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MEMORANDUM

June 9, 2020

To: Tribal Housing Clients

Fr: HOBBS STRAUS DEAN & WALKER, LLP

Re: **HUD ONAP Issues Updated COVID-19 FAQs; NAIHC Legislative Committee Meeting**

This memo reports on two items: the HUD Office of Native American Programs (ONAP) updated COVID-19 FAQs and the monthly NAIHC Legislative Committee meeting.

1. Updated ONAP COVID-19 FAQs

HUD ONAP has periodically updated its online set of FAQs related to COVID-19, found here: https://www.hud.gov/sites/dfiles/PIH/documents/COVID_FAQ_5th_Round_6.1.2020.pdf
A copy is also attached to this memo. The online version has hyperlinks included that can take you to other useful sites.

The updated version shows new areas in blue. Here is a summary of the areas that have been updated.

a. Emergency Funding

HUD ONAP updated the Emergency Funding section of the FAQs to include hyperlinks to information on how to apply for an IHBG-CARES grant and complete an IHBG-CARES Abbreviated IHP fillable PDF form. It includes a hyperlink to additional and updated ONAP COVID-19 information and resources.

The Emergency Funding section also provides detailed information on specific aspects of the IHBG-CARES grant and Abbreviated IHP. In order to properly document the provision of IHBG-CARES emergency services to non-low-income families in the Abbreviated IHP, Tribes and TDHEs must identify the individuals being served by each program activity as low-income, non-low income or non-Native/Essential. The FAQs provides a hyperlink to PIH Notice 2020-06 and accompanying guidance, which provides more detailed information about identifying the individuals served by the IHBG-CARES grant. The FAQs also lists the limitations on the provision of services to low-income families:

- It is provided during the COVID-19 emergency;
- It is designed to protect the health and safety of low-income Native American families;
- It is provided on an urgent basis (as documented by the IHBG recipient); and
- It is temporary in nature.

Tribes and TDHEs must additionally maintain records documenting that these limitations were met. PIH Notice 2020-05, found through a hyperlink on the FAQs site, provides information on providing assistance to non-low-income and non-Native/Essential families pursuant to the current IHBG program regulations.

The Abbreviated IHP requires identification income levels of the groups of people served. ONAP notes that it is not always practical to verify the income eligibility at the time emergency assistance is provided. For activities providing broad services to numerous individuals, Tribes and TDHEs should do their best to reasonably identify the income level of the persons served in the Abbreviated IHP, such as through an estimate of the income based on the population demographics. For activities provided to specific families, Tribes and TDHEs should contact their Area ONAP to discuss how best to document the income levels services provided.

Tribes and TDHEs may rely on self-certified statements via telephone or email while social distancing is recommended due to COVID-19. IHBG recipients may deviate from their current written admissions and occupancy policies and allowing less frequent or more frequent income re-certifications, to assist families that have experienced fluctuations in income due to COVID-19. See PIH Notice 2020-05 for additional information on CARES Act waivers and alternative requirements (hyperlink provided in FAQs).

HUD provided the following guidance in order to determine whether unemployment benefits received under the Federal Pandemic Unemployment Compensation (FPUC) program should be considered income for purposes of calculating annual income and adjusted income under the IHBG and IHBG-CARES programs:

- Section 8: If the Tribe or TDHE adopts the Section 8 definition of annual income in 24 CFR 5.609, the regular unemployment benefits are considered income but the \$600 per week FPUC amount would not be included in the calculation of annual income because these payments are temporary income and excluded under the definition of annual income.
- IRS: If the IRS definition of annual income is adopted by the Tribe or TDHE, the \$600 per week FPUC amount would be included in the calculation of an individual or family's annual and adjusted income because this amount is considered taxable income.

- Census: If the Census definition of annual income is adopted by the Tribe or TDHE, this amount would also be considered unemployment income that is included in the definition of annual and adjusted income under the IHBG and IHBG-CARES programs.

The updated FAQs notes that IHBG-CARES funding will be provided as a separate grant with a different grant number than the annual IHBG formula grant. Because the IHBG-CARES grant is different, recipient must use the Abbreviated IHP, which is a modified version of the normal IHBG IHP/APR form. It is intended to address activities or projects to prevent, prepare for, and respond to COVID-19 with the IHBG-CARES funding. There is no due date for submitting the Abbreviated IHP. However, ONAP encourages recipients to submit the Abbreviated IHP as soon as possible, so that IHBG-CARES funds can be provided sooner.

If recipients cannot obtain a Tribal Certifications due to emergency office closures or shelter in place directives, they can submit the Abbreviated IHP without the Tribal Certifications. However, recipients must still meet the waivers specified in PIH Notice 2020-05 and must obtain the certifications as soon as normal business resumes.

Regarding reimbursements of expenses, Tribes or TDHEs that repurpose 2020 IHBG funds for COVID related expenses **cannot** reimburse these expenses with IHBG-CARES funds. Only costs incurred with non-federal funds used for COVID-19 related expenses can be reimbursed with IHBG-CARES funds. Non-Federal funds include Tribal funds and non-program income. However, a recipient can use IHBG-CARES funds to maintain normal operations and carry out eligible activities during the period that the recipient's program is impacted by COVID-19. An example is a planned IHBG activity that was not completed as planned due to the disruption caused by COVID-19. The IHBG-CARES grant funds can be used to carry out the original IHBG activity that the recipient planned on carrying out, but did not carry out, due to COVID-19. Such an activity should be identified on the Abbreviated IHP as "COVID-19 Respond 2020-X Maintaining Normal Operations Impacted by COVID-19 National Emergency" in the drop-down menu.

The update FAQs provides a link to the PIH Notice 2020-06: IHBG-CARES Act Implementation Notice, which provides a non-exhaustive list of examples of eligible activities that may be tied to one or more of the eligible purposes of the CARES Act. Recipients can use IHBG-CARES funds to provide rental assistance, mortgage assistance, or utility assistance to eligible families living in homes the Tribe or TDHE does not own or operate.

HUD is setting a 5-year period for the expenditure of CARES Act grants. However, ONAP encourages recipients to expend their IHBG-CARES grants expeditiously in order to ensure that the activities properly fall under an eligible purpose of the CARES Act. Regarding spending limits, Total Development Costs (TDC) limits do apply to IHBG-CARES funding. There is, therefore, a limit on how much can be spent on purchasing, renting, or rehabilitating units. Under HUD's waiver governing TDCs under the IHBG-CARES program, recipients may

exceed the current TDC maximum by 20 percent without HUD review or approval if the purpose of the development, acquisition, rehabilitation or assistance is to prevent, prepare for, and respond to COVID-19. The FAQs provides a hyperlink to PIH Notice 2019-19 (Total Development Costs) and PIH Notice 2020-05 (additional TDC requirements under the waiver).

b. Reporting Extensions and Waiver

HUD ONAP updated the Reporting Extensions and Waivers section of the FAQs to provide further information on waivers of compliance for CARES Act grants.

The FAQs notes that there are no waivers for Environmental Review Requirements for CARES Act grants. Recipients can find guidance on COVID-19 and environmental reviews, published by HUD's Office of Environment and Energy, at <https://www.hudexchange.info/programs/environmental-review/>. Included in the guidance is information on submitting Form 7015.15, posting reviews for public comment, accepting public comments, and conducting consultation under Section 106 of the National Historic Preservation Act.

The environmental requirements for the CARES Act are the same as those of IHBG and ICDBG programs. If an activity requires a Request for Release of Funds (RROF) under 24 CFR part 58 because it is categorically excluded and subject to the related laws (24 CFR 58.35(a)), or requires an environmental assessment (24 CFR 58.36), then a RROF for CARES Act funding is required.

Environmental requirements apply when IHBG-CARES or ICDBG-CARES funds are used to reimburse costs incurred by the recipient. This includes costs incurred prior to the enactment of the CARES Act. For projects that the Tribe has determined are exempt or categorically excluded and not subject to the related laws (CENST) pursuant to 24 CFR §§58.34 and 58.35(b), the process is different. In that case, the Tribe may complete the environmental review by documenting the exemption or CENST. The Tribe must ensure compliance with 24 CFR 58.6 before committing its IHBG-CARES or ICDBG-CARES funds as reimbursement after the underlying exempt/CENST activities took place. The FAQs provides a useful chart of activities that are exempt or categorically excluded not subject to the related laws and authorities.

The IHBG-CARES grant is subject to the administrative expenses caps defined in 24 CFR 1000.238. The annual 20% cap on administrative and planning costs therefore does apply to the IHBG-CARES program. However, the IHBG regulations allow recipients to request approval from ONAP to exceed the cap when justified. Recipients should contact their Area ONAP with questions or to request approval for exceeding the cap.

c. Emergency Operations and Tribal Policies Duplication of Benefits

HUD ONAP also updated the Emergency Operations and Tribal Policies Duplication of Benefits section of the FAQs to provide further information on duplication of benefits.

CARES Act grant funding is subject to Section 312 (42 U.S.C. 5155) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, (42 U.S.C. 5121 et seq.), which prohibits duplication of benefits for programs that provide financial assistance to individuals or entities suffering losses due to a major disaster or emergency. Duplication of benefits occurs when Federal financial assistance is provided for the same costs paid by any other source, or for costs to repair or replace losses that have or will be paid by private insurance, and the total amount received exceeds the total need for those costs. Thus, IHBG-CARES funds cannot be used to pay for eligible costs that have already been paid for, or will be paid for, by insurance, another Federal program, or other sources. The recipient must repay the IHBG-CARES program with non-Federal funds if such duplication occurs.

Practically speaking, this means that grant recipients should check to make sure that subgrantees, assisted individuals or families, and other entities to which it provides services have not previously received, or will not receive, duplicative assistance from another source. Grant recipients may check this by requiring a self-certification from assisted individuals or entities certifying that they have not received a duplicate benefit, having them fill out a questionnaire listing potentially duplicative assistance, or through other means. Recipients must do this duplication of benefits analysis before providing IHBG-CARES-funded assistance. The recipient must also require subgrantees, individuals, families, businesses, or other entities who subsequently receive a duplicative benefit, they agree to repay the recipient's IHBG-CARES program.

Recipients have other options for completing a duplication of benefits analysis as well. They may develop an overall budget for their COVID-19 preparation, prevention, and response that demonstrates the funding need for the activity and the funding that they reasonably anticipate receiving. This budget should include all Federal and non-Federal funding, including in-kind donations. If the budget shows that the need is greater than the funding sources, there is no duplication of benefits. The recipient must do this duplication of benefits analysis before providing IHBG-CARES-funded assistance and should only pay for unmet needs/needs not met by other sources of assistance.

The FAQs also noted some ways that Tribes and TDHEs have interacted with their communities and tribal members during the COVID-19 pandemic. This includes utilizing email, recorded telephone messages, radio announcements, mailings, and large-scale posters at crossroads or in front of Tribal departments to advise Tribal members of available resources and provide news, or coordinating with other tribal departments to provide services.

2. NAIHC Legislative Committee

NAIHC held its monthly Legislative Committee meeting by teleconference on June 4, 2020. The brief meeting was presided over by NAIHC Executive Director Tony Walters. Mr. Walters began by noting that Congress is back on its standard schedule. It will be in session during June and then will be on break in July and August. Congress will be back in session again in September and then will be off again in October for the campaign season. Mr. Walters reported on a number of Congressional actions.

a. House Passes HEROS Act

On May 15, 2020, the House passed the Health and Economic Recovery Omnibus Emergency Solutions Act (“HEROS Act”), which is drafted to provide \$3 trillion in additional coronavirus relief. The legislation would provide payments and other assistance to state, local, tribal, and territorial governments, protect renters and homeowners from evictions and foreclosures, and extend family and medical leave provisions previously approved by Congress. It would provide relief for essential workers, such as aviation, rail and Amtrak workers. However, the legislation has not been taken up by Senate and, based on statements made by Majority Leader Mitch McConnell (R-KY), the HEROES bill will not be considered by the Senate. Instead, the Senate is working on its own legislation, which may be released in the coming weeks.

b. Paycheck Protection Program Amendments

The President signed a new law passed by Congress on June 3, 2020 that will provide entities receiving Paycheck Protection Program (“PPP”) loans (under the CARES Act) with more flexibility to spend the loan funds and still receive full forgiveness, a longer term to repay any amounts that are not forgiven, and a longer time to spend the funds. Congress passed this as a standalone bill rather than waiting to bundle it with any “Phase 4” COVID-19 relief legislation that will be negotiated in the coming weeks. The Paycheck Protection Program Flexibility Act addresses some, but not all, concerns of employers who received the loans and found difficulty in using the funds within the eight-week timeframe, given that shutdowns and shelter-in-place orders continue in many locations.

The Act contains several changes to the PPP program:

- Extends the 8-week (56 day) period to use the loan to 24 weeks (168 days) from the date of the loan’s receipt or December 31, 2020, whichever is earlier.
- Reduces the required spend on payroll costs from 75% of the total loan amount to 60% of the total loan amount. There was no change on the eligible uses of funds, which are still payroll costs or other allowable costs (mortgage interest, rent, or utilities).

- Extends the “covered period” for the program to February 15, 2020 until December 31, 2020—extending by six months the previous end of the covered period of June 30, 2020. This extension stops the clock on any interest for unforgiven amounts until the end of the year.
- Clarifies that there will no reduction in forgiveness of a PPP loan due to the reduction of the number of FTEs, provided that an employer is able to document either 1) an inability to hire the same or equivalent employees as before the pandemic occurred; or 2) public health requirements from federal guidelines related to sanitation, physical distancing, or worker safety prevented full operation or return to full business activity.
- Allows borrowers to apply for forgiveness of the PPP loan until October 31, 2021.

The new law has not provided any additional funding to the PPP (though funding remains in the program), and does not provide PPP recipients with the ability to seek more funds or a second loan. Unless employers meet narrow grounds for expansion of their loans (for example, employees not included in original loans entered into before later guidance was issued), employers are still limited to using the original amount they have received.

The major benefits to employer are the extension of the ability to use the funds to 24 weeks (rather than 8), and the reduced percentage required to be spent on payroll costs. Tribal employers with PPP loans should continue documenting the use of the PPP funds very closely in preparation for forgiveness applications.

c. CARES Act – IHBG-CARES and ICDBG-CARES Imminent Threat

Grant applications for the ICDBG-CARES Imminent Threat grants were due to be submitted by Noon Pacific time on June 1, 2020. HUD received approximately 180 applications, which will be time-stamped by the 100ths of seconds. HUD will act on the applications in the chronological order that they were received. Applicants should save the confirmation email that they received with the time-stamp. A few clients submitted their applications on time and then received an automatic response from HUD stating that their application was too early. HUD took 15 minutes to resolve this issue.

Tribes and TDHEs across the nation have expressed frustration with how long it is taking for HUD to send CARES Act funding out to Tribes. However, the IHBG-CARES funding now seems to be moving out to the Tribes. Additionally, now that HUD has received applications for ICDBG-CARES grant, the application approval process is underway. NAIHC will provide further updates as it receives them.

d. FY2021 Appropriations

Congress is currently working on the FY2021 Appropriations process, but NAIHC does not have much information on any FY2021 Appropriations progress. Mr. Walters does not think that there is much congressional appetite for any significant increase in funding levels, nor for any significant cuts. He expects that we are likely to see the same appropriation amounts as last year. NAIHC will be posting its funding requests on the NAIHC website.

e. General housing bills

Mr. Walters is currently working with Senators Udall and Hoeven to draft a NAHASDA bill. He hopes to see a complete draft of the bill released soon. Ideally, the Senate bill will match the House bill, which would increase the chances that it will be passed in a short timeframe. The drafters of the bill are considering adding provisions that would provide funding for a drug elimination program, making sure that such funding is accessible to Tribes. The bill would also turn the ONAP position into an Assistant Secretary, and therefore a political appointee position. NAIHC is working with tribal allies on various options for reauthorization of the NAHASDA bill.

The National Low Income Housing Coalition (“NLIHC”) is advocating for a number of resources and protections for renters, including extending rent and eviction forbearance at least through the end of the year. NLIHC is pushing for a national moratorium on evictions and foreclosures, as well as for emergency funds for homelessness service providers, housing authorities, and housing providers.

f. Wells Fargo Rehabilitation Program Funding

NAIHC and Wells Fargo Tribal Housing Rehabilitation Program Grants were released in May. There were 30 applications, and the Wells Fargo funding was sufficient to fund 21 of these. NAIHC awarded \$600,000 in grants to tribal housing programs to carry out housing repairs for senior homeowners in tribal communities. NAIHC is hopeful that it can keep moving forward the Program in the future.

g. FY 2019 and FY 2020 ICDBG Awards Announced

HUD has announced the awards of the FY 2019 and FY 2020 Indian Community Development Block Grants (totaling approximately \$120 million). HUD had previously issued a NOFA that combined the FY 2019 and FY 2020 ICDBG funding into a single application cycle. The funding will support 107 separate projects around the country. HUD’s list of the awards and amounts can be found here: <https://files.constantcontact.com/7bfad56c001/90d61133-bf25-429a-8b92-5a3a33cbf29e.pdf> These awards are separate from and do not involve the ICDBG-CARES Imminent Threat funding, discussed above.

h. Questions & Comments

A call participant from Cook Inlet expressed concerns about the “differential privacy” element in the statistical method of the 2020 Census, noting that it will hurt AIAN-heavy areas. The participant advocating the need to put pressure on elected officials to not to allow the Census to implement this statistical method. NCAI has been working on this issue for some time and hopes to make progress on it.

i. Announcements

The next NAIHC Legislative Committee will be held Thursday, July 2. 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.