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MEMORANDUM

April 6, 2022

TO: TRIBAL HOUSING CLIENTS

FROM: 
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RE: ***Tribal Housing and COVID-19 Update***

This memo provides an update on two notices recently issued by the U.S. Department of the Treasury (Treasury) and one issued by the U.S. Department of Housing and Urban Development (HUD). On March 30, 2022, Treasury published two new notices, one identifying new Emergency Rental Assistance (ERA) Program fund recapture and reallocation guidelines and another presenting a new draft of the Homeowner Assistance Fund (HAF) Annual and Quarterly Reporting Guidance (“Reporting Guidance”) for review and public comment. On April 1, 2022, HUD published a notice alerting Tribal Leaders to the official establishment of the Tribal Intergovernmental Advisory Committee. In association, HUD published a note in the Federal Register outline the structure and purpose the committee, and the procedures for nominating members.

I. Update Regarding the Recapture and Reallocation of Emergency Rental Assistance Funds for Tribes and Tribally Designated Housing Entities (TDHEs)

As you will recall, under the Consolidated Appropriations Act, 2021, Treasury is required to identify “excess funds” for reallocation from amounts Grantees have “not obligated” from their initial ERA allocations. Specifically, the statute provides that beginning on September 30, 2021, Treasury must recapture excess funds, as determined by the Secretary, not obligated by a grantee for eligible ERA¹ purposes, and Treasury must reallocate those funds to Grantees that, at the time of the reallocation, have obligated at least 65% of their initial ERA1 allocation. The amount of any reallocation is based on demonstrated need within a Grantee’s jurisdiction, as determined by Treasury. Treasury engaged in consultation with Tribes on how to set up a process and standards for such recapture and reallocation for Indian Country, and committed that it would not recapture any funds allocated to Tribes or TDHEs before April 2022. Consistent with these requirements and that consultation, Treasury has developed policies and procedures for identifying the excess funds that will be available for reallocation.

¹ As you will recall, there were two bills that appropriated funds for the ERA Program, the Consolidated Appropriations Act, 2021 (referred to as ERA1), and the America Rescue Plan Act (referred to as ERA2). Tribal programs only received ERA funding under ERA1. Thus the references in this memo are exclusively to ERA1.

On March 30, 2022, the Treasury issued an email notice (“Notice”) that it has updated the *U.S. Department of the Treasury Emergency Rental Assistance Under the Consolidated Appropriations Act, 2021 Reallocation Guidance* (“Reallocation Guidance”)². Treasury has updated its formula for identifying excess ERA funds and established a new date for reviewing the status of reallocation. As Treasury previously announced, Treasury did not attempt to recapture excess funds from Tribes and TDHEs prior to April 2022. Treasury is now setting forth the conditions and process for the recapture and reallocation of excess funds from Tribes and TDHEs. Guidance at 3.

a. Defining Obligated Funds

The Notice defines “obligated” funds, which Treasury will not recapture. Funds are considered to be “obligated” if they meet any of the following conditions:

- i. The funds have actually been spent providing financial assistance and housing stability services under ERA for eligible households;
- ii. The funds are needed to pay for assistance promised in a commitment letter issued to induce a landlord to enter a rental agreement with an eligible household under Treasury’s ERA Frequently Asked Questions (FAQs) #35; or
- iii. Subject to the conditions described below concerning subrecipients, the Grantee has, as part of the Grantee’s ERA program administration, entered into a binding agreement or funding commitment requiring the Grantee to disburse the funds to a third party for eligible ERA purposes.

Reallocation Guidance at 2.

b. Identifying Excess Funds

The Notice also defines how it will determine what funds are “excess” and thus subject to possible recapture. Tribes will be permitted to keep unobligated funds from its initial ERA award that are unobligated as of June 30, 2022, up to the highest quarterly amount that the Tribe/TDHE has previously spent on assistance. The remaining funds above that amount will then be considered excess.

Treasury will also consider funds in excess if a Grantee fails to meet a specific “Expenditure Ratio.” Treasury will be using a new formula to evaluate Grantee’s “Expenditure Ratio” as of September 30, 2021 and approximately every two months after. Reallocation Guidance at 2. The expenditure ratio will be calculated as follows:

- Total Expenditures of ERA1 Funds on Assistance to Eligible Households;
- divided by the amount resulting from the following calculation:

² See <https://home.treasury.gov/system/files/136/REDLINED-Updated-ERA1-Reallocation-Guidance-3-30-2022.pdf> for a redlined version of the updated Reallocation Guidelines (“Reallocation Guidelines”).

- the Initial ERA1 award amount minus any Returned Excess Funds minus 10% of Initial ERA1 Award for Administrative Expenses.

Id. at 3. Treasury will be using the Q2 2022 Quarterly report to determine the total expenditures.

Id. at 4. Treasury implemented a minimum acceptable 30% threshold in September 2021, the minimum Expenditure Ratio has increased and will continue increase by 5% each month. *Id.* at 3

c. Timeline for Reviewing Reallocation

After June 30, 2022, Treasury will consider whether further recapture and reallocation is necessary to ensure the use of ERA funds are obligated prior to the statutory deadline of September 30, 2022. Reallocation Guidance 7.

II. Homeowner Assistance Fund Annual and Quarterly Reporting Guidance for Review and Comment

The Treasury requires HAF Participants to submit compliance reports quarterly and annually. On March 30, 2022, Treasury released its annual HAF Annual and Quarterly Reporting Guidance for Public Review and Comment on the Treasury website³. The public comment period will run for 15 days, concluding on April 14, 2022.

a. General Guidance

1. Guiding Principles

HAF Reporting Guidance provides a series of general guiding principles for HAF participants to develop effective compliance regimes.

- i. HAF participants are responsible for ensuring HAF award funds are used for approved purposes and developing an internal program that minimizes fraud, waste, and abuse associated with the HAF award;
- ii. HAF funded programs must be swiftly and effectively implemented while also maintaining a documentation and compliance regime;
- iii. HAF programs should promote equitable delivery of government benefits and opportunities to underserved communities; and
- iv. HAF awards should be used transparently and subject to public accountability. (Reporting Guidance 4-5.).

2. Eligible Participants

HAF defines eligible HAF participants to include Eligible States, The Department of Hawaiian Homelands, and Eligible Tribal Governments. Eligible Tribal Governments are “Indian

³ See [https://home.treasury.gov/system/files/136/DRAFTHAF-Guidance-Participant-Compliance-Reporting-Responsibilities-Quarterly Annual.pdf](https://home.treasury.gov/system/files/136/DRAFTHAF-Guidance-Participant-Compliance-Reporting-Responsibilities-Quarterly%20Annual.pdf) for draft Guidance now referred to as “Guidance.”

Tribes (or, if applicable, the TDHE of an Indian Tribe) that were eligible for a grant under Title I of the Native American Housing Assistance and Self-Determination Act (NAHASDA) of 1996 (25 U.S.C. 4111 et seq.) for fiscal year 2020 or Indian Tribes that opted out of receiving a grant allocation under the Native American Housing Block Grants program formula in fiscal year 2020.” *Id. at 5*

3. *Qualified Expenses*

HAF participants may use their HAF award funds for the purpose of preventing homeowner mortgage delinquencies, defaults, foreclosures, homeowner loss of utilities or home energy services, and displacements of homeowners experiencing financial hardship. *Id. at 6*. HAF participants may use their funds to cover expenses incurred beginning on January 21, 2020 (or the date of initial qualifying activity). *Id.*

4. *Reporting Requirements*

HAF participants will be required to submit quarterly reports until September 30, 2026, and final reports are due no later than 120 days after the end of the performance period on September 30, 2026. Reporting Guidance at 6-7.

5. *Uniform Administrative Requirements*

HAF awards are subject to the requirements set forth in the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Award. CFR Part 200. These requirements persist. Reporting Guidance at 7.

6. *Additional Financial Compliance*

HAF participants are further required to maintain compliance with all Financial Assistance Agreement Terms and Conditions. These include the System of Award Management (SAM), Federal Funding Accountability and Transparency Act Subaward Reporting System (FSRS), Recordkeeping requirements, Single Audit Requirements, and Civil Rights Compliance. Reporting Guidance at 10-11.

b. Reporting Requirements and Deadlines

Generally, HAF participants are required to submit quarterly reports and annual performance reports. Reporting Guidance at 11-12. A quarterly report identifies the programs funded, expenditures, program status, and additional information. *Id.* An annual performance report identifies the programs undertaken with program funding and provides plans for ensuring those program outcomes are achieved. *Id.* Both the Participant and Treasury provide program goals and mandatory indicators. *Id.*

Reporting requirements are further specified by participant type. The HAF provides the following:

Recipient	Quarterly Report	Annual Performance Report
States	By May 16, 2022 and then 45 days after the end of each quarter thereafter	By August 15, 2022, and annually thereafter by mid-August
Tribal Governments with Allocation > \$5 Million	By May 16, 2022 and then 45 days after the end of each quarter thereafter	By August 15, 2022, and annually thereafter by mid-August
Tribal Governments with Allocation < \$5 Million and Department of Hawaiian Home lands	By August 16, 2022 and annually thereafter by mid-August	By August 15, 2022, and annually thereafter by mid-August

Reporting Guidance at 11.

1. Quarterly Reports

Quarterly Reports must generally include the following program information:

- i. Budget obligations and expenditures relative to HAF Grantee Plan;
- ii. Homeowner Applications and individual metrics;
- iii. Delinquencies resolved using HAF funds;
- iv. Reimbursement expense;
- v. Program information for all HAF funded programs. 6, Tribal Governments and the Department of Hawaiian Home Lands will not be required to report on Program SDIs assisted;
- vi. HAF participant expenditures. Tribal Governments and the Department of Hawaiian Home Lands will not be required to disaggregate information related to Expenditures;
- vii. HAF assistance obligations. Please note, Tribal Governments and the Department of Hawaiian Home Lands will not be required to disaggregate information related to Obligations. Tribal Governments and the Department of Hawaiian Home Lands will not be required to report on Program Design Element SDIs assisted;
- viii. Program Design elements; and
- ix. Impact of assistance on demographic categories.

Reporting Guidance 12-15.

Quarterly Reports must generally include compliance information. In the event that HAF assistance was improperly funded, Participants are required to state how it was identified and what remedial measures were/are being taken to address it. Reporting Guidance at 15-16.

2. Annual Performance Report

Participants are required to submit an Annual Performance Report that must also be published on a public facing website of the HAF participant on or by the same date that the report is given to Treasury. Reporting Guidance at 17. A report must include the following at a minimum:

- i. Demonstrated community engagement via constituent and community based organizational feedback;
- ii. Status update on initial performance goals;
- iii. Identify best practices and coordination with other HAF participant;
- iv. A budget comparison between the initial budget and the current budget; and
- v. Treasury may additionally request information on participant's civil rights compliance.

Reporting Guidance at 17-18.

III. U.S. Department of Housing and Urban Development Establishing Tribal Intergovernmental Advisory Committee and Seeking Nominations

On April 1, 2022, HUD distributed a "Dear Tribal Leader" letter announcing the next step in establishing the Tribal Intergovernmental Advisory Committee (TIAC) by announcing the publication of an affiliated Federal Register Notice. HUD published a Federal Register Notice formally establishing the TIAC and requesting nominations to serve on the committee. 87 CFR 18807. The "Dear Tribal Leader" and Federal Register Publication are attached for your convenience.

a. Purpose and Structure of the TIAC

On November 15, 2021, HUD announced that it was soliciting feedback for the creation of TIAC. After receiving and reviewing feedback, it has officially established the TIAC.

HUD defines the purpose of the TIAC as to:

- i. Further facilitate intergovernmental communication between HUD and Tribal leaders of federally recognized Tribes on all HUD programs;
- ii. To make recommendations to HUD regarding current program regulations that may require revision, as well as suggest rulemaking methods to develop such changes. The TIAC will not, however, negotiate any changes to regulations that are subject to negotiated rulemaking under Section 106 of the

- NAHASDA and will not serve in place of any future negotiated rulemaking committee established by HUD; and
- iii. To advise in the development of HUD's American Indian/Alaska Native (AI/AN) housing priorities.

Notice at 18808-09.

The TIAC's role is to provide input and recommendations to HUD and become a pathway for meaningful communication and consultations between HUD and tribal leaders. Notice at 18809. HUD will maintain the responsibility for all program management, including drafting HUD notices, guidance, and regulations. *Id.*

The TIAC intends to develop its own charter and protocols, but HUD will provide staff support to act as a liaison and manage meeting logistics and provide general support. *Id.*

The TIAC will meet periodically and in person, in compliance with all existing COVID-19 protocols. *Id.* HUD will cover travel expenses. Additionally, the TIAC can choose to meet virtually on their own accord in addition to their in-person meeting. *Id.*

The TIAC will be composed of HUD officials including the Secretary, Assistant Secretaries for the Office of Public and Indian Housing, Office of Policy, Development and Research, Office of Fair Housing and Equal Opportunity, Office of Field Policy Management, Office of Housing, Government National Mortgage Associate, and Office of Community Planning and development. In addition, the TIAC will include fifteen Tribal Representatives. Up to two of these Tribal Representatives will represent each of the six HUD Office of Native American Programs (ONAP) regions and up to three remaining leaders will serve at large. Officials representing Alaska Native Corporations may also serve if they comply with the statutory requirements in the Federal Advisory Committee Act in 2 U.S.C. 1534(b). *Id.*

Initially officials will serve for a period of either two or three years, in order to establish a staggered election cycle. While nominees may select their preference, HUD makes the final determination. Following the initial cycle, all elected officials will serve for a period of two years. *Id.*

b. Nominating individuals for the TIAC

HUD is now requesting nominations for Tribal Representatives to serve on the TIAC. All nominations are to be submitted by May 31, 2022. HUD outlines the nomination process on page 18808 of the Notice.

A nomination must include the following:

- i. The name of the nominee, including a description of the interests that nominee would represent. A description of the nominee's experience and interest in

- American Indian and Alaska Native housing and community development matters;
- ii. Evidence that the nominee is a duly elected or appointed Tribal leader and is authorized to represent a federally recognize tribal government or Alaska Native Corporation;
 - iii. A written commitment from the Nominee; and
 - iv. A written preference for whether the nominee would like to serve two or three years.

HUD will make a final determination based on proven experience, and will evaluate interest areas not previously covered when evaluating candidates for at-large positions. Additionally, tribal employees are eligible for a position on the TIAC if they are nominated by a Tribal Leader who complies with the nomination requirements. Officials representing Alaska Native Corporations may also serve if they comply with the statutory requirements in the Federal Advisory Committee Act in 2 U.S.C. 1534(b).

Conclusion

If you have any questions, please do not hesitate to contact Ed Clay Goodman at egoodman@hobbsstrauss.com or by phone at (503) 242-1745.