

IHS TRIBAL SELF-GOVERNANCE ADVISORY COMMITTEE

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Sent via email: Mark.Chambers@Treasury.gov

October 26, 2015

Dr. Elaine Buckberg
Deputy Assistant Secretary for Policy
Office of Economic Policy
Department of Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

RE: Request for Permanent Administrative Relief from Affordable Care Act's Employer Mandate on Tribes for Tribal Member Employees

Dear Dr. Buckberg:

On behalf of the Tribal Self-Governance Advisory Committee to IHS (TSGAC), I am submitting this letter as a follow-up to our discussion at the TSGAC meeting in Washington, DC, on October 7, 2015. Again, thank you for your and your staff's engagement in a true discussion of the concerns expressed by Tribes with the implementation of employer requirements under the Patient Protection and Affordable Care Act (Affordable Care Act or ACA).

At the recent meeting, TSGAC committed to providing you with suggestions and recommendations that would have the result of alleviating the financial hardship that the ACA's employer shared responsibility mandate is creating for many Tribes. We appreciate your commitment to reviewing these options and continuing to engage with Tribes to identify successful remedies. In our October 23, 2015, letter to you, we requested an extension of transition relief in implementing the ACA's employer coverage and reporting mandates on Tribal governments¹ in order to both allow time to consider and implement available administrative remedies and provide temporary financial relief to those Tribes that have not historically offered formal health insurance coverage to their employees.²

We would like to reiterate the point that the current implementation of the employer mandate as it pertains to Tribes and Tribal member employees is in direct conflict with the federal government's trust responsibility to Tribes.³ 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

¹ 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).

² See October 23, 2015 TSGAC Re: Request for Extension of Transitional Relief from the Employer Mandate.

³ 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.

federal government for the purpose of Tribes assisting the federal government in meeting the health care needs of Tribal members.⁴

Tribes employ a significant number of Tribal member employees who are otherwise exempt from the payment of shared responsibility payments for not securing health insurance coverage. The ACA contains several provisions designed to encourage American Indians and Alaska Native (AI/ANs) 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 encourage their members take advantage of these provisions by enrolling in the Marketplaces, and Tribes have expended considerable resources to take CCIIO up on that challenge.

However, the application by the Internal Revenue Service (IRS) of the ACA's employer mandate to Tribal governments with regard to Tribal member employees works at cross purposes to encouraging Marketplace enrollment, as 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 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 forego offering coverage (or to offer insufficient coverage) to their Tribal member and non-Tribal member employees and pay substantial penalties to the IRS.

These twin policies from IRS and CCIIO are inconsistent, and have combined to discourage AI/AN Marketplace participation and significantly increase costs to Tribal governments. Together, they create a federal policy that is both inconsistent with the right of AI/ANs to obtain trust-obligated health care without charge to the individual at Indian Health Service, Tribal, or urban Indian health programs (I/T/U) 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 I/T/U system.

Previously, Tribal representatives have requested an exemption from the employer mandate for Tribes. While we understand that the IRS has concluded that the employer mandate applies to Tribal governments, we appreciate your willingness to consider other forms of administrative relief that may address these issues short of implementing an exemption from the mandate for Tribal employers.

Presented below is a set of preferred options for addressing Tribal concerns pertaining to the imposition of the ACA's employer coverage and reporting requirements as they pertain to Tribal member employees. We request that the Treasury Department give particular attention to determining if and how these elements can be implemented. This preferred set of options—when taken together—was found to meet three criteria established by Tribal representatives:

- The approach will have the result of making the implementation of the ACA's employer requirements consistent with the federal government's trust responsibility;
- The approach will not block/will enable Tribal member employees to have access to the Indian-specific cost-sharing protections established under the Affordable Care Act, as well as premium tax credits, that are available only when securing coverage through a Marketplace; and,
- The approach will ensure that Tribal and non-Tribal member employees will have avenues available to securing comprehensive health insurance coverage, as envisioned by the ACA.

⁴ Please refer to an additional letter sent by Tribal representatives to the Obama Administration earlier this year that provide 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.]

In addition, we believe there are likely to be other remedies that would provide at least partial relief for some Tribes. We look forward to further discussions with the Treasury Department and other relevant federal agencies to determine which approaches are the most workable.

Preferred Option:

1. **Provision:** Retain the general provisions for Tribal employers to meet the employer coverage and reporting requirements under the Affordable Care Act.

Rationale: This would ensure that Tribal and non-Tribal member employees would have available, to the greatest extent possible, the same options for health insurance coverage that similarly situated employees would have if employed by non-Tribal employers.

2. **Provision:** For Tribal employers, Tribal member employees would not be included with regard to calculations of amounts owed in assessable payments (*i.e.*, shared responsibility payments) under Internal Revenue Code (IRC) § 4980H.

Rationale: Payment of shared responsibility payments by a Tribe to the federal government related to financing of health care services for Tribal member employees is in direct conflict with the federal government's long-standing trust responsibility to Tribes and Tribal members.

3. **Provision:** For Tribal member employees of Tribal employers (and including a spouse or dependent of such employee), an offer of health insurance coverage from the employer would not be considered to be an offer of minimum essential coverage (MEC) under IRC § 36B(c)(2)(B)(i) for purposes of qualifying for premium tax credits and cost sharing reductions unless the employee enrolls in the coverage offered by the employer.

Rationale: An action taken by Tribal employers to meet the ACA's employer requirements by offering health insurance coverage to employees—particularly to meet coverage requirements pertaining to non-Tribal member employees—should not bar Tribal member employees from receiving the full benefits of coverage through the Marketplace (premium tax credits and the Indian-specific cost-sharing protections).

In a final rule issued in 2012, the IRS provided a similar accommodation to veterans (and family members of veterans) by excluding from the definition of MEC under IRC § 36B(c)(2)(B)(i) certain health coverage provided through the Department of Veterans Affairs *if the eligible person did not enroll in the health coverage*. This policy permitted these individuals to enroll in health insurance coverage through a Marketplace and not be barred from eligibility for premium tax credits and cost-sharing protections. This was done for the purpose of adjusting the ACA's statutory language to address the particular circumstances of veterans eligible for health care services through the Department of Veterans Affairs. Citing "administrative convenience," the IRS provided this accommodation to veterans and others (non-veterans) eligible for certain programs of the Department of Veterans Affairs.⁵

⁵ 77 Fed Reg 30379, May 23, 2012, the preamble to the final rule reads: "B. Definition of 'Eligible'. The proposed regulations provide that an individual is eligible for government sponsored minimum essential coverage when an individual meets the requirements for coverage under the program. For administrative convenience, however... the proposed regulations provide that an individual is eligible for minimum essential coverage under the veteran's health care program authorized under chapter 17 or 18 of Title 38, U.S.C. only if the individual is enrolled in a veteran's health care program identified as minimum essential coverage in regulations issued under section 5000A. The final regulations conform the rules to amendments to section 5000A that delete the word "veteran's" in describing health care programs under chapter 17 or 18 of Title 38. Thus, the special rule for veterans' coverage may apply to individuals who are not veterans but are eligible for the Civilian Health and Medical Program of the Department of Veterans Affairs (VA) or the VA's spina bifida program."

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We look forward to discussing these specific options with you further, along with any other options you may be considering, including clarification of the controlled group aggregation rules and other options. We are also formally requesting to engage, pursuant to the Department of the Treasury Tribal Consultation Policy, in Tribal consultation on the matters presented in this letter.⁶

In closing, we appreciate your recognition of the importance of this issue to Tribes and their citizens. If you have any questions, you can reach me at (860) 862-6192; or via email: lmalerba@moheganmail.com. Thank you.

Sincerely,



Chief Lynn Malerba, Mohegan Tribe
Chairwoman, TSGAC

cc: The Honorable Sylvia Mathews Burwell, Secretary, Department of Health and Human Services
Mr. Robert McSwain, Deputy Director, IHS
P. Benjamin Smith, Director, OTSG, IHS
TSGAC and Technical Workgroup

⁶ The Department of the Treasury Tribal consultation policy became effective on September 23, 2015 and replaced the Department's interim consultation policy.