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Department of Health and Human Services Office for Civil Rights Tribal Consultation on Grants Administration Proposed Rule *Tribal Leader Talking Points*

Summary

The Department of Health and Human Services (HHS) Office for Civil Rights (OCR) and Office of the Assistant Secretary for Financial Resources (ASFR) have issued a [Notice of Proposed Rulemaking](#) (NPRM) that would revise certain provisions of the regulations that govern HHS grants administration found at 45 C.F.R. Part 75. Specifically, HHS is soliciting input on provisions in the HHS grant regulations that would require grant recipients to comply with applicable federal statutory nondiscrimination provisions, require HHS compliance with applicable Supreme Court decisions in administering grants, and provide a religious exemption from certain provisions.

Additionally, the NPRM includes provisions to clarify HHS's interpretation of the prohibition of discrimination on the basis of sex to include: (1) discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity, consistent with the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), and other federal court precedent applying *Bostock's* reasoning that sex discrimination includes discrimination based on sexual orientation and gender identity.

Tribal Nations' status as inherently sovereign political entities and our unique relationship with the United States permits the United States to treat Tribal Nations and Native people differently from others and for Tribal Nations to enact and apply our own legal standards for our people and lands. Thus, the federal government must not enact or apply laws and requirements of general applicability created for the public to Tribal Nations, including federal statutory non-discrimination provisions, without first considering whether they should apply in consultation with us. Moreover, funds delivered in fulfillment of trust and treaty obligations must not be conditioned on Tribal Nations' compliance with these laws.

Nowhere does the NPRM or the Dear Tribal Leader Letter announcing the Tribal consultation acknowledge that Tribal Nations and Native people have a political status such that the federal government's provision of services and funding to us in fulfillment of the trust and treaty obligations is not racial discrimination. The NPRM and Dear Tribal Leader Letter also fail to acknowledge Tribal Nations' inherent sovereign status under which we may enact our own laws, such as anti-discrimination laws, that bind our actions, including when utilizing HHS grants.

HHS will hold a Tribal consultation virtually on December 19, 2023 from 3:00 – 4:00 pm ET. Interested participants may [register for the consultation session here](#). We have been informed that written comments will be accepted following the consultation until January 18, 2024. More information on the consultation can be found in the [Dear Tribal Leader Letter](#).

Talking Points

- Laws of general applicability—like the anti-discrimination provisions at issue in this NPRM—and other general requirements created for the public should not be assumed to apply to Tribal Nations.

Because there is Strength in Unity

- Tribal Nations are inherently sovereign governmental entities. We have the authority to enact our own laws that apply to our own people, lands, governments, and enterprises.
- Additionally, because we have a political rather than racial status under federal law, our different treatment is not unlawful discrimination. Indeed, different treatment is often required so that the United States may carry out its trust and treaty obligations to Tribal Nations and Native people.
- Tribal Nations are owed federal funding in fulfillment of trust and treaty obligations—and receipt of that funding should not require a Tribal Nation to agree to abide by federal rules it should instead be crafting for its own people.
- To address this problem, we urge HHS and the Biden Administration to establish the following as federal policy:
 - First, assume laws of general applicability do not apply to Tribal Nations, and instead that Tribal Nations are empowered to enact our own laws.
 - Second, only consider applying a law of general applicability if Congress makes clear and plain that it intends the law to override Tribal or treaty rights or authorities.
 - Last, if the Administration believes that Congress intended a law of general applicability to apply to Tribal Nations, first consult with Tribal Nations before taking steps to apply that law. We appreciate that HHS is consulting on the application of this NPRM in accordance with this responsibility.
 - Additionally, always make clear when discussing application of anti-discrimination provisions that federal services and funding provided to Tribal Nations and Native people are in furtherance of the trust and treaty obligations and do not constitute discrimination.
- In this situation specifically, we ask that HHS expressly acknowledge that the anti-discrimination provisions to which the NPRM refers are *not* applicable to Tribal Nations unless Congress makes their application clear. We also ask that HHS clarify that making services exclusively available to Native people and IHS beneficiaries with HHS grant funding is not racial discrimination.
- We assume these are already HHS's understandings. The NPRM states "the Department of the Interior has evaluated this proposed rule and determined that it would have no substantial effects on Federally Recognized Indian Tribes." And HHS has maintained its regulation at 45 C.F.R. 80.3(d) acknowledging that exclusion of non-Native people from Indian Health Service benefits is not racial discrimination.
- Clarifying the nonapplication of anti-discrimination provisions here is a matter of respecting Tribal Nations' sovereign authority to pass and be bound by our own laws and upholding the United States' trust and treaty obligations to Native people.

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