



NAFOA Comments on Department of Treasury Interim Tribal Consultation Policy

Sent via email to Tribalconsult@treasury.gov • U.S. Department of Treasury • Washington, D.C.

April 27, 2015

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

Re: Tribal Consultation Policy Comments – [Federal Register / Vol. 79, No. 232 / Wednesday, December 3, 2014]

Dear Deputy Assistant Secretary Buckberg:

Thank you for the opportunity to submit comments on the Department of Treasury Interim consultation policy published in the Federal Register on December 3, 2014. NAFOA congratulates the Department of Treasury and its agencies for their efforts in recent years to reach out directly to tribal leadership to solicit feedback on its programs and services. The following comments are submitted by NAFOA on behalf of our member tribes.

The Department of Treasury is influential in matters related to tribal governance and tribal economic growth. The consultation reports filed by the Department of Treasury demonstrate the significant reach and influence of its agencies in Indian Country. NAFOA commends the Department of Treasury's efforts to guide banking and capital access policy through the Office of the Comptroller of Currency and Community Development Financial Institutions as well as its efforts to implement national tax policy through the Internal Revenue Service (IRS). This reach and influence makes the establishment of an effective consultation policy vital to both the Department of Treasury and to tribal governments. Therefore, we request the Department of Treasury consider clarifying or amending the following areas of the published Notice.

1. Omit additional language contained in the definitions section regarding the exclusion of consultation for policies with general applicability.

The Department of Treasury has placed an unnecessary safeguard in the definitions section of the interim consultation policy by stating “It [The Treasury consultation policy] does not include policy matters of general applicability that may have an impact on Indian Tribes or their members.

A justification for excluding policy matters of general applicability was initially raised in the Department of Labor (DOL) consultation policy [Federal Register Notice 77 FR 23283, April 28, 2012, Supplementary Information, Section I (G)]. The DOL was concerned that “...requiring a consultation prior to the initiation of every proposed rulemaking that may only have a minor or tangential impact on a particular Indian tribe would impose an unrealistic burden on DOL agencies...” The expectation that consultation would be required for every policy issue is entirely false and unfounded. The current definitions for determining what constitutes consultation as outlined in the Executive Order 13175 and in the President’s memorandum on consultation are adequate. There is no need to exclude items of general applicability.

Furthermore, the Department of Treasury has created general applicability policies regarding capital and tax policies that have been alarming in their application and impact to tribes. For example, the IRS enforcement of a general welfare policy that lacked consideration and deference to tribal government practices had disturbing outcomes for tribes and their members. In addition, the lack of inclusion of tribes in tax credit programs represents a policy failure for tribal inclusion in general applicability.

We strongly urge the Department of Treasury to comply with the existing definition contained in the Presidential memorandum on consultation which states “agencies are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications...” The additional language creates confusion on what constitutes regular and meaningful consultation for federal polices with tribal impacts and gives the Department of Treasury significant leeway when determining what policies fall under general applicability.

2. Remove restrictive language regarding consultation restrictions under Section III of the Federal Register Notice.

Section III, Subsection A of the Federal Register Notice identifies when the Department of Treasury will endeavor to consult with Indian tribes. While this section of the Notice starts with broad and inclusive language, it ends with restrictions that make it difficult to determine what may constitute meaningful consultation.

According to the Notice, areas where the Department of Treasury will not be required to consult with tribes include:

- *Administrative orders, practices, or litigation 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, or investigations; and*
- *Internal agency guidelines with respect to such matters.*

Leaving out administrative orders involving penalties, administrative orders of limited duration, examinations, and audits along with internal agency guidelines may exclude much of the Department of Treasury's work and would limit necessary interactions - especially interactions with the IRS.

The IRS is not considered an independent agency as listed in 44 U.S.C. 3502(5) making policy and enforcement consultation not only expected but an important aspect of the government-to-government relationship. Furthermore, Public Law 113-168 stands in contrast to the exceptions proposed. The law calls for direct interaction with the Secretary regarding all Indian tax matters and direct interaction involving the training of IRS agents responsible for audits, examinations, administrative orders, and compliance practices.

While individual cases may be considered private concerns, general audit practices, general audit subject matter, and inclusive training for tribes and the Department of Treasury should be included and serve as a cornerstone for consultation practices that are centered on the principle of building strong government-to-government relationships.

Additional Considerations for Consultation

NAFOA would like to address additional considerations that would strengthen consultation policy and subsequently the relationship between the Department of Treasury and tribal governments. Experience working with various Department of Treasury programs and recent changes to the required interaction with the Department of Treasury makes the following considerations timely and essential for consideration.

1. Coordination with existing advisory committees

The IRS has included three appointees to serve on the Advisory Committee on Taxation (ACT) to research and advise the IRS on timely tax issues that impact Indian Country. The ACT has taken

up and submitted recommendations on general welfare, tax-exempt debt, and studied the IRS actions related to the number of training site visits and audits for tribes, among other important issues. The Committee serves to advance recommendations that would otherwise go under-recognized.

Furthermore, Public Law 113–168 creates the seven-member Treasury Tribal Advisory Committee (TTAC) that is charged with advising the Secretary of the Department of Treasury directly on all matters related to Indian taxation. Both of these standing committees serve an important role in communicating concerns and addressing persistent issues regarding tax and finance policy. They also serve an important role in building a better understanding of tribal government issues by the agencies under Treasury and of the various agency programs and processes by tribal governments.

We request that the consultation policy include input from these committees and when practical, use the committees as an additional resource to implement the consultation policy. However, we would caution that receiving input solely from these committees should not be seen as a substitute for regular and meaningful consultation with tribal governments.

2. Include all aspects of Department of Treasury programs and exercising waivers

We strongly encourage the Department of Treasury to ensure tribal governments are consulted on the impacts of existing and future programs that should or may have a direct impact on tribal communities.

The Department of Treasury has the potential to be one of the most influential agencies in impacting positive economic development in Indian Country by. The Department of Treasury, through its many programs, has the ability to create incentives and deterrents through tax policy and has the ability to stream significant levels of capital needed in Indian Country. The “direct implications” of the Department of Treasury programs and services are not always obvious since they often exclude tribes unintentionally or are created without the input of tribes and have the effect of excluding tribes by process. The consultation policy was created to ensure programs and services include tribal input upon creation and ensure deference be given to tribes when policies and programs are not responsive to tribal needs.

The Community Development Financial Institution is a great example of the Department of Treasury creating a responsive program. The program required studies of tribal needs and direct tribal input. Subsequently, accommodations were correctly made for tribally-focused financial organizations. The result has been the creation of a program with unparalleled success

in Indian communities. While this is a good example of the consultation intended in Executive Order 13175 for program creation, the department may consider greater deference to the consultation policy in terms of applying waivers to keep the program working as intended - especially when Congress fails to include matching requirement waivers.

The Bond Guarantee Program, Low-Income Tax Credit Program, and the New Market Tax Credit Program would all benefit from thorough consultation. All of these programs make no accommodations for tribal governments and, as a result, all of these programs have left tribal communities out of much-needed funding, including tax credits for housing and community development and long term loans for business development.

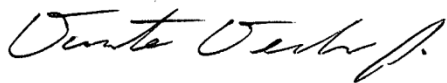
3. Revise the policy of outsourcing decisions and trust obligations

The New Market Tax Credit Program, Low-Income Tax Credit Program, and the Bond Guarantee Program are all federal programs whose funding decisions are outsourced. The Department of Treasury is effectively outsourcing its tribal government trust responsibility by allowing non-profits, industry participants, and states to make funding decisions and need determinations that directly impact tribal governments.

Given the dismal track record these entities have in working with, understanding, or including, tribes in their funding and need decisions, NAFOA strongly recommends this process be revised. The consultation policy should ensure that the Department of Treasury is consulting with tribes prior to the development of these programs to make certain tribes are included regardless of the existing process or the current sentiment that is adverse to set-asides or accommodations that directly meet its trust responsibility. In addition, Treasury should immediately take the stance that any external decisions must accommodate tribal governments.

Thank you for the opportunity to comment on the consultation policy. We encourage the Department of Treasury to utilize this process to develop a stronger relationship between our sovereigns. Please feel free to contact me if you need anything further.

Best regards,

A handwritten signature in black ink, appearing to read "Dante Desiderio".

Dante Desiderio,
Executive Director