

National Indian Health Board



Submitted via: <http://www.regulations.gov>

August 11, 2016

Dr. Audrey Clarke,
Department of Health and Human Services
200 Independence Ave, SW
Washington, DC 20201

RE: Proposed Changes to HHS Grants Regulations, RIN 0991-AC06

Dear Dr. Audrey Clarke:

On behalf of The National Indian Health Board (NIHB) and in response to the Health and Human Services (HHS) Grants Regulation request for comments dated July 13th, 2016, we write to submit comments on the Department of Health and Human Services (HHS) notice of proposed rulemaking regarding proposed changes to HHS' adoption of the Office of Management and Budget's (OMB) Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards.

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/AN). 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 Act (ISDEAA), or continue to also rely on IHS for delivery of some, or even most, of their health care, the NIHB is their advocate

In this most recent notice of proposed rulemaking, HHS has considered modifications to the Office of Management and Budget's (OMB) Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards. These proposed changes have particular implications for residents of Indian Country, as they affect the contracts and compacts awarded pursuant to the Indian Self-Determination and Education Assistance ACT (ISDEAA). Specified within the notice posted on the Federal Register, HHS has claimed that its request for comments is intended to:

...ensure that Indian Tribes and Tribal organizations are fully apprised of their rights and responsibilities. Although HHS considers this amendment to be a

requirement of existing statute and regulation, HHS proposes this change with notice and an opportunity for comment to ensure that the regulated community is aware of this clarification.

HHS maintains one of the most robust and inclusive Tribal consultation policies, and the 2010 revisions only further bolstered the accountability process, stating that:

...Tribal input will be sought “throughout all stages” of the development of policies, regulations, and budgets.

Additionally, one of the five key components of the consultation says that:

No Division shall promulgate any regulation that has Tribal implications and that preempts Tribal law unless the Division consulted with Tribes, included a Tribal summary impact statement in the Federal Register and provides the Secretary with all written communications from Tribes on the issue.

These requirements are consistent with and guided by Presidential Executive Order 13175, which requires federal agencies to consult with Tribes in the development of federal policies that have Tribal implications. Executive Order 13175 also specifically states:

...No agency shall promulgate any regulation that has Tribal implications and that preempts Tribal law unless the agency, prior to the formal promulgation of the regulation, consulted with Tribal officials early in the process of developing the proposed regulation.

As previously mentioned, comprehensive consultation is one of the foundational elements of the government-to-government relationship between the United States and Tribes. Although we are pleased that HHS has taken the time to post a request for comments on the Federal Register, we do not assert that this amounts to meaningful Tribal consultation nor is it in compliance with Executive Order 13175. The Federal Register is an open forum whereby any citizen, agency or stakeholder can impress their opinions and recommendations. It is not an exclusive platform for Tribes to engage with Federal agencies.

We are especially concerned because this rule proposes to make ISDEAA contracts, compacts, and funding agreements subject to HHS grant regulations. This is an overreach of the Secretary’s Authority under ISDEAA¹ and the fact that Tribes have not been consulted is of grave concern.

As a result, we request that the HHS not move forward with the proposed rule until true *meaningful* Tribal consultation can take place on the provisions outlined in this proposed rule.

We hope that the HHS, in the spirit of its partnership and shared interest in improving American Indian and Alaska Native (AI/AN) access to its services, will work with the NIH to improve

¹ 25 U.S.C. § 450k

the methods by which HHS engages in consultation. We thank you for this opportunity to provide our comments and recommendations. Should you have any questions or concerns, please direct them to NIHB's head of Federal Relations, Devin Delrow, at ddelrow@nihb.org.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Lester Secatero', with a stylized flourish at the end.

Lester Secatero
Chairman, National Indian Health Board