

CMS Center for Medicaid and CHIP Services



CMS Tribal Consultation Policy

April 27, 2016



CMS Tribal Consultation Policy

- November 5, 2009, President Obama signed an Executive Memorandum reaffirming the government to government relationship between the Indian Tribes and the Federal Government
- Unique government-to-government relationship exists between Indian Tribes and the Federal Government and this relationship is grounded in the U.S. Constitution, numerous treaties, statutes, Federal case law, regulations and executive orders that establish and define a trust relationship with Indian Tribes.



Background

- CMS issued its Tribal Consultation Policy on November 17, 2011.
- This Policy was developed consistent with the HHS Tribal Consultation Policy and through several years of Tribal Consultation and input from the TTAG.
- On December 10, 2015, CMS revised its Policy based on comments received through consultation.



Purpose of the Policy

- To further the government to government relationship between CMS and Tribes
- To build meaningful relationships with Indian tribes
- To establish a clear, concise and mutually acceptable process for consultation between CMS and tribes



Tribal Consultation Principles

- It is essential that CMS and Indian Tribes engage in open, continuous and meaningful consultation
- The involvement of Indian Tribes in the development of CMS policy is crucial for mutual understanding and development of culturally appropriate approaches to improve greater access to CMS programs.
- An action that triggers consultation is any policy that will significantly affect Indian Tribes.
- Determined on a case by case basis.



Role of Tribal Affairs

- The CMS Tribal Affairs is the point of contact for compliance with the CMS tribal consultation policy.
- Serves as a resource to assist CMS and State and Tribal partners in determining whether a new or proposed change in policy or regulations could significantly affect Indian Tribes.
- Works with CMS TTAG in identifying key issues and providing technical assistance.



Tribal Consultation Process

Guideline to be utilized by CMS and Indian Tribes:

- Identify the applicable program, policy, rule, regulation, statute and authorizing legislation;
- Identify how the policy has Tribal implications and a substantial direct effect on one or more Indian Tribes or on the relationship between Tribes and the Federal Government or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.
- Identify affected/potentially affected Indian Tribe(s).



Consultation Mechanisms

- Mailings;
- Teleconferences – All Tribes’ Calls
- Face-to-face meetings at the local, regional and national levels between the CMS and Indian Tribes;
- Annual HHS Tribal Budget and Policy Consultation Sessions.
- Other regular or special program level consultation sessions.
- Notification and public comment through the Federal Register process



Assessment of Policy

- Under the policy, CMS must periodically conduct an assessment of the policy and the agency's effectiveness in providing a meaningful consultation process.
- On August 20, 2014, CMS issued a Dear Tribal Leader Letter requesting feedback and recommendations on its Tribal Consultation Policy and held an All Tribes' Call on September 15, 2014 to hear comments and answer questions about the Policy.
- We also reached out to State Medicaid Directors to receive their feedback and ideas about the State-Tribal Consultation process.



Revisions to Policy

- CMS received several comments from Tribes, Tribal organizations and Indian organizations and states.
- The TTAG Tribal Consultation Policy Subcommittee met on October 15, 2014 to review the comments submitted during consultation.
- CMS worked collaboratively with the TTAG to develop a final draft policy for agency clearance.
- The Policy was approved by TTAG and signed by the Administrator on December 10, 2015.



Section 8 of the Policy

- Based on comments received through Tribal Consultation, CMS drafted a new section 8 - that incorporates existing State/Tribal consultation requirements found in 5006 of ARRA, the transparency regulations, and the 2001 SMD letter into the CMS Tribal Consultation Policy.
- This new section explains the requirements for state Medicaid agencies to obtain the advice and input from Indian health care providers and tribes prior to changes in the Medicaid and CHIP programs having tribal implications.
- This new section also explains the process for the agency's review of Medicaid and CHIP waivers and SPAs and clarifies those instances when additional tribal consultation might be required.



Section 8 of the Policy – CMS's role

- First, the Policy explains that CMS is responsible for reviewing the waiver and SPA proposals to make sure the state has consulted with tribes and has sought the advice and input of Indian health providers. If it is determined that consultation did not occur, the waiver or SPA is deemed incomplete and returned to the state for tribal consultation.
- Second, if during consideration and review of a SPA or waiver, it is determined that the proposal will have a different effect on tribes than what the state consulted on, CMS will directly consult with tribes or encourage the state to initiate another consultation.
- Third, at any time during the waiver or SPA process, a tribe may invoke the CMS Tribal Consultation Policy and request consultation with CMS directly before a final decision is made to approve the waiver or SPA.



General Overview of State/Tribal Consultation Requirements

Three Distinct Authorities Requiring Tribal Consultation

ARRA Section 5006

The ARRA section 5006 process as codified at 1902 (a)(73) is applicable to Medicaid and CHIP SPAs, new, extension and amendment 1115 Medicaid demonstration applications, and 1915(b) and 1915(c) waiver applications, extensions and amendments.

Transparency Regulation

The transparency regulation at 42 C.F.R. section 431.400 through .428 is applicable to new Medicaid 1115 applications and Medicaid 1115 extension applications.

State Medicaid Director Letter (July 17, 2001 (SMDL #01-024)

Applicable to (new applications or extension applications) for 1115 demonstrations, 1915 (b) and 1915(c) waivers when (1) the state has an ARRA consultation SPA that includes Federally recognized tribes; or (2) does not have an ARRA SPA (no Indian health program) but has a Federally recognized tribe.

ARRA Section 5006

- The ARRA 5006 process is codified at 1902 (a)(73) and requires States to seek advice and guidance from Indian Health Programs and Urban Indian Organizations concerning Medicaid and CHIP issues that have a direct impact on Indians or Indian health programs, including waivers and SPAs.
- Copies of Tribal Consultation SPAs are at:
<https://www.cms.gov/Outreach-and-Education/American-Indian-Alaska-Native/AIAN/StateTribal-RelationsonHealthcare.html>



ARRA Section 5006

- **There are 36 approved consultation SPAs: Alaska, Alabama, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin, and Wyoming.**



Transparency and Tribal Consultation

- **The ACA required the Secretary to set forth transparency and public notice procedures for demonstration projects approved under section 1115 of the Social Security Act.**
 - **Transparency requirements currently only apply to initial applications and extensions (renewals of existing demonstrations) and not to demonstration amendments. The transparency regulations are at 42 C.F.R. section 431.400 through 428**



Transparency and Tribal Consultation

- **The transparency regulation at 42 CFR 431.408(b) requires consultation with federally recognized tribes either using the approved ARRA 1902 (a)(73) SPA process; or**
- **If the state does not have a consultation SPA, the regulation directs the state to consult with federally recognized tribes following the process set forth in a July 17, 2001 SMD if the tribe that has a government office or a major population in a state.**



Transparency and Tribal Consultation

- **Indiana and Virginia have federally recognized tribes that maintain a government office in the state but not an Indian health program.**
- **Those states must consult on new 1115 demonstrations and 1915(c) and 1915(b) waiver applications and extensions, following the process set forth in the July 17, 2001 SMD letter.**



Specific consultation process requirements in 2001 SMD:

- **State must notify Federally recognized tribe in writing at least 60 days before the anticipated submission date of the State's intent to submit a new application or a renewal application to CMS.**
- **The notification must describe the purpose of the waiver or renewal and the anticipated impact on Tribal members.**



- **The notification must describe a method for appropriate Tribal representatives to provide official written comments and questions within a time frame that allows adequate time for State analysis, consideration of any issues that are raised, and time for discussion between the State and Tribes responding to the notification.**
- **Tribal Governments were allowed a reasonable amount of time to respond to the notification. A minimum of 30 days is considered reasonable.**



- **States, if requested by the Tribal Governments, provide an opportunity for an in-person meeting with Tribal representatives.**
- **A State does not need to have separate meetings with each Tribe, but may conduct one or more joint meetings with Tribes to discuss issues.**



Questions Comments??

Please send questions or comments to
tribalaffairs@cms.hhs.gov

Please visit the CMS AI AN website at:
go.cms.gov/AIAN

