

Treasury Department 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 ([EO 13175](#)). EO 13175 requires agencies to establish a process to ensure tribal consultation is undertaken as required on policies and regulatory or legislative activities with tribal implications. 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 matters with tribal implications during the past year.

The Treasury Tribal Consultation Process

The Department of the Treasury supports the overarching 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 the establishment of 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 a direct and identifiable economic impact 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 issues and potential impacts of activities on tribes and American Indians and Alaskan Natives.
- Treasury is committed to developing and issuing regulations and guidance in a timely and efficient manner when they are required.

In furtherance of these goals, the Treasury plan provides that each bureau and office is responsible for maintaining a well-defined set of procedures to achieve the following core objectives: (1) timely identification of matters that may require tribal consultation; (2) timely process for determining whether consultation is required; and (3) an ongoing, pro-active tribal consultation processes. See Appendix A for additional details on the Treasury Department's tribal consultation process.

Agency Point of Contact

The agency point of contact for tribal consultation is the Deputy Assistant Secretary for Policy Coordination in the Office of Economic Policy (hereafter the Point of Contact for Tribal Consultation or POCTC). Elaine Buckberg currently serves in this position. 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 issuance of Treasury policies. In addition to these Department-wide efforts however, and consistent with Deputy Secretary Neal Wolin's March 9, 2010 Memorandum for Office and Bureau Heads, each Treasury bureau and office must 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.
- Tribal leaders regularly raise concerns about tax code matters affecting tribal governments, tribal corporations, and tribal members. Among several tax issues highlighted by tribal leaders, concerns about the general welfare doctrine were foremost.
- Tribal leaders raise a number of concerns regarding access to capital for economic development. In particular, tribal leaders underscore their interest in the structure and allocation of authority to issue tax-favored bonds under the Tribal Economic Development Bond program, and support for the well-regarded Community Development Financial Institutions (CDFI) Fund's Native Initiatives Program.

These points have been raised during consultation since early 2009, and the Treasury Department has taken these matters seriously. As sustained consultation continued, the Treasury Department developed concrete responses to several of the tribal leaders' key concerns. Several of these responses have been realized during the past year, and are described below.

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 need to be able to contact Treasury to request a meeting, ask about a specific program, or convey their views about a particular policy matter.

The Treasury Department needs to be able to communicate with tribal leaders in a clear, consistent, and transparent manner, and solicit tribal views on policy issues that have tribal implications.

In support of these objectives, several institutional structures are in place to facilitate government-to-government communication with tribal leaders.

- The Treasury Department maintains an email address, Tribal.Consult@Treasury.gov, to which any tribal leader may send a tribal consultation request.
- The Department has a dedicated [tribal consultation webpage](#). It 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.
- We have engaged in multiple consultation processes over a wide variety of issues, including the general welfare doctrine, per capita distributions from particular settlements, and Tribal Economic Development authority allocation mechanisms. In addition, we continue to hold general consultation and listening sessions to solicit input from tribal leaders, and enable tribal leaders to ask detailed questions directly of Treasury officials.

Consultation can and must take place both in Washington, D.C. and in Indian Country. In addition, some consultation is conducted via audio conference.

Recent General Consultation Activities this Year¹

Elaine Buckberg, POCTC, hosted a general listening session for tribal leaders at the Main Treasury Building on July 23, 2013. Seventeen Native American tribes sent delegations to this meeting, to convey their concerns and priorities. Representatives from several tribal organizations, including the National Congress of American Indians (NCAI), the Native American Finance Officers Association (NAFOA), and the United Southern and Eastern Tribes (USET) participated in this listening session. Treasury Department personnel from the Office of Economic Policy; the Office of Tax Policy; the Office of Small Business, Community Development, and Housing Policy; the Native Initiatives Program of the CDFI Fund; and the Internal Revenue Service (IRS) Indian Tribal Governments (ITG) Office also attended the meeting.

¹ In addition to consultation activities, Treasury Under Secretary Mary Miller represented the Department at the inaugural meeting of the White House Council on Native American Affairs, on July 29, 2013.

Donet Graves, Deputy Assistant Secretary for Small Business, Community Development and Housing Policy, visited Pine Ridge reservation in South Dakota in June 2013. He met with tribal leaders, visited a CDFI, and toured local businesses to learn about ways Treasury can support greater capital and credit access, and the impact CDFI dollars are having in the community.

Alexander Gelber, Deputy Assistant Secretary for Microeconomic Analysis, spoke at the National Council of American Indians Executive Council's Winter Session on March 6, 2013. His speech provided an overview of Treasury's recent work on tribal policy. An informal listening session was held immediately after the speech.

Deputy Secretary Neal Wolin spoke at the opening session of the 2012 White House Tribal Nations Conference on December 5, 2012. In addition, IRS Indian Tribal Governments Office Director Christie Jacobs and DAS Don Graves participated in the conference break-out session on strengthening tribal communities through economic development.

In late September 2012 Barrett Hester, Acting Deputy Assistant Secretary for Government Financial Policy (OGFP DAS) met with leaders of the Yankton Sioux and Santee Sioux Tribes in South Dakota and Nebraska, respectively, to discuss the establishment of their development funds on October 1, 2013 and the investment of these funds. Gary Grippo, OGFP DAS, has continued the consultation process in FY 2013 with calls to the Tribes' leaders in late April.

Although sequestration has limited travel funds, other Treasury officials have travelled across the country to conduct specific outreach efforts. The IRS Indian Tribal Governments Office regularly holds regional tribal consultation sessions in a variety of venues. Additional details on recent consultation activities are provided below and in Appendix B.

Tribal leaders often raise issues that concern both Treasury headquarters ("Departmental Offices") and the IRS. To best address these concerns we have regularly held joint consultation sessions during which tribal leaders engage with senior officials from both Departmental Offices and the IRS. Representatives of other federal agencies have been included as appropriate. This approach maximizes efficiency and encourages a collaborative process.

Topical Consultation Activities This Year

Specific issues addressed through consultation during the past year are discussed below.

General Welfare Doctrine. During the course of our consultation efforts, as noted above, tribal leaders repeatedly raised concerns regarding whether certain payments or benefits provided by the tribe to members are excludable from taxable income under the general welfare doctrine.

- The General Welfare Exclusion (GWE) is an uncodified, administrative exclusion from income dating from the 1930s, when the IRS took the position that welfare payments were excludible from taxable income.

- New proposed guidance, released in December 2012 and currently in effect, identifies broad exclusions from taxable income that correspond to benefits provided by Indian tribal governmental programs to tribal members.

This new guidance does not govern what benefits a tribe can provide its members; rather, the GWE governs whether the value of these benefits should be included in the taxable income of the benefit recipient. Tribes are free to provide benefits on whatever basis they see fit, subject to other provisions of law.

This new GWE guidance outlines a proposed set of general principles and safe harbors under which Indian tribal government benefits are covered by the exclusion. The new GWE guidance allows many tribal government benefits to be excluded from taxable personal income, including assistance with housing repairs and utilities, some rent and mortgage payments, payments for tuition and educational supplies, job counseling and some placement expenses and assistance for elderly and disabled tribal members.

Before releasing the new guidance, Treasury and IRS listened to and considered the requests of tribal leaders for increased clarity on the application of the general welfare doctrine. While the proposed GWE guidance became effective immediately, Treasury issued the guidance in proposed form to allow for additional consultation with tribes on ways it can be further improved. Although the formal comment period ended in June, Treasury will continue to accept comments, and to assess the feasibility of administering the current proposed guidance, before final GWE guidance is issued. Because the current, proposed guidance was issued “with reliance”, tribes have been authorized to follow the proposed guidance since December 2012 and the IRS is currently applying the proposed draft guidance.

Also with respect to the taxable income of tribal members, the following developments are noteworthy.

Per Capita Payments from Proceeds of Settlements of Indian Tribal Trust Cases. Certain recent settlements between the federal government and 70 distinct Native American tribes compensate tribes for their claims that the Department of the Interior mismanaged trust accounts, lands, and natural resources in the past. Several tribes and tribal representatives raised questions related to the tax status of these settlement payments in the spring of 2012. Treasury and the IRS therefore engaged in repeated consultations on this issue during the spring and summer of 2012.

On September 6, 2012, Treasury and the IRS issued Notice 2012-60 which asserts that the per capita payments from these settlement funds are not included in the recipients’ taxable income. The IRS subsequently issued Notice 2013-1, which updates and supersedes Notice 2012-60.

Since the fall of 2012 several tribes and the NCAI have requested that the Treasury Department and the IRS expand the scope of these notices to cover per capita distributions outside of the settlement context. We are in the process of considering this request.

Business Tax Credits to Stimulate Employment among Native Americans and Alaska Natives. In its Fiscal Year 2014 Revenue Proposals ([Green Book](#)), the Treasury Department recommends making permanent the Indian Employment Credit (IEC) and the Work Opportunity Tax Credit (WOTC). The proposal would also simplify the calculation of the IEC. Both credits have been extended 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. This program does not target Native Americans exclusively, but it is important to Indian Country for two reasons:
 - Qualified veterans are now 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 targets the economically disadvantaged, and unemployment rates among Native American communities are high.

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.² 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 reductions in their federal business income tax liability.³

- *Indian Employment Credit.* The IEC is a business income tax credit available to employers who hire registered Native American Indians, and spouses of registered Native American Indians, living on or near an Indian reservation and working for an employer on that reservation. The credit is available to qualified workers who earn \$45,000 or less annually and who are not employed in the gaming industry.

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

² Employers can 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.

³ See the [Department of Labor WOTC home page](#) for additional details on the WOTC.

Pension Plans for Employees of Indian Tribal Governments

The Department of the Treasury issued an Advanced Notice of Proposed Rule Making (ANPRM) on November 7, 2011 to solicit comments on and initiate a dialogue with the tribal community concerning guidance under consideration relating to the determination of whether a plan of an Indian tribal government is a governmental plan within the meaning of Section 414(d) of the Internal Revenue Code. Section 414(d) was amended by the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (PPA '06) to include certain plans of Indian tribal governments and related entities. PPA '06 provides that the term “governmental plan” includes a plan established and maintained by an Indian tribal government, a subdivision of an Indian tribal government, or an agency or instrumentality of either, if all the services provided by employees participating in the plan are in the performance of essential governmental functions, but not in the performance of commercial activities (whether or not an essential governmental function).

Treasury Departmental Offices and the IRS conducted several consultation sessions with tribes on the ANPRM following its issuance. Further consultation on this issue is contemplated before future guidance is finalized.

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 program is well-regarded in Indian Country. The mission of the CDFI Fund 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 components that focus exclusively on establishing and strengthening CDFIs in American Indian, Alaskan Native, and Native Hawaiian communities: the Native American CDFI Assistance Program (NACA Program) and the Capacity Building Initiative

There are 72 certified Native CDFIs in operation throughout the country, up from just 14 in 2001. Clearly, there is demand among American Indians, Native Alaskans, and Native Hawaiians for the capital and institutional support Native CDFIs provide.

In May 2013 the Treasury Department announced the response to our most recent round of applications for funding under the NACA Program. The CDFI Fund received 65 eligible NACA applications requesting \$26.9 million. The applicants came from 21 states. These applications are currently being reviewed through a merit-based quantitative evaluation system designed to award funding to the applicants most likely to have the greatest impact in Native communities. The CDFI Fund is making approximately \$11.4 million available for Financial Assistance and

Technical Assistance awards through the NACA Program.

Since the NACA Program was launched in 2001, the CDFI Fund has provided over \$81 million in Financial Assistance and Technical Assistance awards under the NACA Program. More than 375 Native CDFIs have received more than 11,000 hours of technical assistance, ultimately strengthening their ability to serve community members.

CDFI Study on Access to Capital and Credit. This year the CDFI Native Initiatives Program launched a new study of Native communities' access to capital and credit. The project will provide detailed analysis and quantitative research that can lead to actionable recommendations for improving access to capital and credit in Native Communities. The CDFI Native Initiatives Program has solicited comments from Indian Country to help direct the study, and will be conducting a number of consultations as part of the study process.

CDFI Bond Guarantee Program. The new CDFI Bond Guarantee Program, authorized under the Small Business Jobs Act of 2010, can be a valuable source of credit and capital to Indian Country, as it provides long-term capital (up to 30 years) at below-market rates to eligible CDFIs. All certified CDFIs are eligible to 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.

The Treasury Department recognizes that collateral issues are especially difficult for Native communities, and the Department has created a number of alternative pathways for tribes to take advantage of the program, one of which includes participating as a Secondary Borrower who receives loans from a Certified CDFI. Tribes or other tribally-related entities also may participate by providing credit enhancements to a Certified CDFI that applies to be the recipient of bond proceeds.

The application period for FY2013 closed on July 17, 2013, and Treasury hopes to provide its first Guarantee approval no later than September 30, 2013. Contingent upon Congressional authorization for Treasury to issue guarantees in FY2014, the Department will resume its outreach efforts next fiscal year to prepare Native communities and the CDFI industry at large for the 2014 application period of the CDFI Bond Guarantee Program.

Tribal Economic Development Bonds. The Treasury Department has also worked with tribes to help improve their access to the capital markets. Under current law, tribes have a more limited authority to issue tax-exempt municipal debt than states and localities. Many have argued against this policy on a variety of grounds, including that it has inhibited economic development,

hampered 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 (Recovery Act) responded to these concerns by granting Treasury the authority to allocate \$2 billion of Tribal Economic Development Bonds (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.

In the [FY 2014 Green Book](#), the Treasury Department proposes key permanent changes to the structure of TEDBs. These changes were also proposed in the Department's [2011 Report to Congress](#). First, the Treasury Department proposes adopting for tribal governments, on a permanent basis, a TEDB authority eligibility standard that is comparable to state or local government standards of eligibility for issuing tax-exempt governmental bonds. Second, it recommends adoption of a comparable private activity board standard, with a tailored volume cap. Third, project location restrictions would be retained but they would be somewhat more flexible than under current law. Finally, TEDB gambling facility restrictions would be retained. The Report concluded 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, without a bond volume cap."⁴

Re-Allocation of Existing TEDB Authority under the Recovery Act. In July 2012 the IRS released [Notice 2012-48](#), which provides guidelines and application forms for the re-allocation of approximately \$1.5 billion in remaining unused national bond volume authority for TEDBs. These new guidelines will be followed to re-allocate authority that was previously allocated in accordance with the Recovery Act but subsequently forfeited.

- The maximum allocation available to any one tribe is slightly less than \$300 million as of August 1, 2013. This per-tribe ceiling will decline as the total authority is used.
- Authority is allocated immediately for approved projects, instead of waiting for a specific date as was done during the original allocation process.

Consultation with tribal leaders preceded the development and announcement of these new guidelines. Our objective is to help tribal nations access these bonds to create jobs and growth in Indian Country.

Additional Outreach to Indian Country

On May 10, 2013, a preliminary meeting was held at the Treasury Department to introduce POCTC Elaine Buckberg to a small number of influential Native leaders. In attendance were representatives of Native American tribes, the National Congress of American Indians (NCAI), and the Native American Finance Officers' Association (NAFOA). Treasury's Office of Economic Policy, Office of Tax Policy, and the IRS Indian Tribal Governments Office also participated.

On July 16, 2013, the Treasury Department and IRS conducted a phone consultation with Alaska Regional Corporations (ARCs) to discuss a forthcoming draft notice on applying the voluntary withholding provisions to dividends and other payments made by an ARC. Voluntary income tax withholding arrangements allow taxpayers to avoid potentially burdensome final tax payments at the end of the year. Twenty-seven tribal representatives participated in the call, together with Treasury personnel from the Office of Tax Policy, Office of Economic Policy, the IRS Chief Counsel's Office, and the IRS Indian Tribal Governments Office.

Conclusion

The Treasury Department is actively monitoring its tribal consultation process to ensure that it fulfills the mandate of EO 13175, and will propose updates if and when necessary. At this time the process appears to be working effectively to ensure meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications.

Appendix A: The Treasury Department Tribal Consultation Process

Guiding Principles: The White House Executive Memorandum on Tribal Consultation (November 5, 2009) highlights the Administration's commitment to continued implementation of the policy directives in [Executive Order 13175](#) (EO 13175).

The Treasury Department supports the fundamental principles outlined in EO 13175. Three further principles, consistent with EO 13175, guide the Treasury Department's consultation process:⁵

- The Treasury Department is committed to the establishment of a comprehensive consultation process that sustains ongoing, meaningful dialogue with Indian tribes on Treasury policies that have implications for such tribes, and in particular those regulations and legislative proposals that have a direct and identifiable economic impact on Indian tribes or 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.
- The Treasury Department is committed to developing and issuing regulations and guidance in a timely and efficient manner.

Agency Point of Contact: The agency point of contact for tribal consultation (POCTC) is the Deputy Assistant Secretary for Policy Coordination in the Office of Economic Policy. The POCTC relies on Treasury's Office of the General Counsel (OGC) and Executive Secretariat (ES) to identify issues that could require consultation prior to issuance of Treasury policies. Each Treasury bureau and office must undertake tribal consultation in accordance with EO 13175.

Goals of Consultation: Consultation is designed to strengthen relationships between the U.S. government and sovereign tribal governments, and to reduce the impact of unfunded mandates on tribal governments and tribal members to the extent practicable and permitted by law. Under EO 13175, new legislative proposals, regulations, and administrative practices, including changes to existing policies, require consultation to the extent that they explicitly target Native

⁵ EO 13175 is available at: http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2000_register&position=all&page=67249

Americans or Alaskan Natives, or affect tribal governments and/or tribal members exclusively or in a significantly disproportionate manner relative to the majority of U.S. residents.⁶

Treasury-Wide Policy on Tribal Consultation: Each bureau and office is responsible for maintaining well-defined procedures to achieve the following core objectives:

- *Timely identification of matters that may require tribal consultation*, to include regulatory and legislative activities that fall within the span of bureau or office operations as well as direct program responsibilities.
- *Timely process for determining whether consultation is required*, to include timely notice to the POCTC of non-routine issues of importance regarding legislative activities, regulations, and administrative practices that may require tribal consultation. The POCTC is also available for advice on the consultation process as needed.
- *Ongoing, pro-active tribal consultation processes*, to include early outreach to solicit comments from tribal governments and members who may be substantially affected by changes in laws, regulations or policies under consideration, when it has been determined that EO 13175 requires consultation. Outreach should incorporate an open process through which tribal governments may pro-actively consult with the Treasury bureau or office, on a government-to-government basis, regarding matters that involve tribal and federal law, regulations, and administrative practice.

These core objectives are discussed below in greater detail.

Timely Identification of Matters That May Require Tribal Consultation

Program and/or legislative staff in each Treasury bureau and office are responsible for identifying pending legislation and regulations that may disproportionately affect tribal governments and members.

- Explicit criteria that may be used to determine when tribal consultation is appropriate, consistent with the mandate of the bureau or office, should be developed and made clear to program and legislative staff, and to points of contact in the appropriate legal office.

⁶ Consistent with EO 13175, please note that the Treasury Department will not be able to accommodate requests for consultation on particular matters, including matters that are the subject of anticipated or active litigation or enforcement actions.

- Bureaus and offices are encouraged to develop indicators of disproportionate effects on tribal governments and members, unfunded mandates, and regulations that would preempt tribal law, to assist program staff and legal counsel in the identification of issues that are likely to require tribal consultation.

Treasury Department legislative proposals that have tribal implications should not be submitted prior to tribal consultation.

Timely Process for Determining Whether Consultation is Required

Each bureau and office is expected to comply with EO 13175, and to initiate consultation at the earliest stage possible when it is required. In general, program or legislative staff in each Treasury bureau and office should inform the POCTC on a timely basis regarding pending legislation, regulations or administrative practices that may require tribal consultation. [OMB Memorandum M-10-33](#), “Guidance for Implementing E.O. 13175,” requires that (a) proposed legislation with tribal implications include a statement or certification that tribal consultation was conducted or is not required, and (b) proposed final regulations that would impose unfunded mandates on tribes or preempt tribal law include a “tribal summary impact statement.”⁷ Treasury offices and bureaus should include these elements in legislative proposals and proposed final regulations submitted for final Treasury clearance, prior to submission to OMB.

The POCTC is available to assist Treasury bureaus and offices in identifying proposed legislation, regulations, and administrative practices that require tribal consultation, if the application of the requirements of EO 13175 is questionable in the view of program staff. In such cases the POCTC will respond to the inquiry within 15 days. If the POCTC and the Treasury bureau or office determine that consultation is required, consultation should be initiated within 30 days. If the POCTC and the Treasury bureau or office disagree on the need for tribal consultation, the question will be referred to OGC for final determination.

As part of their regular review process for proposed legislation, regulations, or administrative practices, ES and OGC shall ask each bureau or office, at the earliest stage that it becomes apparent an activity might require consultation, if a consultation decision has been made. If the associated clearance documents do not indicate explicitly that tribal consultation is completed, planned, or under way, then whenever practicable OGC, ES, or Legislative Affairs will return the documents to program staff for clarification and alert the POCTC to the potential need for

⁷ The required components of the tribal summary impact statement are specified on p. 6 of M-10-33.

consultation. In some cases time constraints may require a staged approach, in which a plan for more extensive tribal consultation is identified and a commitment is made to consult within a specified time frame.

Ongoing, Proactive Tribal Consultation Process

Target Audience: Treasury bureaus and offices should consult directly with tribes and tribal governing officials on matters that explicitly target Native Americans or Alaskan Natives, or affect such tribes and officials exclusively or in a significantly disproportionate manner relative to the majority of U.S. residents. When it is appropriate and useful, inter-tribal organizations representing the interests of tribes in Indian Country should be consulted as well. In most instances, however, reliance solely on discussions with inter-tribal organizations does not constitute consultation on a government-to-government basis under EO 13175.⁸

Methods of Consultation: Each bureau and office may develop its own method of consultation, following the guiding principles above. Mandatory annual progress reports to OMB, compiled for submission in early August, provide descriptions of methods that have been used in the past. The POCTC is available to assist bureaus or offices in developing or revising their tribal consultation plan. Consultation methods may include, but are not limited to, the following.

- Federal Register (FR) notices soliciting comments. Bureaus and offices are required to document tribal consultation in the preamble to Federal Register notices regarding agency regulations that have tribal implications. This process alone may be sufficient, for example, when program staff deal exclusively with highly-complex and/or sophisticated financial matters affecting a small number of well-known constituent groups⁹ In other cases bureaus and offices that work directly with a variety of tribal governments and tribal members have developed, in consultation with tribal governments and officials, detailed guidelines on tribal consultation practices, regular schedules for consultation meetings during regional conferences, and a dedicated staff.

⁸ EO 13175 permits consultation to proceed with *authorized* inter-tribal organizations. However, in initial consultation with tribal leaders during the spring of 2010 many stressed the importance of direct communication with tribal officials and argued explicitly that consultation with inter-tribal organizations is not sufficient. Therefore, the Treasury Department recommends direct outreach whenever practicable.

⁹ For example, the Treasury Financial Crimes Enforcement Network (FinCEN) guidance to gaming organizations is highly specialized, and it directly targets a relatively small number of organizations. Therefore routine requests for comments and guidance that includes brief mention of Indian gaming activities is often sufficient to fulfill EO 13175. See , *e.g.*, FIN-2990-G004, “Frequently Asked Questions, Casino Recordkeeping, Reporting and Compliance Reporting Requirements,” September 30, 2009, available at http://www.fincen.gov/statutes_regs/guidance/html/Casino_FAQs_List.html

FR notices requesting comments from tribal governments and officials regarding proposed changes in law or regulation should be published as soon as practicable after Treasury staff have determined that tribal consultation is necessary, and ideally within 30 days. The FR notice should specify a 60- to 120-day minimum comment period whenever practicable, to allow sufficient time for tribal leaders to consult with their members and legal counsel on any matters of particular concern, and to formulate a response to the notice. Whenever practicable, links to FR notices requesting comments from tribal governments and members, together with brief descriptions of other tribal consultation activities, should be sent to the POCTC to become part of a comprehensive record of Treasury's activities in this regard.¹⁰

- *Meetings, conference calls, videoconferences and workshops to encourage an exchange of views.* When Treasury policies explicitly target Native American and Alaskan Native governments, organizations, or members, or when the issue is complex with a disproportionate effect on tribes and tribal members, consultation should extend beyond FR notices to the extent practicable. Consultation may be conducted through email, regular mail, telephone calls, video conferences and in-person meetings or conferences, as schedules and resources permit. Disparities in time zones and travel costs should be taken into account when scheduling phone calls and conferences, including the time zones of Alaskan Native tribes in the extreme west.
- *Targeted outreach.* Contact information for federally-recognized tribes is available on the Bureau of Indian Affairs web site.¹¹ The POCTC also maintains a Treasury-specific list, including contact points for some inter-tribal organizations; this list is available to other Treasury bureaus and offices upon request. Furthermore tribal organizations often sponsor conferences attended by leaders and officials from many tribes. These conferences may, therefore, provide opportunities for agency listening sessions and/or presentations that are cost-effective from the perspective of tribal governments and the federal government.

Open process: Tribal governments may pro-actively consult with each Treasury bureau or office, on a government-to-government basis, regarding matters that involve tribal and federal law regulations, and administrative practice.

¹⁰ This information will provide the basis for annual reports that the Treasury Department is required to submit to OMB under EO 13175.

¹¹ The Bureau of Indian Affairs, Department of Interior, maintains and regularly updates a [Tribal Leaders Directory](#)

- Tribal.Consult@treasury.gov. Tribal governments may channel information or concerns to a dedicated Treasury Department email address, Tribal.Consult@treasury.gov, or to the POCTC directly. These points of contact may be used only for general information and concerns. Specific cases involving particular tribal governments and tribal members must be referred to the bureau(s) or office(s) with direct jurisdiction.
- Meetings and workshops. Intra- and inter-agency sponsorship of meetings to address areas of concern is encouraged to conserve resource and ensure comprehensive coverage.

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.

Bureau of the Fiscal Service

A. Office of Financial Markets and Bureau of the Public Debt

<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 required by statute to invest, and is investing, two Indian tribal funds and one “tribally related” fund from which payments are being made to several Indian tribes as well as to non-Indian entities. The two tribal funds currently being invested by Treasury are the Cheyenne River Sioux and the Lower Brule Sioux Tribes’ Terrestrial Wildlife Habitat Restoration Trust Funds (the “Title VI Funds”). As with the tribal funds invested by the Department of the Interior, Treasury is required by statute to disburse amounts from the interest earned by the Title VI Funds to the tribes involved as requested for certain statutorily-prescribed purposes. Also, by statute, Treasury is required to review the investment of the funds with the two tribes involved on at least an annual basis, in addition to providing monthly reports to the tribes on the investment activities of their funds.

The one “tribally related” fund that Treasury is required by statute to invest is the Lower Colorado River Basin Development Trust Fund (LCRBDTF), an Interior fund. Interior determines the amounts to be invested and the maturities of such investments, which are in Treasury securities.

During the past year, the Office of Financial Markets (OFM) and Bureau of the Fiscal Service (BFS) have worked closely with other Treasury offices and also with Interior and OMB to address a number of investment and other issues involving the three aforementioned funds as well as several Indian tribal funds that by statute Treasury is required to invest. One of the issues was the impact, if any, of sequestration on these funds. Gary Grippo, OGFP DAS, explained how sequestration would affect the two Title VI funds in letters to the Tribes’ Chairmen in April, following up on consultation calls with the BFS staff. He also discussed sequestration and its impact on the two new development funds to the Yankton and Santee Sioux Tribes in calls made in late April. On these calls, he also continued our consultation with the Tribes on the

establishment and investment of the two development funds. In addition, he consulted in October with the San Luis Rey River Indian Water Authority and the Tohono O’odham Nation regarding Treasury’s proposal to enter into Investment Memoranda of Understanding (MOU) with Interior under which Interior would continue to invest the San Luis Rey Tribal Development Fund and the Cooperative Fund on behalf of Treasury. These MOUs have since been executed. Similar MOUs have been developed for the Yankton Sioux and the Santee Sioux Tribes’ development funds and for the LCRBDTF after consultation with the tribes involved and Interior.

B. Financial Management Service

<http://www.fms.treas.gov>

The Financial Management Service’s (FMS) Customer Relationship Managers (CRMs) have undertaken outreach to tribal governments and businesses. CRMs serve as the central point of contact for Federal Program Agencies (FPAs). CRMs can help FPAs to improve government-wide cash management practices.

FMS administers the surety bond program for the federal government under 31 U.S.C. 9304-9308 for companies that wish to: direct write federal bonds, reinsure federal bonds, or be recognized as an Admitted Reinsurer. Some tribal leaders have expressed an interest in this program.

Community Development Financial Institutions Fund

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

Community Development Financial Institutions (CDFIs) are non-government financial entities whose primary mission is to promote community development, principally by serving and being accountable to a low-income community, and by providing development services. 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 program serves economically distressed Native American, Alaska Native, and Native Hawaiian communities across the nation by providing funding to build the organizational capacity of Certified Native CDFIs, Emerging Native CDFIs, and Sponsoring Entities. As of June 30, 2012, there are 72 certified Native CDFIs.¹²

The Native Initiatives provides support in two ways: through Financial Assistance and Technical Assistance awards provided by the Native American CDFI Assistance Program (NACA

¹² CDFI recertification is under way. An updated count of certified Native CDFIs will be available in the fall.

Program), and through trainings, technical assistance, and other resources provided by the Capacity Building Initiative (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 market analysis, 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. The CBI sponsors a variety of trainings, webinars, and individual technical assistance on a variety of topics, such as small business and microenterprise lending, healthy food financing, and some trainings that are Native-specific. Free reference materials are also available through the CBI's Resource Bank at <http://www.cdfifund.gov/cbi>.

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 serve to create and expand CDFIs primarily 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 Fund formulated two chief strategies for overcoming barriers to credit, capital, and financial services in Native communities:

- Expanding Native Opportunities (ENO), training programs that work to develop new Native CDFIs, strengthen existing Native CDFIs, and assist Native CDFIs in creating financial education and asset building programs in Native communities. ENO has currently evolved and has been incorporated into the part of the larger CDFI Fund Capacity Building Initiative (CBI).
- The Native American CDFI Assistance (NACA) Program, a funding program that aims to increase the number and capacity of existing or new Native CDFIs.

Through CBI, the CDFI Fund sponsored a two-year training series that finished in June 2013. This initiative, involving 16 Native CDFIs, was called The Leadership Journey: Native CDFI Growth & Excellence (The Leadership Journey). Through it Native CDFI leaders developed leadership skills and resources to further staff growth and increase organizational performance.

Building on the success of its first Leadership program, the CDFI Fund expects to launch, in the fall of 2013, the Native Leadership Journey II. This initiative is designed to run for two years and will develop the capacity of established Native CDFI leaders to improve their organization's effectiveness and performance.

On August 6, 2012, the CDFI Fund announced awards totaling \$11.47 million to NACA Program participants in the FY2012 funding round. NACA received 66 applications requesting \$20.94 million for the 2012 funding round. Awardees' primary financing activities are small business/venture capital, affordable housing, and consumer loans. (See the body of this report for specific details about 2013 applications.)

The CDFI Fund Native Initiatives website includes a link to the [2001 Native American Lending Study](#) and the Native Initiatives Strategic Plan for Fiscal Years 2009-2014. The CDFI Fund is now 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. The final report will be available to the public. 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 because they are vulnerable to exploitation through money laundering activities. FinCEN staff works closely with tribally-owned casinos for this reason. FinCEN is part of the inter-agency Indian Gaming Working Group, which also includes the National Indian Gaming Commission, the Department of Justice, the Federal Bureau of Investigation, the Internal Revenue Service, and the Bureau of Indian Affairs Law Enforcement Services.

Internal Revenue Service

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

The overall goal of the IRS Indian Tribal Governments Office (ITG) is to use 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 both the 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 the IRS to ensure the agency complies with EO 13175.

In late 2012, continuing into 2013, the IRS published significant guidance on items ranging from the general welfare exclusion to tax exempt bonds. This guidance is discussed in the body of the report. Most noteworthy are the general welfare exclusion, per capita payments for certain tribal trust settlement proceeds, and the re-allocation process for previously forfeited authority to issue Tribal Economic Development Bonds.

The IRS continues to partner with tribal governments to establish Volunteer Income Tax Assistance (VITA) sites in their local communities. The VITA program has a three-pronged approach which includes financial education and asset building, tax education, and tax preparation. The tax preparation goal is to provide free tax preparation service for low- to moderate-income taxpayers. During 2013, the IRS 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.

Office of Financial Stability

<http://www.financialstability.gov>

The Troubled Asset Relief Program (TARP) was established by the Emergency Economic Stabilization Act of 2008 (EESA). The programs created through TARP include the Legacy Securities Public-Private Investment Program (PPIP), to which an Alaska Native Corporation has served as a contractor. OFS launched PPIP to help restart the market for non-agency residential

mortgage-backed securities and commercial mortgage-backed securities, thereby allowing financial institutions to re-deploy capital and extend new credit to households and businesses. PPIP originally consisted of nine carefully selected Public-Private Investment Funds (PPIFs), to purchase eligible legacy securities from eligible sellers under EESA. During the program, these fund managers established meaningful partnership roles for small businesses, as well as those owned by minorities and women. These roles included, among others, asset management, capital raising, brokers and dealers, investment sourcing, research, advisory, cash management, and fund administration services. For example, the Los Angeles private equity fund Oaktree Capital Management LP (Oaktree), which was one of Treasury's primary PPIP contractors, sub-contracted with Inupiat Eskimo-owned Arctic Slope Regional Corporation (Arctic Slope). In addition, Oaktree partners consulted with Arctic Slope in investment decisions.¹³

United States Mint

<https://www.usmint.gov>

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

Since the beginning of the Native American \$1 Coin Program in 2009, the United States Mint has been actively engaged in consultation 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 development and history of 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 United States Mint develops design themes in consultation with the National Museum of the American Indian, the National Congress of the American Indian (NCAI), the U.S. Senate Committee on Indian Affairs (CIAS), the Congressional Native American Caucus (CNAC) of the U.S. House of Representatives, and the Citizens Coinage Advisory Committee (CCAC). In accordance with the Act, the Secretary of the Treasury then 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.

Additionally, the United States Mint has been working very closely with 32 eligible Native American tribes to develop themes and designs for each tribe's Code Talkers Recognition

¹³ [A more complete description of the PPIP](#) is available at the [PPIP Purpose and Overview page](#) of the Financial Stability section of the Treasury.gov website.

Congressional Gold Medal. Specifically, 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 United States Mint will strike a unique gold medal for each Native American tribe that had a member who served as a code talker. The bureau also will strike silver duplicate medals to be presented to the specific code talkers or their next of kin, and bronze duplicates to be available for sale to the public. The obverse designs are dedicated to the military service of the Native American code talker, while the reverse designs highlight the unique culture and heritage of the code talker's tribe. The United States 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. The United States Mint plans to complete the design evaluation and approval process, as well as strike all 32 Code Talkers Recognition Congressional Gold Medals, by this November.

Appendix C: Possible Criteria for Tribal Consultation

Specific criteria that Treasury bureaus and offices may use to identify legislation and regulations requiring consultation with sovereign American Indian and Alaskan Native (AI/AN) tribes are suggested below, together with illustrative examples.

1. Programs or policies that target AI/ANs explicitly or directly, and programs that target groups and activities in which AI/ANs are disproportionately represented, should engage in consultation early in the regulation drafting process. For example:
 - Policies that relate to the definition of permissible uses for which tribal governments can issue tax exempt debt.
 - Policies that specifically deal with the taxation of benefits provided by tribal governments, such as health care.
 - Programs that seek to increase the availability of capital to Native American owned or controlled financial institutions through additional support for Native American owned CDFIs, directly or as part of a targeted initiative toward similarly situated CDFIs.
 - Programs that seek to prevent exploitation of Native American tribes and tribal businesses through criminal and terrorist activities, such as money laundering activities that target tribally-owned gambling institutions.¹⁴

2. Tribal consultation process may be required when AI/AN tribes request consultation on substantive issues that are unique to tribal governments, when consultation is requested to address regulatory or legislative activities that are likely to have direct and identifiable economic impacts on Indian tribes, or when it is evident or should be evident that the contemplated regulations or legislation could preempt tribal law.

¹⁴ See [Casino Issues](#), posted on the IRS web site. For earlier background see “[Anti-Money Laundering Controls for Indian Tribal Casinos](#),” February 22, 1996.