



*Submitted via e-mail: Tracy\_L\_Goodluck@who.eop.gov  
Karen\_R\_Diver@who.eop.gov*

October 19, 2016

The Honorable President Barack Obama  
The White House  
1600 Pennsylvania Avenue NW  
Washington, DC 20500

**Re: Request for Support for Legislation to Provide Partial Relief to Tribes from the Affordable Care Act's Employer Mandate**

Dear Mr. President:

On behalf of the National Indian Health Board (NIHB), the National Congress of American Indians (NCAI), the Tribal Self-Governance Advisory Committee (TSGAC), the Direct Service Tribal Advisory Committee (DSTAC), the United South and Eastern Tribes, Inc. (USET), the Rocky Mountain Tribal Leaders Council (RMTLC), Northwest Portland Area Indian Health Board (NPAIHB), and the Shoshone Bannock Tribes, we write to request your support for legislation to provide partial relief to federally-recognized Tribes from the Affordable Care Act's (ACA's) employer shared responsibility provision ("employer mandate"), as codified at Internal Revenue Code (IRC) Section 4980H, for Tribal member employees otherwise exempt from the ACA's individual mandate. Together, the organizations that are signatories to this letter represent all of the 567 federally-recognized Tribes.

In making this request for partial relief from the ACA's employer mandate, we would like to stress two points:

1. AI/AN Tribes have been consistent, vocal supporters of your efforts to enact and implement comprehensive health insurance reform. We applaud the passage of the ACA, and with it the Indian Health Care Improvement Reauthorization and Extension Act of 2009, and have worked with your Administration to successfully implement the law. The result is being keenly felt, with the expansion of critically-needed health care resources in our Tribal communities and for millions of our Tribal citizens.
2. The implementation of the employer mandate as it pertains to Tribal governments<sup>1</sup> and Tribal member employees is in direct conflict with the federal government's Trust responsibility to Tribes. Namely, it is the responsibility of the federal government to adequately fund health care services for Tribal members; it is not the responsibility of Tribes to make payments to the federal government for the purpose of Tribes assisting the federal government in financing the health care needs of Tribal members.<sup>2</sup>

Over the past two years, we have engaged with your office, the Department of the Treasury, and the Department of Health and Human Services to seek administrative relief from all or portions of the ACA's employer mandate. In particular, representatives from the Department of the Treasury and the Internal Revenue Service (IRS) have been cooperative and sympathetic, but currently believe that the ACA does not provide sufficient authority to enable an administrative relief to Tribes from all or parts of the employer mandate.

We appreciate the willingness of the Administration to work with us to seek administrative remedies to the elements of the ACA that are inconsistent with the federal government's Trust responsibility. We are hopeful that this solution may still be possible. However, absent success in identifying an administrative remedy, we seek your support for targeted, statutory changes to the ACA to accomplish this goal.<sup>3</sup>

We are working with congressional partners, and are seeking your support, to enact legislation that will exclude from the calculation of IRC Section 4980H payments owed, if any, full-time employees of Tribal governments who are Tribal members.

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<sup>1</sup> For purposes of this request, the term "Tribal Government" includes an Indian Tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian Tribal government (determined in accordance with section 7871(d)), or an agency or instrumentality of either; any corporation, if all of the outstanding stock of such corporation is owned, directly or indirectly, by an Indian Tribal government (as so defined); and any partnership or LLC, if all of the capital and profits interests are owned, directly or indirectly, by an Indian Tribal government (as so defined).

<sup>2</sup> For purposes of the administrative relief from the employer mandate, we are defining "Tribal members" as persons eligible for an exemption from the penalty for not securing health insurance coverage under Internal Revenue Code (IRC) §5000A(e)(3) as a member of an Indian Tribe and persons eligible for an exemption from the penalty for not securing health insurance coverage under IRC § 5000A(e)(5) and ACA § 1501, under which ACA § 155.605(g)(6) was established, granting an exemption for American Indians and Alaska Natives who are eligible for services through an Indian health care provider.

<sup>3</sup> Tribal representatives also have previously requested an extension of the delay in implementing the ACA's employer requirements. See October 23, 2015, TSGAC letter, "Re: Request for Extension of Transitional Relief from the Employer Mandate."

## Background

Tribes employ a significant number of Tribal member employees who are exempt from individual shared responsibility payments (individual mandate) for not securing health insurance coverage. The exemption from the requirement to secure health insurance coverage was provided in the ACA and broadened further by regulatory action, in recognition of the fact that access to the Indian Health System (comprised of the Indian Health Service, Tribal organizations, and urban Indian organizations) has been one means by which the federal government has sought to meet its Trust responsibilities.

The ACA established an additional avenue for the federal government to meet its Trust responsibilities. The ACA contains several provisions designed to encourage American Indian and Alaska Native (AI/AN) enrollment in the ACA Marketplaces, including special cost-sharing exemptions for AI/ANs. The Center for Consumer Information and Insurance Oversight (CCIIO) has been actively encouraging Tribes to exhort their citizens to take advantage of these provisions by enrolling in the Marketplaces, and Tribes have expended considerable resources to take CCIIO up on that challenge. "Tribal premium sponsorship" programs are now in evidence across the United States, and efforts continue to expand enrollment of AI/ANs in comprehensive health insurance coverage through Marketplaces.

However, mandating that Tribes purchase health insurance coverage for Tribal member employees would negate the option of relying on the Indian Health System for health services.

In addition, the application by the Department of Treasury and the IRS of the ACA's employer mandate to Tribal governments *with regard to Tribal member employees* works at cross purposes to encouraging Marketplace enrollment. This is because an offer of coverage to a Tribal member employee disqualifies that employee from the premium subsidies that are critical to facilitating Marketplace enrollment. With the employer mandate and its current interpretation in place, Tribes are put in the untenable position of either having to offer insurance at full price to their Tribal member employees, who will then be unable to take advantage of Marketplace premium subsidies even if they do not accept the employer-based coverage, or to forgo offering coverage (or to offer insufficient coverage) to their Tribal member and non-Tribal member employees and pay substantial amounts to the IRS. *We anticipate that the first notices from the IRS to employers—including Tribal employers—for payment of the section 4980H penalties will be received within two to three months, creating great urgency to remedy this violation of the Trust responsibility.*

These twin policies from the Department of Treasury /IRS and CCIIO are inconsistent and have combined to (1) discourage AI/AN Marketplace participation and (2) significantly increase costs to many Tribal governments for providing health care coverage to Tribal members. Together, they create a federal policy that is inconsistent with the right of AI/ANs to obtain Trust-obligated health care at no cost to the individual through the Indian Health System and that forces many Tribal employers to purchase coverage for workforces largely comprised of Tribal members who

are: (1) exempt from the ACA's individual mandate to obtain coverage and (2) eligible to obtain health care through the Indian Health System.

### Remedy Sought

We are seeking the following remedy to ensure Tribes are not required to pay the federal government for the health care costs of AI/ANs:

**Enact legislation and, if possible, issue regulatory guidance that will exclude full-time employees who are Tribal members from the calculation of IRC Section 4980H payments owed, if any, by a Tribal government employer.**

The proposed legislative language is shown in Attachment A: Proposed Modification to Affordable Care Act. We have been working with members of Congress on this proposal and have secured the support of both Republicans and Democrats for this legislation.

In proposing this remedy, Tribal governments would remain subject to the ACA's employer reporting requirements,<sup>4</sup> as well as to requirements for making IRC § 4980H payments, if otherwise owed, for full-time employees who are not Tribal members. We believe this approach will have the following results:

- Make implementation of the ACA's employer mandate requirements consistent with the federal government's Trust responsibility;
- Not disadvantage non-Tribal member employees, as non-Tribal member employees will have access to either health insurance coverage offered by a Tribal employer or through a Marketplace (with eligibility for premium tax credits); and
- Particularly for Tribal governments that have not historically had sufficient resources to offer health insurance coverage to employees, facilitate Tribal member employees' access to premium tax credits and comprehensive Indian-specific cost-sharing protections through a Marketplace without imposing financial burdens on the Tribal government.

In Attachment B, three examples are provided illustrating the pending financial impact on three Tribal governments under the Affordable Care Act's employer mandate and the impact of implementing the proposed remedy. In each of these three examples, the Tribal government had not offered health insurance coverage to employees prior to enactment of the ACA. The financial impact on the Tribe is shown under the assumption that the Tribe continues not to offer employer-sponsored insurance. In two of the three scenarios presented, the Tribal government remains subject to making some IRC Section § 4980H payments for non-Tribal member

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<sup>4</sup> Please refer to an earlier letter sent by Tribal representatives providing additional background materials on Tribal concerns with the implementation of the ACA's coverage and reporting requirements on Tribes [Joint Tribal Organization letter to The White House dated June 29, 2015].

employees, but the total amount owed is greatly reduced, as Tribal member employees are excluded from the calculation of the payments.

The congressional Joint Committee on Taxation (JCT) has evaluated a more comprehensive version of this proposal (one in which Tribal governments would be exempt from all employer requirements under the ACA).<sup>5</sup> The staff of the JCT estimates that enacting the legislation, H.R. 3080, "would reduce revenues by \$9 million over the 2016–2026 period and increase outlays by \$110 million over the same period," thus increasing "federal deficits by \$119 million over the 2016–2026 period." We anticipate that the cost of our modified proposal, referred to by Tribes as "The Indian Trust Consistency Act," would cost less than the approximately \$12 million per year figure assigned to H.R. 3080.

### Conclusion

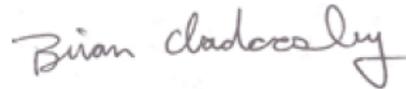
We greatly appreciate the leadership you and your Administration have shown. Together, we have strengthened Indian communities across the United States, and the ACA has been an integral part of that achievement. But the imposition of the ACA's employer mandate on Tribal governments with regard to Tribal member employees threatens to greatly diminish the magnitude of these achievements for many Tribes.

We look forward to engaging with you on this request.

Sincerely,



Lester Secatero  
The National Indian Health Board



Brian Cladoosby, Chairman  
Swinomish Indian Tribal Community  
President, NCAI



Marilynn (Lynn) Malerba  
Chief, Mohegan Tribe  
Chairwoman, TSGAC



W. Ron Allen, Chairman  
Chief, Jamestown S'Kallam Tribe  
Chairman, SGCETC

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<sup>5</sup> See House of Representatives Ways and Means Committee, Committee Report 114-656 on H.R. 3080, "Tribal Employment and Jobs Protections Act," July 5, 2016.



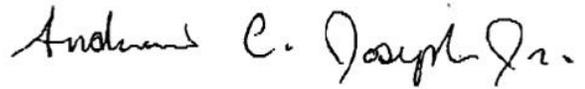
Brian Patterson, President  
United South and Eastern Tribes  
Sovereignty Protection Fund



Nicholas Barton, Executive Director  
Cheyenne & Arapaho Tribes  
Chair, DSTAC



William F. Snell Jr.  
Executive Director  
Rocky Mountain Tribal Leader's Council



Andy Joseph Jr., Councilman  
Confederated Tribes of the Colville Reservation  
Chairman, NPAIHB



Blaine Edmo, Chairman  
Shoshone-Bannock Tribes

Cc: Tracy Goodluck, Senior Associate Director of Public Engagement and Intergovernmental Affairs  
Karen Diver, Special Assistance to the President for Native American Affairs  
Sylvia Burwell, Secretary of the Department of Health and Human Services  
Mary Smith, Principal Deputy Director, Indian Health Service

Attachment A: Proposed Modification to Affordable Care Act

**Indian Trust Consistency Act**

To amend the Internal Revenue Code of 1986 to exclude from the calculation of employer assessable payments for Indian tribal governments and Indian tribal government-owned businesses employees who are tribal members.

**SECTION 1: SHORT TITLE**

This Act may be cited as the Indian Trust Consistency Act.

**SECTION 2: EXCLUSION OF TRIBAL MEMBER EMPLOYEES FROM ASSESSABLE PAYMENT CALCULATION.**

- (a) IN GENERAL.--Section 4980H(c)(2) of the Internal Revenue Code is amended by adding at the end the following new subparagraph:

“(F) EXCLUSION OF TRIBAL MEMBER EMPLOYEES FROM ASSESSABLE PAYMENT CALCULATIONS FOR TRIBAL GOVERNMENTS AND TRIBAL GOVERNMENT-OWNED BUSINESSES.—

(1) For purposes of determining under subsection (a) “the number of individuals employed by the employer as full-time employees during such a month” and under subsection (b)(1) “the number of full-time employees of the applicable large employer described in subparagraph (B) for such month”, for tribal governments and tribal government-owned businesses, Tribal member employees shall not be included.

(A) “Tribal government and tribal government-owned business” is defined as an Indian tribal government (as defined in Internal Revenue Code (IRC) section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with IRC section 7871(d)), or an agency or instrumentality of either; any corporation if all of the outstanding stock of such corporation is owned, directly or indirectly, by an Indian tribal government (as so defined), and any partnership or LLC if all of the capital and profits interests are owned, directly or indirectly, by an Indian tribal government (as so defined).

(B) “Tribal member employees” is defined as persons eligible for an exemption from the penalty for not securing health insurance coverage under IRC § 5000A(e)(3) as a member of an Indian Tribe and persons eligible for an exemption from the penalty for not securing health insurance coverage under IRC § 5000A(e)(5) and ACA § 1501, under which 45 C.F.R. § 155.605(g)(6) was established, granting an exemption for American Indians and Alaska Natives who are eligible for services through an Indian health care provider.

- (b) EFFECTIVE DATE.—The amendment made by this section shall apply to months beginning after December 31, 2013.

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Attachment B: Examples of Impact on Tribal Governments under ACA’s Employer Mandate and Impact from Proposed Modification

<b>Tribe #1 Great Plains Area Tribe</b>			
<u>ACA: Current</u>		<u>ACA: Modified</u>	
704	- total full-time employees	704	- total full-time employees
<hr/>		684	- tribal member employees
		20	- non-tribal member employees
		-30	- ACA general exemption
<hr/>		<hr/>	
704	- applicable employees	0	- applicable employees
\$2,160	- per employee \$4980H payment (2016)	\$2,160	- per employee \$4980H payment (2016)
<hr/>		<hr/>	
\$1,520,640	- Tribal annual payment	\$0	- Tribal annual payment
<hr/>		<hr/>	
<b>Tribe #2 Upper Midwest Area Tribe</b>			
<u>ACA: Current</u>		<u>ACA: Modified</u>	
494	- total full-time employees	494	- total full-time employees
<hr/>		288	- tribal member employees
		206	- non-tribal member employees
		-30	- ACA general exemption
<hr/>		<hr/>	
494	- applicable employees	176	- applicable employees
\$2,160	- per employee \$4980H payment (2016)	\$2,160	- per employee \$4980H payment (2016)
<hr/>		<hr/>	
\$1,067,040	- Tribal annual payment	\$380,160	- Tribal annual payment
<hr/>		<hr/>	
<b>Tribe #3 California Tribe</b>			
<u>ACA: Current</u>		<u>ACA: Modified</u>	
2,400	- total full-time employees	2,400	- total full-time employees
<hr/>		684	- tribal member employees
		1,716	- non-tribal member employees
		-30	- ACA general exemption
<hr/>		<hr/>	
2,400	- applicable employees	1,686	- applicable employees
\$2,160	- per employee \$4980H payment (2016)	\$2,160	- per employee \$4980H payment (2016)
<hr/>		<hr/>	
\$5,184,000	- Tribal annual payment	\$3,641,760	- Tribal annual payment
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