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DEPARTMENT OF THE TREASURY

Tribal Consultation Policy

AGENCY: Department of the Treasury

ACTION: Notice of Tribal Consultation Policy

SUMMARY: This notice announces a policy outlining the guiding principles for all Treasury bureaus and offices engaging with Tribal Governments on matters with Tribal implications. The policy will be updated periodically and refined as needed to reflect ongoing engagement and collaboration with Tribal partners.

DATES: Effective date: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]

FOR FURTHER INFORMATION CONTACT: Elaine Buckberg, Department of the Treasury Deputy Assistant Secretary for Policy Coordination, Office of Economic Policy and Point of Contact for Tribal Consultation, at 202-622-2200 or by e-mail at

TRIBAL.CONSULT@treasury.gov.

SUPPLEMENTARY INFORMATION:

On December 3, 2014, the Department of the Treasury (Treasury) released an interim tribal consultation policy outlining the guiding principles for all Treasury bureaus and offices engaging with Tribal Governments on matters with Tribal Implications (“Tribal Consultation Policy; Notice of Interim Tribal Policy,” 79 Fed. Reg. 71816). In releasing

the interim policy, Treasury solicited comments from tribes. While the policy was being reviewed and finalized, Treasury has operated under the interim consultation policy.

In response, Treasury received over 25 comments from Indian tribal governments and tribal organizations. The written comments and other feedback received via ongoing tribal consultation were very helpful in developing Treasury's final tribal consultation policy. We appreciate the commenters' interest in working with Treasury to develop a consultation policy that satisfies the concerns of Indian tribal governments and their leaders while enabling Treasury to continue to develop and implement policy in a timely and efficient manner.

The final policy includes a number of changes suggested in these comments, including the following:

- The policy no longer includes the phrase "endeavor to consult," and now simply states that Treasury will consult with tribes on policy matters with tribal implications, under the procedures set forth in the policy.
- The final policy now provides for consultation with tribes on policy matters of "general applicability that may have an impact on Indian Tribes or their members."
- While a timely response to consultation requests has always been Treasury's goal, the final policy now formally requires the POCTC to acknowledge requests for consultation "within a reasonable period."

While we incorporated a number of comments, we have retained the language of the interim policy with respect to consultation on actions to enforce requirements administered by the agency (Section III.A.). After further consideration, it remains our

view that consultation on such matters would present a number of legal and practical challenges, and is not within the purview of Executive Order 13175. Our guidance on the General Welfare Exclusion, the Per Capita Act, minor trusts, and other important matters, shows that a robust tribal consultation process can address tribes' concerns about enforcement actions or penalties when it is appropriate to do so.

The consultation policy will be updated periodically and refined as needed to reflect ongoing engagement and collaboration with Tribal partners.

Department of the Treasury Tribal Consultation Policy

In furtherance of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," 65 Fed. Reg. 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 Fed. Reg. 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.
- 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 Treasury Point of Contact for Tribal Consultation (POCTC) is the Deputy Assistant Secretary for Policy Coordination in the Office of Economic Policy, or another official as designated by the Secretary or the Deputy Secretary. Treasury bureaus and policy offices, as well as the Office of the General Counsel (OGC) and the Executive Secretariat, may assist the POCTC in identifying policy matters that may require Tribal Consultation.

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.

David R. Pearl
Executive Secretary

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