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MEMORANDUM

September 27, 2021

TO: TRIBAL HOUSING CLIENTS

FROM:  Edmund C. Goodman
HOBBS, STRAUS, DEAN & WALKER, LLP

RE: ***Emergency Rental Assistance Program: Initial Notice from Treasury
Regarding Recapture and Reallocation***

On Friday, September 24, 2021, the Deputy Secretary of the Treasury, Adewale O. Adeyemo, sent out a letter previewing new guidance that Treasury plans to issue later this week to set out the process and standards for recapture and reallocation of Emergency Rental Assistance (ERA) Program funds. A copy is attached to this memo. First we provide some background for context.

Background

As we have noted in our prior memoranda, on December 27, 2020, as part of the Consolidated Appropriations Act, 2021 (the “Act”) (Pub. L. No. 116-260, Division N § 501, Dec. 27, 2020), Congress passed, and the President signed, an updated COVID-19 relief package that included \$25 billion (\$25,000,000,000) for the ERA Program. Tribes received an \$800 million (\$800,000,000) set-aside from this fund to assist eligible households who are facing eviction due to unpaid rents and utilities, or the inability to pay prospective rents and utilities. While the allocation of Tribal funding was determined by the annual IHBG formula operated by HUD, the ERA Program itself is overseen by Treasury.

One of the provisions of the ERA Program legislation is that, beginning on September 30, Treasury shall begin recapturing “excess” funds and reallocating those funds to recipients who have already expended 65% or more of their ERA Program funding by that date. The statute does not define “excess” funds, leaving such definition to Treasury.

Noel Poyo, Deputy Assistant Secretary (DAS) for Community Economic Development, leads Treasury’s emergency housing team. As we reported on September 17, he has been making presentations to various regional tribal housing associations on the ERA Program, and specifically addressing questions about the recapture and reallocation provisions of the ERA Program. DAS Poyo stated that he did not want to preempt the guidance by stating what is likely to be in it, but he did make certain points about the September 30, 2021 deadline:

- Treasury is not required to and will not be recapturing funds on September 30 from programs that have not expended 65 percent (65%) of their ERA Program funding;
- The programs that Treasury will focus on recapturing funds from will be the larger programs, and Tribes/TDHEs are among the smaller programs. So Tribes/TDHEs will not be the first targets in any recapture reallocation;
- In making any determination to recapture and reallocate funds, Treasury is going to consider whether there is any other entity in the area that would serve the same population. DAS Poyo noted that Tribes/TDHEs are often, if not always, the only program that is serving the Tribal population in a particular area; and
- No Tribe/TDHE is going to wake up on October 1 to see their ERA Program accounts swept.
- Treasury will engage in government-to-government consultation with tribes regarding reallocation.

DAS Poyo emphasized that the Secretary's decision to recapture excess funds will not be a "gotcha" game. The Secretary has no interest in surprising tribes by sweeping away funds from tribes and TDHEs. Instead, Treasury is concerned with allocating the most amount of funding to grantees that can best distribute it to low-income tenants in need. DAS Poyo commented that in developing the structure of the recapture and reallocation, Treasury is strongly considering the fact that, for many communities, there is no entity that can serve the tribal members better than the tribes themselves. DAS Poyo noted that Treasury would not be serving tribal members if they recapture funds from the very entity that can best serve the tribal members. DAS Poyo further remarked that Treasury is very clear on the substantial challenges that tribes face that are distinct from what a state or local entity would face.

DAS Poyo also remarked that the reallocation process will *not* be a one-time event that happens immediately on September 30, 2021. The Act simply directs the Secretary to begin the recapture and reallocation process then. Particularly given the fact that this involves matters of tribal sovereignty, Treasury will engage in consultation with tribes concerning the recapture and reallocation of excess funds.

September 24, 2021 Letter

In the September 24 letter, which is not addressed specifically to tribes but to all ERA Program funds recipients, Deputy Secretary Adeyemo writes to provide "insight into how Treasury intends to approach the reallocation process and outline [Treasury's] vision for the months to come." He notes that Treasury will issue detailed guidance "in the coming days," but provides the general framework of the approach that Treasury is going to use.

- The key provision that Deputy Secretary Adeyemo discusses is how Treasury is going to define “excess” funds. Treasury will be using an “expenditure ratio”, which will be calculated by taking a grantee’s total *expenditures* on assistance (thus excluding administration and planning expenses) divided by an amount equal to 90% of the grantee’s ERA Program fund allocation. So, for a hypothetical example, if a TDHE received \$1 million in ERA Program funds and has expended \$100,000, that TDHE’s expenditure ratio would be 0.11. The calculation works as follows:
 - 90% of \$1 million = \$900,000
 - \$100,000 expenditure divided by \$900,000 = 0.11.
- Treasury will use the expenditure data that has been reported so as to avoid placing additional reporting burdens on grantees.
- Treasury will announce a “minimum expenditure ratio”, below which a grantee will be deemed to have “excess funds.” The letter does not identify that minimum ratio.
- For those grantees who are below the minimum, the amount “potentially subject to reallocation” is the difference between the grantee’s actual expenditures and the minimum expenditure ratio. Thus, using the example above:
 - Treasury sets minimum expenditure ratio at .30 (*this is a purely hypothetical number – we do not have information at this time as to what the actual number will be*).
 - For the above hypothetical grantee with a \$900,000 ERA Program grant, the minimum expenditure would be \$270,000.
 - The hypothetical TDHE grantee has only expended \$100,000.
 - Thus, the “excess funds” potentially subject to recapture and reallocation for that grantee in this hypothetical situation would be \$170,000 (the difference between the amount they have expended with the amount they *would have expended* had they met the minimum expenditure ratio).
- Another key provision is that even if a grantee is below the minimum expenditure ratio, the grantee will be given the opportunity to present mitigating circumstances in order to reduce the amount of funds recaptured (for tribes and TDHEs, such circumstances may include those factors that DAS Poyo discussed, as referenced in the previous section).
- Further, Treasury will not recapture and reallocate funds that have been *obligated* but not yet spent.
- Treasury is going to strive to keep reallocated funds within the same state.

- Treasury will implement reallocation gradually, over a period of months.
- ***Finally, Treasury will consult with Indian tribes before implementing any reallocation of tribal ERA Program funds.***

This final point is very important, and is consistent with statements made by DAS Poyo: that the Administration is committed to government-to-government consultations with tribes and will not reallocate tribal funds without undertaking such consultation.

We will report on the specific details of the guidance once it is released.

Conclusion

If you have any questions, please contact Ed Clay Goodman at 503-242-1745 or egoodman@hobbsstrauss.com.