

Department of the Treasury Progress Report to OMB on Tribal Consultation October 2018

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.

The Department of the Treasury (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 August 2017 through August 2018 time period.

The Treasury Tribal Consultation Process

Treasury supports the Fundamental Principles set forth in Section 2 of EO 13175. Treasury published a draft tribal consultation policy in the Federal Register on December 3, 2014, and after making several changes in response to comments from Indian Tribal Governments and tribal organizations, formally adopted a consultation policy on September 23, 2015. See Appendix A. The tribal consultation policy is applicable Department-wide.

Three principles guide Treasury’s 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.

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).

To further these goals, Treasury's consultation policy provides that each bureau and office should maintain a well-defined set of procedures to achieve the following core objectives:

- (1) A timely identification of matters that may require tribal consultation.
- (2) A timely process for determining whether consultation is required.
- (3) An ongoing, proactive tribal consultation processes.

Agency Point of Contact

The agency Point of Contact for Tribal Consultation (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.

Consultation

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

- 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 Community Development Financial Institutions Fund (CDFI Fund) Native Initiatives Program.

These points have been raised during consultation since early 2009. As tribal consultation continues, Treasury will address tribal leadership concerns.

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 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 updated with information for tribal leaders and other interested parties about relevant policy statements, reports on recent consultation activities, and reports to Congress.
- Treasury's consultation with tribal leaders has come to fruition with final decisions or guidance on several key issues: the Treasury Secretary's appointment of tribal leaders to the Treasury Tribal Advisory Committee (TTAC), which was newly chartered in 2015 in compliance with the [Tribal General Welfare Exclusion Act of 2014](#). In addition, Treasury continues to hold general consultations and listening sessions to solicit input from tribal leaders on matters of concern to them, and to enable tribal leaders to discuss these 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 Native American concerns.

Treasury Tribal Advisory Committee

On September 26, 2014, the President signed into law the Tribal General Welfare Exclusion Act of 2014 (TGWEA). Treasury implemented this legislation by consulting with tribal leaders through multiple channels. Among other provisions, the TGWEA requires that the Department establish a Treasury Tribal Advisory Committee (TTAC). The TTAC committee members advise the Treasury Secretary on the taxation of Indians, the training of Internal Revenue Service field agents, and instruction on the General Welfare Exclusion for Native American finance officers. The TTAC Charter was filed in February 2015 and renewed in February 2017.

The TTAC consists of seven members. Three are recommended by the Secretary of the Treasury. Four members are recommended by the majority and minority leadership of the Senate Committee on Finance and the House Committee on Ways and Means. The Secretary's recommendations serve on the TTAC for a two-year term. The Congressional recommendations serve for a four-year term.

Tribal Representatives to the TTAC:

- *Mr. W. Ron Allen of the Jamestown S’Klallam Tribe (Washington State)*
- *Ms. Rebecca Benally of the Navajo Nation (Utah)*
- *Ms. Sharon Edenfield of the Confederated Tribes of Siletz Indians (Oregon)*
- *Ms. Lacey Horn of the Cherokee Nation (Oklahoma)*
- *Ms. Patricia King of the Oneida Tribe (Wisconsin)*
- *Mr. Eugene Magnuson of the Pokagon Band of Potawatomi Indians (Michigan)*
- *Ms. Marilyn Malerba of the Mohegan Tribe (Connecticut)*

Tribal Consultation Activities since August 2017

- On December 4, 2017, the Point of Contact for Tribal Consultation (POCTC) conducted an in-person Tax Reform Listening Session. Tribal leaders presented issues and recommendations on matters related to taxation and economic development in Indian Country. The session was attended by several high-level Treasury officials and over 60 Tribal Leaders.
- On February 8, 2018, Treasury announced the seventh and final tribal representative for the Treasury Tribal Advisory Committee (TTAC).

Policy Responses to Tribal Consultation

On September 18, 2015, the Department of the Treasury and IRS issued final guidance (Notice 2015-67) regarding per capita distributions made to members of Indian tribes from funds held in trust by the Secretary of the Interior. The final guidance clarifies that, generally, these per capita payments will not be subject to federal income tax. Consultation began in 2012, in response to feedback and concerns from tribal nations about specific Indian tribal trust settlements.

After publication of Notice 2015-67, tribes and the Department of the Interior (DOI) requested clarification from the Service regarding direct pay leases, which were not expressly addressed in the Notice. The Bureau of Indian Affairs (BIA) within DOI manages tribal leases and other contracts on Indian trust lands. Under current BIA regulations, the BIA may approve direct payment to a tribe from the leases and contracts' operators rather than depositing these payments into a DOI-maintained tribal trust account. Funds acquired through these direct pay leases and other contracts are derived from tribal trust resources. Direct pay leases and contracts are approved by the same process or are subject to the same BIA-approved standards as leases and contracts under which the funds are deposited into tribal trust accounts. (Direct pay arrangements are often preferable for both tribes and DOI because they enable faster

payments and eliminate the need for DOI to manage the funds). Treasury and IRS officials held listening sessions by telephone and at national tribal organization conferences to learn more about the issue. In response, in June of 2016, the Service issued Interim Guidance Memorandum TEGE 04-0516-0009 instructing IRS employees to apply the same standards set forth in Notice 2015-67 when determining whether per capita distributions of direct pay lease funds are subject to taxation.

During the listening sessions on direct pay leases, tribes also informed us that there is another DOI tribal lease program that is administered under the HEARTH Act. The HEARTH Act creates an alternative and voluntary tribal land leasing process. Instead of direct approval of each individual tribal lease, the Act requires that the Secretary of the Interior approves tribal leasing regulations for each participating tribe. Treasury and IRS officials again held listening sessions with tribal leaders to more fully understand the issue. In response, in June of 2017, the IRS issued new Interim Guidance Memorandum TEGE-04-0617-0015 to replace TEGE 04-0516-0009, which expands the favorable income tax treatment set forth in Notice 2015-67 to both Direct Pay and HEARTH Act lease arrangements.

Financing Tribal Government Investments

Tribal Economic Development Bonds (TEDBs)

Treasury and the IRS have released new guidance that allows Indian tribal governments increased flexibility in the use of Tribal Economic Development Bonds (TEDBs). Since publication of Notice 2015-83 on December 4, 2015, Tribes may now finance their investments through “draw-down” loans, in which bonds are issued in phases over time. Indian tribal governments have up to three years to use the full bond volume cap allocations if they issue at least 10% of the total allocated authority within the first six months, and 50% of the total amount within two years. This new guidance, Notice 2015-83, was issued on December 4, 2015.

On December 1, 2015, before this guidance was issued, the total outstanding TEDB authority available to tribal governments was \$1.4 billion, or 70 percent of the \$2 billion originally allocated under the American Recovery and Reinvestment Act of 2009 (ARRA). By November 21, 2018, the total available TEDB authority was roughly \$359 million. That is, \$1,051 billion in unused TEDB authority, over seventy-five percent of the outstanding totals, has been allocated to tribal governments during the thirty-six-month period between December 1, 2015 and November 21, 2018.

It is too soon to tell whether these more recent allocations will increase the rate of successful bond issuance by tribal governments. But we believe this new approach may be helpful to smaller tribes, as it has been for smaller municipalities, as the economy continues to strengthen while interest rates remain relatively low.

In addition, recently, an issue has arisen regarding a potential need for public guidance to clarify whether Indian tribal governments may issue TEDBs to refinance outstanding TEDBs

in current refunding issues without additional bond volume cap similar to certain other targeted bond programs. The Treasury-IRS's 2018-2019 Priority Guidance Plan released on November 8, 2018, includes this issue as a priority guidance item.

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 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.³ 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, without a bond volume cap."⁴

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 growth in Indian Country.

³ 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.

⁴ Report, p.2.

Indian Employment Credit (IEC)⁵

The Indian Employment Credit (IEC), a business income tax credit, is 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 is available to qualified workers earning \$45,000 or less annually and not employed in the gaming industry.

Employers may not take the Work Opportunity Tax Credit (WOTC) and the IEC concurrently for the same employee.

Community Development Financial Institutions Fund

Community Development Financial Institutions (CDFIs) are non-governmental financial entities whose primary mission is to promote community development by providing financing and development services to low-income communities, and by being accountable to those communities through their governing or advisory boards.

All of the CDFI Fund's programs have been used to support community development in economically distressed Native American, Alaska Native, and Native Hawaiian communities (Native Communities). Several of the CDFI Fund's programs were specifically involved in Native Communities in the past year as discussed below.

Native Initiatives

The Native Initiatives program serves economically distressed Native Communities across the nation by providing funding to build the organizational capacity of Native CDFIs. As of July 31, 2018, there are 72 certified Native CDFIs with assets totaling more than \$1.164 billion. To be certified as a Native CDFI, an organization must meet the CDFI Fund's certification eligibility requirements and direct more than 50 percent of its activities to Native Communities and/or Native persons.

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 support the creation and expansion of Native 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

⁵ The IEC does not apply to tax years beginning after December 31, 2017. As of December 13, 2018, legislation extending the IEC has not been enacted.

access to capital and 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:

1. **Expanding Native Opportunities:** 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, which is currently administered through the Capacity Building Initiative (CBI); and
2. **The Native CDFI Assistance Program (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 \$136 million in awards to help Native CDFIs deliver financial services and financial products to their communities.

The CDFI Fund commissioned the *Access to Capital and Credit in Native Communities Report (Report)* as a follow-up to its 2001 *Native American Lending Study*. The first part of the Report, which was published in May 2016, examined recent successes in the effort to improve access to capital and credit in Native Communities as well as what could be done to build on that success. The second part of the Report, titled *Access to Capital and Credit in Native Communities: A Data Review (Data Review)*, was released in February 2017. The *Data Review* uses a range of data sets to document the evolution of Native Communities' capital access. Ultimately, the two-part study is intended to provide research and analysis in support of further improvements in access to capital and credit in Native Communities.

Today, the CDFI Fund's Native Initiatives provide support in two ways: 1. through Financial Assistance and Technical Assistance Awards provided by the NACA Program, and 2. through training, 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 Awards are available to certified Native CDFIs, Emerging Native CDFIs, and Sponsoring Entities. Technical Assistance Awards are typically used to acquire products or services including computer technology, staff training, and professional services such as hiring a consultant to conduct 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 CBI, CDFIs and Native CDFIs are provided trainings, webinars, and individual technical assistance on multiple topics, such as small business and microenterprise lending, expanding services into underserved areas, and Native-specific trainings. Free reference materials are available through the CBI's Resource Bank.

Annual Activity

In fiscal year (FY) 2017, the NACA Program awarded over \$15.5 million to 38 organizations headquartered in 19 states. \$12.9 million of awards were provided in the form of Financial Assistance, while \$2.6 million was awarded for Technical Assistance. The awardees were composed of 33 Loan Funds, one (1) Credit Union, and four (4) Sponsoring Entities.

Additionally, throughout 2017 and 2018, CDFI Fund leadership and staff have routinely engaged Native CDFIs, national Native American organizations, and other federal agencies serving Native Communities. These engagements were intended to both receive direct feedback from the Native CDFI industry and increase the CDFI Fund's capacity to increase access to capital and credit in Native Communities.

On September 26, 2017, CDFI Fund staff participated in the Annual Native CDFI Convening at the 2017 Opportunity Finance Network Conference, held in Washington, DC. CDFI Fund leadership and NACA Program staff participated in a panel discussion with representatives of Native CDFIs from across the United States. CDFI Fund staff both provided an update on its planned activities for FY 2018 and participated in a dialogue with Native CDFI staff and leadership in order to receive feedback on how the CDFI Fund could better serve the Native CDFI Industry. On October 12, 2017, the CDFI Fund also participated in the First Annual Native CDFI Network Member Meeting, with CDFI Fund Director Annie Donovan providing an overview of the findings of the *Access to Capital and Credit in Native Communities Report* and its supporting *Data Review*. Additionally, NACA Program staff participated in a Q&A session with Native CDFI Network members and provided an update on the results of the FY 2017 NACA Funding Round.

CDFI Fund leadership and staff also visited Native Communities across the United States throughout 2017 and 2018 in order to gain first-hand insight into how Native CDFIs are increasing access to capital and credit in their communities.

In September of 2017, Director Donovan and NACA staff visited the Four Bands Community Fund, Lakota Funds, Lakota Federal Credit Union, and Mazaska Owecaso Otipi Financial, four Native CDFIs located on the Cheyenne River and Pine Ridge Indian Reservations in South Dakota. CDFI Fund staff participated in site visits to economic development projects financed by the four Native CDFIs and listened to success stories of individuals and businesses that received both financial products and technical assistance from the organizations.

In October of 2017, CDFI Fund Director Annie Donovan and NACA Program staff attended the Alaska Federation of Natives (AFN) Convention in Anchorage, Alaska and visited two Native CDFIs in the state, Alaska Growth Capital and Cook Inlet Lending Center. During the AFN Convention, Director Donovan provided an update on the CDFI Fund's Native Initiatives and participated in a roundtable discussion of emerging and certified Native CDFIs. CDFI Fund staff also visited a long-term elder care facility in Kotzebue, AK, financed by Alaska Growth Capital and the home offices of Cook Inlet Lending Center in Anchorage, AK.

The CDFI Fund also engaged with the Native CDFI industry through a variety of national

gatherings of Native American financial institutions in order to increase awareness of the CDFI Fund's Native Initiatives. In April of 2018, NACA Program staff participated in a panel discussion at the Native American Financial Officers Association Annual Conference titled "Seeding Capital for Growing an Economy," intended to explore options for Native Communities exploring development of financial institutions. The CDFI Fund also played a role in the first annual Native American Financial Institutions Gathering, co-hosted by the Federal Reserve Bank of Minneapolis' Center for Indian Country Development and the Federal Reserve System Partnership for Progress. Director Donovan provided remarks regarding Native CDFI access to the CDFI Fund's programs at the Gathering, and NACA Program staff participated in a panel to provide administrative updates on behalf of the CDFI Fund.

Capital Magnet Fund

The Capital Magnet Fund competitively awards funds to CDFIs and qualified non-profit housing organizations to finance affordable housing activities, as well as related economic development activities and community service facilities. Award recipients are able to utilize Capital Magnet Fund awards to create financing tools such as loan loss reserves, loan funds, equity funds, risk-sharing loans, and loan guarantees. Awards must be used to leverage housing and economic development investments at least ten times the size of the award amount.

In FY 2017, the Tohono O'odham KiKi Association (TOKA), the tribally designated housing entity of the Tohono O'odham Nation, located in south central Arizona, received a \$900,000 Capital Magnet Fund award. Established in 1962, the TOKA is solely responsible for developing and managing affordable housing for the Tohono O'odham Nation tribal members. TOKA is using its award to capitalize an Affordable Housing Fund to develop housing for low- and very low-income renters on the reservation.

New Markets Tax Credit Program

The CDFI Fund's New Markets Tax Credit Program (NMTC Program) provides incentives to taxpayers with Federal tax liabilities to invest in Community Development Entities (CDEs) that were awarded allocations of New Markets Tax Credits (NMTCs). The proceeds from the taxpayers' purchase of the NMTCs (Qualified Equity Investments) are used to make loans, equity investments and/or provide financial counseling and other related services to businesses located in Low-Income Communities. NMTCs are used to provide financing to for-profit and non-profit businesses located in Low-Income Communities (generally defined as 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 certified 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 requires proportional allocation of NMTC authority to non-metropolitan counties. 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 2017, NMTC Program investments in Native lands totaled \$991.7 million.

CDEs awarded allocations in the calendar year 2017 Round (announced February 2018) committed to investing \$52 million in Federal Indian Reservations, Off-Reservation Trust Lands, Hawaiian Home Lands, or Alaska Native Village Statistical Areas.

Following up on the success of the FY 2017 contract providing specialized training and Technical Assistance to minority- and Native-owned or controlled CDEs, in May 2018, the CDFI Fund participated in a one-day workshop hosted by the Federal Reserve Bank of Minneapolis' Center for Indian Country Development. The workshop, "Making the New Markets Tax Credit Work in Native Communities," was attended by 43 individuals representing Native entities including CDFIs, CDEs, and banks as well as others working in Native Communities.

Bank Enterprise Award Program

The CDFI Fund's Bank Enterprise Award Program (BEA Program) provides monetary awards to FDIC-insured depository institutions that demonstrate increased investment in certified Community Development Financial Institutions (CDFIs) or in their own lending, investment, or service-related activities (qualified activities) in communities where at least 30 percent of the population lives at or below the national poverty level and where the unemployment rate is at least 1.5 times the national average.

Award amounts are a percentage of the increase in the amount of investments in qualified activities from one annual reporting period to the next.

Institutions that receive awards must reinvest those award dollars in additional BEA Program qualified activities.

The BEA Program's authorizing legislation includes geographic areas where land is held by incorporated Native groups, regional corporations, and village corporations (as defined in and pursuant to the Alaska Native Claims Settlement Act), public domain Indian allotments, and former Indian Reservations in the State of Oklahoma.

The CDFI Fund's FY 2017 BEA Program awards, announced in June 2018, included two FDIC-insured Native CDFIs that received awards. Bank 2, located in Oklahoma, received an award of \$225,984; and Native American Bank, N.A., located in Colorado, received an award of \$233,387. Each bank will use the award to reinvest in additional BEA qualified activities.

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 is working effectively to ensure meaningful consultation and collaboration with tribal officials in policies that have tribal implications.

Appendix A: Treasury Department Tribal Consultation Policy

In furtherance of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” 65 FR 67249, issued by President Clinton on November 6, 2000, and the Presidential Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation, 74 FR 57881, signed by President Obama on November 5, 2009, the U.S. Department of the Treasury (Treasury) establishes this 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.

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 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 Policies that have Tribal Implications.

D. “Policies that have Tribal Implications” has 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; however, Treasury may consider Consultation on such matters under the circumstances described in Section III.A.

Show citation box

E. “Tribal Official” refers to an elected, appointed, or designated official or employee of the governing body of an Indian Tribe, or an authorized inter-tribal organization.

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 affect 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 consult with Tribal Officials prior to implementing Policies that have Tribal Implications. While not required by this Policy or EO 13175, when specifically requested, Treasury also may consult with Tribal Officials regarding policy matters of general applicability that may have an impact on Indian Tribes or their members. 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 policy 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 EO 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 or practices 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, collections, litigation, or investigations; and
- Internal agency guidelines with respect to such matters.

B. Role of the POCTC

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 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 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 may have Tribal Implications. The POCTC may advise on the potential need for Tribal Consultation with respect to such matters.
5. With respect to regulations and published guidance on matters that have Tribal Implications, to the extent practicable and permitted by law, Treasury will 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 opportunities may be announced in FR notices and other published guidance, including guidance published in the Internal Revenue Bulletin. FR notices and other published guidance requesting comments from Tribal Officials 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 Officials 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 Policies that have 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 Policies that have Tribal Implications. Consultation requests may also be addressed to the POCTC, who may direct the matter to additional Treasury officials, as appropriate. Consultation requests to the POCTC will be acknowledged within a reasonable period. 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 Treasury, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against Treasury 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

The Office of the Comptroller of the Currency (OCC) continues to review and address any issue raised by the Native American community. Agency staff participate on ad hoc basis in Native American conferences on issues related to banking and community development. The OCC maintains an ongoing relationship with several major Native American, or Native-focused, organizations, such as the Native American Finance Officers Association, the National Congress for American Indians, and The Center for Indian Country Development. And the OCC's Community Affairs division maintains a Native American Banking Resource Directory (<http://www.occ.treas.gov/Cdd/Nativeam>) containing various OCC publications on Native American banking topics.

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 by the tribes involved as requested for the statutorily-prescribed purposes. Treasury is also statutorily required to annually review 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 and the Department of the Interior is charged to disburse the interest amounts 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.

The Office of Federal Program Finance (OFPF) and Bureau of the Fiscal Service (BFS) work closely with other Treasury offices, Interior and OMB to address any investment issues involving the four aforementioned funds as well as several Indian tribal funds that, by statute, Treasury is required to invest.

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 (additional information)

<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.

- Three 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 procedures to ensure compliance with EO 13175 and the Treasury Consultation Policy. During FY18, ITG participated in numerous conferences to provide information and get feedback from tribes on the impact of various tax related topics. For example, the ITG Director and senior staff participated in breakout sessions at NAFOA and NITA to discuss topics including the Tribal General Welfare Exclusion Act, employment tax issues, and tax compliance resources available to tribes.

ITG staff also provided 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. A Web based session was held on Form 1042-S Filing Tips for Tribes. In FY28, multiple items were developed and posted to www.IRS.Gov for use by tribes. Three interactive gaming tools were created addressing Title 31 – The Bank Secrecy Act, Tip Income Reporting, and Information Return Reporting. Five issue snapshots were completed on the following topics: IRC Section 7871 – Treatment of Indian Tribes as States, Revenue Ruling 59-354 – Tribal Council Members’ Wages, FUTA Exemption for Indian Tribal Governments, IRC Section 7873 – Treaty Fishing Rights-Related Income, and IRC Section 414(d) – Governmental Plans for Tribes. In addition, ITG posted information on Tuition and Other Educational Benefits Provided by Tribes, Form 1098-T.

Employment tax lessons to help Indian tribal Governments meet their responsibilities were recorded and made available as ITG Employment Tax Video Lessons. These lessons are available both on-line and as Publication 5287, Employment Tax Video Guides for Indian

Tribal Governments (CD-ROM) so that tribes with less access to high speed internet can still benefit from the materials.

In addition, Tribal communities were specifically included in the Earned Income Tax Credit (EITC) Thunderclap Event for only the second time to increase awareness of EITC for tribal members across social media platforms.

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. For example, during the recent filing season, 19 sites in the southwest were focused on tribal communities and transmitted 9348 returns. A total of \$16,831,471 in refunds went out to members of those communities from these 19 sites! Of that total, \$7,041,193 came from the Earned Income Tax Credit and \$1,482,879 came from the Child Tax Credit. ITG provided training and technical support to the site volunteers at the sites sponsored by tribal governments.

United States Mint

Since the beginning implementation 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 (heads) 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 National Congress of the American Indian (NCAI), and the United States Senate Committee on Indian Affairs the United States House of Representatives Congressional Native American Caucus and these themes are reviewed by the Citizens Coinage Advisory Committee (CCAC).

In accordance with the Act, the Secretary of the Treasury selects reverse (tails) designs after the Mint consulting with the respective Congressional entities, NCAI, 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 through its numismatic program, in various quantities, qualities, and packaging options.