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## MEMORANDUM

January 27, 2021

TO: TRIBAL HOUSING CLIENTS

FROM:   
Edmund C. Goodman  
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RE: ***Indian Housing Updates related to COVID-19***

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This memorandum reports on recent developments in Indian Housing, including those arising out of or related to the COVID-19 pandemic.

### ***Update on Emergency Rental Assistance***

We participated in a Legislative Working Group meeting with the National Low Income Housing Coalition (NLIHC), which took place on January 26, 2021. The meeting was led by Sarah Saadian, the Vice President of Public Policy at NLIHC. Ms. Saadian provided an update that the Department of the Treasury (“Treasury”) has been making its state and local assistance fund disbursements to state and local governments since last week. Those disbursements are still continuing, and as soon as later today (but more likely tomorrow) Treasury will publish the allocations given to each state and local government that is certified with them. She believes we will have that information more clearly available by tomorrow, but it does look like Treasury is moving ahead at full speed. As a reminder, the statutory deadline was thirty days to disburse funds, and Treasury is on time with that deadline. A participant asked whether the allocation publication will also list Tribally Designated Housing Entities (TDHEs). Ms. Saadian responded that those numbers might be delayed, because Treasury gave tribes additional time to certify in order to receive direct allocations.

Ms. Saadian noted that Treasury does plan to make changes to the FAQ document that the Trump Administration put out on the last day before President Biden’s inauguration. It was reported that the revised FAQ was expected to be released yesterday, so it does appear to be a bit delayed, but it is supposed to be coming out soon and will hopefully make a number of substantive changes and clarifications that will provide more flexibility and enable housing providers to meet the needs of low income tenants.

Another participant raised the concern that the existing Treasury FAQ is not clear as to whether subgranting and subrecipients are allowed. There have been discussions at state and local levels, and it seems that the guidance does not say that you cannot subgrant, but it does not explicitly permit it either. Such ambiguity is a concern, of course, because organizations do not

want to run into legal issues, even though the guidance is not explicit either way. Ms. Saadian responded that she believes that suballocation to other entities is permitted, because the intention behind the allocation money was that it would flow into existing programs, and many of those existing programs operate as third parties contracted with state and local governments. She affirmed that there is no Congressional intent otherwise but admitted that the statute is not specific.

Another participant asked if this rental assistance would apply to individuals staying in hotels or motels. Ms. Saadian responded that this would depend on the definition in the statute. NLIHC has encouraged Treasury to read the statute as broadly as possible, but that is something we will also see in the guidance they release. Note that in the initial Tribal listening session call, the Treasury representative, Dan Kowalski, said Treasury had not made a decision on this point but that he did not think it fit within the statutory definition. Mr. Kowalski is now gone from Treasury, and so we will see if there is any movement on this point. NLIHC encouraged Treasury to explicitly delineate all possible forms of rental housing, including hotels and motels. The same participant then followed up by asking if translation services and legal aid are included as part of the ten percent for administrative cost/supportive services fees. Ms. Saadian responded that supportive services and administrative fees are separate. In her opinion, Treasury misread the statute, and she believes it should be ten percent for supportive services and ten percent for administrative fees. Note, however, that this interpretation does not square with the express statutory requirement that 90% of the funding be used for rental and utility payment assistance. Treasury was encouraged to use the Emergency Solutions Grants Program (ESG) definition of support services as a starting point, which would include legal aid, but that is something we are waiting to see from Treasury.

### ***Future COVID Package***

Ms. Saadian also discussed the forthcoming COVID-19 relief legislation by noting that, although President Biden's wish was for these negotiations to be done in a bipartisan manner, the conversations his team has been having with the bipartisan group of senators may not come to fruition. Democrat leadership in the House and Senate is moving ahead on budget reconciliation as a process for getting this done (meaning that the bill would not be subject to the Senate filibuster rules, and could be passed on a straight party-line vote, with Vice President Harris breaking the tie in favor of the Democrats). Ms. Saadian noted that under a bipartisan agreement, the scope of the bill would have to be a lot smaller, and Democrats are concerned that it would undermine their ability to get the full sweep of what they want to be included. President Biden's Rescue Plan seems to be the starting point, and committees have been told to put together their wish list for the next package. It is likely or possible that those wish lists put together might be more than \$1.9 trillion, so there will be an effort from leadership and committees to scale that down to at least \$1.9 trillion. It is possible that number could go even lower as well, but it is not clear by how much.

Ms. Saadian added that any further addition to what President Biden has already proposed will be difficult, because Democrats are wanting to stay under that number of \$1.9 trillion. Anything more would have to come from somewhere else, and the Administration and

its Congressional allies want to move quickly on this package. Another participant added that the debate right now about bipartisanship is not as heavily focused on the emergency rental piece—most people do not think those asks are extravagant. The biggest debate with respect to the current COVID package is regarding the \$2,000 (or \$1,400 added to \$600) stimulus checks. There has been some effort to play around with those numbers in terms of the size and who is eligible. A lot of discussion over the last weekend was regarding certain people getting benefits who were not considered to be needing it. Regarding the COVID package, they are also probably working on the minimum wage, because it is unlikely Republicans will support such a measure. However, this respondent reminded the group that there will be a second package which is still up in the air. It could be that provisions which are dropped from the first COVID package could be incorporated into the next one. It will be helpful to get as many communications in to leadership and leaders as possible emphasizing that \$30 billion is not adequate, and we want to make sure a similar crisis does not exist in the future.

Ms. Saadian then provided the link to the NLIHC's memorandum entitled "Responding to Coronavirus: Ensuring Housing Stability During a Crisis," which describes NLIHC's current and future priorities regarding the coronavirus.<sup>1</sup> She added that NLIHC is looking to put together a sign-on letter soon regarding a future stimulus package, particularly on the issue of vouchers. President Biden's proposal is good, but NLIHC is making a push for an additional \$20 billion in vouchers and an additional \$44 billion in acquisition funds.

Ms. Saadian also encouraged the group that any non-housing organizations also weigh in on the housing asks that have been put together. Committee staff have emphasized that it is especially important for non-housing groups to be weighing in on the housing asks so that NLIHC and its allies can gain further leverage on funding allocation. Some non-housing groups are heavy hitters that can reach out to a wider audience of people who we can convince to support our points and get more funding. Now is the time to encourage these groups to organize with Democratic leadership, and NLIHC can help with this. She also encouraged reaching out to your own members of Congress and asking that they weigh in to the Banking Committee, House Financial Services Committee, and the Democratic leadership to support as robust a package as possible.

If Congress plans to pass a COVID relief bill by mid-March, which is the deadline for when the current unemployment benefits run out, the process would look as follows: the Budget Committee would pass a budget resolution with instructions to each committee, where it is possible that those instructions will either set a dollar limit for each committee or provide an overall number and leave negotiations for later; then, the House and Senate will have to mark up their bills to meet that instruction criteria, trying to pre-negotiate as much as possible to avoid lengthy negotiation later. These constraints mean that the Budget Committee might take up the resolution with instructions as soon as next week. Part of what determines this timeline, of course, is the second impeachment proceeding—there may be an effort to pass this resolution during the pretrial phase of impeachment before the impeachment processes fully start. We do not know how the impeachment will impact the timeline moving forward.

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<sup>1</sup> Available here: [https://nlihc.org/sites/default/files/response-to-corona\\_2021.pdf](https://nlihc.org/sites/default/files/response-to-corona_2021.pdf)

A participant then asked if there had been any discussion regarding homeowners, since the current \$25 billion was allocated for rental assistance, and now it appears the rescue bill's additional \$25 billion will also be for rental assistance. Will forbearance for homeowners be extended? Ms. Saadian responded that she assumes this concern will be included even though it was not in President Biden's proposal. If \$1.9 trillion is our limit and that represents only some but not all of our rental assistance asks, we are not sure where the homeownership money would come from. Jennifer Schwartz from the National Council of State Housing Agencies (NCSHA) then added that now that we have rental assistance, homeownership assistance is essential. Homeowner debt is significant, and forbearance is not enough, and it is more expensive for households to rent in some states than to pay their mortgages. Homeownership assistance is a priority for NCSHA. A participant then asked about flexible funds for homeowners and rental assistance. Ms. Saadian responded that NLIHC does not support flexible funds. While some states would distribute that money well, other states would focus only homeowners, which often have high income, at the expense of renters—we want each group to have the money they need.

### *Executive Orders and Presidential Memoranda*

President Biden has issued and intends to continue to issue a flurry of Executive Orders and Presidential Memoranda. Many though not all of these are aimed at reversing policies of the Trump administration that President Biden campaigned against (re-joining the Paris Climate Accords, lifting the ban on immigration from Muslim-majority countries). One of the key Executive Orders increased the federal cost share for Federal Emergency Management Agency (FEMA) Public Assistance—used for covering the costs of moving individuals who are experiencing homelessness into safer living spaces in hotels and motels—up to 100%.<sup>2</sup> Previously, states had to pay 25% to match that cost, which can be prohibitive in many states where state and local budgets have been decimated. NLIHC's Disaster Housing Recovery Coalition asked for 100%, and they received it on day one. From what we hear this change is not retroactive, but going forward, state and local governments can be using 100% of the cost-share by the federal government for those FEMA resources. Further, this executive order directs FEMA to provide an advance of the federal share on a percentage of the expected reimbursement from FEMA-approved projects. This is a change from the reimbursement basis that FEMA usually works off of, which is often unclear and can dissuade state and local governments from participating.

Another Executive Order President Biden signed on his first day in office, January 20, instructed the Centers for Disease Control and Prevention (CDC) to extend the federal eviction moratorium through at least March 31, 2021. CDC Director Rochelle Walensky announced that extension on January 20, stating that because “COVID-19 continues to spread in America at a concerning pace... we must take action to get cases down and keep people in their homes and out of congregate settings – like shelters – where COVID-19 can take an even stronger foothold.” The federal eviction moratorium was originally slated to expire on December 31, 2020, and was

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<sup>2</sup> NLIHC's January 25 memorandum discussing this Executive Order can be accessed here: <https://nlihc.org/resource/new-executive-order-addresses-urgent-health-and-housing-needs-people-experiencing>.

extended under the recent Consolidated Appropriations Act 2021 until January 31, 2021.<sup>3</sup> We are still waiting on the actual language from the CDC extending the moratorium, but that is forthcoming. The CDC Director will begin the process to seek input on improvements, and NLIHC is trying to get a meeting with the CDC Director to discuss such improvements.

On January 26, President Biden signed a Presidential Memorandum reaffirming and committing his administration to EO 13175 (2000) and the Presidential Memorandum of November 5, 2009, which direct federal executive departments and agencies to engage in government-to-government consultations with Indian tribes and develop policies to implement this memorandum, which states:

It is a priority of my Administration to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal Indian policy. The United States has made solemn promises to Tribal Nations for more than two centuries. Honoring those commitments is particularly vital now, as our Nation faces crises related to health, the economy, racial justice, and climate change — all of which disproportionately harm Native Americans. History demonstrates that we best serve Native American people when Tribal governments are empowered to lead their communities, and when Federal officials speak with and listen to Tribal leaders in formulating Federal policy that affects Tribal Nations.

The Presidential Memorandum of November 5, 2009 (Tribal Consultation), required each agency to prepare and periodically update a detailed plan of action to implement the policies and directives of Executive Order 13175. The January 26 Memorandum reaffirms the policy announced in the prior Executive Order and Presidential Memorandum. The key provisions of the new Memorandum read as follows:

- (a) The head of each agency shall submit to the Director of the Office of Management and Budget (OMB), within 90 days of the date of this memorandum, a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175. The plan shall be developed after consultation by the agency with Tribal Nations and Tribal officials as defined in Executive Order 13175.
- (b) Each agency's plan and subsequent reports shall designate an appropriate agency official to coordinate implementation of the plan and preparation of progress reports required by this memorandum. These officials shall submit reports to the Assistant to the President for Domestic Policy (APDP) and the Director of OMB, who will review agency plans and subsequent reports for consistency with the policies and directives of Executive Order 13175.

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<sup>3</sup> NLIHC's January 25 memorandum discussing this Executive Order can be accessed here: <https://nlihc.org/resource/president-biden-extends-federal-eviction-moratorium>.

(c) The head of each agency shall submit to the Director of OMB, within 270 days of the date of this memorandum, and annually thereafter, a progress report on the status of each action included in the agency's plan, together with any proposed updates to its plan.

(d) The Director of OMB, in coordination with the APDP, shall submit to the President, within 1 year from the date of this memorandum, a report on the implementation of Executive Order 13175 across the executive branch based on the review of agency plans and progress reports. Recommendations for improving the plans and making the Tribal consultation process more effective, if any, should be included in this report.

### ***Housing Counselor Certification Requirement***

On December 18, 2020, HUD sent out a Dear Tribal Leader Letter regarding Tribal Consultation for Housing Counselor Certification Requirements to solicit feedback and comments. The next consultation will take place on February 4, 2021. HUD is seeking comments on the following points:

- 1. Whether the housing counseling certification requirements included in the final rule would be practical and effective in your community;*
- 2. What impact the housing counseling certification requirements would have on providing culturally relevant housing counseling and other programming in Indian Country and your community;*
- 3. What changes to the housing counseling certification requirements included in 24 C.F.R. part 214 would you recommend to ensure that these certification requirements (a) are not administratively burdensome, (b) enable appropriate access to housing counseling services in your community – particularly in very remote areas – and (c) help tribal members address their housing issues;*
- 4. Any other ideas on how HUD can ensure that the counselor certification requirements applicable to HUD's Native American programs are effective in Indian Country; and*
- 5. Do you anticipate challenges if the qualification process that HUD currently uses for approving units of State or local government included in 24 C.F.R. part 214 were applied to tribes or Tribally Designated Housing Entities (TDHEs)?*

We have heard from a number of tribal housing professionals that these new requirements were onerous and not supportive of self-determination, and that tribes should be permitted to develop their own requirements. Further, the changes proposed in this rule would be duplicative of the many certifications and trainings that Indian housing authorities and associations have developed for themselves. The certification detailed at 24 C.F.R. part 214 describes tasks that are already handled by housing authorities, and while this sort of certification would be useful for public housing entities with folks who work with limited jobs, like Credit Counselor, TDHE and Tribal Housing Program employees have broader job tasks. For the requirements to be practical and effective for Indian housing authorities, they would need to be tailored towards Indian housing. It is also an affront to tribes for HUD to have stated that unless these requirements are met,

tribal housing entities cannot provide “counseling” services, only “information sharing” services. More information on this consultation can be found [here](#).

***Conclusion***

If you have any questions about the issues discussed in this memorandum, or would like our assistance with drafting comments, please do not hesitate to contact Ed Clay Goodman ([egoodman@hobbsstrauss.com](mailto:egoodman@hobbsstrauss.com) or 503-242-1745).