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## MEMORANDUM

July 30, 2020

To: TRIBAL HOUSING CLIENTS

From:   
HOBBS, STRAUS, DEAN & WALKER, LLP

Re: *COVID-19 Update*

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This memorandum provides an update on the NCAI Tribal Government and Housing Workgroup and the HEALS Act, the proposed legislation from Senate Republicans on Phase 4 Response Legislation. This memorandum is current as of July 30, 2020; guidance and other developments are likely to change.

### **I. NCAI Tribal Government and Housing Workgroup**

NCAI established several working groups at the onset of the COVID-19 pandemic to address and develop strategies for responding to legislative and regulatory activities related to COVID-19. After a lull in legislative activity, there is once again a flurry of activity in Washington, D.C., over the parameters of a fourth bill to address COVID-19. The NCAI Tribal Government and Housing Workgroup met by phone on July 28 to discuss the latest development, the proposal by Senate Republicans known as the HEALS Act (discussed in more detail in the second part of this memo).

Tyler Scribner, the NCAI staffer who has organized this workgroup, noted that the HEALS Act does not contain any proposed funding for the BIA Office of Indian Programs (OIP), nor any funding for Indian Housing Block Grant or the Indian Community Development Block Grant programs. He noted that the House bill, passed last month, while not containing any direct funding for these programs did include a complicated infrastructure that included tribal set-asides, and that those set-asides could be used for housing funding. Given that the Senate bill has no provisions for Indian housing or BIA OIP, the House approach might make sense, as it would provide a mechanism for getting such funding to tribes without forcing an issue that the Senate Republicans seem to be showing little appetite for. There will be a need to work with tribal allies in the Senate Republican caucus for support.

The discussion mainly focused on the strategy for communicating with Congress, and particularly how to demonstrate, with examples, that the funding for Indian Housing and BIA OIP in the CARES Act was not sufficient, and more supplemental funding is needed. One issue that I raised was that a number of my clients have had trouble

spending down the IHBG-CARES Act funds, not because there was no need for such funding, but because the restrictions on the use of such funds worked to make it difficult to expend such funds – in particular, to reimburse tribes and TDHEs for expenditures they already made using IHBG funds and program income to address COVID-19 prior to the availability of the IHBG-CARES funds. If those restrictions could be eased or removed, we think that those funds would be spent down in very short order. Another participant noted that there is rental and homebuyer assistance language in the HEROES Act and that this might be a mechanism to get more funding to tribal housing programs.

While NAIHC Executive Director Tony Walters was not on the call, he has been working with Tyler and NCAI on these issues. In a follow-up email from NAIHC, Mr. Walters noted that the HEROES Act included tribal set asides for new Rental and Mortgage Assistance programs. Those set-asides would direct \$3.5 billion to tribal housing programs to assist renters and homebuyers in tribal communities. With the release of the Senate package, the two sides must negotiate a final version that can be enacted and signed by the President. The NAIHC email also noted that tribes received \$300 million under the CARES Act in March (\$200 million for IHBG and \$100 million for ICDBG), but that has not been enough to assist tribes in their response to COVID-19, as evidenced by the fact that the ICDBG-CARES funding provided for less than 50% of the total need demonstrated through tribal applications for the program.

The NAIHC email concluded by noting that NAIHC is working with congressional offices to ensure the final deal includes tribal housing and they are working on releasing an advocacy campaign that will make it easy for tribes and TDHEs to contact members of Congress. NAIHC encourages tribes and TDHEs to tell their members of Congress that tribal housing programs need to be included in any COVID-19 response package.

## **II. *The HEALS Act and Prospects for Phase 4 Legislation***

As of this writing, congressional Democrats and Republicans are at odds on how to proceed in this fourth phase of federal COVID-19 relief legislation. Each side has put forth radically different visions for what to prioritize and how much money to spend. Congressional Democrats are urging that any Phase 4 bill be modeled after their over \$3 trillion House-passed HEROES Act (H.R. 6800). Meanwhile this week, Senate Republicans have released a series of draft bills which they are calling the HEALS Act. However, there are differences amongst congressional Republicans on this legislation, and differences between the congressional Republicans and the Trump Administration on the HEALS Act, which President Trump has referred to as "semi-irrelevant."

With enhanced unemployment benefits and eviction restrictions set to run out at the end of the month, and little hope of a comprehensive agreement in sight, the Trump Administration is now proposing a "skinny" package with temporary extensions of some

CARES Act provisions, including modified unemployment benefits and eviction protections. Congressional Democrats have expressed little interest in that position as they continue to press for a comprehensive bill modeled on the HEROES Act.

We attach brief summaries prepared by the National Congress of American Indians (NCAI) and the Native American Finance Officers Association (NAFOA) of the Senate Republicans' HEALS Act proposal. Below, we highlight significant economic provisions of interest to tribes and tribal organizations as negotiations continue.

In addition to the following areas, the HEALS Act would make changes to unemployment compensation, which we know is important for many tribal members. Instead of providing a \$600 per week federal supplement to unemployment, the HEALS Act would lower that payment to \$200 a week through the end of September, then starting in October would provide 70% of a worker's wages in combined state and federal benefits up to a cap of \$500 a week through the end of the year. The HEALS Act bill would also provide another one-time \$1,200 payment to individuals making \$75,000 or less (and would phase out that payment for incomes over that level, providing nothing to those with incomes over \$99,000) and would provide \$500 per dependent (of any age).

*A. Coronavirus Relief Fund*

The HEALS Act would provide no new funding for the Coronavirus Relief Fund (CRF)—the \$150 billion fund from which tribal governments received \$8 billion—but would extend the timeline for using existing funds and lift some of the restrictions on governmental revenue replacement.

The HEALS Act would extend the CRF use period through September 30, 2021, from the current December 30, 2020 date; it would also allow the use of funds past the September 30, 2021 date as long as the funds were obligated for an eligible use. (The House Democrats' HEROES Act would provide new funding and allow spending until the funds are expended over the next several years). The HEALS Act bill would also allow governments to use up to 25% of their CRF funds to replace revenue shortfalls if: (1) there was a shortfall in revenue in FY 2020 or 2021; and (2) the recipient certifies to the Treasury that the government has sent at least 25% of funds to local governments in its jurisdiction (or that there are no local governments in the jurisdiction). Revenue replacement funds could not be used for pensions or post-employment benefits or related liabilities, to establish or augment a government "rainy day" fund, participate in some types of litigation, or lobby federal, state, or local governments.

The HEALS Act also includes specific statutory requirements for reporting and recordkeeping (including quarterly reports similar to those that the Treasury is already requiring from CRF recipients).

### *B. Liability Protections*

A main feature of the HEALS Act is to modify the available liability claims for individuals and employees seeking to sue a person, employer, business, healthcare provider, or government for contracting COVID-19. Senate Republicans are likely to insist that some sort of this language be retained in any final bill.

This HEALS Act would create a federal cause of action for “coronavirus exposure claims” and coronavirus medical liability claims that would be the exclusive remedy for any claims. A plaintiff would need to provide clear and convincing evidence of gross negligence or willful misconduct by the defendant to be successful in any claim. Defendants who undertook reasonable efforts to comply with the applicable mandatory coronavirus standards and regulations would not be liable for coronavirus-related personal injuries.

Nothing in the liability provisions would affect tribal sovereign immunity, which is explicitly protected. However, the bill would only extend that immunity to tribal entities that are: (1) wholly owned by the tribal government; and (2) have been delegated and exercise at least one governmental function. This definition would narrow the applicability of sovereign immunity beyond current precedent, and tribal advocates are seeking this limitation’s removal.

### *C. Paycheck Protection Program Extension*

The HEALS Act would expand the Paycheck Protection Program (PPP) with \$180 billion in funding, and make several changes that would attempt to direct those funds to smaller businesses and those who have not yet received loans.

It would lower the employee ceiling from 500 to 300, which would likely affect many tribal business entities, particularly gaming facilities; tribal advocates are seeking an exemption from this for tribal entities. It would allow businesses who have received a PPP to get a second one, but only if the total of the two loans remains under a \$10 million cap. It proposes to set aside \$25 billion for employers with 10 or fewer employees, and \$10 billion to be distributed through community-based lenders like CDFIs. A business would need to show at least 50% reduction in gross revenue to get a second loan.

The bill would expand the eligible uses of PPP funds to supplier costs, covered worker protection costs (such as PPE or changes to allow for physical distancing), property damage costs, and costs for “covered operations” (including software, accounting, HR, and supply costs). It would also make changes to improve eligibility for farmers and ranchers, simplify applications, and streamline forgiveness for smaller loans.

### *D. Emergency Supplemental Appropriations.*

Of note, the emergency supplemental appropriations section of the HEALS Act would provide:

- \$1.605 billion more for the Indian Health Service (to remain available through September 30, 2021), of which
  - \$605 million would be for Indian health services; and
  - \$1 billion would be for Indian health facilities.
- \$105.1 billion more for the Department of Education's Education Stabilization Fund, (to remain available through September 30, 2021) of which:
  - One half of one percent (\$525 million) would be transferred to the Department of Interior for programs operated or funded by the Bureau of Indian Education (BIE).

The HEALS Act contains no direct emergency appropriations for the IHBG or ICDBG programs akin to what was appropriated in the CARES Act.

### *Conclusion*

Please do not hesitate to contact us if you have any questions about our report or any of the provisions in the attached summaries.