



THE DIRECTOR

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

July 30, 2010

M-10-33

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES,
AND INDEPENDENT REGULATORY AGENCIES

FROM:

Peter R. Orszag
Director

A handwritten signature in black ink, appearing to read "P. Orszag", written over the printed name and title.

SUBJECT:

Guidance for Implementing E.O. 13175, "Consultation and
Coordination with Indian Tribal Governments"

On November 5, 2009, President Obama signed a Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation. In this Memorandum, the President emphasized his commitment to "regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175." Pursuant to Executive Order 13175, executive departments and agencies are charged with engaging in consultation and collaboration with Indian tribal governments; strengthening the government-to-government relationship between the United States and Indian tribes; and reducing the imposition of unfunded mandates upon Indian tribes.

Within the Office of Management and Budget, the Office of Information and Regulatory Affairs (OIRA) has primary responsibility for implementing Executive Order 13175 and the President's Memorandum. To assist in this charge, the OIRA Administrator, Cass R. Sunstein, has prepared the attached guidance.

Please circulate this memorandum (attached) to the appropriate officials within your agency for immediate attention.

Thank you.

Attachment



ADMINISTRATOR
OFFICE OF
INFORMATION AND
REGULATORY
AFFAIRS

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**MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES,
AND INDEPENDENT REGULATORY AGENCIES**

FROM: Cass R. Sunstein
Administrator

SUBJECT: Guidance for Implementing E.O. 13175, "Consultation and
Coordination with Indian Tribal Governments"

On November 5, 2009, President Obama signed a Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation.¹ In this Memorandum, the President emphasized his commitment to regular and meaningful consultation and collaboration with tribal officials in Federal policy decisions that have tribal implications. Fulfillment of this commitment includes, as an initial step, complete and consistent implementation of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," issued by President Clinton on November 6, 2000.²

To ensure compliance with Executive Order 13175, President Obama instructed "each agency head to submit . . . a detailed plan of actions the agency will take to implement the policies and directives of [that] Executive Order." The President also instructed "each agency head to submit to the Director of the OMB, within 270 days after the date of this memorandum, and annually thereafter, a progress report on the status of each action included in its plan together with any proposed updates to its plan."

This guidance provides additional instruction to agencies on the preparation and submission of these progress reports. It also updates the relevant guidance issued in 2001 by the Office of Management and Budget Deputy Director for Management on what agencies should do to comply with Executive Order 13175, and how they should document that compliance.

¹ Published at 74 Fed. Reg. 57879 (November 9, 2009), and available at <http://www.gpo.gov/fdsys/pkg/DCPD-200900887/pdf/DCPD-200900887.pdf>

² Published at 65 Fed. Reg. 67249 (November 9, 2000).

Compliance with Executive Order 13175 and President Obama's November 5, 2009, Memorandum is critical to facilitate a meaningful dialogue between Federal officials and tribal officials. This dialogue is a continuing part of the Administration's commitments to transparency, participation, and collaboration, as emphasized by the President in his Memorandum on Transparency and Open Government, issued on January 21, 2009.³ In that Memorandum, the President emphasized that "[k]nowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge."

Following the President's Memorandum on Transparency and Open Government, the OMB issued the Open Government Directive, which, among other things, specifically instructs the Administrator of the Office of Information and Regulatory Affairs (OIRA) to "review existing OMB policies . . . to identify impediments to open government and to the use of new technologies and, where necessary, issue clarifying guidance and/or propose revisions to such policies, to promote greater openness in government."⁴

Consistent with Executive Order 13175, the President's Memorandum on Tribal Consultation, and his Memorandum on Transparency and Open Government, the purpose of this guidance is to help Federal agencies to comply with their obligations to provide meaningful consultation and collaboration with tribal officials, and to promote greater openness in government.

1. When did Executive Order 13175 take effect?

Executive Order 13175 ("the Order") became effective on January 5, 2001 (Sec. 9(d)).

2. What agencies does it cover?

E.O. 13175 binds all Federal agencies, except for independent regulatory agencies (Sec. 1(c)). It encourages independent regulatory agencies to comply voluntarily with its provisions (Sec. 8). The Order adopts definitions of "agency" and "independent regulatory agency" used by the Paperwork Reduction Act of 1995.

3. What is the role of an agency tribal consultation official and which agencies must have them?

³ President Barack Obama, Memorandum on Transparency and Open Government (Jan. 21, 2009), *available at* <http://www.gpoaccess.gov/presdocs/2009/DCPD200900010.pdf>

⁴ OMB Memorandum M-10-06, *Open Government Directive* (Dec. 8, 2009), *available at* http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf

Pursuant to E.O. 13175, each agency and department must have a tribal consultation official (Section 5(a)).⁵ Each tribal consultation official must:

- assure that agency program personnel have considered the fundamental principles and policymaking criteria stated in Sections 2 and 3 in formulating or implementing policies, and in the development of legislative proposals, that have tribal implications;
- facilitate a meaningful and timely form of consultation concerning the development, administration, and enforcement of regulations that have tribal implications; and
- provide certifications of compliance to OMB.

The tribal consultation official may designate staff to assist in the performance of these duties.

Pursuant to the President's November 5, 2009, Memorandum on Tribal Consultation, each agency and department must designate an appropriate official to coordinate implementation of the plan and preparation of progress reports. This official may be, but is not required to be, the same tribal consultation official required by E.O. 13175.

4. How does an agency designate its tribal consultation official?

The head of each agency should make this designation by notifying the OIRA Records Management Center (see question 13 below).

5. To what activities does the Order apply?

Section 2 sets forth "Fundamental Principles" to guide agencies in formulating and implementing policies that have tribal implications. Section 3 sets forth "Policymaking Criteria" to which agencies must adhere "to the extent permitted by law." These fundamental principles and policymaking criteria apply to an agency's "regulations, legislative comments or proposed legislation, and other policy statements or actions" that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes" (Sec. 1(a)). The term "Indian tribe" means "an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe" (Sec. 1(b).) Further, pursuant to Pub. L. 108-199, 118 Stat. 452, as amended by Pub. L. 108-447, 118 Stat. 3267, OMB and all Federal agencies are required to "consult with Alaska Native corporations on the same basis as Indian tribes under Executive Order No. 13175."

⁵ The specific procedures for consultation with Indian tribal governments set forth in E.O. 13175 are closely similar to those set forth in E.O. 13132, "Federalism." Depending on how an agency has already decided to implement E.O. 13084 and E.O. 13132, an agency has the option of having the tribal consultation official designated under E.O. 13175 be the same official as the federalism official already designated under E.O. 13132.

6. What are the Order’s policymaking criteria?

Under Section 3, “Policymaking Criteria,” and in addition to adhering to the fundamental principles set forth in Section 2, agencies must adhere, to the extent permitted by law, to specified criteria when formulating and implementing policies that have tribal implications. Agencies must:

- respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments;
- with respect to Federal statutes and regulations administered by Indian tribal governments, grant Indian tribal governments the maximum administrative discretion possible;
- when undertaking to formulate and implement policies that have tribal implications,
 1. encourage Indian tribes to develop their own policies to achieve program objectives;
 2. where possible, defer to Indian tribes to establish standards; and
 3. in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

The Order establishes a process to ensure that agencies adhere to these policymaking criteria. For any draft final regulation that has tribal implications that is submitted to OIRA for review under E.O. 12866, the tribal consultation official must certify that the requirements of E.O. 13175 concerning both the evaluation of these policymaking criteria and consultation have been met in a meaningful and timely manner (Sec. 7(a)). This certification may take the form of a statement in the preamble of a draft final regulation explaining that either the consultation was conducted according to the requirements of E.O. 13175, or that there was no impact on tribal interests and thus no consultation was necessary.

7. What does the Order require concerning agency development of proposed legislation?

Agencies must not submit to the Congress legislation that would be inconsistent with the policymaking criteria stated in Section 3.

The Order establishes a process to ensure that agencies consider the “Special Requirements for Legislative Proposals” stated in Section 4. In transmitting for OMB clearance proposed legislation that has tribal implications, the tribal consultation official must certify that the “Special Requirements for Legislative Proposals” set forth in Section 4 have been met (Sec.7(b)). This certification may take the form of a statement that either the consultation was

conducted according to the requirements of E.O. 13175, or that there was no impact on tribal interests and thus no consultation was necessary.

8. What does the Order require concerning agency development of regulations?

Agencies must have “an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications” (Sec. 5(a)). The consultation process must involve “tribal officials” (Sec. 5(a)), which the Order defines to mean “elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations” (Sec. 1(d)).

Each agency must submit to OMB “a description of the agency’s consultation process” when implementing the Order. Each description should indicate how the agency identifies those policies that have tribal implications and the procedures the agency will use to ensure meaningful and timely input by tribal officials. OMB encourages agencies to submit updates to this description as part of the annual update to OMB (see below).

The Order establishes specific procedures for consultation with tribal officials in two circumstances – if a rule imposes unfunded mandates on tribes or if a rule preempts tribal law.

- Subsection 5(b) establishes specific procedures for unfunded mandates. Subsection 5(b) defines a mandate as “any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute.” Subsection 5(b)(1) permits an agency not to follow the specific procedures if the Federal government funds the direct costs of complying with the mandate.
- Subsection 5(c) establishes the specific procedures for “any regulation that has tribal implications and that preempts tribal law.”
- The specific procedures are identical for regulations that impose unfunded mandates or preempt tribal law. Agencies must adhere to these specific procedures “to the extent practicable and permitted by law” (Secs. 5(b) and 5(c)).
- Each agency must consult, to the extent practicable and permitted by law, with tribal officials “early in the process of developing the proposed regulation” (Sec. 5(b)(2)(A) & 5(c)(1)). These consultations should seek comment on compliance costs or preemption as appropriate to the nature of the rulemaking under development. The timing, nature, detail, and extent of the consultation involved should also be appropriate to the nature of the regulation involved.
- When an agency submits a draft final regulation to OMB for review under E.O. 12866 prior to promulgation of the final regulation, the agency must include in “a separately identified portion of the preamble to the regulation” a “tribal summary impact statement” (Secs. 5(b)(2)(B) & 5(c)(2)).

- The “tribal summary impact statement” must include –
 - “a description of the extent of the agency’s prior consultation with tribal officials;”
 - “a summary of the nature of their concerns and the agency’s position supporting the need to issue the regulation; and”
 - “a statement of the extent to which the concerns of tribal officials have been met” (Secs. 5(b)(2)(B) & 5(c)(2)).
- To the extent that an agency has carried out consultation with tribal officials prior to the publication of the Notice of Proposed Rulemaking (NPRM), the agency should help tribal officials, and the public as a whole, by including a “tribal summary impact statement” in its preamble to the NPRM.
- When submitting a draft final regulation to OMB for review, each agency must provide a copy of any formal policy-related correspondence from tribal officials, and must, on request, make available a copy of any other written communications submitted to the agency by tribal officials (Secs. 5(b)(2)(C) & 5(c)(3)).

9. Are tribal consultations under the Order subject to the Federal Advisory Committee Act?

No. The exemption to the Federal Advisory Committee Act provided in Section 204(b) of title II of P.L. 104-4, the “Unfunded Mandates Reform Act of 1995,” remains in effect. As OMB stated in its guidelines for implementing Section 204(b):

“In accordance with the legislative intent, the exemption should be read broadly to facilitate intergovernmental communications on responsibilities or administration.”

“This exemption applies to meetings between Federal officials and employees and State, local, or tribal governments, acting through their elected officers, officials, employees, and Washington representatives, at which ‘views, information, or advice’ are exchanged concerning the implementation of intergovernmental responsibilities or administration, including those that arise explicitly or implicitly under statute, regulation, or Executive order. The scope of meetings covered by the exemption should be construed broadly to include any meetings called for any purpose relating to intergovernmental responsibilities or administration. Such meetings include, but are not limited to, meetings called for the purpose of seeking consensus; exchanging views, information, advice, and/or recommendations; or facilitating any other interaction relating to intergovernmental responsibilities or administration.”⁶

⁶ OMB Memorandum 95-20 (September 21, 1995), pp. 6-7, 60 Fed. Reg. 50651, 50653 (September 29, 1995); *see* Delegation of Authority To Issue Guidelines or Instructions to Federal Agencies on Consulting With State, Local,

10. What does the Order provide concerning flexibility for Indian tribal waivers?

The Order directs agencies to “review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes” (Sec. 6(a)). It also sets forth the circumstances under which agencies must consider an application by an Indian tribe for a waiver of statutory or regulatory requirements. It encourages flexibility in granting waivers, but does not change applicable Federal waiver review criteria, including the principle of budget neutrality. It also sets a target completion date of 120 days after the filing of a complete waiver application for an agency decision. These provisions apply “only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency” (Sec. 6(d)).

11. How should agencies document compliance with the Order?

President Obama’s November 5, 2009 Memorandum requires all agencies to create a detailed plan of action that documents steps the agency will take to implement the policies and directives of E.O. 13175. On August 2, 2010, and annually thereafter, agencies are required to submit to the Director of OMB a progress report on the status of each action included in its plan as well as any proposed updates to its plan. Each agency should submit these plans and reports to the OIRA Records Management Center (see question 13 below).

The Assistant to the President for Domestic Policy and the Director of OMB will review agency plans and subsequent reports for consistency with the policies and directives of E.O. 13175. By November 5, 2010, the Director of OMB, in coordination with the Assistant to the President for Domestic Policy, will submit to the President a report on the implementation of E.O. 13175 across the executive branch based on the review of agency plans and progress reports. Recommendations for improving the plans and making the tribal consultation process more effective should be included in this report when applicable.

In addition, under the Unfunded Mandates Reform Act (UMRA), Section 208, OMB must publish an annual report on agency compliance with the requirements of Title II, including agency compliance with Section 204, “State, Local, and Tribal Government Input.” Each year, OMB will request a summary of your progress in implementing the requirements of the Order as part of your description of your UMRA Section 204 consultations for the previous year.

12. Whom should we contact when we have questions concerning E.O. 13175?

For agency questions about the Order or this Memorandum, please contact your OIRA desk officer.

13. How should an agency submit documentation to OMB?

and Tribal Governments, President Clinton’s Memorandum to the Director of the Office of Management and Budget (August 25, 1995), 60 Fed. Reg. 45039 (August 29, 1995).

Please submit documentation to the OIRA Records Management Center via email (OIRA_Submission@omb.eop.gov). Please include “EO 13175” in the subject line. If email is not possible, call 202-395-6880 to make alternate arrangements.