



## MEMORANDUM

October 18, 2013

TO: Tribal Clients

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP *Geoff Stranner* by: NAM

RE: *Senators Introduce Fix to Definition of "Indian" under Affordable Care Act*

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On October 16, 2013, Senators Mark Begich (D-AK), Max Baucus (D-MT), Tom Udall (D-NM), Brian Schatz (D-HI), and Al Franken (D-MN) introduced S. 1575, legislation to ensure that the Affordable Care Act (ACA) uses the same definition of "Indian" to define eligibility of Indians for federal services. The proposed change will not affect eligibility for IHS coverage. It is designed to ensure that everyone who is eligible for IHS services will be eligible for the Indian-specific benefits and protections in the ACA. The bill was referred to the Finance Committee.

The ACA contains a number of special benefits and protections for American Indians and Alaska Natives. For example, American Indians and Alaska Natives are eligible for cost-sharing protections when they enroll in health insurance coverage through the new Health insurance exchanges, and also qualify for open enrollment on those Exchanges. In addition, the Act exempts members of Indian tribes from the tax penalties associated with not having minimum essential health insurance coverage. The issue is that ACA definition of Indian only includes members of federally recognized tribes or Alaska Native Claims Settlement Act (ANCSA) corporations, and does not include Indians and Alaska Natives who are eligible for IHS services but who are not members of tribes (such as certain children and descendants). The IHS serves more than just tribal members, and includes "Eskimo or Aleut or other Alaska Natives;" a person "considered by the Secretary of Interior to be an Indian for any purpose;" a person determined to be Indian under HHS regulations; individuals who are members of organized groups of Indians, including state-recognized tribes or tribes terminated since 1940, or their first or second degree descendants; California Indians as defined by 25 U.S.C. § 1679; and urban Indians meeting these criteria.

Without the Indian definition amendment proposed by S. 1575, many Native people such as California Indians and tens of thousands of Alaska Natives may not be eligible for the ACA benefits provided to others. Currently, the HHS has only been able to use regulatory means to exempt the wider group of Native people from the tax penalty, though even that is a short-term fix. This legislative proposal is intended to be a permanent solution to the problem of disparate definitions.

The legislation is attached to this memo. It is still in its nascent stages, so it must advance through the full legislative process to become law. It remains to be seen if the sponsors intend to attach this to a technical correction bill or other moving legislation.

If you have any questions, please do not hesitate to contact Geoff Strommer ([gstrommer@hobbsstrauss.com](mailto:gstrommer@hobbsstrauss.com) or 503-242-1745), Elliott Milhollin ([emilhollin@hobbsstrauss.com](mailto:emilhollin@hobbsstrauss.com) or 202-822-8282), Karen J. Funk ([kfunk@hobbsstrauss.com](mailto:kfunk@hobbsstrauss.com) or 202-822-8282), or Adam Bailey ([abailey@hobbsstrauss.com](mailto:abailey@hobbsstrauss.com) or 916-442-9444).





FOR IMMEDIATE RELEASE  
October 17, 2013

Contact: Heather Handyside, (Begich) 907-350-4846  
Julie McClain, (Schatz) 202-224-3934

**Begich, Baucus, Udall, Schatz, Franken Introduce Important 'Fix' to Affordable Care Act**  
***Bill Will Provide Clarification for Thousands of Alaska Natives / American Indians***

U.S. Sens. Mark Begich (D-AK), Max Baucus (D-MT), Tom Udall (D-NM), Brian Schatz (D-HI), Al Franken (D-MN) co-sponsored legislation today to correct an inconsistency in the Affordable Care Act (ACA), which without a permanent fix could prevent health care benefits for thousands of Alaska Natives and American Indians nationwide.

The current version of the health care law contains several important provisions for Native Americans including permanent reauthorization of the Indian Health Care Improvement Act. However, the health care law contains several different definitions of "Indian" which led to conflicting interpretations of eligibility for benefits and requirements for coverage. The new legislation adds new and comprehensive definitions that are outlined in the attached bill.

"I've said many times that the Affordable Care Act has flaws that need to be addressed and this is just one more way we can improve the law and ensure even more Alaskans have access to quality medical care," **said Senator Begich**. "I have heard from Alaska Tribal Health organizations for months about the urgent need to introduce legislation that will serve as a technical fix within the ACA to broaden the definition of Indian as applied to Alaska Natives. I see this bill as part of our duty to ensure that our tribes and tribal health organizations can best serve and offer health care to all of those who are intended to benefit from the Affordable Care Act, and as part of the federal government's trust responsibility to the First Peoples of this country."

"The Health disparities faced by American Indians, Alaska Natives and Native Hawaiians are appalling and must be addressed at every opportunity," **said Senator Schatz**. "That is why I have joined Senate colleagues in introducing this measure of vital importance to American Indians and Alaska Natives eligible for Indian Health Service programs and services. This bill will provide a number of technical corrections to clarify provisions under the Affordable Care Act to ensure that the definition of 'Indian' will be consistent with the eligibility rules of the IHS and

Medicaid and moves us in the right direction. I urge Congress to act expeditiously to adopt this measure."

In Alaska, it has been estimated that up to 14,000 Alaska Native people are not enrolled in Alaska Native Corporations and also not enrolled in a tribal government. These individuals have historically been eligible for IHS benefits, and will continue to be. However the issues at stake are the IRS tax penalties for not carrying coverage, cost sharing provisions, and special enrollment periods. The proposed legislation will change the definition of Indian within the Affordable Care Act to include all Alaska Natives who are eligible to receive healthcare under existing law, which would allow the estimated 14,000 receive fair treatment under the law.

"On behalf of those served by the Alaska Native Tribal Health Consortium and most especially those who would be harmed from this unintended and narrowly interpreted oversight, we applaud Senator Begich for his proactive stewardship in sponsoring legislation which ensures that Alaska Native people will receive the intended benefits of health reform and the Affordable Care Act," said Andy Teuber, Alaska Native Tribal Health Consortium Chairman and President.

This issue had been identified as a problem since 2010 when the legislation was enacted and released to the public. Since then the Health and Human Services Administration has issued what's known as a hardship waiver to help streamline the definition of Indian in the ACA, to avoid tax penalties for Native American's who do not carry insurance. However, regulatory statutes tend to fluctuate over time and Administrative action, however helpful was not a full and permanent fix.

Additional information is available in the attached FAQ sheet.



113TH CONGRESS  
1ST SESSION

S. \_\_\_\_\_

To correct in inconsistencies in the definitions relating to Native Americans  
in the Patient Protection and Affordable Care Act.

\_\_\_\_\_

IN THE SENATE OF THE UNITED STATES

Mr. BEGICH introduced the following bill; which was read twice and referred  
to the Committee on \_\_\_\_\_

\_\_\_\_\_

**A BILL**

To correct in inconsistencies in the definitions relating to  
Native Americans in the Patient Protection and Afford-  
able Care Act.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. TECHNICAL CORRECTIONS TO PPACA.**

4       (a) DEFINITION OF INDIAN.—Section 1304 of the  
5       Patient Protection and Affordable Care Act (42 U.S.C.  
6       18024) is amended by adding at the end the following:

7       “(f) INDIAN.—

8               “(1) IN GENERAL.—In this title, the term ‘In-  
9       dian’ means any individual—

1           “(A) described in paragraph (13) or (28)  
2 of section 4 of the Indian Health Care Improve-  
3 ment Act (25 U.S.C. 1603);

4           “(B) who is eligible for health services pro-  
5 vided by the Indian Health Service under sec-  
6 tion 809 of the Indian Health Care Improve-  
7 ment Act (25 U.S.C. 1679);

8           “(C) who is of Indian descent and belongs  
9 to the Indian community served by the local fa-  
10 cilities and program of the Indian Health Serv-  
11 ice; or

12           “(D) who is described in paragraph (2).

13           “(2) INCLUDED INDIVIDUALS.—The following  
14 individuals shall be considered to be an ‘Indian’:

15           “(A) A member of a Federally-recognized  
16 Indian tribe.

17           “(B) A resident of an urban center who  
18 meets 1 or more of the following 4 criteria:

19           “(i) Membership in a tribe, band, or  
20 other organized group of Indians, including  
21 those tribes, bands, or groups terminated  
22 since 1940 and those recognized now or in  
23 the future by the State in which they re-  
24 side, or being a descendant, in the first or  
25 second degree, of any such member.



1                   “(ii) Is an Eskimo or Aleut or other  
2                   Alaska Native.

3                   “(iii) Is considered by the Secretary of  
4                   the Interior to be an Indian for any pur-  
5                   pose.

6                   “(iv) Is determined to be an Indian  
7                   under regulations promulgated by the Sec-  
8                   retary.

9                   “(C) An individual who is considered by  
10                  the Secretary of the Interior to be an Indian for  
11                  any purpose.

12                  “(D) An individual who is considered by  
13                  the Secretary to be an Indian for purposes of  
14                  eligibility for Indian health care services, includ-  
15                  ing as a California Indian, Eskimo, Aleut, or  
16                  other Alaska Native.”.

17                  (b) CONFORMING AMENDMENTS.—

18                  (1) AFFORDABLE CHOICES HEALTH BENEFIT  
19                  PLANS.—Section 1311(c)(6)(D) of the Patient Pro-  
20                  tection and Affordable Care Act (42 U.S.C.  
21                  18031(c)(6)(D)) is amended by striking “section 4  
22                  of the Indian Health Care Improvement Act” and  
23                  inserting “section 1304(f)”.

24                  (2) REDUCED COST-SHARING FOR INDIVIDUALS  
25                  ENROLLING IN QUALIFIED HEALTH PLANS.—Section

1       1402(d) of the Patient Protection and Affordable  
2       Care Act (42 U.S.C. 18071(d)) is amended—

3               (A) in paragraph(1), in the matter pre-  
4               ceding subparagraph (A), by striking “section  
5               4(d) of the Indian Self-Determination and Edu-  
6               cation Assistance Act (25 U.S.C. 450b(d))” and  
7               inserting “section 1304(f)”; and

8               (B) in paragraph (2), in the matter pre-  
9               ceding subparagraph (A), by striking “(as so  
10              defined)” and inserting “(as defined in section  
11              1304(f))”.

12              (3) EXEMPTION FROM PENALTY FOR NOT  
13              MAINTAINING MINIMUM ESSENTIAL COVERAGE.—  
14              Section 5000A(e) of the Internal Revenue Code of  
15              1986 is amended by striking paragraph (3) and in-  
16              serting the following:

17              “(3) INDIANS.—Any applicable individual who  
18              is an Indian (as defined in section 1304(f) of the  
19              Patient Protection and Affordable Care Act).”.



**Tribal Leader Guide to the ACA Indian Definition Issue**  
*Prepared by NW Portland Area Indian Health Board*  
June 27, 2013

**What is the Indian Definition Issue?**

The ACA includes special protections and benefits for American Indian and Alaska Natives (AI/AN). The U.S. Department of Health and Human Services (HHS) has ruled that in order to be eligible for these special protections and benefits a person must be an enrolled member of a federally-recognized Tribe. This issue is not about determining who is eligible to enroll in a Tribe. It is about making Indian people eligible to receive health benefits in the new health reform law.

**Who does the current definition leave out?**

The current definition of Indian under ACA will leave out many California Indians, Alaska Natives who are not shareholders in Native corporations under the Alaska Native Claims Settlement Act, Indian children whose Tribes do not enroll people younger than 18 years old, and some descendants of Tribal members who are eligible for IHS health care.

**What definition are Tribal advocates supporting?**

Tribal advocates support changing the ACA definition of Indian eligibility to be the same as the eligibility rules of the Indian Health Service (IHS) and Medicaid.

**Why is fixing the Indian definition issue a good thing?**

The current ACA definition will result in inconsistent eligibility determinations for AI/AN special provisions for health care services under the ACA, Medicaid and IHS programs. This will cause confusion and make it harder to manage the programs. Also, it means that some AI/AN will have higher costs for health insurance, while other groups of AI/AN will have free or low cost health insurance. Changing the definition of Indian in ACA will remove this inequality.

**Will an expanded Indian definition decrease health services and resources to enrolled members?**

No. If people who use Indian health care had insurance under the ACA and qualified for the special protections and benefits, IHS and Tribal programs could bill the insurance companies for the costs of providing services and save valuable CHS dollars, so there will be more resources for everyone who uses IHS, Tribal, and urban Indian programs.

**Will the definition issue affect Tribal sovereignty about enrollment in my Tribe?**

No. This issue has nothing to do with a Tribe's sovereign authority to determine its membership and enrollment.

**Will AI/AN have to pay a tax penalty for not having insurance?**

No. Enrolled members of federally-recognized Tribes can receive an "Indian exemption." Individuals who are eligible for the Indian Health Service (IHS) and/or meet the Medicaid definition of Indian can receive a "hardship exemption" from paying the tax penalty for not having private health insurance.

**How can I help fix this issue?**

The federal government has stated that the only way to fix the ACA Indian definition issue is with legislation. Tribal leaders and advocates should contact their Congressional Members about this issue and recommend passage of legislation developed by the National Indian Health Board to address this issue. Information is available at: [www.nihb.org](http://www.nihb.org).