



215 SW Washington Street, Suite 200  
Portland, OR 97204

T 503.242.1745  
F 503.242.1072

HOBBSSTRAUS.COM

## MEMORANDUM

January 15, 2021

To: TRIBAL HOUSING CLIENTS

From: Ed Clay Goodman and Cari Baermann  
HOBBS, STRAUS, DEAN & WALKER, LLP

Re: ***Emergency Rental Assistance Program – Listening Session with Department of Treasury***

---

On December 27, 2020, President Trump signed into law the Consolidated Appropriations Act, 2021 (P.L. 116-260). This massive bill includes federal discretionary funding for FY 2021 as well as additional provisions for COVID-19 relief. One of those COVID-19 relief provisions was an appropriation of \$25 billion for Emergency Rental Assistance, to be used to assist households who are facing eviction due to unpaid rents and utilities. The funds are provided directly to States, U.S. Territories, local governments, and Indian tribes. Grantees use the funds to provide assistance to eligible households through existing or newly created rental assistance programs. More information on the program can be found here: <https://home.treasury.gov/policy-issues/cares/emergency-rental-assistance-program>.

\$800 million of that appropriation was set aside for tribes and TDHEs, to be allocated according to the same proportions as the Indian Housing Block Grant (IHBG) appropriation was allocated for FY 2020. Treasury is required to get the funds distributed to tribes within 30 days of the bill being signed into law. Treasury set a “soft” deadline of January 12, 2021, for tribes and TDHEs to submit their information and application for this funding. On January 14, 2021, Treasury representatives, joined by several HUD officials, convened a telephonic listening session to hear from tribes and TDHEs, and to answer questions.

The two main participants from the Department of Treasury were Dan Kowalski, who is the Treasury representative for Tribal Consultation, and Danielle Christianson, who will be playing the lead role in authorizing and distributing payments under the program. Also on the call were Todd Richardson, Heidi Frechette, and Jad Atallah from HUD.

### Opening Remarks

Dan Kowalski made some brief opening remarks. He mentioned that he has already worked with Tribes in the consultations for distributing CARES Act funding. He noted that Treasury has a hard deadline for distribution of these funds under the statute, and that Treasury was taking all steps to make that deadline. This program is operated by Treasury, and while Treasury is working with HUD, the funds will flow from Treasury. However, they are working

closely with HUD to ensure that Treasury is using concepts that are familiar to people in the housing world.

Treasury is currently in the process of determining the amounts of payments to be made to tribes and TDHEs. Under the statute, they are required to allocate based on the same proportions as HUD used in distributing the FY 2020 IHBG appropriation. However, the statute also provided an opportunity for tribes who do not participate in IHBG to receive such funding, and Treasury is in the process of developing a methodology for including any non-IHBG tribes in the allocation of these funds. They plan to have that out by sometime next week.

Danielle Christianson then gave some brief remarks. This program will be set up similar to the Coronavirus Relief Fund (CRF) allocations under the CARES Act. There is a Treasury portal for tribes and TDHEs to submit information, and Treasury will use that information to make its allocation determinations and will deliver funding directly to those entities who have applied and who are eligible. Currently Treasury has received 350 applications for the tribal funding. There are several instances where both the tribe and its TDHE have submitted applications. Only one entity can receive the tribal funding for each tribe, and so Treasury will be working with those tribes to determine who to provide the funds to.

Treasury has a much larger team working on this allocation than they had for the CRF distribution, and hope that will help them make the deadline. The January 12 deadline to submit application materials was a “soft” deadline, but January 21 will be a hard deadline. Tribes that do not submit their application materials by that date will not be receiving these funds. Treasury anticipates making the first round of payments next week, and then calculating the amount of additional funding to be reallocated based on those tribes who did not submit applications. For technical information, go to [caresitforms@treasury.gov](mailto:caresitforms@treasury.gov). Treasury also wants to hear from tribes, particularly about suggestions for reporting requirements. Please submit comments online to [TreasuryConsult.gov](https://TreasuryConsult.gov). Finally, Treasury has given the Emergency Rental Assistance Program its own acronym: **ERAP**.

## **Program Overview**

Mr. Kowalski then gave a broad overview of the ERAP requirements.

- 90% of the funds must be used for direct financial assistance to households for rental assistance.
- The remaining 10% can be used for supportive housing activities or administrative costs, or some combination of the two, but cannot exceed this 10% threshold in total.
- The funding expires on 12.31.21, although you can request a three-month extension.
- However, you must use 65% of the funding by September 30, 2021; otherwise, any remaining funds you have on hand must be returned to Treasury.
- Funding must go to eligible households.
  - Household income is at 80% or less of the median income.
  - Household must be facing financial distress due to COVID-19.
- Financial distress must be contributing to risk of homelessness due to inability to pay

- rent or utilities (or arrears for same).
- The maximum assistance that can be provided to a household is for 12 months of assistance, but this can be extended for a maximum of three months.
  - You can only commit funds for future rents for a maximum of three months.
  - If you are assisting a household with rents or utility payments, and the household has arrears, you must provide assistance for the arrears as well.
  - The application for assistance can be submitted by a landlord or household, but household must sign if landlord sends it.
  - Payments are to be made directly to the landlord or utility company, unless such entity refuses to accept direct payments; only in these limited circumstances can payment be made directly to the household.

Treasury is developing FAQs and guidance regarding some as-yet unresolved issues, such as how to determine household income, and will issue those soon. Treasury needs information to see where sticking points are and what would be useful for ERAP funds. In particular, they are planning to develop guidance for reporting, and are seeking input from tribes and TDHEs. The statute is detailed on what is required for nontribal entities, but Congress gave Treasury the authority to determine an alternative reporting process for tribes. Treasury is interested in thoughts on what kind of reporting requirements will lead to transparency while still respecting tribal authority and sovereignty.

## Questions and Comments

*Q. Under NAHASDA, in determining whether a household is at or below 80% of median income, tribes and TDHEs have the discretion to use the local median income or the national figure, since in some areas the local median income is so low that they would not be able to serve many people. Has Treasury considered allowing tribes/TDHEs the same flexibility here?*

A. Treasury has not looked into this question, but notes that the statute says “local” area median income.

*Q. When paying for arrearages, how far back can we go?*

A. Treasury is considering this question and will include a response in its initial FAQ, but Mr. Kowalski floated the idea of perhaps the date of the first COVID-19 case in the United States or perhaps a date in March 2020 when closures started to occur, but also wondered whether the date of enactment of the statute might be a hard deadline.

*Q. Can the funding be used to help homeowners make mortgage payments?*

A. The statutory language refers to rental payments, and at this time Treasury is taking the position that it does not include mortgage payments.

*Q. Comment: Suggests that Treasury use the HUD reporting requirements for TDHEs.*

A. Treasury will take this under consideration.

*Q. Can the funding be used to help homeowners make utility payments?*

A. Treasury will take this under consideration, but there may be some flexibility in this regard under the statute. They are looking at what extent can read statutory language to separate ERAP money for utilities; i.e., can utilities be a separate stream and go to owned home not rental property?

*Q. Can Treasury require use of and compliance with Single Audit Act, so that tribes/TDHEs don't have to do a separate audit for this program?*

A. Treasury will take this under consideration.

*Q. What if a tribe/TDHE feels that its FY2020 IHBG allocation was not accurate; can we challenge that allocation and provide our own correct data? Note that tribes/TDHEs who did not participate in the FY2020 IHBG allocation will be able to submit some kind of alternative data.*

A. Treasury does not have authority under the statute to “look behind” the FY 2020 IHBG allocations. The statute expressly addresses the non-IHBG participants separately. Todd Richardson of HUD weighed in here, noting that they will be advising Treasury to treat those non-IHBG participants exactly the same as the IHBG participants, using the Census/ACS data to determine their allocation.

*Q. Will Treasury be monitoring whether a program participant might be double-dipping, i.e., receiving ERAP assistance from both a tribe and from the local government?*

A. Treasury will not be able to do this kind of monitoring. It will be up to tribes/TDHEs to police this boundary, and to work with local governments in the area to prevent this from occurring.

*Q. Is internet considered a “utility” for purposes of ERAP?*

A. No final answer on this yet, but the answer is likely to be no. Internet is not traditionally considered to be a utility.

*Q. Many tribes and TDHEs are also landlords. Can a tribe/TDHE use ERAP to pay itself for rents and arrearages?*

A. This question was asked a couple of different times and in slightly different ways. Mr. Kowalski's initial response was pretty straightforward: yes, you can pay yourself, but you cannot treat yourself any differently than any other landlord. For

example, you cannot prioritize applicants who are your tenants over others, or pay costs to yourself that you would not pay to other landlords. However, after one of the questions on this point, Jad Atallah from HUD said that they would need to look at this question carefully.

*Q. What is required for income verification?*

A. Treasury is developing a method for this that will be described in guidance or FAQs. They will be issuing a list of documentation that can be used, but it won't be exhaustive.

*Q. Will there be a cap on the benefits under ERAP that can be provided to a household?*

A. There is not limit in the statute.

*Q. Can we use the same preferences that we apply under NAHASDA?*

A. Treasury will be looking into this and providing an answer.

*Q. What is required for income verification?*

A. Treasury is developing a method for this that will be described in guidance or FAQs. They will be issuing a list of documentation that can be used, but it won't be exhaustive.

*Q. Can we provide supplemental benefits to tribal members who are getting ERAP assistance from another government?*

A. Yes, funding can be blended, so long as household is not receiving funding from two sources for the same benefit. For example, if a household is getting ERAP from the local city to pay rent, the tribe can provide ERAP assistance to pay utilities. Just be sure not to duplicate assistance.

*Q. If a tribe/TDHE gets funding next week, will it still be able to receive the reallocated funds?*

A. Yes. If you receive funds next week you will be receiving reallocated funds later, if there are any reallocated funds available.

*Q. Comment: Suggest that Treasury allow tribes/TDHEs to use National Median Income.*

A. Treasury will take this under advisement.

*Q. Is there a geographic limitation on providing ERAP services?*

- A. There does not appear to be any geographic limit in the statute. Treasury will consult with HUD on this question.
- Q. If a tribe is providing assistance to a household with CARES Act funds, can the tribe/TDHE provide ERAP assistance?*
- A. This would be permissible, so long as you are not providing duplicate benefits, i.e., two payments for the same thing.
- Q. Can a tribe/TDHE provide ERAP assistance to an essential family on the reservation that is not an Indian family?*
- A. The statute does not contain any restriction against serving non-Indians.
- Q. What kind of documentation will Treasury require to show that a TDHE is authorized to submit on behalf of a tribe?*
- A. Treasury is looking into this. They have a couple of instances where both the tribe and TDHE have applied, and they have to work through this with those entities.
- Q. Can the ERAP be used to pay arrears that are the result of things like unpaid maintenance charges?*
- A. Treasury will look into this, but the answer is probably no, because the statute is pretty specific about rents and utilities.
- Q. If we are providing ERAP services outside our jurisdiction, can we still apply tribal/Indian preference?*
- A. Treasury asked that the participant submit this question in writing, and they will provide a written response. Treasury needs to think through this.
- Q. Can tribes/TDHEs use ERAP funds to pay for long-term hotel stays?*
- A. Treasury does not have an answer for this, but does not think this is what the statute envisioned.
- Q. Can ERAP funds be used to pay up front deposits for rental housing?*
- A. Treasury looking into this question, but probably will say yes.
- Q. Comment: For reporting, suggest that Treasury piggy-back on existing HUD reporting requirements for IHBG.*

- A. Treasury will take this suggestion under advisement, and will look at the overlay between HUD requirements and the ERA statute

### **Closing Remarks**

Mr. Kowalski said that he appreciated the comments, that he has learned a lot, and will be looking at: median income versus local; HUD IHBG reporting requirements; permissibility of paying rent to buildings to owned by operator of program; what related housing costs are permissible. Treasury hopes to provide preliminary guidance next week, but it likely will not cover everything that needs to be covered. He asked for patience and understanding that Treasury's focus for the moment is getting the money out the door by the statutory deadline. After that they will focus on questions that allow tribes to set up programs.

Please email [emergencyrentalassistance@treasury.gov](mailto:emergencyrentalassistance@treasury.gov) for comments and questions, and provide a copy to [TreasuryConsult.gov](http://TreasuryConsult.gov).

### ***Conclusion***

If you have any questions about this memo, please contact Ed Clay Goodman at 503-799-3924 or at [egoodman@hobbsstrauss.com](mailto:egoodman@hobbsstrauss.com). We are working on a set of draft ERAP policy documents for a pool of our clients. Please let me know if you would like to participate in that pool.