



# NATIONAL CONGRESS OF AMERICAN INDIANS

## The National Congress of American Indians Resolution #SPO-16-052

**TITLE: Requesting that the CFPB Extend the Comment Period on its Proposed Rules on Small Dollar Lending and Arbitration Agreements Pending Meaningful Consultation with Tribal Governments; and Requesting that DOJ Engage in Consultation Regarding the Application of State Law to Tribal Internet Transactions**

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**WHEREAS**, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

**WHEREAS**, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

**WHEREAS**, on May 24, 2016, the Consumer Financial Protection Bureau (CFPB) issued a Notice of a Proposed Regulation on Arbitration Agreements (“Proposed Arbitration Regulation”) that would 1) prohibit providers of consumer financial products and services from using an agreement with a consumer that provides for arbitration to bar the consumer from participating in a class action; and 2) would require a provider to submit records to the Bureau, 81 FR 32830-01 (May 24, 2016); and

**WHEREAS**, under the Notice of the Proposed Arbitration Regulation, the comment period is currently scheduled to conclude on August 22, 2016; and

**WHEREAS**, on June 2, 2016, the CFPB issued a notice of a proposed regulation on “Payday, Vehicle Title and Certain High-Cost Installment Loans” (“Proposed Small Dollar Lending Regulation”) Pursuant to this Notice, comments must be received on or before September 14, 2016; and

**WHEREAS**, Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Tribal Governments are required to be treated the same as State Governments, and are to be treated as co-regulators with CFPB in the implementation and enforcement of the Dodd-Frank Act; and

**WHEREAS**, pursuant to the CFPB’s Policy for Consultation with Tribal Governments, the CFPB has committed to engage in “regular and meaningful consultation” with Tribal Governments on, among other things, “Proposed new and amended policies, regulations, and programs . . . to the extent that they would be expressly directed to tribal governments or tribal members or . . . would have direct implications for Indian tribes”; and

**WHEREAS**, numerous Tribal Governments regulate the provision of consumer financial products and services ostensibly covered by the Proposed Regulations; and

**WHEREAS**, numerous Tribal Governments own and operate entities that provide financial products and services to consumers ostensibly covered by the Proposed Regulations, and the CFPB asserts that it has the authority to regulate such tribally-owned entities; and

**WHEREAS**, to the extent that the Proposed Arbitration Regulation purports to apply to tribally-owned providers of covered financial products and services, it constitutes an *unlawful abrogation of tribal sovereign immunity* to the extent that it purports to require such tribally-owned entities to consent to class action litigation; and

**WHEREAS**, to the extent that the Proposed Arbitration Regulation purports to apply to tribally-owned providers of covered financial products and services, it effectively diminishes tribes’ inherent and sovereign to negotiate, enter into and regulate consensual contractual agreements with nonmembers, including agreements for dispute resolution, venue and choice of law; and

**WHEREAS**, to the extent that the Proposed Arbitration Regulation purports to apply to Tribal Governments and tribally-owned providers of covered financial products and services, it imposes onerous and costly record-keeping and submission requirements that directly and negatively impact resources of Tribal Governments that would otherwise be utilized for Tribal Government purposes, including the provision of essential governmental programs and services to tribal members;

**WHEREAS**, contrary to the CFPB’s Policy for Consultation with Tribal Governments, and contrary to President Obama’s Memorandum to the Heads of Executive Departments and Agencies on Tribal Consultation, the CFPB admittedly failed to consult with Tribal governments in the development of the proposed rule, and instead stated in the proposed rule that, “The Bureau *expects to meet with Indian tribes and engage in consultation pursuant to its Policy for Consultation with Tribal Governments after the release of this notice of proposed rulemaking*. The Bureau specifically solicits comment on this proposal from Tribal governments”; and

**WHEREAS**, contrary to the CFPB’s Policy for Consultation with Tribal Governments, and contrary to President Obama’s Memorandum to the Heads of Executive Departments and Agencies on Tribal Consultation, the CFPB has not engaged in *meaningful* consultation with Tribal Governments on the Proposed Small Dollar Lending Regulation, but instead only held “listening sessions” wherein CFPB officials did not interact with tribal officials or permit tribal officials to participate in any meaningful way in the development of the Proposed Small Dollar Lending Regulation; and

**WHEREAS**, NCAI has become aware of policy positions taken by the United States Department of Justice (DOJ) relating to the application of tribal law and/or tax jurisdiction to internet transactions between Tribal Governments and/or tribal government-owned entities and non-tribal members; and

**WHEREAS**, NCAI believes that any dispute over whether tribal law or state law applies to internet transactions involving Tribal Governments and/or tribally-owned entities and non-tribal members is a policy matter that is solely within the authority of Congress to resolve, pursuant to its power to regulate Indian commerce under the United States Constitution; and

**WHEREAS**, DOJ's Tribal Consultation Policy requires consultation with Tribal Governments before adopting policies that have tribal implications, including policies that may "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";

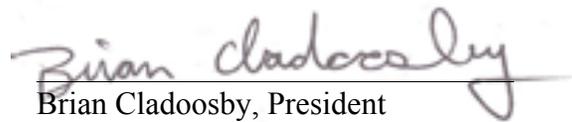
**NOW THEREFORE BE IT RESOLVED**, that NCAI requests that the DOJ immediately begin the process of engaging in meaningful consultation with Tribal Governments on DOJ's policy regarding the application of state law and/or taxation to internet transactions involving Tribal Governments and/or tribally-owned entities and non-tribal members; and

**BE IT FURTHER RESOLVED**, that NCAI requests that the CFPB immediately begin the process of engaging in meaningful consultation with Tribal Governments on its Proposed Regulations; and

**BE IT FURTHER RESOLVED**, that NCAI requests that the CFPB extend the comment period for each proposed Regulation for an additional 120 days in order for such meaningful tribal consultation to take place.

#### CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2016 Mid-Year Session of the National Congress of American Indians, held at the Spokane Convention Center, Spokane, Washington, June 27-30, 2016, with a quorum present.

  
Brian Cladoosby, President

**ATTEST:**

  
Aaron Payment, Recording Secretary