions to

the Policy based upon periodic assessments in collaboration with the TTAG, and assure that issues surfaced by the Indian Tribes are addressed promptly.

17. 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 – Between CMS and Indian Tribes, “consultation” means government-to-government communication between agencies of the United States and Indian Tribes (and their designees). It emphasizes trust, respect and shared responsibility and requires open and free exchange of information and opinion among parties. 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/or Collaboration – Working and communicating together in a meaningful government-to-government effort to create a positive outcome.

Deliberative Process Privilege – Is a 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 United States 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.

Impact on Indian Tribes means direct or indirect effect on the operation of health programs operated by the Indian Health Service, Indian Tribes or Tribal Organizations (including reimbursement, payment methodology, administration, outreach and enrollment, and all other aspects of participation in Medicare, Medicaid and SCHIP) and access to programs of CMS by AI/ANs.

Indian Organization – Any group, association, partnership, corporation, or legal entity owned or controlled by Indians, or a majority whose members are Indians.

Indian Tribe – Any Indian Tribe, band, nation or other organized group or community including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 et seq.], which is

recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. (25 U.S.C. Sec 450b(e)).

Indian – Indian means a person who is a member of an Indian Tribe. (25 U.S.C. 450b(d)). Throughout this policy, Indian is synonymous with American Indian/Alaska Native.

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, P.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 among Indian Tribes, “substantial costs” is also variable by Indian Tribe. Each Indian Tribe and the Secretary 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 Not Prohibited 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 authorized inter-tribal organizations.

Tribal Organization – The recognized governing body of any Indian Tribe; any legally established organization of American Indians and Alaska Natives which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the community to be served by such organization and which includes the maximum participation of Indian Tribe members in all phases of its activities (25 U.S.C. 450b(1)).

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 Self-Governance – The governmental actions of Tribes exercising self-government and self-determination.

Tribal Technical Advisory Group – A group composed of individuals who are elected tribal officials and/or tribal employees acting on their behalf, appointed by federally recognized tribal

governments to serve as an advisory body to CMS providing expertise 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 care program funded (in whole or in part) by CMS.

Urban Indian Organization – A program that is funded by the Indian Health Service under Title V (Section 502 or 513) of the Indian Health Care Improvement Act.