

July 3, 2024

VIA ELECTRONIC SUBMISSION

The Honorable Jen Easterly
Director
Cybersecurity and Infrastructure Security Agency
U.S. Department of Homeland Security
2707 Martin Luther King Jr Ave SE
Washington, DC 20528

RE: Tribal Governments Should be Excluded from CIRCIA’s Reporting Requirements due to Substantial Tribal Implications (Docket No. CISA-2022-0010)

Dear Director Easterly:

As the Tribal Information Sharing & Analysis Center (“Tribal-ISAC”), and on behalf of the 62 Tribal Nations our membership represents, we are submitting this letter in response to the notice and request for comment from the Cybersecurity and Infrastructure Security Agency (“CISA”) regarding the text of the proposed rule implementing the Cyber Incident Reporting for Critical Infrastructure Act (“CIRCIA”) (“Proposed Rule”).¹

The Tribal-ISAC is a 501(c)(3), non-profit security threat information and intelligence sharing community for federally recognized tribal governments and their enterprises. We are dedicated to furthering cybersecurity awareness and preparedness amongst our membership, consisting of 81 tribal organizations and tribal enterprises and represented by a total of 244 security professionals, across three core industries—tribal government, gaming, and healthcare.

¹ Cyber Incident Reporting for Critical Infrastructure Act (CIRCIA) Reporting Requirements, 89 Fed. Reg. 23644 (proposed April 4, 2024) (to be codified at 6 C.F.R. pt. 226).

Our members represent some of the largest and the smallest federally recognized tribes across the United States, and the Tribal-ISAC plays a crucial role in enhancing cybersecurity and resilience by facilitating the exchange of information among Tribal Nations. Members of the Tribal-ISAC have come together as a nationwide community of tribal industry peers, pooling their combined expertise and resources to bring timely awareness of potential threats, trends, and solutions to help better protect Native American governments, enterprises, and organizations from cybersecurity threats.

The Tribal-ISAC is committed to enhancing cybersecurity in Indian Country, in protecting tribal infrastructure, and advocating on behalf of its member nations. As such, the Tribal-ISAC has an interest in ensuring that laws, regulations, and policies that impact its members are fully consistent with the United States' obligations to federally recognized tribes. To uphold this commitment to its members, Tribal-ISAC must seek prompt and appropriate redress, either through tribal consultation, or other means as necessary, when a proposed regulation creates substantial tribal implications, inconsistent with the United States' obligations to federally recognized tribes, as is the case here.

In its preamble to the Proposed Rule, CISA specifically welcomed comments on both the applicability of Executive Order 13175 (the "Order") and CISA's determination that the Proposed Rule did not have tribal implications as defined by the Order.² While we appreciate CISA's acknowledgment of the tribal consultation process, we respectfully disagree with CISA's determination that tribal consultation was not warranted in this instance, and we believe that further

² *Id.* at 23765.

agency action is required. However, because CISA believes there are no tribal implications under the Proposed Rule, a simple remedy exists—in codifying the final rule, remove tribal governments and their respective enterprises from the definition of a “covered entity” or modify Sections 226.16-17 to clearly exclude tribal governments from these provisions.

The Proposed Rule, as written, has a substantial and direct effect on our members’ relationships with the Federal government and on the distribution of power and responsibilities between the Federal government and our members. On behalf of our members, as well as other impacted Tribal Nations who were not provided the opportunity for consultation as required by the Department of Homeland Security (“DHS”) Directive 071-04, “Consultation and Coordination with Tribal Nations”³ (the “Tribal Consultation Directive”), we urge CISA to remove tribal governments and their respective enterprises from the definition of a “covered entity” in the final rule or, at a minimum, modify Sections 226.16-17 to clearly exclude tribal governments from these provisions.⁴

As cybersecurity professionals, we believe that collaboration is an essential driver of an effective cybersecurity program, and we deeply appreciate the importance of CISA’s role in building a strong national cyber defense. In doing so, however, it is vital that CISA understands

³ U.S. DEP’T. OF HOMELAND SEC., CONSULTATION AND COORDINATION WITH TRIBAL NATIONS (Dec. 15, 2022), https://www.dhs.gov/sites/default/files/2023-04/dhs_tribal_consultation_directive_071-04.pdf.

⁴ *Supra* note 1, at 23766, 75.

and acknowledges the tribal implications of promulgating a rule that designates our members' sovereign governments⁵ and income generating enterprises⁶ as covered entities and mandates a referral for debarment or suspension from Federal programs in the event of covered entities' non-compliance. As a federal agency, CISA owes a fiduciary duty to Indian tribes,⁷ which includes, at bottom, engaging in a "robust" consultation with tribal governments, on a Nation-to-Nation basis, prior to promulgating a final rule.⁸

As described in the Order, tribal consultations are "[a]n accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have

⁵ Under § 226.2(b)(8), any State, local, Tribal, or territorial ("SLTT") government entity for a jurisdiction with a population equal to or greater than 50,000 individuals is a covered entity. It is unclear how this requirement applies to tribes and their enterprises. For tribes, there is no standard definition of population size. Population size could refer to the number of enrolled members, the number of residents on reservations, or the number of individuals who self-identify with the tribe even if they are not formally enrolled (e.g., individuals who identify with a tribe as part of the US Census or other surveys, or who otherwise participate in tribal life). Moreover, tribal economic entities include unincorporated business operations of a tribe, state-law corporations and LLC's wholly owned by a tribe, tribally-chartered corporations, or federally-chartered corporations formed under Section 17 of the Indian Reorganization Act.

⁶ Many of our member tribes operate casinos and casino resorts and likely qualify as a covered entities under the Proposed Rule. In its commentary, CISA suggests using the DHS Sector-Specific Plans ("SSPs") as guidance on the scope of the critical infrastructure sectors. For example, according to the SSPs, a hotel or casino could be regarded as part of the Commercial Facilities sector. However, these are not conventionally regarded as critical infrastructure, and a cyber incident occurring at a hotel or casino would ultimately present little risk to critical infrastructure, national security, economic security, or public health or safety. This is particularly true at the level of individual hotels and casinos. "No individual casino in the country has significant impacts on the gaming industry at the local, regional, or national level." David Riedman, *Questioning the Criticality of Critical Infrastructure: A Case Study Analysis*, 12 HOMELAND SEC. AFFAIRS: THE J. OF THE NAVAL POSTGRADUATE SCHOOL CENTER FOR HOMELAND DEFENSE AND SEC. (ESSAY 3) (2016). Further, guidance issued by CISA during the COVID-19 pandemic omitted mention of casinos as being part of "critical infrastructure," which begs the question as to why they are now in scope for CIRCIA compliance, when they were not considered critical infrastructure during the recent national crisis. CYBERSECURITY AND INFRASTRUCTURE SEC. AGENCY, *Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response* (March 28, 2020), https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Infrastructure_Workforce_Version_2.0_1.pdf. Finally, hotels and casinos—as well as other entities identified in the Commercial Facilities SSP, such as libraries, fairs, and self-storage facilities—also fall outside of the Presidential Policy Directive 21's ("PPD-21") definition of critical infrastructure. While exceeding PPD-21 may be acceptable for the non-binding SSPs, it is unacceptable for a congressionally directed rulemaking required to use PPD-21's definition.

⁷ See generally *Quechan Tribe v. U.S. Dep't. of the Interior*, 755 F.Supp.2d 1104 (S.D. Cal. Dec. 15, 2010).

⁸ Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 2021 DAILY COMP. PRES. DOC. 202100091 (Jan. 26, 2021).

tribal implications.”⁹ Federal agencies have been criticized for failure to provide sufficient notice of a consultation and for sending representatives with only pretextual authority, thus rendering the consultation a “check-the-box” exercise, rather than a meaningful meeting between sovereign governments to shape federal policy.¹⁰ Here, there was not so much as a “check-the-box” exercise before CISA promulgated the Proposed Rule, concluding it had no tribal implications. Had CISA adhered to the Tribal Consultation Directive and met with Tribal governments to obtain timely input, it would have become apparent that the Proposed Rule directly impacts Tribal-ISAC members’ trust relationships with the Federal government.¹¹

Pursuant to the Tribal Consultation Directive, which conveys DHS’ commitment to “upholding the federal trust responsibility to Tribal Nations and adhering to the various treaties and agreements made between the governments,” the involvement of Indian Tribes in proposed actions is required where these actions could have “tribal implications.”¹² Tribal implications exist “when a proposed regulation, policy, legislative recommendation, or planned action causes,

⁹ Exec. Order No. 13175, 65 Fed. Reg. 67250 (Nov. 9, 2000).

¹⁰ See also Michael Blumm & Lizzy Pennock, *Tribal Consultation: Toward Meaningful Collaboration with the Federal Government*, 33 COLO. ENV’T L.J. 1 (2022) (citing Jennifer Yachnin & Jeremy P. Jacobs, *Tribes expect a voice on land and waters under Haaland*, Greenwire (Feb. 4, 2021) (quoting Shannon Wheeler, chairman of the Nez Perce Tribe, stating “Consultation with federal agencies is honored and at the highest level, and it’s not just a check-the-box process.”)).

¹¹ See COHEN’S HANDBOOK ON FEDERAL INDIAN LAW § 5.04[3](a) (Nell Jessup Newton ed., 2012) (describing *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) as the case that “provided the basis for analogizing the government-to-government relationship between tribes and the federal government as a trust relationship with a concomitant federal duty to protect tribal rights to exist as self-governing entities”). See also, e.g., U.S. DEP’T OF THE INTERIOR, SECRETARIAL ORDER NO. 3335, REAFFIRMATION OF THE FEDERAL TRUST RESPONSIBILITY TO FEDERALLY RECOGNIZED TRIBES AND INDIVIDUAL INDIAN BENEFICIARIES 4 (Aug. 20, 2014) (“The Department [of the Interior] has . . . sought to build a strong government-to-government relationship with Indian tribes. The Department of the Interior Policy on Consultation with Indian Tribes, which was adopted in December 2011, sets forth standards for engaging with Indian tribes on a government-to-government basis to ensure that the decisions of the Department consider the impacts on affected Indian tribes and their members.”).

¹² U.S. DEP’T. OF HOMELAND SEC., *supra* note 3, at 3.

or is likely to cause, a substantial direct effect on (a) the self-government, trust interests, or other rights of a Tribal Nation; (b) the relationship between the Federal Government and Tribal Nations; or (c) the distribution of power and responsibilities between the Federal Government and Tribal Nations.”¹³ With the Proposed Rule, CISA is proposing regulations that condition Indian Tribes’ receipt of federal funding, grants, and eligibility for contracts on adherence to CIRCIA’s reporting requirements. This is precisely the type of substantial direct effect on the rights of Indian Tribes that the tribal consultation process is designed to prevent. “[I]n an effort to work toward free, prior, and informed consent,” this discrepancy must be promptly rectified by including a fulsome exemption for Tribal governments in the final rule.¹⁴

In the commentary to the Proposed Rule, Section J – Indian Tribal Governments, CISA states that the requirement to file a CIRCIA Report does not cause a substantial direct effect on Indian Tribes and emphasizes that “Congress explicitly prohibited CISA from pursuing enforcement against a tribal government for failure to report a covered cyber incident or ransom payment.”¹⁵ Despite CISA’s assurance that CIRCIA cannot be enforced against Tribal governments, the Proposed Rule leaves room for the imposition of other punitive measures, even when the text of the Proposed Rule is construed to the benefit of a Tribe.¹⁶ As proposed, Tribal governments and their respective entities will be subject to a mandatory referral for suspension

¹³ U.S. DEP’T. OF HOMELAND SEC., *Implementing Consultation and Coordination With Tribal Nations* 3 (Feb. 8, 2023), <https://www.dhs.gov/sites/default/files/2023-04/dhs-consultation-policy.pdf>.

¹⁴ U.S. DEP’T. OF HOMELAND SEC., *supra* note 3, at 3.

¹⁵ *Supra* note 1, at 23765 (Citing the “Exclusion” provision at 6 U.S.C. 681d(f)).

¹⁶ *See generally, County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (“Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit). If there is an ambiguity, the United States Supreme Court has held that “ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encourage tribal independence.” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982).

and debarment should CISA find noncompliance with CIRCIA's reporting requirements, as the punitive measures set out below do **not** exclude Tribal governments.¹⁷

§ 226.16 Referral to the Department of Homeland Security Suspension and Debarment Official

The Director must refer all circumstances concerning a covered entity's noncompliance that may warrant suspension and debarment action to the Department of Homeland Security Suspension and Debarment Official.

...

§ 226.17 Referral to the Cognizant Contracting Official or Attorney General

The Director may refer information concerning a covered entity's noncompliance with the reporting requirements in this part that pertain to performance under a federal procurement contract to the cognizant contracting official or the Attorney General for civil or criminal enforcement.¹⁸

(Emphasis added). Because an exclusionary provision like that found in Section 226.14 is not explicitly provided in reference to these paragraphs, and Section 226.20 contains a clear severability provision, Tribal-ISAC members must assume Sections 226.16-17 are intended to apply to them. CISA's failure to carve out an exemption for Tribal governments in Sections 226.16-17 has significant tribal implications and creates the potential for serious harm across Indian Country.

As defined by DHS, a Tribe's *suspension* would exclude the Tribe from "participating in covered transactions and transactions covered under the [Federal Acquisition Regulation] for a temporary period," and a Tribe's *debarment* would likewise exclude the Tribe from government

¹⁷ Cf., *supra* note 1, at 23773, where the subpoena and request for information procedures provide a clear exemption for Indian Tribes.

¹⁸ *Supra* note 1, at 23775.



contracting, subcontracting, or covered transactions for a specified period of time.¹⁹ The definition of *covered transactions* is expansive, including, “grants, cooperative agreements, scholarships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements, and any other non-procurement transactions between a Federal agency and a person.”²⁰

For Tribal-ISAC members, the consequences of debarment could include the loss of funding for healthcare services, disruption to broadband access initiatives, loss of funding for mental health programs, and a substantial loss of revenue from enterprises holding government contracts. The importance of these Federal programs and special services provided by the United States as part of the trust relationship cannot be overstated. Debarment of a Tribal Nation for failure to comply with CIRCIA reporting requirements would not only devastate the Tribe, but also retract Federal programs put in place to repair and redress the cross-generational harm suffered by Tribal members. There can be no greater “tribal implication” warranting a consultation.

Excluding Tribal-ISAC members from this discussion by denying our member governments (and similarly situated Indian Tribes) the consultation to which they are entitled under the Order and Tribal Consultation Directive, undermines the Biden Administration’s support of Tribal sovereignty and self-determination. In lieu of tribal consultation, we respectfully call on CISA to remove Tribal governments and their respective enterprises from the definition of “covered entity” in the final rule or to modify Sections 226.16-17 to clearly exclude Tribal

¹⁹ U.S. DEP’T. OF HOMELAND SEC., SUSPENSION AND DEBARMENT INSTRUCTION 2-3, 2-7 (May 4, 2024), https://www.dhs.gov/sites/default/files/2024-05/24_0504_ogc_suspension-and-debarment-instruction-146-01-00.pdf.

²⁰ *Id* at 2-2.



governments from these provisions. Should CISA pursue a consultation in line with the Order and Tribal Consultation Directive, the Tribal-ISAC will engage fully in this process.

We, and our member Tribal Nations,²¹ look forward to future consultations with CISA and hope that our commentary provides CISA with guidance on how to engage with Tribal Nations and to ensure the final rule avoids tribal implications in accordance with its stated intent.

If you have further questions, please contact Mike Day, Chairman of the Tribal-ISAC, at director@tribalisac.org.

Sincerely,

Tribal ISAC

Tribal-ISAC

²¹ Member Tribal Nations including, but not limited to: Cherokee Nation, Yocha Dehe Wintun Nation, Forest County Potawatomi Community, Poarch Band of Creek Indians, Barona Band of Mission Indians, Santa Ynez Band of Chumash Indians, Coushatta Tribe, and Paskenta Band of Nomlaki.