

NEW YORK HEALTH BENEFIT EXCHANGE TRIBAL CONSULTATION POLICY

I. Introduction

A health benefit exchange (HBE) is an entity that is intended to create an organized and competitive market for health insurance by offering a choice of plans that establish common rules relating to the offering and pricing of insurance to consumers. In 2010, Congress passed and the President signed the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act, together referred to as the “ACA.” As part of the ACA, states must have an Exchange in place by Jan. 1, 2014. On April 12, 2012, Governor Cuomo signed Executive Order 42 establishing the New York Health Benefit Exchange within the New York State Department of Health.

The New York Health Benefit Exchange (NYHBE) will improve access to coverage by providing a central marketplace where individuals, families and small businesses can buy health insurance - Medicaid, Child Health Plus (CHP), the Basic Health Program, if the state elects to have one, or qualify for tax credits to help pay for health insurance premiums. The NYHBE will also provide information to help customers understand what plan best fits their needs and allow for comparison-shopping. The ACA includes a number of provisions related to health reforms that are specific to American Indians and Alaska Natives (AI/AN), including special benefits and protections.

The ACA requires that each exchange consult with a variety of key stakeholders in the planning, establishment and ongoing operation of exchanges. This ensures that exchanges have a multi-faceted approach to work closely with a variety of stakeholders including Federally-recognized Tribes that provide health care services to AI/AN communities. The U.S. Department of Health and Human Services (HHS) is requiring that each state engage one or more federally recognized Tribe(s) to develop a process for consultation with Tribal governments and input from urban Indian health programs regarding the start-up and ongoing operation of the Exchanges.

The NYHBE shares the HHS goal to establish a clear Tribal consultation policy, as the foundation of their relationship with New York’s tribes. This policy describes protocols for NYHBE to conduct Tribal consultation in order to obtain advice on a regular, ongoing basis from designees of New York’s eight federally recognized Tribes and confer with urban Indian programs under Title V “Health Services for Urban Indians on matters having tribal implications regarding the establishment and ongoing operation of the Exchange. Specifically, this consultation policy applies to New York’s:

Cayuga Nation;
Oneida Nation;
Onondaga Nation;
Saint Regis Mohawk Tribe;
Seneca Nation;
Shinnecock Nation;
Tonawanda Seneca Nation;
Tuscarora Nation; and
American Indian Community House (AICH).

II. Definitions

For the purposes of this Tribal Consultation Policy, the following definitions apply:

American Indian: An individual who has been determined eligible, as an American Indian pursuant to 42 CFR 136.12 to receive health care services from Indian health care providers.

Indian Health Care Provider/Tribal Entity: A health care program, including contracted health services, operated by the IHS or by an Indian Tribe, Tribal Organization, or Urban Indian Organization as those terms are defined in Section 4 of the Indian Health Care Improvement Act (25 U.S.C. 1603) and Title V, Health Services for Urban Indians

Tribal Consultation: Tribal consultation is an open and continuous government-to-government exchange of information that leads to mutual understanding and informed decision making between federal and state entities, NYHBE and Tribal governments. The process of government-to-government consultation with individual Tribal governments may also be supplemented through informational exchanges and conferrals with working groups, task forces, advisory committees, and other groups representing the interests of AI/AN individuals, such as urban Indian programs. Tribal consultation is distinct from any other notice and comment periods, community involvement programs, or other public participation processes of the NYHBE. Unless justified by extraordinary circumstances, Tribal consultation should occur before the public release of any proposal or change involving matters that require or are appropriate for Tribal consultation.

III. ACA Background

The ACA offers special benefits and protections for AI/AN members, including limits on cost sharing and payer of last resort requirements for health programs operated by the Indian Health Service (IHS), Indian tribes, tribal organizations, and urban Indian organizations. The Center for Consumer Insurance Information Oversight (CCIIO) rules to implement insurance exchanges also requires that each state that has one or more Federally-recognized tribe must engage in regular and meaningful consultation and collaboration with such tribes and their tribal officials on all Exchange policies that have tribal implications.

IV. Consultation Policy Statement

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.

The special government-to-government relationship between American Indian tribes and federal and state governments will be respected in all dealings between Indian tribes and the NYHBE. The relationship between the NYHBE and New York's Indian tribes can only be built through trust and mutual respect. The NYHBE recognizes that it is essential to work on a government-to-government basis with New York's Indian Tribes together to develop a cooperative relationship in order to best serve the interests of Tribal members. Consultation with Tribal Governments is especially important in the context of the Centers for Medicare and Medicaid Services (CMS) programs because Indian Tribes serve many roles in their tribal communities, including:

- a) Many 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.
- b) Tribal members are also eligible to enroll in Medicare, Medicaid, the Children's Health Insurance Program (CHIP), and exchanges.
- c) Many Tribal governments operate businesses, are employers, and are health care providers, through administration of hospitals, clinics, and other health programs.
- d) Tribal governments may also provide substantial health insurance cost coverage to Tribal members and their dependents, by providing either direct insurance coverage or direct payment of healthcare costs.

The NYHBE is committed to ensuring that the special benefits and protections extended to AI/AN communities under the ACA will be incorporated in New York's Exchange operational policies and procedures, as required by federal law. It is the intent of the NYHBE to meaningfully consult on a regular on-going basis with the eight Federally-

recognized New York Indian Tribes on matters relating to exchange eligibility, operations and services which are likely to have a substantial direct effect on Native Americans and Indian Health Programs. This process ensures that New York's federally-recognized Tribal governments and urban Indian Programs have an opportunity to comment and advise the NYHBE staff when developments or changes impact Tribal members and their health programs. This process also preserves the right of the exchange to make appropriate decisions based upon the needs of all exchange users and beneficiaries, so long as any decision does not limit the exchange related protections and benefits afforded to AI/AN communities under the ACA.

V. Identification of Activities Requiring Consultation

To the extent practicable, the NYHBE will engage Tribal representatives in meaningful consultation (see Section IX below) and confer with urban Indian program representatives prior to decisions being made on Exchange policy or services with a substantial direct effect on AI/AN individuals, Tribes or Tribal entities, or urban Indian programs including:

- Federally or statutorily mandated proposals or changes in which the NYHBE has flexibility in implementation, and/or
- Proposals or changes impacting services or access to services provided to or contracted for, by Tribal entities or urban Indian Programs including but not limited to Exchange eligibility, enrollment periods, specific AI/AN benefits and protections afforded by the ACA, group purchasing and sponsorship of Tribal members, I/T/U¹ as providers in the Exchange and direct enrollment assistance.
- If the proposal or change substantially directly affects American Indians, Tribal programs or urban Indian programs, but is federally or statutorily mandated with

¹ I/T/U refers to Indian Health Service, Tribally-operated programs, and urban Indian programs.

no state flexibility in implementation, or if there is no substantial direct effect on American Indians, Tribal programs, or urban Indian programs, no consultation will be required; however, the proposal or change will be communicated through written updates from the NYHBE to Tribal Chairs and Health Directors as soon as possible, and at least 10 business days prior to implementation, or as soon as practically possible if the change is proposed fewer than 10 business days prior to the required date of implementation.

Initially it is anticipated that topics for consultation will include, without limitation:

- a) Development of Tribal engagement in operational design,
- b) Exchange Application and enrollment process,
- c) Specific AI/AN benefits and protections afforded by the ACA,
- d) Group purchasing and sponsorship of tribal members,
- f) I/T/U as providers in Qualified Health Plans offered in the Exchange, and
- g) Enrollment assistance, outreach, accessibility and appeals/problem solving.

Topics for consideration are subject to change based on developments both at the state and federal level.

In addition to NYHBE's determination as to which matters require consultation, if a Tribe believes that any proposed or anticipated change may have a substantial direct effect on the Tribe or its members, a Tribe may request consultation on that issue. The NYHBE will respond to such consultation requests and engage the Tribe in meaningful consultation in a timely manner, and to the extent practicable, prior to implementation of the proposal or change. The ability of a Tribe to request consultation on specific issues in no way alleviates the NYHBE's regular and ongoing obligation to engage in meaningful one-on-one consultation with individual Tribes.

VI. Consultation structure

NYHBE will consult with Tribal representatives and confer with urban Indian program representatives at the earliest opportunity and to the maximum extent possible, in a manner that ensures that appropriate Tribal and urban Indian program designees have adequate time to consider and respond to all proposals. In engaging Tribal governments in consultation, NYHBE will provide sufficient information to the Tribe to ensure that the consultation is meaningful, including, information describing the purpose of the proposal/change, and anticipated impact on American Indians, Tribal entities and urban Indian programs.

A. One-on-One Consultation With Individual Tribes

The primary method for engaging in consultation with Tribes and Tribal entities under this policy shall be for the NYHBE to initiate and engage in meaningful, one-on-one consultation with each Tribal government on an individual basis. On any subject for which Tribal consultation is required or appropriate, NYHBE will engage in individualized outreach efforts to elicit meaningful input from each Tribal government regarding the proposal or change. Such outreach efforts by NYHBE may include letters or e-mails to individual Tribal leaders or their designees, phone calls, or individualized requests for face-to-face meetings. All requests to initiate one-on-one consultation with Tribes shall include sufficient information to the Tribe to ensure that the consultation is meaningful, including, specific information describing the purpose of the proposal/change, and its anticipated impact on American Indians, Tribal entities and urban Indian programs, in general and in terms of the specific Tribe to whom the consultation request is directed.

All initial requests to engage in consultation shall be initiated as soon as practically possible so as to give adequate time to respond to the request, and shall indicate a response date. In the event that a Tribe does not respond by the date provided in the initial request, NYHBE shall endeavor to reach out to the Tribe to determine the Tribe's interests and level of involvement the Tribe would prefer to have in the consultation. NYHBE should allot a minimum of 5 business days response time for its follow-up

efforts, unless extraordinary circumstances demand a shorter timeframe. If a response to its follow-up efforts is still not received, NYHBE should document its follow-up attempts, and proceed as if the Tribe has declined to engage in consultation on the matter in question.

In conducting one-on-one Tribal consultation efforts, NYHBE recognizes that the consultation process may often require Tribes to provide sensitive information that may implicate privacy and confidentiality concerns with respect to sensitive tribal affairs. As such, NYHBE recognizes that government-to-government Tribal consultations must be conducted in a manner that exhibits sensitivity to and respect for Tribal confidentiality concerns regarding cultural, religious, political, and other intra-tribal affairs. NYHBE will develop appropriate safeguards and policies, and provide necessary assurances to Tribal leaders sufficient to ensure the protection of Tribal confidentiality interests throughout the consultation process.

B. Tribal Technical Work Group

Formation and Function

If following one-on-one Tribal consultation described in Part VI.A of this policy, common issue(s) arise that can be addressed through the formation of a technical work group, each Tribe in Section I and AICH will have the opportunity to appoint one or more representative(s) to a Tribal Technical Work Group (TTWG). This TTWG will be co-chaired by a representative of the I/T/U community and a designated NYHBE staff member. Once the work group is in place, the work group will decide on the I/T/U co-chair, while the NYHBE Executive Director will name the NYHBE co-chair.

The purpose of the TTWG will be to provide advice in working toward solutions on common issues. The existence or meetings of the TTWG do not under any circumstances relieve NYHBE of its obligation to engage in meaningful, one-on-one consultation with individual Tribes.

If a TTWG is formed meetings will be held on a regular basis in person, by teleconferences or webinar. The physical locations for any in-person meetings will be rotated so as not to pose an undue travel burden on any Tribe or Tribes. Agenda items for each meeting will be set by the TTWG chair and a designated NYHBE staff member.

All TTWG meetings will be open to all Tribal Chairs and their technical advisors or designees. The minutes and a summary of discussions taking place at any TTWG meetings will be communicated in writing to Tribal leaders within 10 business days after the meeting, and will be sent by e-mail, as well as postal service.

I/T/U and Tribal organizations, may receive funding directly from NYHBE to assist with travel expenses associated with TTWG.

Formal Joint Meetings of Tribal Leaders

One or more Tribal Leaders may request a formal joint meeting of Tribal Leaders to discuss issues raised during any meeting of the TTWG. If a formal joint meeting is requested, the NYHBE shall schedule a formal joint meeting with the leaders of each of the New York Tribes or their formal designees. To the extent practicable, the NYHBE will notify all Tribal leaders of the joint meeting at least 10 business days before the meeting. In the case that an immediate joint meeting is required prior to the 10 business days, NYHBE may request, upon Tribal approval, that the 10-business day notice period be waived. To the extent practicable, the NYHBE will schedule the joint meeting, and any appropriate follow-up meetings with individual Tribes, prior to making any final decision or implementing any change related to the subject matter in question.

Tribal Leaders and their technical advisors will be able to participate in the joint meetings in person and by telephone.

The minutes and discussions from any formal joint meetings will be communicated in writing to Tribal leaders within 10 business days after the meeting, and will be sent by e-mail, as well as postal service.

C. NYHBE Executive staff

It is important for New York's Tribes to ensure that they have access to NYHBE Executive staff through the formal consultation process and through informal means. The NYHBE Executive Director or Executive Designee shall attend each formal consultation meeting. The NYHBE Executive Director or Executive Designee may also attend TTWG meetings.

VII. Communication Methods, Procedures and Timeframes:

Face-to-face consultation and confers will be the preferred method of communication for Tribal consultation. However, recognizing geographic challenges, conference calls, webinars, email or mail may be utilized for time-sensitive matters. In the event a deadline is out of the control of NYHBE, the communication may be handled by written letters and/ or e-mails distributed by NYHBE staff to Tribal entities listed above or by conference calls.

Tribal and urban Indian program representatives may also identify an issue of importance to Tribes or Tribal members, and request one-on-one consultation as needed or add it to the TTWG agenda. NYHBE will review Tribal consultation and urban Indian program confer results and will make recommended changes to the extent practicable and not prohibited by law.

VIII. Other

In addition to formal Tribal consultation and the TTWG, should it be formed, representatives of the I/T/U may serve on various advisory and planning structures within the Exchange.

IX. Meaningful consultation requirement

Under the requirements of this policy, the NYHBE must provide New York's Indian Tribes meaningful consultation, which refers to an effective process that allows New

York's Tribal governments to provide significant and timely input in the development of regulatory policies on matters that substantially directly affect their communities. Meaningful consultation refers to individualized, one-on-one outreach and consultation efforts that are specifically targeted and designed to elicit meaningful input from each Tribal government regarding the proposal or change that is the subject of consultation. Meaningful consultation also requires NYHBE to develop appropriate safeguards and policies, and provide necessary assurances to Tribal leaders sufficient to ensure the protection of Tribal confidentiality interests throughout the consultation process. As used in this policy, the "to the extent practicable" and/or "not prohibited by law" qualifications will only apply in extraordinary circumstances, and does not permit the NYHBE to forego tribal consultation due to ordinary course time and budget concerns, or in order to meet self-imposed NYHBE deadlines.

X. Disclaimer

The NYHBE respects the sovereignty of each of New York's Tribes. In executing this policy, no party waives any rights, including treaty rights; immunities, including sovereign immunities; or jurisdictions. This policy does not diminish any rights or protections afforded other AI/AN or entities under state or federal law. Through this policy, the parties strengthen their collective ability to successfully resolve issues of mutual concern related to the NYHBE. While the relationship described by this policy provides increased ability to solve problems, it likely will not result in a resolution of all issues related to the NYHBE. Therefore, inherent in their relationship is the right of each of the parties to elevate an issue of importance to any decision-making authority of another party, including, where appropriate, that party's executive office.

XI. Effective date

This policy will be effective on February 15, 2013 and may be reviewed at the request of any Tribal or urban Indian program representative or NYHBE.