National Indian Health Board

Sent via email: Mark.Chambers@Treasury.gov

October 30, 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 Extension of Transition Relief from the Employer Mandate

Dear Dr. Buckberg:

On behalf of the National Indian Health Board[1] I would like to thank you for the opportunity to engage in a discussion on implementation of the Patient Protection and Affordable Care Act (Affordable Care Act or ACA). Please accept this letter as a formal request for an extension of transition relief in the application of the employer shared responsibility mandate ("employer mandate") under the Affordable Care Act on Indian Tribes, Tribal Organizations as defined by Section 4(L) of the Indian Self-Determination and Education Assistance Act, and Tribally Owned Entities (collectively referred to as "Tribes").

Further, as discussed at the recent Tribal Self-Governance Advisory Committee (TSGAC) meeting held on October 7, 2015, Tribes and Tribal Organizations will be submitting shortly for the Treasury Department's consideration, options and recommendations on potential approaches for other forms of permanent administrative relief in the implementation of the employer mandate on Tribes as these requirements pertain to a Tribe's Tribal member employees. [2]

Many Tribes with large governmental commercial operations have always offered their employees health coverage and will continue to do so. But many others, in particular Tribes who employ large numbers of Tribal member employees, have not done so as those employees have a right to access

[1] Established in 1972, the NIHB is an inter-Tribal organization that advocates on behalf of Tribal governments for the provision of quality health care to all American Indians and Alaska Natives (AI/ANs). The NIHB is governed by a Board of Directors consisting of a representative from each of the twelve Indian Health Service (IHS) Areas. Each Area Health Board elects a representative to sit on the NIHB Board of Directors. In areas where there is no Area Health Board, Tribal governments choose a representative who communicates policy information and concerns of the Tribes in that area with the NIHB. Whether Tribes operate their entire health care program through contracts or compacts with IHS under Public Law 93-638, the Indian Self-Determination and Education Assistance, or continue to also rely on IHS for delivery of some, or even most, of their health care, the NIHB is their advocate.

[2] For purposes of the transition relief for 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.

Indian Health Service (IHS) services at no cost to the Tribal employees. Those Tribes are particularly vulnerable to the employer mandate, which will force them to either purchase insurance for Tribal member employees otherwise exempt from the individual mandate, or pay significant penalties to the United States.

Specifically, we are requesting an extension of transition relief in implementation of the following requirements under the employer mandate from January 1, 2015 until at least January 1, 2016 and preferably to January 1, 2017:

- Employer coverage requirements, including any associated mandate to make shared responsibility payments under Internal Revenue Code (Code) section 4980H;
- Employer reporting requirements under Code section 6056; and
- Application of the extension of transition relief to all employees of Tribes.

We are requesting this transition relief for two primary reasons:

1) To provide Tribes additional time to seek a permanent remedy to these requirements; and
2) To allow Tribes that have not historically provided health insurance coverage to their employees and that currently lack the capacity to offer coverage and/or meet the reporting requirements additional time to get technical assistance and determine how to manage the reduction in funding and services to Tribal members that will be caused by the employer mandate.

For those Tribes that have not historically provided formal health insurance coverage to their employees, as was discussed at the October 7th TSGAC meeting and as was presented in previous correspondence in a joint letter dated June 29, 2015 (attached), the imposition of the employer mandate requirements under the ACA is creating a significant hardship. Specifically, if required to offer comprehensive coverage or make "employer shared responsibility payments" to the federal government, many Tribes will be forced to reduce current service levels to Tribal members due to the costs of either purchasing coverage or making payments to the Treasury.

Further, for all Tribes, whether they have provided comprehensive health insurance coverage to their employees as a standard business practice or not, making payments to the federal government for the health care needs of Tribal members is in direct conflict with the federal government's trust responsibility to meeting the health care needs of Tribes and their citizens.

Providing Tribes with additional transition relief in implementing the ACA's employer mandate would build on previous Treasury Department actions pertaining to all or a subset of employers. There are eight forms of transition relief for 2014 and / or 2015 already provided. For example, a one-year delay was provided to all employers with regard to all their employees (from January 1, 2014, to January 1, 2015). An additional one-year extension was provided to mid-size employers with regard to all their employees (from January 1, 2015, to January 1, 2016), eliminating the requirements during the current 2015 coverage year.

We believe that providing the extension of relief requested in this letter will not disadvantage employees of Tribes. Coverage decisions have already been made by Tribes for the 2015 coverage year. Implementation of an extension of transition relief until January 1, 2016 will not impact the actions of

Tribal employers for this current coverage year. In addition, an extension of relief to Tribes for an additional one-year period through January 1, 2017, will provide the administration with more opportunity for Tribal consultation to devise a plan providing effective and permanent relief for all Tribes.

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.[3] This is also pursuant to the President's commitment towards effective Tribal consultation[4] for the federal government and its special trust relationship with Tribes.

We look forward to your continued engagement with us on this matter. And, we appreciate your recognition of the importance of this issue to Tribes and their citizens. Thank you.

Sincerely,

Lester Secatero, Chair
The National Indian Health Board

Attachment: Joint Tribal Organization letter to The White House dated June 29, 2015.

[3] The Department of the Treasury Tribal consultation policy became effective on September 23, 2015 and replaced the Department's interim consultation policy.
[4] Executive Order 13175 of November 6, 2000 and as confirmed in the President's memorandum of November 5, 2009

National Indian Health Board

National Congress of American Indians

Submitted via e-mail: Tracy_L_Goodluck@who.eop.gov
Raina_D_Thiele@who.eop.gov

June 29, 2015

Raina D. Thiele
Associate Director of Intergovernmental Affairs and Public Engagement
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Tracy L. Goodluck
Policy Advisor for Native American Affairs, White House Domestic Policy Council
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Re: Request for Tribal Relief from the Affordable Care Act Employer Mandate.

Dear Ms. Thiele and Ms. Goodluck:

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), and the Rocky Mountain Tribal Leaders Council (RMTLC), we write to you to again request a meeting to discuss the need for relief for Tribes from the Patient Protection and Affordable Care Act's (ACA) employer shared responsibility rule (the "employer mandate"). We continue to await response to our original letter submitted to the White House on February 2, 2015.

The Internal Revenue Service's (IRS) Final Rule implementing the employer mandate is inconsistent with the federal trust responsibility to Tribes, denies many Tribal members the opportunity to take advantage of the benefits and protections designed for them in the Marketplace, and chills Marketplace enrollment for American Indians and Alaska Natives (AI/AN). It is cost-prohibitive for many Tribes and will result in a diminution of Tribal services

for Indian people. If fully implemented in Indian Country, Tribes will be faced with one of two undesirable options: either providing expensive employee coverage, which will result in a reduction of governmental services and the disqualification of Tribal member employees from AI/AN-specific benefits and protections in the marketplace, or using scarce (and in all likelihood, federal) resources to pay the IRS substantial employer mandate penalties. Neither outcome represents good federal policy.

As discussed below, the ACA contains several provisions designed to encourage AI/AN enrollment in the ACA Marketplaces, and 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.

But the IRS's application of the employer mandate to Tribal governments works at cross purposes to encouraging Marketplace enrollment. Tribal workforces include a significant number of Tribal member employees. The offer of employer-sponsored health 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 placed 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 offer insufficient coverage) to their Tribal member employees and pay substantial penalties to the IRS.[1]

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 inconsistent with the right of AI/ANs to obtain federally-funded, trust-obligated health care without charge to the individual at I/T/U facilities, and which further 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. And application of the employer mandate will be simply unaffordable to many Tribes and Tribal organizations and act as a barrier to the provision of critical governmental services.

Finally, neither the ACA nor its implementing regulations should be interpreted as applying to Tribes in the first instance. The employer mandate is set out in Section 4980H of the Tax Code, as added by Section 1513 of the ACA (as amended).[2] Section 4980H of the Code does not specifically include Tribal governments within the definition of a covered employer, and Section 54.4980H-2(b)(4) of the employer shared responsibility regulations reserves application of special rules for government entities.

[1] We illustrate these various scenarios in the examples below.

[2] *See* 26 U.S.C. § 4980h; 26 C.F.R. § 54.4980H–1 - .4980H-5.

With the employer mandate in effect as of January 1, 2015, we request consultation on the need for Tribal relief from the rule as soon as possible. In addition, IRS Information Reporting deadlines for employers subject to the mandate for the 2015 tax year are fast approaching (i.e., employers must issue 1095-C statements to full-time employees by January 31, 2016 and must file 1094-C and 1095-C forms by February 29, 2016, or March 31, 2016, if filing electronically).

I. Background.

Congress has recognized both that "[f]ederal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people"[3] and that it is a "major national goal . . . to provide the resources, processes, and structure that will enable Indian tribes and tribal members to obtain the quantity and quality of health care services and opportunities that will eradicate the health disparities between Indians and the general population of the United States."[4] The federal trust responsibility and laws enacted pursuant thereto provide ample authority for the federal agencies of the Executive Department to design, implement and tailor federal programs in a manner that recognizes and supports the unique government to government relationship between sovereign Tribal governments and the United States.[5] One manner in which the federal government partially fulfills its trust responsibility is by making AI/ANs eligible to receive care through the Indian Health Service (IHS) system without charge to the individual patient.[6]

In light of the federal government's trust responsibility, many Tribal employers have not historically offered health coverage to their employees. Not only are the majority of many Tribal workforces eligible for IHS services, but the remote location of many I/T/U facilities creates additional difficulties in locating plans that treat Tribal facilities as in-network or otherwise preferred providers. This often leaves the I/T/U as the only viable health service option for the employee population, regardless of coverage status. In addition, insurance plans in these remote areas are frequently expensive, have high cost-sharing amounts, or are less comprehensive than plans available in urban settings.[7] Federal responsibility for the provision of health services

[3] 25 U.S.C. § 1601(1).

[4] 25 U.S.C. § 1601(2).

[5] Additional background on the authority of federal agencies to tailor their programs to meet the unique needs of federally-recognized tribes and American Indians and Alaska Natives is provided in Appendix B to the CMS TTAG Strategic Plan, "Appendix B: Legal Basis for Special CMS Provisions for American Indians and Alaska Natives." A copy of Appendix B is appended to this letter.

[6] 42 C.F.R. §§ 136.11 and 136.12.

[7] *See, e.g.*, Letter from Monica J. Linden, Commissioner, Montana Department of Securities and Insurance, to Kathleen Sebelius, Secretary, U.S. Department of Health and Human Services (Mar. 10, 2014) (recognizing practical difficulties for Tribal employers in finding and offering adequate coverage and seeking Tribal exemption from employer mandate).

allows Tribal governments to expend scarce resources elsewhere rather than obtaining high cost, low quality employee insurance.[8]

II. Discussion.

With these unique circumstances in mind, the application of the employer mandate to Tribal employers presents three primary problems: (1) it undercuts the federal government's trust responsibility by forcing AI/ANs to "pay" for health coverage (whether directly or by proxy through their Tribal employer); (2) it undercuts multiple ACA provisions designed to encourage AI/AN enrollment in the Marketplaces; and (3) compliance with the mandate requires a significant diminution in Tribal governmental services. We discuss each issue in turn.

1. The Employer Mandate Runs Counter to the Federal Government's Trust Responsibility by Requiring Tribes to Either Pay the Federal Government Penalties or Subsidize Private Insurance Companies.

As noted above, the federal government owes a trust responsibility towards AI/ANs, through which they are eligible to receive health care through the IHS system without cost to the individual. However, IHS is chronically underfunded, and AI/ANs continue to suffer the highest health disparities of any ethnic group in the United States and are disproportionately likely to be uninsured.[9] The employer mandate forces Tribes to divert funding necessary to sustain Tribal health programs, which by right should come from the federal government, and redirect it to the purchase of employee health insurance from private companies.

This contradicts the trust responsibility by resulting in a redundant payment cycle in which (1) Tribal employers use their own funding (most likely a combination of federal funding and outside revenue) to purchase employee insurance; (2) many employees visit the local IHS health program for services; and (3) the employee's insurer then reimburses IHS. In the alternative, the Tribal employer does not purchase insurance and instead simply pays penalties to the IRS, another federal agency.

In these circumstances, the employer mandate essentially results in Tribes funding the federal government: either they take their limited Tribal funding (some or all of which might be federal funding anyway) and pay it to the IRS in the form of a tax penalty, or they purchase insurance from private companies, which then pay IHS after keeping between 15-20% of the premium payments off the top.[10] Tribal subsidization of the United States does not respect either the trust

[8] We note that the federal government's budgeting and expenditures do not come close to meeting the requirements of the trust responsibility: IHS is only funded at approximately 56% of need, and the most recent contract support cost shortfall was estimated at $90 million. NATIONAL TRIBAL BUDGET FORMULATION WORKGROUP'S RECOMMENDATIONS ON THE INDIAN HEALTH SERVICE FISCAL YEAR 2015 BUDGET 3, 6 (2013).

[9] *See generally* SAMANTHA ARTIGA ET AL., HENRY J. KAISER FAMILY FOUNDATION, HEALTH COVERAGE AND CARE FOR AMERICAN INDIANS AND ALASKA NATIVES (2013), *available at* http://kff.org/disparities-policy/issue-brief/health-coverage-and-care-for-american-indians-and-alaska-natives/ (last visited July 18, 2014).

[10] *See* 45 C.F.R. § 158.210 (establishing acceptable insurance medical-loss ratios in the large group, and individual health markets).

responsibility or the government-to-government relationship between Tribes and the United States. It is also inefficient, as federal funds will be used to circuitously pay for the cost of insurance premiums or for tax penalties rather than directly funding health care through the IHS system, while also allowing insurance companies to step in and keep a percentage of the funding for themselves. The trust responsibility neither envisions Tribes as middlemen for transactions between private insurers and IHS nor Tribal "funding" of federal agencies through the payment of penalties.

2. The Employer Mandate Undercuts the ACA's Indian-Specific Protections.

Applying the employer mandate to Tribal employers directly undercuts the ACA's Indian-specific protections in three ways. First, it punishes Tribes for assisting AI/AN enrollment in the Marketplaces, despite the multiple ACA provisions designed specifically to encourage such activities. Second, it can disqualify AI/ANs from eligibility for premium tax credits in Marketplace plans, thus leaving them unaffordable. Third, it ignores the fact that AI/ANs are exempt from the individual mandate and forces Tribal employers to pay for AI/AN insurance plans as a proxy for the individual. None of these outcomes benefit Tribal employers, individual AI/ANs, or the federal government.

The ACA contains several provisions designed to maximize AI/AN participation in Marketplace plans: for example, Indian-specific cost-sharing protections that help defray the cost of health coverage,[11] special AI/AN enrollment periods,[12] and the ability for Tribes sponsor Marketplace plan premium payments for Tribal members.[13] Many Tribes and Tribal organizations have aggressively sought to facilitate AI/AN enrollment in Marketplace plans in order to take advantage of these protections. However, the employer mandate actively discourages AI/AN Marketplace participation, in direct contradiction to the provisions described above.

First, Tribes may find it more affordable to offer Marketplace premium assistance to Tribal member employees than it is to pay for employee-sponsored coverage. However, it is our understanding that the IRS has opined that Tribal premium sponsorship for member employees does not satisfy the employer mandate. Tribes will therefore be forced to either continue offering premium assistance and pay the employer mandate penalty (thus diminishing the funding available for premium assistance and AI/AN Marketplace enrollment) or else purchase employer coverage and discontinue premium assistance (which may not be financially viable and which forecloses Tribes from obtaining a benefit that Congress deliberately included in the ACA).

Second, even if a Tribe does offer employer coverage, AI/AN employees will almost certainly be personally responsible for paying premium costs and (depending on the type of plan and location

[11] 42 U.S.C. § 18071(d).

[12] 42 U.S.C. § 18031(c)(6)(D).

[13] 25 U.S.C. §§ 1642, 1644.

of services) for deductibles, co-payments, and co-insurance. Recognizing that eligibility for IHS services acts as a natural disincentive for AI/AN enrollment in any insurance plan (employer-sponsored or otherwise) that requires such expenditures, Congress further incentivized AI/AN Marketplace participating through the availability of premium tax credits: various types of Indian-specific income is excluded when calculating AI/AN eligibility for the tax credits, thus leaving it comparatively easier for AI/ANs to qualify[14] and making many individual Marketplace plans significantly more affordable or comprehensive to AI/ANs than employer-sponsored coverage. However, employees are automatically disqualified from tax credit eligibility upon receiving a qualifying offer of coverage from their employer.[15] So, even if a Tribe provides employer-based insurance that is less affordable or comprehensive than a plan available through the individual Marketplace, the mere offer of coverage eliminates the ability of AI/ANs to obtain the tax credits that make the individual plan affordable in the first instance.

Finally, Congress exempted AI/ANs from the ACA's individual mandate out of recognition that AI/ANs are entitled to federal health care benefits and therefore should not be forced to pay for non-IHS coverage. Requiring Tribal employers to provide AI/ANs with such coverage anyway, and penalizing them if they do not, functionally invalidates the AI/AN exemption from the individual mandate by shifting the penalty from the individual to the Tribe itself. This also leaves AI/AN employees with two choices: either accept the coverage and be personally responsible for any applicable employee share of premiums or cost-sharing (again invalidating the individual mandate) or else reject the coverage and lose eligibility for Marketplace tax credits. Under either scenario, the individual AI/AN is "paying" for health coverage.

The following examples illustrate the various ways in which the employer mandate uniquely disadvantages Tribal employers and AI/ANs:

1. **The Tribal employer complies with the employer mandate and offers minimum essential coverage to all employees.**
    a. Tribal employer offers minimum essential coverage to all of its employees, the majority of which are Tribal members.
    b. Due to extremely limited and zero sum nature of Tribal budgets, the Tribe is forced to diminish basic governmental services to make up for the cost of coverage.
    c. In partnership with CCIIO, the Tribe is actively encouraging Tribal members to enroll in the Marketplaces. Tribal members who are employees are disqualified from Marketplace tax credits due to the offer of coverage.
    d. By providing coverage to Tribal member employees, the Tribe is required by proxy to comply with the individual mandate "on behalf" of AI/AN employees, thus nullifying the AI/AN individual mandate exemption.

[14] *See* 26 U.S.C. § 36B(d) (tying tax credit eligibility to modified adjusted gross income); *see also* 43 U.S.C. § 1620; 25 U.S.C. § 1407; 25 U.S.C. § 171b(a) (exempting various AI/AN-specific income from modified adjusted gross income calculation).

[15] 26 U.S.C. § 36B(2)(B); 26 U.S.C. § 5000A(f)(1)(B), (f)(2).

2. **The Tribal employer does not offer health insurance to any employees, and instead pays the "first" employer mandate penalty of $2,000 per employee per year.**[16]
    a. The Tribe does not offer coverage to its employees.
    b. The Tribe must pay $2,000 per employee per year in penalties to the IRS. The Tribe is forced to reduce government services in order to make up for the penalty costs.
    c. Tribal member employees do not have an offer of coverage and can take advantage of premium assistance and AI/AN cost-sharing exemption on the Marketplaces, but the Tribe must "pay" the IRS a penalty in order for those AI/AN employees to qualify for those statutory rights.
    d. Due to the zero sum funding of Tribal governments, the Tribe will be receiving federal funding to provide services to their members and then paying it back to the IRS in the form of an employer mandate penalty.

3. **The Tribal employer offers employees a "low end" plan (high deductible, few covered services, etc.) that satisfies the first employer mandate penalty but not the "second" employer mandate penalty.**[17]
    a. The Tribe purposefully designs its coverage options to result in significantly expensive plans for their employees. The Tribe is liable for payment of the "second" employer mandate penalty if employees go onto the Marketplace and obtain a premium tax credit or cost-sharing reduction.
    b. Tribal member employees are not likely to accept that coverage, as it results in high personal costs and they have a right to care through the IHS system.
    c. Tribal member employees are also not likely to obtain coverage through the Marketplaces, as they have a right to care through the IHS system, thus foregoing their statutory benefits under the ACA.
    d. In order to encourage members to take advantage of Marketplace premium assistance and AI/AN cost-sharing exemptions, the Tribe will have to pay the IRS a penalty of up to $3,000 per Tribal member employee that receives a tax credit or cost-sharing reduction in order to ensure that those members qualify for their statutory benefits.

[16] This penalty applies when (1) an employer offers health coverage to less than 95% of its full-time employees and their dependents in a calendar month, and (2) at least one of the full-time employees then enrolls in a QHP through a Marketplace and receives an advance premium tax credit or cost sharing reduction. 26 U.S.C. § 4980H(a); 26 C.F.R. § 54.4980H–4(a). In such cases, the penalty amount for each applicable month is equal to the number of the employer's full-time employees for the month (subtracted by thirty), multiplied by 1/12 of $2,000. 26 U.S.C. § 4980H(c)(2)(D); 26 C.F.R. § 54.4980H–1(a)(41).

[17] This penalty applies when an employer does offer health coverage to at least 95% of its full-time employees and their dependents, but (1) at least one full-time employee receives a premium tax credit or cost sharing reduction to help pay for coverage in a Marketplace because the coverage was either unaffordable or failed to provide minimum essential coverage. 26 U.S.C. § 4980H(b)(1); 26 C.F.R. §§ 54.4980H–5(e)(1). In such cases, the penalty amount is calculated by taking the number of full-time employees who receive a premium tax credit in a given month and multiplying that amount by 1/12 of $3,000. 26 U.S.C. § 4980H(b)(1); 26 C.F.R. § 54.4980H–1(a)(41).

e. Due to the zero sum funding of Tribal governments, the Tribe will be receiving federal funding to provide services to their members and then paying it back to the IRS in the form of an employer mandate penalty.
f. The Tribe is still responsible for paying for coverage for employees (AI/AN or otherwise) who do enroll in the employer-sponsored plan.

These scenarios underscore the employer mandate's inherent incompatibility with both the unique nature of the Tribal health system and the AI/AN-specific provisions of the ACA.

Applying the mandate in any circumstances results in either a significant diminution in Tribal governmental services, a functional elimination of the AI/AN exemption from the individual mandate, or the disqualification of AI/ANs from their statutorily-established Marketplace benefits and protections. The end result is that the Tribe must either bear the burden of paying for expensive and/or low-quality coverage or else subject itself to significant employer mandate penalties, while the AI/AN employee must choose between accepting whatever coverage is offered and losing tax credit eligibility, remaining uninsured, or having their Tribe "pay" the IRS before they can qualify for the benefits and protections in the Marketplace to which they are legally entitled. This fundamentally undercuts congressional intent in crafting the ACA and requires a Tribal exemption from the mandate.

3. The Employer Mandate Will Be Unaffordable for Tribal Governments.

Compliance with the employer mandate forces Tribes to either absorb the cost of employee health insurance or else pay non-compliance penalties of up to $2,000 per year per full-time employee.[18] Not only is this potentially devastating for Tribes that are already faced with significant financial hardships, but it fails to recognize the fundamental distinction between Tribal employers and private businesses.

It is our understanding that the IRS views the application of the mandate to Tribal employers similarly to that of non-governmental businesses: essentially as a revenue-driven cost-benefit analysis. This is simply not the case in the Tribal context. Tribes are sovereign, governmental entities that are directly responsible for the health and welfare of their people, and are often the only major employers in Tribal territories. Forcing Tribes to pay millions of dollars in penalties – or, alternatively, to purchase costly insurance for Tribal member employees who are otherwise exempt from the individual mandate and eligible for IHS services – will not just affect Tribal business decisions concerning hiring or expansion, but will directly limit their ability to provide basic social, health, safety, and other governmental services on which their members and other reservation residents rely. Tribes cannot "pass on" the costs of compliance by raising prices on goods or services. Tribal governmental funding is a zero sum game, and any funding used to either comply with the mandate or pay the penalties will necessarily come from coffers used to provide what may be the only constituent services for hundreds of miles.

[18] *See generally* 26 C.F.R. §§ 54.4980H–4, H-5.

While it is true that all employers must account for insurance costs when making decisions concerning expansion or hiring, the stakes are comparatively much higher when a Tribe might have to choose between complying with the mandate and funding an adequate reservation police force or other Tribal entity. If applied to Tribal governments, the mandate has the potential to critically undercut Tribal governmental functions.

4. The Internal Revenue Service Should Issue a Regulatory Exemption from the Employer Mandate.

The IRS has previously recognized the burden that the ACA's employer-specific provisions place on Tribal employers: for example, the IRS explicitly excludes "federally recognized Indian tribal governments or . . . any tribally chartered corporation wholly owned by a federally recognized Indian tribal government" from an otherwise-applicable requirement that employers report the cost of coverage under an employer-sponsored group health plan on their employees' W-2 forms.[19] For the reasons discussed above, the IRS should similarly exempt Tribes and Tribal organizations from the employer mandate.

The IRS has the legal authority to issue such an exemption. The ACA's definition of the "applicable large employers" subject to the mandate does not explicitly include Indian Tribes.[20] Statutes of general applicability that interfere with exclusive issues of self-governance, such as the relationship between Tribal employees and on-reservation businesses, generally require "a clear and plain congressional intent" that they apply to Tribes before they will be so interpreted.[21] Although Congress repeatedly referenced Indian Tribes within the ACA,[22] it did not include any such reference in the employer mandate, therefore indicating that the mandate does not apply of its own force to Tribal employers.[23] Because the sole explicit application of

[19] *See* Internal Revenue Service, "Employer-Provided Health Coverage Informational Reporting Requirements: Questions and Answers," *available at* http://www.irs.gov/uac/Employer-Provided-Health-Coverage-Informational-Reporting-Requirements:-Questions-and-Answers (Dec. 19, 2013).

[20] *See* 26 U.S.C. § 4980H(c)(2)(A) (defining the term as "with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year").

[21] *E.E.O.C. v. Fond du Lac Heavy Equip. & Const. Co., Inc.*, 986 F.2d 246, 249 (8th Cir. 1993) (Age Discrimination in Employment Act did not apply to employment discrimination action involving member of Indian Tribe, Tribe as employer, and reservation employment); *accord Snyder v. Navajo Nation*, 382 F.3d 892, 896 (9th Cir. 2004) (Fair Labor Standards Act did not apply to dispute between Navajo and non-Navajo Tribal police officers and Navajo Nation over "work [done] on the reservation to serve the interests of the tribe and reservation governance").

[22] *See, e.g.*, Section 1402(d)(2) (referring to health services provided by an Indian Tribe); Section 2901(b) (referring to health programs operated by Indian Tribes); Section 2951(h)(2) (referring to Tribes carrying out early childhood home visitation programs); Section 2953(c)(2)(A) (discussing Tribal eligibility to operate personal responsibility education programs); Section 3503 (discussing Tribal eligibility for quality improvement and technical assistance grant awards).

[23] *See, e.g., Dean v. United States*, 556 U.S. 568, 573 (2009) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposeful in the disparate inclusion or exclusion.").

the employer mandate to Tribes is found in IRS regulations,[24] the IRS may accordingly promulgate the following standalone exemption in 26 C.F.R. § 54.4980H–2:

> **26 C.F.R. § 54.4980H–2 Applicable large employer and applicable large employer member.**
> **(a) In general.** Section 4980H applies to an applicable large employer and to all of the applicable large employer members that comprise that applicable large employer.
>
> **(b) Determining applicable large employer status—**
>
> . . . .
>
> **(5) Indian Tribes and Tribal Entities.** For the purposes of any penalty or assessment under 26 U.S.C. § 4980H or 26 C.F.R. § 54.4980H, the term "applicable large employer" shall not include any Indian tribe, tribal health program, tribal organization, or urban Indian organization (as defined in 25 U.S.C. § 1603).

III. Conclusion.

We request a meeting to further discuss this issue and ask that the IRS exercise its legal authority to provide categorical relief for Indian Tribes, Tribal organizations, and Urban Indian Organizations from the employer mandate. The ACA employer mandate creates an impossible choice for Tribal governments, forcing them to either pay for the cost of insurance for Tribal member employees who are otherwise exempt from having to obtain coverage, or pay a tax penalty in order to ensure that Tribal member employees qualify for the benefits and protections to which they are entitled by law. The mandate discourages Tribes from facilitating AI/AN Marketplace enrollment, requires Tribes to pay an individual mandate penalty by proxy on behalf of its AI/AN employees, and precludes AI/AN eligibility for tax credits. The mandate also acts as a federal directive that many AI/ANs pay for their health care in circumvention of the trust responsibility. Finally, the mandate is unaffordable for many Tribes, as Tribes will pay for both the penalties and the insurance payments with already-scarce resources that would be far better allocated towards funding direct Tribal services and programs.

Thank you for the opportunity to engage with us on this matter. We stand ready to work with you on any necessary follow up issues and look forward to a continued open dialogue on the employer mandate. NIHB Director of Federal Relations, Devin Delrow (ddelrow@nihb.org), will follow up by phone to secure a mutually acceptable meeting date and time.

Sincerely,

[24] Internal Revenue Service, Shared Responsibility for Employers Regarding Health Coverage; Final Rule, 79 Fed. Reg. 8,544 (Feb. 12, 2014); 26 C.F.R. § 54.4980H–1(a)(23).

Lester Secatero, Chairman,
The National Indian Health Board

Brian Patterson, President
United South and Eastern Tribes, Inc.

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

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

Brian Cladoosby, Chairman
Swinomish Indian Tribal Community
President, NCAI

Sandra Ortega, Councilwoman,
Tohono O'odham Nation
Chair, DSTAC

Attachments:
1. TTAG Strategic Plan, Appendix B [See footnote 5]
2. Rocky Mountain Tribal Leaders Council Resolution and Letter to White House, May 18, 2015
3. NIHB and USET Letter to White House Requesting Relief from Employer Mandate, February 2, 2015