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MEMORANDUM

April 25, 2018

To: Tribal Housing Clients

From: Hobbs, Straus, Dean & Walker, LLP

Subject: *HUD Consultation with Deputy Assistant Secretary Heidi Frechette on Revisions to Section 184 Program Regulations*

On April 24, 2018, HUD held another consultation session on revisions to the Section 184 program regulations in conjunction with the annual Self-Governance Conference in Albuquerque, New Mexico.

This consultation was hosted by Heidi Frechette, the HUD ONAP Deputy Assistant Secretary (DAS). Also present were Krisa Johnson, Acting Director in the Office of Loan Guarantee at ONAP and David Southerland, the Regional Administrator for the ONAP Southwest Region. As with prior consultations, the HUD ONAP representatives began by touting the benefits and successes of the Section 184 program. They then went on to note that there have been a number of obstacles that have arisen in recent years, particularly in getting mortgage financing on reservation and other trust lands. HUD is analyzing the program's current regulations and processes, and will draft new regulations through a proposed rule later this year. On March 12, 2018, DAS Frechette notified tribal leaders of HUD's intent to revise its regulations for the Section 184 program, and its intent to conduct consultation prior to circulating draft regulations for tribal review.

1. Why new regulations?

In its "read-ahead" document, HUD laid out its reasons for considering new regulations. It contained the following main point: the program has grown substantially over the past few decades, from fewer than 100 loans in 1994 to over 4000 loans worth over \$700 million in FY 2017. "Given the growth and maturity of the program HUD finds it necessary to expand and revise the regulations to meet the programs growing demands, and to hold participating banks accountable to both tribes and the federal government."

The read-ahead letter also noted that some of the program's features are built into the statute, and that changes to those features cannot be made through regulation, but only through legislative amendment.

The letter notes as follows: “ONAP is interested in hearing from the tribal community on what works and what does not work with the Section 184 program. The goal is to make the program work the best it can for both HUD’s interests and the interests of Indian Country.”

2. April 24, 2018 Consultation Session

During the April 24 consultation, a number of participants asked questions or provided comments to DAS Frechette and her team. The HUD ONAP team noted at the beginning of the consultation that they were appearing in a “listening capacity” and that note takers were recording all questions and comments for the record. Here are the topics discussed.

a. Tribal court jurisdiction over foreclosures on trust land

Nearly every tribal representative who spoke stated that the recently-imposed prohibition on enforcing Section 184-backed mortgages in tribal courts must be removed. One commenter pointed out that this prohibition was a direct affront to tribal sovereignty and self-determination. Another pointed to other federal agencies (such as USDA) which have direct loan programs and that they are willing to subject themselves to tribal court jurisdiction to foreclose. Another participant noted that some agencies will hire private attorneys to carry out the foreclosures on their behalf, so that the Department of Justice is not put in the position of being subject to tribal court jurisdiction. Many participants stated the tribes must have jurisdiction over foreclosures on trust land, and that the regulations must ensure that tribal court jurisdiction is specifically provided for. Many participants also noted that tribes need to be able exercise their sovereignty over their own lands. No participant voiced any opposition to this request.

DAS Frechette addressed this issue. She stated that she and HUD ONAP support jurisdiction in tribal courts, but said that it was the U.S. Department of Justice and the U.S. Attorneys who said that they would not appear in tribal court. She stated that she therefore felt it would be improper to approve tribal ordinances for enforcement in tribal courts if the Department of Justice attorneys would not appear. There was some discussion as to whether a change in the regulations would be sufficient, as HUD may not have the authority to subject the Department of Justice to tribal court jurisdiction through regulation. There were some side-bar discussion about the need for legislative action, perhaps through a mark-up to an appropriations bill, to authorize tribal court jurisdiction in such circumstances.

b. Availability of approved lenders/lender hesitation to lend on trust land

Several participants noted that private lenders are still hesitant to enter into mortgage financing on reservation or other trust land. Some noted that more lenders seem to be withdrawing from the program than entering it. The general theme of these comments was that HUD should make the program easier to use and easier to navigate for lenders, and that HUD should be more proactive in working with the lending institutions.

c. Obstacles to greater participation

One of the questions that HUD asked for feedback about concerned the obstacles to greater participation. Some specific obstacles that participants pointed out:

- The processing fee is too high, and should be reduced or removed altogether.
- One federal agency will not accept the appraisal by another federal agency, so if there are multiple funding sources in a project, the cost is increased because more than one appraisal is required.
- The required environmental reviews are very expensive, and are an added cost for low-income families.
- Where there is a prior tax lien and judgment, HUD's new guidelines require 12 months to pass before issuing a loan guarantee.

d. Increase maximum mortgage amounts

Several representatives noted that many higher income Indian families are returning to the reservation, but are confronted by a shortage of housing suitable to their needs and income level. However, the Section 184 program has limits on the amount that an individual can borrow that these participants felt was too low to be of much practical use to these returning tribal members. The limits as established by HUD are set as follows:

Maximum mortgage amounts are set based on an established loan-to-value ratio and the borrower's debt to income ratio, and, in no case, can these mortgage amounts exceed 150% of the FHA (HUD's Federal Housing Administration) mortgage limit established for the locality as published on March 8, 2008.

HUD Section 184 Indian Housing Loan Guarantee Program: Processing Guidelines 2011 (available at https://www.hud.gov/sites/documents/184PG_CH_1_REV_4_8_11.PDF).

Participants requested that HUD consider raising the maximum mortgage amount to facilitate higher-income Indian families moving back to the reservation. Ms. Johnson asked people to think about how much higher they would want those amounts to be. One participant said there should be no limit, but just be based on the ability to pay and LTV ratio. Another suggested using Fannie Mae's guidelines.

e. Right of first refusal

Ms. Johnson posed the question as to what kind of notice (if any) should a tribe get when a tribal member goes into default. Several participants stated that tribes should always have the right of first refusal to step in and take over the HUD-guaranteed loan, even for loans on fee-simple properties, and that HUD should provide notice to allow that to happen. There was some discussion as to the timing of when that notice should come: On the first default in payment? At the second? Just prior to foreclosure proceedings being initiated? Different participants had different perspectives.

All participants, however, supported the idea of notice and of a right of first refusal. Tribes could choose to exercise that option, or not, at their discretion. Doing so allows tribes to obtain (or retain) housing stock for their membership. DAS Frechette noted this comment and said that HUD ONAP would look into how this could be structured within the current framework of the program, but that HUD did not have any conceptual opposition to the idea.

f. Increase amount of homes per loan

Several participants addressed the concern that the maximum number of homes that can be under a single Section 184 loan guaranty is four. They requested that HUD consider raising the number of units that could be subject to a Section 184 loan. Ms. Johnson said that while HUD was open to considering this kind of change but noted that the four-unit maximum is driven by the secondary market (she gave as examples Fannie Mae and Freddie Mac). The buyers in the secondary market impose this kind of limit. Lenders want the flexibility to sell these loans on the secondary market, and if they are tied up and cannot do so because this restriction was not followed, they will be less likely to take advantage of the Section 184 program.

g. Should there be a homebuyer education requirement?

Ms. Johnson posed the question to the participants: there used to be a homebuyer education requirement that was part of the Section 184 process – do you support returning to that requirement? Several of the participants stated that they felt this was a good idea.

3. What does HUD want feedback on?

HUD is still soliciting comments, both through further consultation sessions and through its online comments portal (information below). At the consultation session and in the read-ahead letter, HUD indicated that it is open to “all tribal comments” on the Section 184 program, but that in particular HUD is looking for comments on the following areas:

General Overview:

- What is working well with the Program
- What challenges have your tribal members experienced

Program Access:

- Availability of lenders
- Quality of service provided by lenders
- Barriers to access
- Unintended consequences

Delinquencies/Default/Foreclosure/Sale:

- Tribe's experience with loss mitigation for its members
- Tribe's experience with the foreclosure process for its members
- Potential improvements to this process
- Increased (or decreased) tribal involvement in the process

4. Next steps

The proposed rule will be drafted following HUD's final consultation session on May 3, 2018 in Chicago, IL. DAS Frechette estimated that HUD would have a draft to circulate to tribes and TDHEs toward the end of August.

You may submit comments to HUD now, as well as on the proposed revisions to the regulations to 184consultation@hud.gov.

Once HUD has prepared draft regulations, HUD will send a copy out to tribal leaders and TDHEs for comment via a "Dear Tribal Leader letter." There will be a 60 day comment period, during which written comments on the proposed regulations may be submitted to 184consultation@hud.gov. During this comment period, HUD also plans to hold regional calls with Tribal leaders and their designees. These calls will be an opportunity to ask questions about the draft regulations and to verbally submit comments. Once this tribal comment period is over and any comments received are considered, HUD will publish the proposed rule in the Federal Register for public comment.

5. Conclusion

Please let us know if you have any questions about this memorandum. We are available to assist with submission of comments to HUD regarding the process and regarding the proposed revisions to the Section 184 regulations once they are released. Please do not hesitate to contact me at egoodman@hobbsstrauss.com or by phone at (503) 242-1745.