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MEMORANDUM

May 7, 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 May 7, 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 beginning to return to D.C. and is discussing a fourth COVID-19 package. The original discussions about the next round of COVID-19 legislation and funding (referred to as “Phase 4.0”) involved infrastructure. However, the recent discussions concerning Phase 4.0 have moved away from infrastructure and more towards providing further assistance for states and cities. Tribes will likely be included in any Phase 4.0 COVID-19 bill. The Phase 4.0 COVID-19 package may include various forms of homeowners’ assistance and emergency rental assistance. NAIHC is making sure tribes and native homeowners are part of the conversation for Phase 4.0 funding.

Funding for the HUD Emergency Solutions Grants Program is another proposal that Congress is discussing. This Program provides funding to assist individuals in regaining stability in permanent housing after experiencing a housing crisis and/or homelessness. Tribes are not eligible for these grants, but the current draft language in the bill provides for a tribal set aside. NAIHC will update its website with any new bills that are assigned as the Phase 4.0 COVID-19 discussions continue.

On April 24, 2020, the President signed into law the Paycheck Protection Program and Health Care Enhancement Act (this is known as “Phase 3.5” of the COVID-19 legislative response). The main focus of the legislation was to add more funding to the SBA Paycheck Protection Program (PPP), which provides forgivable loans to businesses if they do not lay off employees. The Act authorizes loans through CDFIs, including Native CDFIs. Tribal housing authorities are generally 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. Mr. Walters noted that there are some other options available for tribal housing to access PPP funding. Any tribal housing programs that have questions or who think they may not be eligible for PPP should reach out to Mr. Walters or to their legal counsel to consider these options.

Another program for which housing programs might be eligible is the employee retention tax credit, which gives employers credits against payroll taxes that they pay. However, housing programs who apply for this program are not eligible for PPP loans, so any housing programs considering these should carefully consider which program will benefit them the most.

2. IHBG CARES Act Funding

HUD released the calculated allocations that it was going to distribute to tribes relatively quickly after the CARES Act was passed, but actual distribution of those funds to tribal housing programs and TDHEs has lagged significantly. As reported in our 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. *Tribes should send in their abbreviated IHPs to HUD as soon as they are able, as doing so is a precondition to receiving your IHBG CARES Act funding.*

HUD has been and will continue to hold webinars 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_americans. 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

We are still waiting on the Implementation Notice for the ICDBG CARES Act Imminent Threat Funding. As soon as NAIHC hears that HUD has released the Implementation Notice, it will send it out through the NAIHC newsletter and will post it on the NAIHC website. 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 for comments has passed, the comment period was not based on a regular Federal Register notice, so if you have not yet submitted comments but would like to have some input, submit your comments to HUD as soon as you can.

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 normal ICDBG funding (the FY 2019 and 2020 NOFA), and are hoping to release their award notices sometime soon.

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

Funding for tribes from the CARES Act \$8 Billion Tribal Government Stabilization Fund is starting to be sent out. Treasury has indicated that it will use the IHBG population formula to allocate those funds across tribes. This funding is not earmarked for housing, even though Treasury is using IHBG methods to allocate the funding. Instead, 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.

There are concerns being expressed on behalf of some tribes that do not participate in IHBG programs. These tribes have had no opportunity to review or challenge the HUD IHBG population data that Treasury is using to allocate the \$8 billion funding, since doing so would have taken place through the regular HUD IHBG process. Mr. Walters responded that a Treasury press release stated that tribes that do not participate in IHBG programs should submit data to Treasury to be used for allocation of the funding. Treasury asked for data from tribes at the beginning of the process of deciding how to allocate the funding and then settled on using population data. Mr. Walters is not sure of the details for tribes who do not participate in IHBG programs, but will provide more information as he learns of it.

There has been some controversy and litigation regarding whether the CARES Act \$8 billion funds can be distributed to Alaska Native Corporations ("ANCs"). Treasury recently indicated that it will withhold some of the \$8 billion in funding from tribes until the litigation has been resolved. We will continue to provide updates on this litigation as it progresses.

Treasury has issued some preliminary guidance on uses of the \$8 billion funds. The guidance suggests that the Federal Government may take a position that narrows allowable uses of these funds. The guidance provides an 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. Housing Bills

As noted in our last NAIHC memo, most other bills that would otherwise be moving through Congress are at a standstill, including FY2021 Appropriations. The Senate has indicated that it hopes to send out a NAHASDA reauthorization bill in early summer to tribal housing programs in order to receive their feedback. This timeline may be pushed back depending on the COVID-19 legislation. The FEMA flood-mapping provision that is currently part of the NAHASDA bill may be separated to be a standalone bill. NAIHC will provide updates on this as it receives them.

Neither the Tribal HUD-VASH nor the Continuum of Care bills have moved forward since the last updates from February. However, Congress has been working on other housing assistance, including a proposal to work with HFLB affordable housing programs that will include tribal set asides. The native organizations in D.C. have been successful in making sure tribes are included in any new proposals.

6. Wells Fargo Rehabilitation Program Funding

Mr. Walters indicated that the funding announcement from Wells Fargo and NAIHC for the Tribal housing rehabilitation program was released this week. This is an initiative that has been in the works for some time. There were 30 applications, and the Wells Fargo funding was sufficient to fund 21 of these. NAIHC recently awarded \$600,000 in grants to tribal housing programs to carry out housing repairs for senior homeowners in tribal communities.

7. Announcements

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, June 4 and Thursday, June 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.