

Department of the Treasury Progress Report to OMB on Tribal Consultation

This progress report responds to a Presidential Memorandum dated November 5, 2009, directing each department and agency to submit to the Director of the Office of Management and Budget, on an annual basis, a progress report on consultation and coordination with Indian tribal governments and any proposed updates to its plan to implement the policies and directives of Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) ([EO13175](#)).¹ EO 13175 requires an agency to establish “an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.”² Policies with tribal implications are ones 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.

Treasury is committed to robust tribal consultation. Consistent with its tribal consultation plan of action, Treasury has engaged in careful and extensive consultation on policies with tribal implications during the past year.

The Treasury Tribal Consultation Process

The Department of the Treasury supports the Fundamental Principles set forth in Section 2 of EO 13175. Three additional principles inform Treasury’s implementation of its tribal consultation process and policies:

- Treasury is committed to establishing a comprehensive consultation process leading to meaningful dialogue with Indian tribes on Treasury policies that have implications for such tribes, and in particular those regulations and legislative proposals that have direct and identifiable economic impacts on Indian tribes or that preempt tribal law.
- Tribal consultation will assist Treasury’s development of policy, regulation, and legislative activities, as it will increase Treasury’s understanding of the potential impacts of these activities on tribes and American Indians and Alaskan Natives.
- Treasury is committed to efficiently developing and issuing regulations and guidance.

To further these goals, Treasury’s plan to implement EO 13175 provides that each bureau and office should maintain a well-defined set of procedures to achieve the following core objectives:

(1) timely identification of matters that may require tribal consultation; (2) a timely process for determining whether consultation is required; and (3) an ongoing, proactive tribal consultation processes.

Interim Tribal Consultation Policy

Over the past few years tribal leaders have repeatedly requested that the Department adopt a formal tribal consultation policy, to provide a lasting institutional commitment to the consultation process. Many other federal agencies have adopted formal consultation policies. In response, Treasury published a draft tribal consultation policy in the Federal Register on December 3, 2014, requesting

¹ Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000), available at <http://www.gpo.gov/fdsys/pkg/FR-2000-11-09/pdf/00-29003.pdf>.

² EO 13175, § 5(a).

comments by April 2, 2015(see Appendix A). Treasury adopted this draft policy on an interim basis. We anticipate that this interim policy will be finalized in the next year.

Agency Point of Contact

The agency Point of Contact for Tribal Consultation is Dr. Elaine Buckberg, Deputy Assistant Secretary for Policy Coordination in the Office of Economic Policy (hereafter the Point of Contact for Tribal Consultation or POCTC). The POCTC relies on Treasury's Office of the General Counsel (OGC) and the Executive Secretariat (ES) to identify issues that may require consultation prior to the issuance of Treasury policies. In addition to these Department-wide efforts, and consistent with then-Deputy Secretary Neal Wolin's March 9, 2010 Memorandum for Office and Bureau Heads, each Treasury bureau and office should also undertake tribal consultation in accordance with EO 13175.

Consultation

Tribal leaders have raised the following key issues in consultations with the Treasury Department:

- Consistently, tribes stress the importance of tribal sovereignty. True tribal consultation is only possible when both parties understand that the relationship between tribes and the federal government is a government-to-government relationship based on mutual respect.
- Tribal leaders regularly express concerns about tax code matters affecting tribal governments, tribal corporations, and tribal members.
- Tribal leaders raise a number of concerns regarding access to capital for economic development. In particular, they underscore their interest in the structure and allocation of authority to issue tax-favored bonds under the Tribal Economic Development Bond (TEDB) program, and support for the well-regarded Community Development Financial Institutions Fund (CDFI Fund) Native Initiatives Program.

These points have been raised during consultation since early 2009, and the Treasury Department has taken them seriously. As sustained consultation continued, Treasury developed concrete responses to several of the tribal leaders' key concerns. Responses to several of these important issues have been realized during the past year, and are described below, under **Recent Tribal Consultation Activities This Year**.

Tribal Sovereignty

During tribal consultation, exchanges between the federal government and tribal governments are conducted on a government-to-government basis, predicated on mutual understanding and respect for tribal sovereignty. A strong consultation process requires open lines of communication in both directions. Tribal leaders must be able to contact Treasury to request a meeting, ask about a specific program, or convey their views about a particular policy matter. Treasury must be able to communicate clearly, consistently, and transparently with tribal leaders, and to solicit tribal views on policy matters that have tribal implications.

To support these objectives, several institutional structures are now in place to facilitate government-to-government communication with tribal leaders:

- Treasury maintains an email address, Tribal.Consult@Treasury.gov, to which any tribal leader may send a tribal consultation request.
- Treasury has a dedicated [tribal consultation webpage](#) that is regularly updated with requests for information from tribal leaders and other interested parties, policy statements, reports on recent consultation activities, and reports to Congress.
- Over the past year, Treasury has engaged in consultation on a wide variety of issues, including the [Tribal General Welfare Exclusion Act of 2014](#), per capita distributions from [tribal trust account funds](#), and Tribal Economic Development Bond authority [allocation](#) mechanisms. In addition, Treasury continues to hold general consultations and listening sessions to solicit input from tribal leaders and enable tribal leaders to discuss matters directly with the appropriate Treasury officials.
- Treasury participates actively in the annual White House Tribal Nations Conference, in meetings of the White House Council on Native American Affairs and its subcommittees, and in inter-agency working groups that address tribal leaders' concerns.

Consultation takes place both in Washington, D.C. and in Indian Country. Consultation may also be conducted via audio or video conference.

Tribal General Welfare Exclusion Act of 2014 (H.R. 3043)

On September 26, 2014 the President signed into law the Tribal General Welfare Exclusion Act of 2014 (TGWEA). Treasury began to implement this legislation promptly, consulting with tribal leaders through multiple channels.

The TWGEA has three major components:

1. It codifies the general welfare exclusion (GWE) as it is applied to tribes and tribal members. In floor statements, House sponsor Rep. Devin Nunes and Senate Finance Committee Chair Ron Wyden indicated that the legislation was intended, in part, to incorporate existing Internal Revenue Service (IRS) Revenue Procedure 2014-35. This IRS guidance was published on June 3, 2014, after extensive consultation with tribes that began in 2011. The guidance addresses the application of the GWE to certain benefits provided by Indian Tribal government programs to their members.
2. The TWGEA requires that the Treasury Secretary establish a Tribal Advisory Committee, (TTAC) to advise the Secretary on the taxation of Indians. The Treasury Secretary is to appoint three of the seven committee members; the chairmen and ranking members of the Senate Finance and House Ways and Means Committees will each appoint one member.
3. The Secretary is also directed to provide appropriate training for IRS field agents on Federal Indian law, and instruction on the GWE for Native American financial officers. The legislation calls for any audits and examinations of Indian Tribal governments and members of Indian Tribes to be suspended, to the extent such an audit or examination relates to the GWE, until completion of the education and training of IRS field agents.

The TTAC Charter was filed in February 2015. Tom West, Tax Legislative Counsel, will serve as its Designated Federal Official (DFO).

In a February email to tribal leaders and in a Federal Register notice Treasury solicited nominations

and applications for the Secretary of the Treasury's three appointees to TTAC. We requested that nominations and applications for the two-year Secretarial TTAC appointments be submitted by April 28, 2015. A follow-up email to tribal leaders invited them to participate in an April 2 conference call to address any questions they might have regarding applications and recommendations for appointments by the Treasury Secretary. Treasury is currently in the process of selecting the Secretary's three appointees.

We anticipate members of the TTAC will assist Tribes, IRS field agents, and the Treasury Department by contributing to the development of clear guidelines and norms on the general welfare doctrine and related tax matters as they affect tribal governments.

With respect to the codification of prior guidance into the Internal Revenue Code as Section 139E, Treasury and the IRS issued Notice 2015-34 on April 2015 to confirm that taxpayers may continue to rely on Rev. Proc. 2014-35 and its safe harbors for general welfare exclusions. The new notice also requested comments on several matters that should be addressed in future guidance implementing the TGWEA.

Recent Tribal Consultation Activities This Year

Tribal General Welfare Exclusion Act

- On October 28, 2014 Elaine Buckberg, Treasury Deputy Assistant Secretary for Policy Coordination and POCTC, served as a panelist for a session titled *Tribal Tax Parity: Next Steps After a New Federal Law*. This panel was part of the National Congress of American Indians' 2014 Annual Convention and Marketplace in Atlanta, Georgia. The panel discussed the TGWEA, other tribal tax issues that Congress will consider during their remaining term, and tax reform opportunities anticipated for the next Congress.
- On December 2, 2014, the Treasury Department hosted a government-to-government consultation on the TGWEA in conjunction with the White House Tribal Nations Conference (WHTNC). Over 25 tribes were represented at the meeting by their leaders or other officials. Tribal leaders engaged in constructive dialogue with Treasury Secretary Jacob Lew, Assistant Secretary Mark Mazur, Deputy Assistant Secretary Elaine Buckberg, Indian Tribal Governments Office Director Christie Jacobs of the IRS and other representatives of the Treasury Department regarding establishment of the TTAC. Treasury also announced the release of its interim Tribal Consultation Policy at the meeting, requesting that tribal leaders send comments on the interim policy to tribal.consult@treasury.gov by April 2, 2015.
- Also in conjunction with the WHTNC, IRS Commissioner Koskinen met with tribal leaders on December 4, 2014 to listen to their comments, suggestions and concerns relating to federal taxation and government-to-government relations with the IRS. Tribal leaders discussed an array of tribal tax issues with the Commissioner. Much of the focus was on the TGWEA. Both the Commissioner and the tribal leaders agreed that the IRS must continue to honor and build on its recent success in meeting its federal trust responsibility towards Indian tribes. They also agreed that Treasury's recent release of its interim Tribal Consultation Policy, which will apply to all Bureaus of the Treasury including IRS, will provide a solid foundation to ensure IRS engagement with tribes on a government-to-government basis and respect for tribal sovereignty.
- On February 23, 2015 Mark Mazur, Assistant Secretary for Tax Policy, spoke at the National

Congress of American Indians (NCAI) 2015 Executive Winter Session. Dr. Mazur provided a brief overview of some of Treasury's initial considerations on the implementation of the TGWEA during the course of a panel discussion titled *Discussion of Tax Issues with the Administration*. The ensuing discussion also addressed the establishment of and nominations for the TTAC. Deputy Assistant Secretary Elaine Buckberg, POCTC, and Christie Jacobs, Director of the IRS Indian Tribal Governments Office, also participated in the discussion.

White House Tribal Nations Conference of 2014

On December 3 and 4 of 2014, Treasury Department officials participated in the following WHTNC breakout sessions:

- Jessica Milano, Treasury Deputy Assistant Secretary for Small Business, Community Development, and Housing Policy, participated in the breakout session titled *Strengthening Tribal Economies: Jobs, Energy, Housing and Infrastructure*
- Kimberly Koch, Special Counsel for Health Care, IRS Office of the Chief Counsel, participated in the breakout session titled *Access to Healthcare and the Affordable Care Act*
- Elaine Buckberg, Deputy Assistant Secretary for Policy Coordination and POCTC, and Christie Jacobs, Director of the IRS Indian Tribal Governments Office, participated in the breakout session titled *Advancing the Government to Government Relationship: Self Determination, Treaty, and Trust Responsibilities*

IRS Proposed Rulemaking Regarding Information Returns for Certain Winnings

On June 12, 2015, Treasury and the IRS held a joint tribal consultation conference call with tribal leaders and their representatives to discuss an IRS notice of proposed rulemaking (NPRM) on information returns for winnings from bingo, keno, and slot machines. The NPRM requested comments on regulatory changes designed to simplify taxpayers' record-keeping obligations when winnings exceed specific thresholds. Tribal leaders underscored their concerns about specific components of the proposal, the quantitative importance of gaming as a revenue source for many tribes, and the restrictions on the use of tribal gaming revenues imposed by the Indian Gaming Regulatory Act (IGRA)³

Treasury officials have traveled across the country to conduct specific outreach efforts. In particular, the IRS ITG Office and the CDFI Fund's Native Initiatives program regularly hold regional tribal consultation sessions in a variety of venues. More details on their recent consultation activities, and the consultation activities of a wide range of Treasury offices and bureaus, appear below and in Appendix B.

Policy Responses to Tribal Consultation

Exemption from Affordable Care Act Individual Shared Responsibility Payment

³ Under IGRA Class II and Class III net gaming revenues are not to be used for purposes other than (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies.

Treasury and the IRS collaborated with the Department of Health and Human Services (HHS) and the Indian Health Service (IHS) to ensure that individuals eligible for an exemption from the Affordable Care Act (ACA) individual shared responsibility payment because they are eligible for services through an Indian health care provider, including the IHS, are able to claim this exemption through the tax filing process. These arrangements mean families can use the same processes to claim both the tribal member exemption and the exemption based on eligibility for services through an Indian health care provider, without needing to visit the Marketplace to claim either exemption.

This collaborative effort developed in response to a direct request from the HHS/IHS Tribal Self-Governance Advisory Committee that was received in January 2014. [HHS guidance](#) and [draft IRS instructions](#) regarding this process were posted in September of 2014. Final forms and explanations are now posted on the IRS web site, under [Individual Shared Provision – Exemptions](#).

On September 22, 2014, Deputy Assistant Secretary Elaine Buckberg, Treasury POCTC, spoke about this collaborative effort at the Native American Finance Officers Association (NAFOA) Fall Finance and Tribal Economies Conference. Her remarks focused on government policies impacting tribal governments, and she highlighted the guidance described above.

Tax Policies Affecting Tribal Member Employment

Business Tax Credits to Stimulate Employment among Native Americans and Alaska Natives. In its Fiscal Year 2016 Revenue Proposals, Treasury recommends making permanent the Work Opportunity Tax Credit (WOTC) and the Indian Employment Credit (IEC). The proposal would also simplify the calculation of the IEC. Congress has extended both credits numerous times, but often either retroactively or near the expiration date, and only for a few years. This pattern leads to uncertainty for employers regarding the availability of the credits and may limit their effectiveness.

- *Work Opportunity Tax Credits.* The WOTC employer business tax credit effectively reduces hiring costs. Though this program does not target Native Americans exclusively, it is important to Indian Country for two reasons:
 - Qualified veterans have been included among the targeted groups eligible for the WOTC, and the armed forces enlistment rate of Native Americans is the highest of all widely-recognized demographic groups in the United States.
 - The WOTC targeted the economically disadvantaged, and unemployment rates among Native American communities are high.

Under the WOTC program, an employer who submits the necessary form receives a business tax credit for qualified wages paid to a WOTC-eligible employee during the first year of employment, or for a longer period in some cases.⁴ The main objective of this program is to enable targeted employees to gradually achieve economic self-sufficiency, earning a steady income and becoming contributing taxpayers, while participating employers are partly compensated for employee hiring costs through reduction in their federal business income tax liability.⁵

⁴ Previously, employers could claim a credit of 50 percent of the first \$10,000 earned for retaining long-term family assistance recipients during a second year. See CRS Report RL30089 (2013), *The Work Opportunity Tax Credit (WOTC)*, p. 8.

⁵ See the [Department of Labor WOTC home page](#) for additional details on the WOTC.

- *Indian Employment Credit.* The IEC, a business income tax credit, has been available to employers who hire enrolled members of Indian tribes, and spouses of enrolled tribal members, if the credit-eligible employees live on or near an Indian reservation and work for their employer on that reservation. The credit was available to qualified workers earning \$45,000 or less annually and not employed in the gaming industry.

Employers may not take the WOTC and the IEC concurrently for the same employee.

Programs Promoting Access to Capital

During consultation, tribal leaders stressed the importance of improved access to capital and credit in achieving economic growth in Indian Country. Treasury programs that facilitate access to capital and tribal consultation activities related to new initiatives are described below.

Native Initiatives. The CDFI Fund's Native Initiatives are well-regarded in Indian Country. The CDFI Fund's mission is to expand the capacity of financial institutions to provide credit, capital, and financial services to underserved populations and communities in the United States. Native Initiatives has two program components that focus exclusively on establishing and strengthening CDFIs in Native American, Alaskan Native, and Native Hawaiian communities: the Native American CDFI Assistance Program and Native CDFI training series under the Capacity Building Initiative (CBI).

Native American CDFI Assistance Program (NACA Program). The NACA Program is a funding program that provides financial assistance and technical assistance awards to build and expand the capacity of Native CDFIs. Award announcements for the FY 2015 funding round are expected later this summer.

- CDFIs are specialized financial institutions dedicated to serving low-income communities. There are several different types of CDFIs, including loan funds, community development banks, community development credit unions, and venture capital funds. To be certified as a Native CDFI, an organization must meet the CDFI eligibility requirements and direct more than 50 percent of its activities to Native communities and/or Native persons. As of June 2015, there were 71 certified Native CDFIs.
- Financial assistance awards, used primarily for financial capital, are available only to entities that have been certified as Native CDFIs. In contrast, technical assistance grants are available to certified Native CDFIs, emerging Native CDFIs, and sponsoring entities.
- Sponsoring entities are unique to the NACA Program. Usually tribes or tribal entities, sponsoring entities create and support fledgling Native financial institutions as they move toward CDFI certification.
- Technical assistance grants are often used to acquire products or services including computer technology, staff training, and professional services such as a market study; and support for other general capacity-building activities.

Since it was launched in 2001, the NACA Program has provided awards totaling more than \$100 million to help Native CDFIs deliver financial services and financial products to their communities. What started as just a few Native CDFIs ten years ago has now grown to 71 Native CDFIs headquartered in 21 states.

The awards made under the NACA Program are typically announced in the late summer or early fall. For the FY 2014 award round, the CDFI Fund received 49 NACA applications, of which 41 were deemed eligible to advance to the review process. Eligible organizations requested around \$21 million, and on August 26, 2015, the CDFI Fund announced almost \$12.2 million in awards. Native CDFIs received 20 Financial Assistance awards and 13 organizations received Technical Assistance grants. The FY 2015 budget approved \$15 million for the CDFI Fund's Native Initiatives, level with the FY 2014 budget and an increase from \$12 million in FY 2013. The President's FY 2016 Budget requests level funding at \$15 million, continuing support for the prior fiscal year's increase and demonstrating strong support for the CDFI Fund's Native Initiatives.

Capacity-Building Initiative. The second major component of the Native Initiatives is a series of training programs that further support the development of Native CDFIs. Part I of this highly successful program provided training to 16 experienced Native CDFIs. Part II, *The Leadership Journey: Native CDFI Growth & Excellence*, builds upon that success by offering a new cohort of 13 Native CDFIs in-person training events, along with continuous customized technical assistance, executive coaching, and peer mentoring over two years. Between The Leadership Journey I and II, the CDFI Fund will provide over 3,000 hours of direct one-on-one capacity building assistance to Native CDFIs.

Building Native CDFIs' Sustainability and Impact, a third capacity building program for Native CDFIs, was launched in October 2014. This contract is a two-year training and technical assistance effort. Through it the CDFI Fund will again enable Native CDFIs to increase their impact and improve their sustainability through individualized training.

The CDFI Fund has also created an online resource bank that makes training curricula and reference materials used in a number of its training programs available to all Native CDFIs at no cost. Materials from Part II of The Leadership Journey series will be added to the resource bank, so even more Native CDFI leaders will have access to this outstanding training program.

CDFI Study on Access to Capital and Credit. The CDFI Fund is also having a study completed on Native communities' access to capital and credit, building upon its 2001 Native American Lending Study. Begun in 2013, the new study was designed to provide detailed analysis and quantitative research to support recommendations for improving access to capital and credit in Native communities. The CDFI Fund solicited comments from Indian Country to help direct the study; tribal consultation was an integral part of the process. The study is anticipated to be finalized and released to the public in late 2015 or early 2016.

New Markets Tax Credit Program (NMTC Program): The CDFI Fund's NMTC Program provides incentives to taxpayers with Federal tax liabilities to invest in Community Development Entities (CDEs) that have been awarded allocations of New Markets Tax Credits (NMTCs). The proceeds from these equity investments are used to make investments such as loans, equity investments and financial counseling and other related services to businesses located in low-income communities. Through this mechanism, the NMTC Program provides incentives for investing in distressed and low-income communities (generally defined as those Census tracts with poverty rates of greater than 20 percent or with median family incomes of less than 80 percent of the area median family income). All Native CDFIs are eligible to be certified as CDEs.

The NMTC Program is responsive to its legislative mandate, the Tax Relief and Health Care Act of 2006, which required proportional allocation of NMTC authority to non-metropolitan communities.

While current legislation does not include set-asides for minorities or indigenous peoples, the CDFI Fund has found that NMTC investments in Native lands are proportionate, reflecting the share of the U.S. population living on Native lands. From 2004 to 2013, NMTC Program investments in Native lands totaled almost \$783 million. In the most recent award round announced in June of 2015, the Chickasaw Nation Community Development Endeavor LLC received an allocation of NMTCs.

The NMTC Program operates on a calendar year basis. The next award round is scheduled to be opened in the fall with awards announced in the summer of CY 2016 pending NMTC reauthorization from Congress. The Administration's FY 2016 Budget proposes that the NMTC Program be permanently extended, and modified to permit offsets against alternative minimum tax liabilities.

CDFI Bond Guarantee Program. Treasury's CDFI Fund Bond Guarantee Program, enacted through the Small Business Jobs Act of 2010, can be a valuable source of credit and capital to Indian Country. It provides long-term capital (up to 30 years) at below-market rates to eligible CDFIs. All certified CDFIs may apply for the CDFI Bond Guarantee Program, regardless of their target market. The program is designed to operate at no cost to the taxpayer. As a result, all bonds issued must be secured by collateral and potential borrowers may be required to obtain additional credit enhancements. Treasury senior management and CDFI Bond Guarantee Program staff are working closely with representatives of NAFOA and the Native CDFI network to identify sources of collateral tribes may use, recognizing that tribal land held in trust cannot be used as collateral.

A case study demonstrating some of the ways that Native CDFIs can participate in the CDFI Bond Guarantee Program was presented at all outreach and training sessions during the FY 2015 funding round, as well as at NAFOA's annual conference, to highlight successful ways the CDFI Bond Guarantee Program can serve Native communities. Further, Treasury and the CDFI Fund have updated the Program's secondary loan requirements in order to add a leasehold interest as an eligible form of collateral for secondary loans and secondary loans as leasehold mortgages. This policy change is critical to expanding Native Communities' access to the CDFI Bond Guarantee Program.

The application period for the FY 2015 round, the second round of the CDFI Bond Guarantee Program, closed in June 2015. The Qualified Issuer (QI) application deadline was June 5, 2015, and the bond guarantee application deadline was June 12, 2015. Treasury will announce FY 2015 awards in September 2015. The QIs will issue bonds that will be purchased by the Federal Financing Bank. QIs will use bond proceeds to provide bond loans to eligible CDFIs which will use the bond loan proceeds for community and economic development purposes. The Secretary of the Treasury, as the guarantor of the Bonds, may guarantee bond issues having a minimum guarantee of \$100 million each.⁶ Contingent upon Congressional authorization for Treasury to issue guarantees in FY 2016, the Department will resume its outreach efforts next fiscal year to prepare Native communities and the CDFI industry at large for the 2016 application period of the CDFI Bond Guarantee Program.

To date, Treasury has closed \$525 million in Bond issues for 8 Eligible CDFIs with maturities up

⁶ As part of a package of CDFI Bond Guarantee Program legislative and administrative changes for inclusion in the President's FY 2016 Budget, Treasury proposed the minimum Bond issue size be reduced from \$100 million to \$25 million to increase options for Eligible CDFIs and QIs that do not have the capacity to lend or manage \$100 million or more.

to 29.5 years for community and economic development financing. As of July 31st 2015, over \$113.9 million has been disbursed. The disbursement includes a Secondary Loan, in the Commercial Real Estate Asset Class, to a Native community in Nevada and California. The CDFI Fund has thus far selected five QIs to issue the Bonds and make Bond Loans to Eligible CDFIs for investments in low-income and distressed communities across the country.

Tribal Economic Development Bonds. Treasury is also working with tribes to help improve their access to the tax-exempt bond market. Under current law’s “essential government function” standard for bonds issued by tribal governments, tribes have more limited authority to issue tax-exempt municipal debt than states and localities do, in general. Many tribal leaders have argued against this policy on multiple grounds, including that it inhibits economic development, hampers tribes’ access to the capital markets, and is unfair when compared to the broader authority granted to state and local governments. The American Recovery and Reinvestment Act of 2009 (Recovery Act) responded to these concerns by granting Treasury the authority to allocate \$2 billion of TEDBs to tribal governments according to criteria more comparable to those applied to state and local government bonds. These allocations effectively grant tribes the authority to issue tax-exempt debt for a wide range of projects that previously would not have qualified for tax-exempt status. As of August 1, 2015, approximately \$1.4 billion in TEDB authority remains available, for a maximum allocation to a single tribe of approximately \$277 million.⁷

In the Administration’s Fiscal Year 2016 Revenue Proposals, Treasury recommends that standards similar to those authorized for TEDBs be adopted on a permanent basis. The Department’s [2011 Report to Congress on Tribal Economic Development Bonds \(Report\)](#) also proposed these changes.

The 2011 Report to Congress identifies the following factors constraining tribes’ bond issuance: limited income and property tax bases, shared jurisdiction with states for sales tax revenues, tribes’ inability to offer land held in trust as collateral, transaction costs due to securities law registration requirements for public offerings, and limited historical issuances and performance.⁸ Credit market weakness during the recession exacerbated these problems.

The Report includes four key recommendations. First, Treasury proposes adopting for tribal governments, on a permanent basis, the State or local government standard for tax-exempt governmental bonds. This is generally embodied in the limited authorization for TEDBs for purposes of Indian tribal governmental eligibility to issue tax-exempt governmental bonds, without a bond volume cap on such bonds. Second, it recommends allowing Indian tribal governments to issue tax-exempt private activity bonds for the same types of projects and activities as are allowed for State and local governments under a tailored national bond volume cap. Third, project location restrictions would be retained but they would be more flexible than under current law. Finally, TEDB gambling facility restrictions would be retained. The Report concludes that “for reasons of tax parity, fairness, flexibility, and administrability, the Department recommends that Congress adopt the State or local government standard for tax-exempt government bonds ... on a permanent basis for purposes of Indian Tribal government eligibility to issue tax-exempt governmental bonds,

⁷ These volume caps are revised every two months. Updates are [posted](#) on the [IRS web site](#).

⁸ As noted in the Report, state and local governments are exempt from securities law registration requirements under Section 3(a)(2) of the Federal Securities Act of 1933. Indian tribal governments have no comparable exemption, so they must either register their securities with the Securities and Exchange Commission or raise funds in private placements. See Report to Congress on Tribal Economic Development Bonds, “Credit Challenges Facing Indian Tribal Governments,” pp. 14-15.

without a bond volume cap.”⁹

Consultation with tribal leaders preceded the development and announcement of these recommendations. Treasury’s objective is to help Indian tribes access these bonds to promote job and economic promote growth in Indian Country.

Insurance in Indian Country. Recognizing the important role insurance plays in supporting asset protection, inter-generational transfer of wealth, retirement security, and economic development in communities and regions, FIO is engaging with Tribal leaders and other federal agencies to identify challenges with respect to access to insurance and alternative ways to improve access to insurance on sovereign Tribal lands.

- FIO Deputy Director Elizabeth Sammis, and her colleagues, held a listening session with tribal leaders during NAFOA’s 2014 Fall Finance and Tribal Economies Conference, in San Diego, California.
- Michael McRaith, FIO Director, and his staff, held a listening session with tribal leaders during the NCAI 2015 Executive Council Winter Session, in Washington DC.

Conclusion

Treasury monitors its tribal consultation process in order to fulfill the mandate of EO 13175, and will propose updates to its process as may be appropriate. Treasury’s process seems to be working effectively to ensure meaningful consultation and collaboration with tribal officials in policies that have tribal implications.

⁹ Report, p. 2.

Appendix A: Interim Treasury Department Tribal Consultation Policy

As noted above, on December 3, 2014 Treasury issued a draft, interim Tribal Consultation Policy, requesting consultation and comment. We anticipate that this interim policy will be finalized in the next year.

In furtherance of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” 65 Fed. Reg. 67,249, issued by President Clinton on November 6, 2000, and the Presidential Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation, 74 Fed. Reg. 57881, signed by President Obama on November 5, 2009, the U.S. Department of the Treasury (Treasury) establishes this interim Tribal Consultation Policy (Policy). The Policy outlines the guiding principles for all Treasury bureaus and offices engaging with Tribal Governments on matters with Tribal Implications. The Policy will be updated periodically and refined as needed to reflect ongoing engagement and collaboration with Tribal partners.

I. DEFINITIONS

- A. Indian Tribe refers to 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.
- B. Tribal Government refers to the recognized governing body of an Indian Tribe.
- C. Tribal Consultation (or Consultation) involves the direct, timely, and interactive process of receiving input from Indian Tribes regarding proposed Treasury actions on policy matters that have Tribal Implications.
- D. Policies that have Tribal Implications shall have the same meaning as used in Executive Order 13175, and refers to Treasury regulations, published guidance, or 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 the distribution of power and responsibilities between the Federal Government and Indian Tribes. It does not include policy matters of general applicability that may have an impact on Indian Tribes or their members.
- E. Tribal Officials refers to elected or duly appointed officials of Tribal Governments or authorized inter-tribal organizations.

II. GUIDING PRINCIPLES

- A. The United States recognizes the right of Indian Tribes to self-government, and their inherent sovereign powers over their members and territories. The principle of consultation has its roots in the unique relationship between the federal government and the governments of Indian Tribes. This government-to- government relationship has a more than 200-year history, and is built on the foundation of the U.S. Constitution, treaties, legislation, executive action, and judicial rulings. Most recently, consultation was recognized in Executive Order 13175 and in the November 5, 2009 Presidential Memorandum on Tribal Consultation.
- B. Treasury is committed to strengthening the government-to-government relationships between the United States and Indian Tribes. Treasury recognizes that agency policies, programs, and

services may impact Indian Tribes and is committed to consulting with Tribal Officials with regard to Treasury Policies that have Tribal Implications. This Policy will complement, not supersede, any existing laws, rules, or regulations that guide existing consultation processes with Indian Tribes.

- C. Tribal Consultation will inform Treasury's development of regulations, published guidance, and other policy statements or actions, as it will enhance Treasury's understanding of the potential impacts of these activities on Indian Tribes.
- D. Treasury is committed to developing and issuing regulations and guidance in a timely manner.

III. CONSULTATION POLICY

A. Statement of Policy

Treasury will endeavor to consult with Tribal Governments prior to issuing regulations, published guidance, and Policies with Tribal Implications. Treasury may also conduct listening sessions, meetings with individual Tribes, and informal discussions with Tribal Officials on matters of concern.

The Tribal Consultation process should achieve the following core objectives: (1) timely identification of matters that may warrant Tribal Consultation; (2) implementation of a process that is accessible and convenient to Tribal participants; and (3) development of meaningful, transparent, and accountable dialogue involving the appropriate participants.

Consistent with Executive Order 13175, Tribal Consultation is not required for actions to enforce requirements administered by the agency or actions to penalize violations of these requirements, even if the actions impact multiple Indian Tribes or members of multiple Indian Tribes. Actions that do not require Tribal Consultation include, but are not limited to:

- Administrative orders, practices, or litigation involving penalties or equitable or similar relief to ameliorate the effects of prior violations or ensure compliance;
- Administrative orders that impose specialized requirements of limited duration;
- Audits, examinations, or investigations; and
- Internal agency guidelines with respect to such matters.

B. Role of the POCTC

The Treasury Point of Contact for Tribal Consultation (POCTC) is the Deputy Assistant Secretary for Policy Coordination in the Office of Economic Policy, or another official as designated by the Secretary or the Deputy Secretary. Treasury bureaus and policy offices, as well as the Office of the General Counsel (OGC) and the Executive Secretariat, may assist the POCTC in identifying policy matters that may require Tribal Consultation.

The POCTC is available to assist Treasury bureaus and offices in the identification of policy matters that may be appropriate for Tribal Consultation. OGC is also available to assist in resolving internal questions related to Tribal Consultation matters.

C. Procedures for Evaluating and Initiating Consultation

1. Treasury bureaus and offices should endeavor to conduct Tribal Consultation with respect to policies that have Tribal Implications, including early outreach to solicit comments from appropriate Tribal Officials who may be substantially affected by changes in Treasury regulations, published guidance, or other policies under consideration. Program staff and legal counsel should assist in the identification of policy matters that are likely to require Tribal Consultation. Generally, every effort should be made to provide sufficient notice prior to scheduling Consultation, and the POCTC or Treasury office or bureau conducting a Consultation should inform Tribal Officials as soon as practicable if exceptional circumstances, such as legislative or regulatory deadlines or other factors beyond Treasury's control, warrant an abbreviated period of advance notice.
2. Tribal Consultation with Tribal Officials will be conducted by Treasury officials who are knowledgeable about the matters at hand and authorized to speak for the Department.
3. A phased approach to Tribal Consultation may be appropriate in some matters, in which a plan for more extensive Tribal Consultation is identified and a commitment is made to consult within a specified time frame.
4. Treasury bureaus and offices should notify the POCTC in advance of final actions on policies that have Tribal Implications. The POCTC may advise on the potential need for Tribal Consultation with respect to such matters.
5. With respect to policies that have Tribal Implications regulations and published guidance, to the extent practicable and permitted by law, Treasury should consult with Tribal Officials early in the process of developing such regulations or guidance. These Consultations should seek comment on compliance costs as appropriate to the nature of the regulation or guidance under development. The timing, nature, detail, and extent of Consultation will depend on the regulation or guidance involved.

D. Methods of Consultation

Tribal Consultation may include, but is not limited to, one or more of the following:

- Federal Register (FR) notices or other published guidance soliciting comments. Tribal Consultation may be announced in FR notices and other published guidance, including guidance published in the Internal Revenue Bulletin, with respect to policies that have Tribal Implications. FR notices and other published guidance requesting comments from Tribal Governments should be published as soon as practicable after Treasury determines that Tribal Consultation is appropriate. When practicable, a comment period of 60 to 120 days will be provided, to allow sufficient time for Tribal Governments to consult with their members and legal counsel on any matters of concern.
- Meetings, written correspondence, conference calls, videoconferences, and workshops to encourage an exchange of views. Tribal Consultation may also be conducted through email, regular mail, telephone calls (including conference calls), video conferences, and in-person meetings or conferences, as schedules and resources permit. Where appropriate, intra- and inter-agency meetings also may be utilized to address areas of concern, conserve resources, and ensure comprehensive coverage of

an issue. Disparities in time zones and travel costs, including those of Alaskan Native tribes, will be taken into account when scheduling phone calls and conferences.

- Targeted outreach. Treasury officials or the POCTC may also directly contact Tribal Officials to discuss matters with Tribal Implications. In addition, as resources and schedules permit, Treasury officials may attend conferences sponsored by inter-tribal organizations to participate in agency listening sessions and/or to present on issues of concern to Indian Tribes.

E. Process for Tribal Officials to Request Consultation

Tribal Officials are encouraged to contact directly the appropriate Treasury officials, on a government-to-government basis, to seek Consultation on matters with Tribal Implications. Consultation requests may also be addressed to the POCTC, who will direct the matter to additional Treasury officials as appropriate. The POCTC also may be contacted with general concerns or requests for information, and may refer specific policy matters to the Treasury bureaus or offices with direct jurisdiction, as appropriate. The POCTC can be reached at Tribal.Consult@treasury.gov.

IV. JUDICIAL REVIEW

This policy is intended only to improve the internal management of the Department, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the Department or any person.

Appendix B: List of Programs in Various Treasury Bureaus and Offices that are Actively Involved in Issues Affecting Tribal Governments and Members

Office of the Comptroller of the Currency

<http://www.occ.treas.gov/Cdd/Nativeam>

The Office of the Comptroller of the Currency (OCC) is reviewing its process independently.

Office of Financial Markets and Bureau of the Public Debt, Bureau of the Fiscal Service

<http://www.publicdebt.treas.gov/> <http://www.treasurydirect.gov/govt/reports/tfmp/tfmp.htm>
<http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Financial-Markets.aspx>

Treasury is currently investing in four Indian tribal trust funds: the Cheyenne River Sioux and the Lower Brule Sioux Tribes' Terrestrial Wildlife Habitat Restoration Trust Funds (the "Title VI Funds"), and the Yankton Sioux and Santee Sioux Tribes' Tribal Development Trust Funds (the "Development Funds").

For the Title VI Funds, Treasury is required by statute to disburse amounts from the interest earned to the tribes involved as requested for certain statutorily-prescribed purposes. Treasury is also statutorily required to review at least annually the investment of the funds with the four tribes involved, and to provide monthly reports to the tribes on the investment activities of their funds.

On October 1, 2013, Treasury created the Development Funds and deposited in those Funds the principal amount as defined in statute plus, after consultation with the tribes, an amount of interest as if the Funds had actually been invested for the 10 years prior. Treasury is required to invest the funds, but Interior must disburse the interest to these tribes. After consultation with the tribes, Treasury entered into Investment Memoranda of Understanding (MOU) with Interior under which Interior would invest the Development Funds on behalf of Treasury. Treasury has also executed an MOU with Interior to invest the Lower Colorado River Basin Development Trust Fund, a tribally-related fund.

During the past year, the Office of Financial Markets (OFM) and Bureau of the Fiscal Service (BFS) have worked closely with other Treasury offices, Interior and OMB to address a number of investment and other issues involving the four aforementioned funds as well as several Indian tribal funds that, by statute, Treasury is required to invest. All sequestration issues have been resolved, and all sequestered funds were deposited in the funds at the beginning of FY 2015.

Community Development Financial Institutions Fund

http://cdfifund.gov/what_we_do/programs_id.asp?programID=3

CDFIs are non-government financial entities whose primary mission is to promote community development, mainly by serving and being accountable to low-income communities, and by providing financing and development services.

Native Initiatives

The Native Initiatives program serves economically distressed Native American, Alaska Native, and Native Hawaiian communities across the nation by providing funding to build the organizational capacity of Native CDFIs. As of June 30, 2015, there are 71 certified Native CDFIs. To be certified as a Native CDFI, an organization must meet the CDFI eligibility requirements and direct more than 50 percent of its activities to Native communities and/or Native persons.

The Native Initiatives provides support in two ways: through financial assistance and technical assistance awards provided by the NACA Program, and through training, technical assistance, and other resources provided by the CBI.

- Financial assistance awards, used primarily for financial capital, are available only to entities that have been certified as Native CDFIs.
- Technical assistance grants are available to certified Native CDFIs, Emerging Native CDFIs, and Sponsoring Entities. Usually technical assistance grants are used to acquire products or services including computer technology, staff training, and professional services such as a market study; and support for other general capacity-building activities. Sponsoring entities are unique to the NACA Program. They create and support fledgling Native organizations as they move toward CDFI certification.
- Through the capacity building initiative, CDFIs and Native CDFIs are provided trainings, webinars, and individual technical assistance on multiple topics, such as small business and microenterprise lending, healthy food financing, and Native-specific trainings. Free reference materials are available through the CBI's Resource Bank at <http://www.cdfifund.gov/cbi>.

Background. The CDFI Fund, established in September 1994 under the Riegle Community Development and Regulatory Improvement Act, sponsors Native Initiatives designed to increase access to credit, capital, and financial services in Native communities. These initiatives create and expand CDFIs mainly active in Native communities. The CDFI Fund's authorizing statute mandated that the CDFI Fund conduct a study of lending and investment practices on Indian reservations and other lands held in trust by the United States. This study recognized barriers to private financing, identified the impact of such barriers on access to capital and to credit for Native peoples, and provided options to address these barriers.

Following the November 2001 release of the CDFI Fund's Native American Lending Study, the CDFI Fund formulated two chief strategies for overcoming barriers to credit, capital, and financial services in Native communities:

- Expanding Native Opportunities (ENO), training programs that develop new Native CDFIs, strengthen existing Native CDFIs, and help Native CDFIs create financial education and asset building programs in Native communities. ENO has evolved and has been incorporated into part of the larger CDFI Fund CBI.
- The NACA Program, a funding program that aims to increase the number and capacity of existing or new Native CDFIs. Since its 2001 launch, the NACA Program has provided more than \$100 million in awards to help Native CDFIs deliver financial services and financial products to their communities.

New Developments. Building on the success of The Leadership Journey I and II, the CDFI Fund launched *Building Native CDFIs' Sustainability and Impact (BNCSI)*. The series will provide specialized training and technical assistance to Native CDFIs in order to foster their growth and sustainability, and to enhance their ability to deliver financial services and financial products Native Communities. To date, BNCSI has already provided around 100 hours of technical assistance and sponsored two week-long training events to over 39 organizations.

The CDFI Fund Native Initiatives website includes a link to the [2001 Native American Lending Study](#) (NALS) and the Native Initiatives Strategic Plan for Fiscal Years 2009-2014. The CDFI Fund is building upon NALS and researching the state of access to capital and credit in Native communities. The research will provide policy-makers, tribal governments, tribal community organizations, and economic development practitioners with detailed analysis and quantitative research that can lead to actionable recommendations for improving access to capital and credit in Native Communities. This in-depth report will be titled *Access to Capital and Credit in Native Communities* and is expected to be finalized in late 2015 or early 2016. For an example of CDFI Fund-initiated FR consultation, see the [November 30, 2012](#), request for comments on the new study on access to capital and credit in Indian Country.

Financial Crimes Enforcement Network

<http://www.fincen.gov>

The Financial Crimes Enforcement Network (FinCEN) deals with complex and/or sophisticated financial matters that affect a small number of well-known constituent groups. Casinos are in this category, since they are vulnerable to exploitation through money laundering activities. For this reason, FinCEN staff works closely with tribally-owned casinos.

Internal Revenue Service

<http://www.irs.gov/tribes>

Within the IRS, the Indian Tribal Governments Office (ITG) uses partnership opportunities with Indian tribal governments, including Alaska Native governments, tribal associations, and other federal agencies, to respectfully and cooperatively meet the tax administration needs of Indian tribal governments and the federal government.

- Five ITG field groups consisting of tribal government specialists work in locations near the seats of tribal governments.
- ITG specialists can address issues that relate to tribal governments as employers; distributions to tribal members; and the establishment of governmental programs, trusts, and businesses.

ITG has consulted extensively with tribal governments throughout the development of its programs, and continues to lead a review of IRS consultation procedures to ensure compliance with EO 13175 and the new interim Treasury Consultation Policy. During FY15, ITG participated in numerous conferences to provide information and get feedback from tribes on the impact of various tax related topics. In addition to those summarized at the beginning of this report, the ITG Director and senior staff participated in breakout sessions at NIGA, NAFOA and NITA to discuss topics including the ACA employer provisions, general welfare exclusion, gaming reporting regulations, and the per capita act. Senior staff also participated jointly with HHS and IHS in outreach sessions held across Indian Country on ACA provisions.

ITG staff also provided significant training opportunities to tribes, with an increased emphasis on virtual products to allow tribal staff to access the materials when needed and at no cost. Web based sessions were held on ACA, year-end tax reporting, tip agreements, travel expenses, and the proper reporting of tribal council pay. In addition, local ITG staff provided in-person training sessions on reconciling year-end tax reporting and Title 31 compliance.

As explained above, TEDBs are tax-exempt bonds that Indian tribal governments can issue to finance any project or activity for which state or local governments could issue tax-exempt bonds. TEDBs are not subject to the limits Indian tribal governments have in their use of tax-exempt bonds to the financing of “essential governmental function” activities that are customarily performed by state and local governments. The ITG web site has posted a TEDB fact sheet and a phone forum webinar on their web site that is permanently available for replay.

The IRS and ITG partner with tribal governments to establish Volunteer Income Tax Assistance (VITA) sites in their local communities. The VITA program has a three-pronged approach, including financial education and asset building, tax education, and tax preparation. The tax preparation aims to provide free tax preparation services for low- to moderate-income taxpayers. During the past year the Service continued to expand partnerships with tribal organizations and coalitions of tribal governments that share knowledge and resources to prepare free tax returns in their local communities.

United States Mint

<https://www.usmint.gov> http://www.usmint.gov/mint_programs/nativeamerican/

http://www.usmint.gov/mint_programs/nativeamerican/

http://www.usmint.gov/mint_programs/native-american-coins-medals/

Since the beginning of the Native American \$1 Coin Program in 2009, the United States Mint (Mint) has actively consulted with Native American stakeholders to ensure that the Native American \$1 Coin themes and designs are appropriate, significant, and historically accurate. The Native American \$1 Coin Act (Act) (Pub. L. No. 110-82 (Sep. 20, 2007)), as codified at 31 U.S.C. § 5112(r), authorizes the Secretary of the Treasury to mint and issue circulating \$1 coins commemorating the important contributions made by Native American tribes and individual Native Americans to the United States. The Act mandates a reverse design with an image emblematic of one important Native American person or Native American contribution each year. The obverse bears the image of Sacagawea, a design that first appeared on the Golden Dollar in 2000. The Mint develops design themes in consultation with the National Museum of the American Indian, the NCAI, the U.S. Senate Committee on Indian Affairs (CIAS), the Congressional Native American Caucus (CNAC) of the U.S. House of Representatives, and these themes are reviewed by the Citizens Coinage Advisory Committee (CCAC). In accordance with the Act, the Secretary of the Treasury selects reverse designs after consulting with the NCAI, CIAS, CNAC, CCAC, and the U.S. Commission of Fine Arts (CFA). While the Federal Reserve Banks do not order Native American \$1 Coins for circulation, the United States Mint offers these coins in various quantities, qualities, and packaging options through its numismatic program.

The 2015 Native American \$1 Coin commemorates the contributions of the Kahnawake Mohawk and Mohawk Akwesasne communities to “high iron” construction work and the building of New York City skyscrapers. The reverse design depicts a Mohawk ironworker reaching for an I-beam that is swinging into position, rivets on the left and right side of the border, and a high elevation view of the city skyline in the background. The design includes the required inscriptions “UNITED STATES OF AMERICA,” “\$1,” and the additional inscription “MOHAWK IRONWORKERS.”

The Mint has also worked closely with eligible Native American tribes to develop themes and designs for each tribe’s Code Talkers Recognition Congressional Gold Medal. The Code Talkers Recognition Act of 2008, Public Law 110-420 (Oct. 15, 2008), requires the Secretary of the Treasury to strike Congressional Medals to recognize the dedication and valor of Native American Code Talkers to the United States Armed Services during World War I and World War II. The Code Talker program required 66 new coin designs; the Mint has now completed production of more than 58 of these designs, approximately the same number of designs that the Mint produces in one full year for all its other coin programs combined. The Mint’s design recommendations for the Code Talkers Recognition Congressional Gold Medals, which the bureau presents to the Secretary of the Treasury for his approval, are determined based on consultation with the senior leaders from each eligible tribe, the CCAC, and the CFA.