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MEMORANDUM

April 23, 2020

To: Tribal Housing Clients
Fr:  HOBBS, STRAUS, DEAN & WALKER, LLP
Re: **NAIHC Legislative Committee Meeting**

NAIHC has been holding its Legislative Committee meetings twice a month while the COVID-19 crisis is ongoing, to update tribes and TDHEs on resources and developments. The NAIHC Legislative Committee held its most recent meeting by teleconference on April 23, 2020. The main purpose of the call was to provide the latest updates on the CARES Act and other COVID legislation, FY2021 Appropriations, and other on-going housing bills. NAIHC Executive Director Tony Walters presided over the meeting.

1. 116th Congress Updates

Congress is currently working on the 3.5 version of the COVID-19 legislation, an update and extension of items covered in the CARES Act (the 3.0 version). This version has been passed by the Senate, and is expected to pass the House today and to be signed by the President. The main focus of the bill is to add more funding to the SBA Paycheck Protection Program (PPP), which provides forgivable loans to businesses to keep employees from being laid off. The new bill will authorize providing loans through CDFIs, so Native CDFIs should consider applying.

Tribal housing authorities are not eligible for PPP loans, but tribal housing programs or entities organized as non-profits under section 501(c)(3) of the Internal Revenue Code are eligible.

Another program that housing programs might be eligible for is the employee retention tax credit, which gives employers credits against payroll taxes that they pay. But if you apply for this program you are not eligible for PPP.

Next up will be negotiations over version 4.0 of COVID-19 legislation. Mr. Walters has heard that the housing focus in this bill may involve homeowners and mortgages rather than public and Indian housing. This bill will not likely be finalized and adopted until mid-May or later.

Most other bills that would otherwise be moving through Congress are at a standstill. NAHASDA reauthorization legislation has not moved forward since the last updates from February, nor have Tribal HUD-VASH or the Continuum of Care bills. Mr. Walters is going to try and get an update on FY 2021 appropriations for the next phone call. In February there had been some discussion about a joint NAHASDA reauthorization bill in both the House and the Senate, with a May or June timeline under consideration. That will likely be pushed back due to the COVID-19 crisis.

A question was raised as to whether there has been any discussion about infrastructure funding legislation. Mr. Walters has not heard much about infrastructure in the last few weeks. The original discussions about phase 4.0 COVID-19 funding involved infrastructure, but that does not seem to be the direction the current negotiations are going.

2. IHBG CARES Act Funding

As reported in our most recent memo, on Wednesday, April 22, 2020, HUD ONAP issued OPIH Notice 2020-06, which is the implementation notice for the IHBG CARES Act funding. In addition, ONAP also released the “abbreviated IHP” that tribal housing programs and TDHEs will be required to submit to receive their allocation of the IHBG CARES Act funding. The form is a fillable PDF, and should not be submitted through the Energy and Performance Information Center (EPIC) system. Here again is the link to the form: https://www.hud.gov/sites/dfiles/PIH/documents/IHBG_CARES_IHP-APR_Form.pdf. *HUD suggests that if you are having problems opening the form, to try cutting and pasting this link into the Internet Explorer browser.* Another HUD suggestion is to download the free version of the most recent Adobe Acrobat PDF reader.

HUD will be holding webinars over the next couple of weeks on how to submit the abbreviated IHP and how to utilize the IHBG CARES Act funding. HUD is also regularly updating the FAQs on the HUD website: https://www.hud.gov/coronavirus/native_american. NAIHC is also putting this information up on its website: <http://naihc.net/>. Deputy Assistant Secretary Heidi Frechette has indicated that she and her team are planning to have another national conference call to take questions.

3. ICDBG CARES Act Imminent Threat Funding

HUD asked for comments on this part of the CARES Act in a Dear Tribal Leader Letter. The main focus of HUD’s questions was whether there should be funding caps on the grants, and if so what should those caps be. They are trying to balance making the funds as broadly available as possible while ensuring that the grants are large enough to be used effectively. While HUD’s deadline was yesterday, Mr. Walters noted that the comment period was not based on a regular Federal Register notice, so if you have not yet submitted comments but want to have some input, just submit those to HUD as soon as you can. HUD is still reviewing.

NAIHC has asked HUD how many tribes have accessed the ICDBG imminent threat program for FY 2020 for COVID-19 emergencies. The answer was that no one has submitted any COVID-19-related applications, and that there are still some funds left in the ICDBG imminent threat program for FY 2020.

HUD is still reviewing the current applications for ICDBG funding (the FY 2019 and 2020 NOFA), and are hoping to release their award notices sometime soon.

Question: if a TDHE has a delinquent audit, will they still be eligible to apply for the ICDBG CARES Act funding? Mr. Walters does not know the answer to this question, but will reach out to HUD to find out an answer.

4. CARES Act \$8 Billion Tribal Government Stabilization Fund

Treasury is still working on the formula for allocating this funding. There has been some controversy and litigation regarding whether these funds can be distributed to Alaska Native Corporations (“ANCs”). There is current a motion for temporary restraining order and preliminary injunction pending, and oral argument scheduled for Friday in one of those cases.

Treasury filed its response brief in the ANC litigation late this afternoon. In that brief they formally take the position that the ANCs should be included in the distribution (despite telling the judge earlier in the day that they had not made up their mind). The plaintiffs in that case will file their response brief tomorrow morning, and the judge will hold a hearing tomorrow afternoon. The judge has indicated that he will issue his ruling quickly.

Treasury’s statutory deadline for distributing these funds is April 24, but Treasury has indicated in its filings in the ANC litigation that it will not be meeting that deadline due to factors outside of the tribal funding context.

These funds will be allocated to tribal governments, so if tribal housing programs or TDHEs want to access these funds, they will have to work through their tribal governments.

Treasury has issued some preliminary guidance on these uses of these funds. The guidance suggests that the Federal Government may take a position that narrows allowable uses of these funds. The guidance provides initial interpretation of the two substantive standards for the CRF in the statute: 1) necessary expenditures incurred due to the public health emergency; and 2) costs not accounted for in the budget most recently approved as of March 27, 2020. The guidance also provides a non-exclusive list of *allowable* expenditures and a short, non-exclusive list of *non-allowable* uses of funds.

With regard to the "necessary expenditures" standard, Treasury states that CRF funds may be used to "respond directly to the emergency, such as by addressing medical or public health needs, as well as expenditures incurred to respond to second-order effects of the emergency, such as by providing economic support to those suffering from employment or business interruptions due to COVID-19-related business closures." However, the guidance explicitly states that the CRF cannot be used for "revenue replacement" or to "fill shortfalls in government revenue to cover expenditures that would not otherwise qualify under the statute." Treasury defers to governments to determine when the allowed spending is "necessary."

With regard to the second matter of "costs not accounted for in the budget," Treasury states that costs already in a budget are not eligible uses of funds, but instead that the funds must be used for costs that existing budget items would not have covered or are "substantially different" from how they would have been used.

Together, these two positions from Treasury cast doubt on whether a tribe would be able to use CRF funds for non-COVID-19 response-related government funding. However, the guidance does state that an allowable use of funds is "expenditures related to a State, territorial,

local, or Tribal government payroll support program." It is not clear how a "payroll support program" is defined, but tribal governments should consider creating a program to provide payments to employees who are not working as a potential option.

5. Wells Fargo Rehabilitation Program Funding

Mr. Walters indicated that the promised funding announcement from Wells Fargo and NAIHC for Tribal housing rehabilitation program should be coming out shortly. This is an initiative that has been in the works for some time. NAIHC hopes to be releasing more detailed information soon. There were 30 applications, and the Wells Fargo funding was sufficient to fund 21 of these. The grant awards are pending and will be announced soon.

6. Comment

There is a bi-partisan group of Senators working on a tribal set-aside program that would work like the Paycheck Protection Program, but would be separate from that and would be specific to tribal small businesses. This may be a part of the version 4.0 of COVID-19 legislation.

The next NAIHC Legislative Committee meetings will be back on the normal schedule (first Thursday of the month). The next two meetings are scheduled for Thursday May 7 and Thursday June 4. Mr. Walters hopes that he will have more specific information on non COVID-19 legislation (NAHASDA Reauthorization, Tribal HUD VASH, Continuum of Care and FY 2021 appropriations) at the next meeting.

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If you have any questions about this memo, please contact Edmund Clay Goodman at egoodman@hobbsstrauss.com or at (503) 242-1745.