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December 4, 2020

Mr. James Lawrence, Senior Counsel
Office of General Counsel
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

RE: Notice of Proposed Rulemaking (NPRM) Securing Updated and Necessary
Statutory Evaluations Timely, Docket No. HHS-OS-2020-0012

Dear Mr. Lawrence:

The National Indian Child Welfare Association vigorously opposes the Securing Updated and Necessary Statutory Evaluations Timely NPRM, Docket No. HHS-OS-2020-0012 and requests that the U.S. Department of Health and Human Services (HHS) withdraw the NPRM. Our national organization works closely with tribal nations and urban Indian communities across the United States and knows firsthand how critical many HHS regulations are to ensuring that American Indian and Alaska Native (AI/AN) children and families receive the protections and services they need. We have reviewed and commented on dozens of HHS proposed regulations over the last 30 years and have advocated for review of several different HHS regulations during that same time period, so we agree that regular review of regulations is an important function. However, we do not believe the approach taken in this NPRM is balanced, and given the goals and potential negative consequences, it is out of alignment with the existing HHS federal tribal consultation policy. Moreover, it has the potential to make HHS agencies choose between urgent and important work that HHS needs to concentrate on in the future and the arbitrary goal of pursuing regulation review in the compressed timeline in this NPRM.

Tribal nations rely on federal regulations to clarify the means by which they access a wide variety of federal programs, the specific requirements that apply to them, and important clarification on how other federal laws outside HHS programming apply in the context of HHS programs. In many cases, these regulations provide protections against federal agencies overlooking tribal nations and urban Indian organizations being overlooked as primary providers of services to their communities. HHS regulations help clarify the need for states to include tribes as they plan and operate federally funded services, which is a benefit for both tribes and states. HHS regulations also provide the Secretary of HHS with authority to establish program requirements that reflect the unique cultural, legal, and service delivery conditions that exist for AI/AN people. We are very concerned that the NPRM approach to regulation review could create pressure to perform superficial reviews by agency staff to meet the timelines, which could lead to unanticipated modifications or elimination of critical provisions that would diminish AI/AN peoples' access to critical safety net programs.

The government-to-government relationship between the United States and tribal nations is enshrined in the United States Constitution, hundreds of treaties between the United States and tribal nations, and almost 200 years of federal court decisions and congressional action (enacted law). It is aligned with the trust relationship that the federal government has with tribal nations that contains a responsibility to support self-determination of tribal nations and the protection of the general welfare of all AI/AN people.

The government-to-government relationship requires the federal government to actively consult with tribal nations on federal policy matters that impact their citizens. Almost all of the agencies under HHS have tribal consultation policies and advisory bodies consisting of tribally appointed representatives that regularly meet to discuss federal

policy and agency operations. HHS's department-wide consultation policy contains several key components including:

- Each HHS Operating and Staff Division has an accountable consultation process to ensure meaningful and timely input by Tribal officials in the development of policies that have Tribal implications. Several HHS Divisions currently have their own consultation policy, based upon the Departmental document. All other Divisions follow the Department-wide policy.
- No Division shall promulgate any regulation that has Tribal implications and imposes costs on Indian Tribes, or that is not required by statute, unless the Federal Government is paying the costs or formal consultation has taken place with Tribes.
- 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.
- Each Division should explore and use consensual mechanisms for developing regulations, included negotiated rulemaking.

Unfortunately, tribal nations were not consulted with regard to this NPRM, despite the critical implications for AI. Furthermore, the NPRM proposes an arbitrary method for incentivizing regulatory review in the future that could substantively alter or eliminate critical regulations that provide protections for AI/AN people without any consultation simply because a timely review did not occur. This approach poses far too much risk for AI/AN people to lose access to critical safety net programs and does so with little to no consideration for the government-to-government relationship between the federal government and tribal nations as well as the current HHS tribal consultation policy.

HHS estimates that 2,480 or more regulations would need to be reviewed within the first two years of a final rule being issued (January 2021 to January 2023) or face being eliminated simply because they were not reviewed in time. The proposed approach establishes a system that could easily overwhelm HHS agencies by forcing them to reduce staff and agency resources for other urgent priorities, cause perfunctory, less substantive assessments, or not assess regulations at all resulting in them being eliminated. While regular review of regulations should and do occur, the reason it most often does not happen is because of staff and agency resource limitations, not the absence of more punitive federal requirements or incentives. Threatening to eliminate regulations as the primary incentive provides a much greater punishment for the vulnerable populations that depend upon HHS safety net programs than for the agencies themselves.

The National Indian Child Welfare Association has always been a proponent of effective governance. As we work with tribes, states, and federal agencies, we emphasize the need to balance the need for government involvement with the desire for self-determination and local control. While HHS professes to have similar goals in this NPRM, their approach does not meet the test of effective governance and honoring the trust relationship the United States has for AI/AN people. We urge HHS to withdraw the NPRM and instead work with tribal leadership to better understand how to develop a more effective approach to regulatory review consistent with the federal trust relationship.
Sincerely,

Sarah J. Kastelic

Sarah Kastelic, PhD, MSW (Alutiiq)
Executive Director