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## MEMORANDUM

August 26, 2021

TO: TRIBAL HOUSING CLIENTS

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

RE: *Emergency Rental Assistance Program Update; CDC Extends Eviction Moratorium*

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This memorandum reports on recent developments regarding the Emergency Rental Assistance Program (“ERA Program”). The first is an updated Frequently Asked Questions (FAQs) published by U.S. Treasury Department (“Treasury”) on the ERA Program. The second is a press release from Treasury regarding the need and suggestions for additional measures to get ERA Program funds out the door.

On December 27, 2020, as part of the Consolidated Appropriations Act, 2021 (Pub. L. No. 116-260, Division N § 501, Dec. 27, 2020) (the “Act”), Congress passed, and the President signed, an updated COVID-19 relief package that included \$25 billion for the ERA Program. The funds are provided directly to States, U.S. Territories, local governments, and Indian Tribes. Tribes received an \$800 million set-aside from this fund to assist eligible households who are facing eviction due to unpaid rents and utilities. While the allocation of tribal funding was determined by the annual Indian Housing Block Grant (“IHBG”) formula operated by the U.S. Department of Housing and Urban Development (“HUD”), the ERA Program itself is overseen by Treasury.

### I. Updated Treasury Guidance Summary

On January 19, 2021, Treasury published an initial set of FAQs to serve as guidance for the ERA Program. Treasury has updated the FAQs several times, the most recent being on August 25, 2021. The updated FAQs are available by clicking on the following link: <https://home.treasury.gov/system/files/136/ERA-FAQ-8-25-2021.pdf>. The FAQs that have been revised are **questions 3, 4, 7, 11, and 38**. Three new questions have been added: **40, 41, and 42**.

Below is a summary of the main points of the updated ERA Program Guidance:

- **Self-attestation can be used in documenting each aspect of a household’s eligibility for ERA, including: a) financial hardship, b) the risk of homelessness or housing instability, and c) income.** Treasury noted that the use

- of self-attestation for documenting household eligibility speeds up the processing of applications for rental assistance. Treasury therefore decided to provide greater clarity and specificity regarding the use of self-attestation and is encouraging grantees to simplify application processes to use self-attestation when other forms of documentation are not immediately available. [FAQs 3 and 4](#).
- **During the public health emergency, state and local ERA programs may rely on self-attestation alone to document household income eligibility when documentation is not available.** During the public health emergency, again in order to facilitate the rapid provision of assistance, Treasury is clarifying that grantees may rely solely on a self-attestation of income when applicants are unable to provide other documentation of their income. [FAQ 4](#).
  - **A tenant’s costs associated with obtaining a hearing or appealing an order of eviction may be covered with ERA funds as an eligible “other expense.”** Many jurisdictions require tenant payments of rent to a court on behalf of the landlord (often referred to as “rent bonds”) as a condition for a tenant to have the opportunity to defend herself in court before being evicted. The new guidance makes clear that rent bonds are an eligible ERA expense. [FAQ 7](#).
  - **Grantees may advance assistance to landlords and utility providers based on estimated eligible arrears.** Treasury is establishing guidelines for providing a portion of estimated bulk payments to landlords and utility providers in anticipation of the full satisfaction of application and documentation requirements. According to Treasury, these changes were made to balance the need to assist households served by larger landlords and utilities with the need to protect taxpayers. [FAQ 38](#).
  - **Past arrears at previous addresses may be covered.** To remove barriers a household may face in accessing new housing if they have outstanding debt in collection, Treasury’s guidance now makes clear that grantees may—at an eligible tenant’s request—provide assistance to cover remaining rental or utility arrears at a previous address. [New FAQ 40](#).
  - **Grantees may make additional rent payments to landlords that take on tenants facing major barriers to securing a lease, including those who have been evicted or experienced homelessness in the past year.** ERA programs may make an additional payment required as a condition for entering into a lease with a “hard-to-house” household that would not otherwise qualify under a pre-existing and lawful screening or occupancy policy. [New FAQ 41](#).
  - **Grantees may enter into partnership with nonprofits to deliver advance assistance to households at risk of eviction while their applications are still being processed.** Where an expedited payment could reasonably be viewed as necessary to prevent an eviction that may occur under a grantee’s standard application process, Treasury is establishing guidelines for state and local programs to engage with non-profit organizations able and willing to take on the financial risk of advancing assistance prior to an application being fully processed to speed aid to at-risk households. [New FAQ 42](#).

## II. Treasury Press Release and Letter to Recipients

Also on August 25, 2021, Treasury Deputy Secretary Wally Adeyemo issued a press release and letter to grantees emphasizing the following points:

- Treasury, in line with communications from the Department of Justice, strongly encourages jurisdictions to follow the lead of states and cities that are putting in place added protections against evictions, including for renters who have applied for assistance but have not yet had their applications processed.
- Treasury, in coordination with its partners, is prepared to send out a next round of technical assistance providers to help ERA grantees strengthen their programs.
- **If grantees are unable or unwilling to deliver ERA resources, Treasury is prepared to reallocate funds. Beginning September 30, 2021, the ERA statute requires Treasury to recapture excess funds that have not been obligated by a state or other grantee and reallocate those resources to high-performing jurisdictions that have obligated at least sixty-five percent (65%) of their original allocation. (Emphasis added)**

We wanted to underscore this last bullet point regarding the September 30, 2021, deadline. There have been numerous discussions around this point, including some suggestions that Treasury may not treat September 30, 2021, as a hard deadline to expend sixty-five percent (65%) of your ERA Program grant. While the statutory language does not require Treasury to recapture funds from recipients that do not hit the sixty-five percent (65%) obligation target by September 30 (due to the discretion around the term “excess”), it strongly suggests that they should. And it certainly authorizes them to do so. While Treasury has the discretion to determine what is “excess” funding, and while Deputy Assistant Secretary (DAS) Noel Andrés Poyo has made some helpful statements in calls with Tribal leaders and the National American Indian Housing Council, there is nothing in writing from Treasury indicating how they will determine what is and what is not excess. Therefore, we want to underscore that Tribes and Tribally Designated Housing Entities (TDHEs) should not take their foot off the gas and should try to obligate as much of those funds by September 30 as possible.

As part of its press release, Treasury issued an announcement of “Seven Additional Policies to Encourage State and Local Governments to Expedite Emergency Rental Assistance.” You can find the full announcement at the following link: <https://home.treasury.gov/system/files/136/Treasury-July-ERA-Data-Blog-Post.pdf>. The announcement contains a summary of the revisions to the ERA Program Guidance discussed above.

### III. Centers for Disease Control (CDC) Extends Eviction Moratorium to October 3, 2021

On September 4, 2020, the CDC published an Eviction Moratorium Order in response to the COVID-19 pandemic. The Moratorium prohibits all private and public landlords and property owners from evicting individuals from residential properties for failure to make rental or housing payments, so long as the tenant submits a declaration to the landlord. The eviction Moratorium was originally set to expire on December 31, 2020, but the CDC has extended it several times. The Moratorium was subjected to a legal challenge and was upheld by the Supreme Court by a 5 – 4 vote. However, in a concurring opinion, Justice Kavanaugh expressed skepticism that the CDC had the authority to issue the Moratorium, and that he had voted in favor of it only because it was about to expire.

Since then, however, the CDC has extended the Moratorium again, most recently to October 3, 2021. The most recent version of the Moratorium order is available here: <https://www.cdc.gov/coronavirus/2019-ncov/communication/Signed-CDC-Eviction-Order.pdf>.

This version of the Moratorium applies only to those counties where the COVID-19 transmission rates are “substantial” or “high”, which designations the CDC updates on a regular basis. You can find the COVID-19 transmission rate for your county here: <https://covid.cdc.gov/covid-data-tracker/#county-view>.

The COVID-19 transmission rates for the vast majority of counties in the United States are currently either substantial or high, so the Moratorium is essentially in effect for the entire country. The Moratorium has been challenged again, and is back in front of the Supreme Court. We expect a decision on the latest challenge within the next week or so.

#### *Conclusion*

We will continue to update you as Treasury releases additional guidance and FAQs on the ERA Program, as well as regarding the legal status of the CDC Moratorium. If you have any questions about the ERA Program, please do not hesitate to contact Ed Clay Goodman ([egoodman@hobbsstrauss.com](mailto:egoodman@hobbsstrauss.com) or 503-242-1745).