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MEMORANDUM

October 8, 2021

TO: TRIBAL HOUSING CLIENTS

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

RE: *Housing and COVID-19 Update*

This memorandum provides a synthesis of information presented during a Native American Indian Housing Council ("NAIHC") Legislative Forum, as well as other developments in housing matters related to the coronavirus ("COVID-19") pandemic.

I. Congressional Updates

a. 117th Congress Fiscal Year 2022 Appropriations

Congress is continuing its work on the Fiscal Year ("FY") 2022 Appropriations process. As we have noted in prior memoranda, the Biden Administration released its proposed FY 2022 budget on May 28, 2021. The U.S. Department of Housing and Urban Development ("HUD") component of the budget contains proposed funding levels for Indian housing. Overall, the budget requests \$1 billion for Indian housing programs, over \$175 million more than the amounts appropriated for FY 2021. Below is a breakdown of the proposed amounts compared to prior years.

Programs	FY 2020	FY 2021	FY 2022 Budget Request	NAIHC Recommendation
Indian Housing Block Grants ("IHBG")	\$646 million	\$647 million	\$723 million	\$966 million, at least \$755 million
Competitive IHBG	\$100 million	\$100 million	\$100 million	
Climate Initiative			\$100 million	
Training and Technical Assistance Grants	\$7 million	\$7 million	\$7 million	\$7 million

Indian Community Development Block Grant ("ICDBG")	\$70 million	\$70 million	\$70 million	\$100 million
Title VI Loan Guarantee	\$2 million	\$1 million	\$0 **	\$2 million
Section 184 Loan Guarantee	\$1.6 million	\$2 million	\$3.5 million	\$10 million
Native Hawaiian Housing Block Grant ("NHHBG")	\$2 million	\$2 million	\$7 million	\$20 million
Tribal HUD Veterans Affairs Supportive Housing ("HUD-VASH")	\$1 million	\$5 million	\$5 million	\$7 million
Housing Improvement Program ("HIP")	\$11.7 million	\$11.7 million	\$11.7 million	\$23 million
U.S. Department of Agriculture ("USDA") Rural Development 502 Single Family Direct Loan	\$1 billion *general, not Tribal specific	\$1 billion *general, not Tribal specific	\$1 billion *general, not Tribal specific	\$1 billion (general) with Tribal set-aside

(** HUD indicates that existing program funds are sufficient to carry out these activities)

On July 31, 2021, the House passed its appropriations package proposing \$950 million for tribal housing, which includes: \$722 million for IHBG formula grants; \$150 million for IHBG competitive grants; \$70 million for ICDBG grants; \$7 million for training and technical assistance; and \$1 million for Title VI Loan Guarantees.

A participant asked what tribes and Tribally Designated Housing Entities ("TDHEs") should be telling their Senators and Representatives about the reconciliation bill regarding protecting the \$2 billion for tribal housing that was in the Administration's original version of the bill, and whether a sample advocacy letter is available. Mr. Walters responded that he will work on drafting a sample letter and will send it out when available. The key issue is to advocate that tribal housing is included in the larger appropriations package. Tribes and TDHEs can also use the general advocacy letter NAIHC sent out. Anyone interested can reach out to Mr. Walters for that letter.

b. Infrastructure Bills

As you have seen in the news, there are two (2) separate tracks of infrastructure legislation. There is a bipartisan bill that recently passed the Senate. This legislation would appropriate approximately \$1 trillion for items traditionally considered as infrastructure: roads, bridges, water/sewer, and broadband. This bipartisan bill does not include any funding for housing, tribal or otherwise. The House Democratic leadership, largely driven by the progressive caucus, is holding up a vote on the bill in the House (at least for now) until progress is made and a vote held

on the much larger and much broader Democratic-only infrastructure bill. The House Democratic leadership is working on next steps.

The other track is the Democratic-only infrastructure bill. This bill was originally proposed by the Biden Administration as the "Build Back Better" Act, containing approximately \$3.5 trillion for a much broader set of infrastructure goals, including housing. The Democrats are trying to pass this legislation through the reconciliation process (to avoid a Republican filibuster in the Senate). The House could likely pass the bill as is, but there are a couple of centrist Democratic Senators who are trying to reduce the size of the bill. This legislation does include funding for housing. There are currently substantial negotiations going on between the White House, the progressive Democrats, and the centrist Democrats over what will be contained in that legislation.

The Biden Administration's original proposal included \$2 billion for Indian housing: \$650 million for IHBG, \$350 million for ICDBG, and \$1 billion for IHBG competitive. The House Committee on Financial Services draft currently includes \$787 million for IHBG, \$787 million for IHBG Competitive, \$334 million for ICDBG, \$7 million for NHHBG, and \$90 million for training and technical assistance and HUD administration. Budget reconciliation is a process by which Congress can pass bills without having to meet the Senate's 60-vote supermajority (required to end filibusters). Mr. Walters commented that the amounts will likely decrease as Congress negotiates this bill. NAIHC is continuing to advocate that tribal housing remain a priority and that tribes receive adequate funding, and Mr. Walters will be working on a draft letter urging Congress to protect these higher amounts for Indian housing.

II. Update on Other Tribal Housing Bills

a. NAHASDA

The Senate Committee on Indian Affairs ("Committee on Indian Affairs") is still focusing on the reauthorization of the Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA"). The NAHASDA reauthorization bill (S. 2264) has nine (9) bipartisan cosponsors: Senators Brian Schatz (D-HI), Lisa Murkowski (R-AK), John Tester (D-MT), John Hoeven (R-ND), Tina Smith (D-MN), Catherine Cortez Masto (D-NV), Ben Ray Lujan (D-NM), Mike Rounds (R-SD), and Elizabeth Warren (D-MA). The cosponsors are trying to move the NAHASDA reauthorization bill out of committee and onto the Senate floor for consideration. The next step is a vote by the Committee on Indian Affairs. The bill will then need to pass the full Senate. Key provisions of the Senate version of the bill include:

- Authorizing NAHASDA programs through 2032;
- Creating an Assistant Secretary for Indian Housing at HUD;
- Re-establishing a Drug Elimination Program for tribal communities;
- Consolidating the environmental review requirements for housing;
- Recognizing tribal sovereignty to govern maximum rent requirements;

- Allowing tribal housing programs to access the Indian Health Service ("IHS") sanitation funding;
- Making tribes eligible for HUD Housing Counseling grants;
- Including HUD-VASH provisions; and
- Leveraging/using NAHASDA funding as a match for other federal grants.

Mr. Walters noted the House has released its version of a NAHASDA reauthorization bill (H.R. 5195). The bill is similar to the House's NAHASDA draft bills released in past years. The bill was reported out of the House Financial Services Committee on September 15, 2021. The draft bill includes the following key provisions:

- Creating an Assistant Secretary for Indian Housing at HUD;
- TDC allowances for energy efficiency upgrades;
- Five percent (5%) tribal set-aside for USDA programs;
- Making tribes eligible for HUD Housing Counseling grants;
- HUD-VASH provisions;
- Exemption from the Flood Insurance Program; and
- Providing for tribal court jurisdiction over Section 184 loan foreclosures.

However, the House bill also contains some concerning provisions. First, it contains language that targets the five tribes ("Five Tribes") in Oklahoma (Cherokee Nation, Seminole Nation, Muscogee Nation, Chickasaw Nation, and Choctaw Nation), withholding NAHASDA funding from the Five Tribes unless they provide housing assistance to Freedman descendants. Mr. Walters commented that NAIHC does not support this provision and is working with the House to remove it.

An additional concern is that the House version of the NAHASDA reauthorization bill contains a funding authorization component that sets appropriations at \$680 million for FY 2022. That amount is lower than what the Biden Administration included in its budget proposal, and is of general concern because it could set what becomes perceived as a hard cap in subsequent appropriations cycles. NAIHC has commented on this to congressmembers, advocating that the amount be higher and that tribes are provided with the flexibility to obtain the resources they need. In the coming weeks, NAIHC will send out a letter requesting tribes to reach out to their congressional members on the House bill, especially to comment on the provision targeting the tribes.

Because the NAHASDA bill is too small (in the larger scheme of legislative activity) to be passed as a standalone measure, it will likely be passed as part of a larger bill. The NAHASDA bill is currently included in the American Housing and Economic Mobility Act (S.1368, HR. 2768). This bill includes a provision that reauthorizes NAHASDA for ten (10) years through 2031

and provides \$2.5 billion in funding for NAHASDA in the first year. The bill would also allow tribes to access the HUD Section 8 housing vouchers, which provide additional housing assistance to eligible families. Tribes are not currently eligible to access Section 8 housing vouchers. This bill, however, has only Democratic co-sponsors, and the likelihood of any action on this bill is very slim.

On October 26, 2021, at 2:00 P.M. Eastern Time ("ET"), HUD will be hosting a 25th anniversary event for NAHASDA. HUD will release additional information this month. NAIHC will also be focusing on NAHASDA throughout the next year as part of the anniversary celebration.

b. Tribal HUD-VASH

There has been little progress on the Tribal HUD-VASH program since our last update, although the Tribal HUD-VASH is included in both the Senate and House NAHASDA reauthorization bills. The Tribal HUD-VASH would provide assistance and supportive services to Native American veterans who are homeless or at risk of homelessness. The Tribal HUD-VASH bill would codify and make permanent the Tribal HUD-VASH program within the larger HUD-VASH program and ensure adequate funding for the program. The bill would also make all tribal nations and their tribal housing programs eligible for the HUD-VASH program.

c. Native American Rural Homeownership Improvement Act

The Native American Rural Homeownership Improvement Act (S. 2092) is a bipartisan bill being co-sponsored by six (6) Senators: Tina Smith (D-MN), Mike Rounds (R-SD), John Tester (D-MT), John Thune (R-SD), Kevin Cramer (R-ND), and Brian Schatz (D-HI). It would provide \$50 million from the USDA single-family home loan program to Native Community Development Financial Institutions to provide home loans in tribal communities. It is based on the success of the USDA 502 pilot program and would expand that program to be accessible to tribes across the country. Mr. Walters commented that, if passed, the funding would increase the amount of loan funding for tribal communities.

III. HUD Programs

The American Rescue Plan Act ("ARPA") provides \$450 million for the IHBG program (IHBG-ARPA), \$280 million for the ICDBG program (ICDBG-ARPA), \$5 million for the Native Hawaiian Housing Block Grant program (NHHBG-ARPA), and \$10 million for related technical assistance resources. The allocations for the IHBG-ARP funding are based on the 2021 IHBG formula. The U.S. Department of Housing and Urban Development – Office of Native Programs ("HUD-ONAP") has released a chart showing the allocations of such funding, which is available [here](#). Additional information on the HUD programs funded through the ARPA can be found on the HUD-ONAP website and [here](#).

ICDBG-ARP grants are available to prevent, prepare for, or respond to COVID-19—the same purpose as the ICDBG funds provided under the Coronavirus Aid, Relief, and Economic

Security ("CARES") Act, or ICDBG-CARES funds. On July 20, 2021, HUD published an Implementation Notice for the ICDBG-ARPA funding, which can be found [here](#). The ICDBG-ARPA grants will be awarded in three (3) phases. Under Phase I, HUD will prioritize ICDBG-CARES applications that were not funded due to limited appropriations.

Under Phase II, HUD began accepting Phase II, ICDBG-ARPA grant applications on September 3, 2021. The application period close date is **October 18, 2021, at 6 P.M. ET**. All Phase II applications will be sorted into two (2) tiers:

- **First Tier:** Applications from grantees that did not receive an award under the ICDBG-CARES program and are not listed in the Phase I Priority List (or are listed but failed to apply timely under Phase I).
- **Second Tier:** Applications from grantees that did receive a fully funded award under the ICDBG-CARES program. This does not include grantees that were partially funded under ICDBG-CARES, which are included under Phase I.

Under Phase III, any applications received after the Phase II applications deadline will be considered on a first come, first served basis.

HUD is on track to release other grants this year as well, but it is prioritizing its work on future tribal housing grants in the following order:

- (1) IHBG-ARPA and ICDBG-ARPA grants;
- (2) ICDBG FY 21 grants (\$76 million), deadline is **October 25, 2021**; and
- (3) IHBG Competitive FY 21 grants (\$950 million), deadline is **December 1, 2021**.

Funding is also available under the Continuum of Care Program (\$2.6 billion) (deadline November 6, 2021). Tribes are eligible in FY 21 as project applicants within existing Continuum of Care networks.

IV. Treasury Programs

a. Emergency Rental Assistance Program

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 for the Emergency Rental Assistance program ("ERA Program"). Tribes received an \$800 million 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 the U.S. Department of the Treasury ("Treasury").

One of the provisions of the ERA Program legislation is that, beginning on September 30, 2021, Treasury will 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. On September 24, 2021, the Deputy Secretary of the Treasury, Adewale O. Adeyemo, sent out a letter previewing new guidance that Treasury plans to issue in the coming weeks to set out the process and standards for recapture and reallocation of ERA Program Funds. A copy is attached to this memorandum. Treasury has 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 on that date. Particularly given that this involves matters of tribal sovereignty, Treasury will consult with Indian tribes before implementing any reallocation of tribal ERA Program funds.

In August, Treasury released tribal ERA Program data, which was based on the June 30, 2021, reports. As of that date, tribes had spent \$76,109,500 (nine and one-half percent (9.5%)) and obligated \$181,678,109 (twenty-two and seven-tenths percent (22.7%)). The amounts spent and obligated have increased since that date. Mr. Walters noted that Treasury has posted additional pages on its website covering best practices and attestation form samples. The website can be found [here](#).

Mr. Walters commented that NAIHC sent out a survey a few weeks ago to gauge tribal implementation of the ERA Program. Mr. Walters encourages tribes to take the survey now. Responses to the survey will help NAIHC determine when tribes will reach the expenditure deadlines, how they are implementing the ERA Program, and what obstacles they are facing. Thus far, NAIHC has received feedback on how much of an administrative burden it is on tribes to meet the requirements of the ERA Program. Mr. Walters commented that Treasury has made efforts to alleviate this burden.

Mr. Walters also remarked that tribal members who are eligible for tribal ERA Programs are also likely eligible for receiving assistance through state ERA Programs. If tribes are running out of ERA Program funds, they can direct their tribal members to seek assistance through the state ERA Programs.

One participant commented that Treasury now has an agreement with HUD to provide technical assistance for the ERA Program. If tribes want or need technical assistance for their ERA Program, they should reach out to their area HUD-ONAP.

b. Treasury's Homeowner Assistance Fund

As we have reported in prior memos, the ARPA provides approximately \$498 million in funding to tribes for the Homeowner Assistance Fund ("HAF Program"). The HAF Program provides mortgage assistance to homeowners to prevent the foreclosure or post-foreclosure eviction of a homeowner due to the COVID-19 pandemic. The HAF Program will be operated in a manner similar to Treasury's ERA Program, but is focused on homeowners in economic distress at risk of losing their homes.

Funding for the HAF Program is allocated through the Treasury for distribution. Allocations are based on the IHBG formula for FY 2021. Tribes or TDHEs that want to receive HAF funding must submit a Notice of Request for HAF funding. A copy of that form is available [here](#). Treasury recently extended the deadline for Tribes or TDHEs to submit that Notice to **November 15, 2021**. Treasury also requires that the Tribe or TDHE, as a condition of receiving the funds, sign a Financial Assistance Agreement, a copy of which is available [here](#).

Treasury will make initial payments to tribes or TDHEs in the amount of ten percent (10%) of the allocated HAF Program funds. In order to receive the remaining 90 percent (90%) of HAF Program funds, the Tribe or TDHE must submit a plan for its use of the HAF funds. Treasury recently published the templates for HAF Program participants to use in developing their HAF plans, which can be found [here](#). Tribes must go to a Treasury portal to submit the completed plan and claim their allocation of HAF Program funds. The portal went live on May 5, 2021, and the portal website link can be found in the portal instruction manual issued by Treasury.

One participant asked whether NAIHC has received any word regarding when Treasury will be approving the HAF plans for tribes. Mr. Walters responded that he has asked Treasury that question and has not yet received a response.

V. Other Matters

a. NAIHC Legal Symposium

The next NAIHC event will be the annual Legal Symposium, currently scheduled to be held in person on December 6–8, 2021, at The Mirage, Las Vegas, Nevada. Registration for the event is currently open. If NAIHC decides to hold the Symposium virtually due to changes in the COVID-19 pandemic, any registration fees paid will be refunded. The Legal Symposium will include a members' meeting. Mr. Walters noted that the Legislative Committee meeting will start at 4:00 P.M. Pacific Time on Monday, December 6, 2021. The full agenda can be found [here](#).

One participant asked whether there will be a virtual option for the Legislative Committee Meeting or the entire Legal Symposium. Mr. Walters responded that they are still considering that question and what they can do to accommodate any COVID-19 safety concerns.

b. NAIHC Legislative Committee meetings

The NAIHC Legislative Committee meetings will continue to be held the first Thursday of each month. Mr. Walters encouraged NAIHC members to contact him if they would like NAIHC to meet more frequently to discuss the ERA Program or HAF Program. The next NAIHC Legislative Committee meetings will be held November 4, 2021. Anyone who would like to submit questions prior to the calls may do so through the link provided in the NAIHC email sent out prior to each call. Sending in questions and comments ahead of time allows NAIHC to provide detailed responses during the call. NAIHC will continue to host the calls via a Zoom platform. Mr. Walters encouraged participants to reach out to NAIHC staff with any questions or comments.

Participants may do so by sending an email to Twalters@NAIHC.net. NAIHC will be providing the PowerPoint and recording of this call on its website.

c. New Additional Monthly Forums

Mr. Walters noted that these Legislative Committee meetings generally provide updates but do not get delve into the details of various housing programs. NAIHC is therefore proposing to begin holding additional monthly member forums to focus on more in-depth conversations, starting in October 2021. The tentative plan is to hold these additional forums on the third week of each month. The forums will cover a rotating discussion on a single topic. Currently, NAIHC is proposing the three (3) following topics: (1) Treasury programs; (2) HUD Continuum of Care; and (3) HUD Housing Counseling (Mr. Walters noted that he has been named to the HUD Housing Counseling Federal Advisory Committee). NAIHC is asking for volunteers to help lead discussions during the forums.

One participant asked whether NAIHC would split out the Treasury ERA Program and HAF Programs into two (2) separate discussion groups. Mr. Walters responded that at the moment, because there is little information being released on either program, NAIHC will keep the two (2) programs combined. However, NAIHC may split up the programs in the future if that becomes useful.

d. Other Updates

NAIHC will continue to provide virtual training and technical assistance. Mr. Walters encouraged NAIHC members to use the virtual trainings and provide feedback. NAIHC sends out a Native housing newsletter every two (2) weeks. Mr. Walters recommends that any tribe who does not currently receive the newsletter can go to the NAIHC website to sign up.

Conclusion

We will continue to update you on the ERA Program and on any forthcoming eviction moratoriums. If you have any questions, please contact Ed Clay Goodman (egoodman@hobbsstrauss.com or 503-242-1745).