

---DRAFT---

## **The Minnesota Health Insurance Exchange Tribal Consultation Policy**

### **1. INTRODUCTION**

Consultation is an enhanced form of communication that emphasizes trust, respect, and shared responsibility. It is an open and free exchange of information and opinion among parties, which leads to mutual understanding and comprehension. Consultation is integral to a deliberative process that results in effective collaboration and informed decision-making with the ultimate goal of reaching consensus on issues and better outcomes.

To establish and maintain a positive government-to-government relationship between the state and Indian tribes, consultation must occur on an ongoing basis so that tribes have an opportunity to provide meaningful and timely input on issues that may have a substantial direct effect on Indian Tribes. Consultation with Tribal Governments is especially important in the context of CMS programs because Indian Tribes serve many roles in their tribal communities:

- Tribal members are beneficiaries of services provided by the Indian Health Services (IHS), by tribal health programs operating under the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, as amended, and by urban Indian health programs operating under Title V of the Indian Health Care Improvement Act.
- Tribal members are also eligible to enroll in Medicare, Medicaid, the Children's Health Insurance Program (CHIP), and Exchanges.
- Tribal governments operate businesses, are employers, and are health care providers, through administration of hospitals, clinics, and other health programs.

Many IHS and Tribal facilities are located in remote and isolated locations, experience difficulty in recruitment and retention of health professionals, and endure challenging socio-economic conditions. The involvement of Indian Tribes in the development of federal and state policies related to health care is crucial for mutual understanding and development of culturally appropriate approaches to improve American Indians' access to federal and state health care programs, to enhance health care payment and resources to IHS and Tribal health providers, and to contribute to overall improved health outcomes for Indian people.

### **2. BACKGROUND**

Since the formation of the Union, the United States has recognized Indian Tribes as sovereign nations. A unique government-to-government relationship exists between Indian Tribes and the Federal Government; 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. This relationship is derived from the political and legal relationship that Indian Tribes have with the Federal Government and is not based upon race.

On November 5, 2009, President Obama signed an Executive Memorandum reaffirming the government to government relationship between the Indian Tribes and the Federal Government, and directing each executive department and agency to engage in regular and meaningful consultation and collaboration with Tribal officials in the development of Federal policies that have Tribal implications and a substantial direct effect on Indian Tribes. The importance of consultation with Indian Tribes has been affirmed through Presidential Memoranda in 1994, 2004 and 2009, and Executive Order (EO) 13175 in 2000.<sup>1</sup> In addition, in 1976, Congress recognized the need for AI/ANs to have access to Medicare and Medicaid services in IHS and Tribal facilities located in Tribal communities and amended titles XVIII and XIX of the Social Security Act to authorize the IHS and Tribal health programs to bill Medicare and Medicaid for services provided in these facilities.

In Minnesota, the Department of Human Services developed a formal consultation policy related to the state's Medical Assistance and MinnesotaCare programs. This policy grew out of long-standing communications with tribes in the health care arena, which over time have resulted in improved access to state health care programs and improved reimbursement to tribal health care providers. The formal consultation policy was approved by CMS in March 2011.

### **3. PURPOSE**

The purpose of the Minnesota Health Insurance Exchange Tribal Consultation Policy is to build meaningful relationships with Federally recognized Indian Tribes<sup>2</sup> and to establish a clear, concise and mutually acceptable process through which consultation can take place between the State and Tribes.

### **4. OBJECTIVES**

In order to fully effectuate this consultation policy, the Commissioners of the Minnesota Department of Commerce and the Minnesota Department of Human Services will:

---

<sup>1</sup> This special relationship is affirmed in statutes and various Presidential Executive Orders including, but not limited to:

- Older Americans Act of 1965, Pub. L. 89-73, as amended;
- Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, as amended;
- The Indian Health Care Improvement Act, Pub. L. 94-437, as amended; -Native Americans Programs Act of 1974, Pub. L. 93-644, as amended;
- Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193
- Presidential Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, November 6, 2000;
- Presidential Memorandum, Government-to-Government Relationship with Tribal Governments, September 23, 2004;
- Presidential Memorandum, Tribal Consultation, November 5, 2009;
- American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 115 (Feb. 17, 2009);
- Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. 111-3, 123 Stat. 8 (Feb. 4, 2009); and
- Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, 124 Stat. 119 (Mar. 23, 2010).

<sup>2</sup> When used in this Consultation Policy, "Indian Tribe" or "Tribe" has the meaning given such term in section 4 of the Indian Health Care Improvement Act (25 U.S.C. § 1603)).

- Formalize a policy to seek consultation and the participation of Indian Tribes in the development of policies and program activities that impact Indian Tribes;
- Create opportunities for Indian Tribes to raise issues with the Minnesota Health Insurance Exchange Advisory Task Force (MHIEATF) and for the MHIEATF to seek consultation with Indian Tribes and communication with Indian organizations when new issues arise;
- Conduct Tribal consultation regarding Minnesota Health Insurance Exchange policies and actions that have tribal implications;
- Encourage partnerships between Indian tribes, insurers, urban Indian organizations and non-tribal providers of medical services.

## 5. ROLES

The government-to-government relationship between the U.S. and Federally recognized Indian Tribes dictates that the principal focus for consultation by the Commissioners of the Minnesota Department of Commerce and the Minnesota Department of Human Services is with Indian Tribes, individually or collectively.

Consultation parties are:

- Indian Tribes represented by the Tribal President, Tribal Chair, or Tribal Governor, or an elected or appointed Tribal Leader, or their authorized representative (s).
- The Commissioner of the Minnesota Department of Commerce or his designee.
- The Commissioner of the Minnesota Department of Human Services or her designee.

Each party will identify his/her authorized representatives with delegated authorities to negotiate on his/her behalf.

In addition, the following entities may be included in consultation:

**Tribal Organizations:** Pursuant to P. L. 93-638, Indian Tribes have the authority to delegate their right to carry out programs of the IHS to a Tribal organization. To the extent that this has occurred, as practicable and permitted by law, the Commissioners of the Minnesota Department of Commerce and the Minnesota Department of Human Services may provide such Tribal organizations an opportunity to fully participate in Tribal consultation under this policy. Such participation will not substitute for direct consultation with Indian Tribes.

**Indian Organizations:** At times it is useful that the Commissioners of the Minnesota Department of Commerce and the Minnesota Department of Human Services communicate with Indian organizations to solicit Indian Tribes' advice and recommendations. These organizations represent the interest of Indian Tribes when authorized by those Tribes. These organizations by the sheer nature of their business serve and advocate for Indian Tribal issues and concerns that might be negatively affected if these organizations were excluded from the process. Although some organizations do not represent Federally recognized Indian Tribes, the Commissioners of the Minnesota Department of Commerce and the Minnesota Department of Human Services may

communicate with these groups as part of the consultation process. While communication and interaction with Indian organizations is critical, it does not substitute for tribal consultation.

**Urban Indian Organizations:** Urban Indian organizations are funded under Title V of the Indian Health Care Improvement Act to provide health services to eligible Indians living in urban areas. While communication with Urban Indian organizations is critical, it does not substitute for tribal consultation.

**Tribal Consultation Work Group (TCWG):** The TCWG will meet regularly to advise the Commissioners of the Minnesota Department of Commerce and the Minnesota Department of Human Services regarding issues relevant to American Indians. The TCWG will be open to all tribally elected officials and their representatives and official representatives of Urban Indian organizations, and will be attended by State officials with authority to make decisions on behalf of the Exchange.

## 6. TRIBAL CONSULTATION PROCESS

In keeping with the State of Minnesota's commitment to engage Tribes in a government-to-government relationship, and in consideration of the impact that implementation of Health Insurance Exchanges will have on Minnesota Tribes and American Indian citizens, these procedures for consultation during the development of Minnesota's Health Insurance Exchange and throughout its operation are established.

Any new or amended policy that will significantly affect American Indians or Indian Tribes will trigger consultation with the Tribes. Although determined on a case-by-case basis, such issues could arise in any policy area for which the Commissioners of the Minnesota Department of Commerce and the Minnesota Department of Human Services have responsibility, such as program eligibility standards, changes in provider payment and reimbursement methodologies, or changes in services provided. The State will notify and consult with the tribes prior to such significant new policy or policy amendment.

It is agreed that the State, through its Department of Commerce, will:

- Appoint at least one elected tribal official or the designated representative of a tribally elected official to the MHIEATF.
- Include at least one elected tribal official or their representative on each work group providing technical assistance to the Commissioner of the Department of Commerce on the design and development of a Minnesota Health Insurance Exchange. This policy is not violated if no tribal official or representative elects to participate. The opportunity to participate remains available to tribal officials or representatives indefinitely.
- Communicate with tribal leaders and their employees in the manner requested by each tribe. At a minimum, meeting agendas and minutes, important documents, concerns raised during meetings, policy statements, etc. of the TCWG will be promptly communicated to the Tribes.
- Send all important MHIEATF and TCWG documents, such as those described above, to the Acting Director of the Bemidji Area Office of the IHS for posting on the area office website.
- Report at least quarterly to the Tribal Health Directors meeting and at least semi-annually to the Minnesota Indian Affairs Council on the activities of the MHIEATF and the TCWG.

- Consult at least annually with tribal leaders to address American Indian concerns regarding the Minnesota Health Insurance Exchange. The consultation will take place in a public forum and will be attended by State officials with authority to make decisions on behalf of the Exchange. Minutes and outcomes of such consultation events will be communicated to tribal leaders in a timely manner.
- Keep records of its tribal consultation activities; all such records will be made available to Tribes in an accessible and appropriate manner.

DRAFT