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MEMORANDUM

December 19, 2022

To: TRIBAL HOUSING CLIENTS

From:  Ed Clay Goodman and Cari L. Baermann
HOBBS, STRAUS, DEAN & WALKER, LLP

Re: ***HUD Section 184 Proposed Rule***

On November 30, 2022, the U.S. Department of Housing and Urban Development (HUD) issued a [press release](#) stating that it will be publishing a proposed rule (“Proposed Rule”) for the Section 184 Indian Home Loan Guarantee Program (“Section 184”). The Proposed Rule will be published in the Federal Register sometime in the next two weeks. This memorandum provides an analysis and overview of an early release of the Proposed Rule’s most significant provisions, as well as a discussion of a listening session HUD conducted regarding the Proposed Rule.

A. Overview

HUD’s Section 184 Proposed Rule will amend the regulations governing the Section 184 program. Section 184 provides a loan guarantee to borrowers in the event of borrower default, which is paid from the Section 184 Loan Guarantee Fund (“Fund”). The program allows Native American borrowers to purchase a home with a low down-payment and flexible underwriting. HUD states that its intention for the Proposed Rule is to modernize the Section 184 program and provide detailed processes and requirements that HUD intends to improve to increase homeownership in Indian Country.

HUD will conduct multiple tribal consultation sessions on the Proposed Rule, as outlined in the final section of this memo. The deadline for public comments is **March 6, 2023**.

B. Proposed Changes

The Proposed Rule includes approximately 141 regulations, divided into nine subparts (Subparts A–I), which will be codified at 24 C.F.R. parts 48 and 1005. Dep’t of Housing and Urban Development, Proposed Rule: Strengthening the Section 184 Indian Home Loan Guarantee Program, at 1, 8 (Nov. 30, 2022). The Proposed Rule “remove[s] outdated sections and replac[es] them with the following: definitions, eligibility requirements for Lenders, rules governing participation by Indian Tribes, underwriting requirements, rules on the closing and

endorsement process, loan fees, servicing requirements submission of Claims, and standards governing monitoring, reporting, sanctions and appeals.” *Id.* at 8.

Subpart A – General Program Requirements

Subpart A addresses “General Program Requirements,” which includes: the purpose of Section 184 (as defined under § 1005.101) and definitions pertinent to Section 184 (located at § 1005.103). The Proposed Rule revises current definitions under § 1005.103, including the definitions of “Default,” “Indian,” “Property,” “Section 184,” and “Trust or Restricted Land.” *Id.* at 9. The Proposed Rule also eliminates the terms “Mortgage” and “Mortgagee” from § 1005.103 because those terms “are no longer used in the [Section 184] program and are obsolete.” *Id.* The Proposed Rule would further codify the adoption of terms HUD commonly uses in administering Section 184. *Id.*

Subpart B – Lender Eligibility & Requirements

Subpart B, titled “Lender Eligibility & Requirements,” governs “Lender eligibility and the application process to participate in Section 184 . . . as a Non-Direct Grantee or Direct Guarantee Lender,” which the Proposed Rule changes in the following ways:

- Changes § 1005.201 (governing lender approval and participation) by requiring Lenders to submit an application “for participation in accordance with the level of activity a Lender wants to engage in, as provided by Section 184 Program Guidance.”
- Changes § 1005.203, titled “Lender deemed approved by statute,” by “referenc[ing] Community Development Financial Institutions (CDFIs) as being included as a ‘Lender approved by statute.’”
- Adds § 1005.205 to address qualifications for participation in HUD’s Section 184 program if a Lender is not approved under the statutory approved list in § 1005.203 and how such a prospective lender could apply to become a lender under § 1005.205.
- Adds § 1005.207 to address the two levels of lender participation in Section 184, Non-Direct Guarantee Lender and Direct Guarantee Lender, and require eligible lenders to select their desired participation level by submitting an application to HUD.
- Adds § 1005.209 to: (1) address application requirements for lenders to become a Direct Guarantee Lender and (2) require such applicants to submit a quality control plan. *Id.*
- Adds § 1005.211 to address what constitutes HUD approval for Lenders applying to participate as a Direct Guarantee Lender under § 1005.209, which would be a new addition to HUD’s current practice.

- Adds § 1005.213 to describe the “sponsorship relationship between a Direct Guarantee Lender and a Non-Direct Guarantee Lender and the general responsibilities of a Direct Guarantee Lender as the Sponsor.” This aligns with HUD’s current practice.
- Requires lenders to meet annual reporting requirements (provided under § 1005.214) and to submit quality control plans (provided under § 1005.217).
- Adds § 1005.219 to require lenders to comply with various sovereign’s laws (e.g., tribal, state, federal) and, in addition to HUD’s current practice, meet a minimum level of lending on Trust Land. HUD intends for the latter requirement to increase lending on Trust Land “to further the objectives of the Section 184 Program and provide additional homeownership opportunities on Trust Lands.”
- Adds several other sections to reduce risk in determining lender eligibility, such as defining lender ineligibility (§ 1005.225), requiring annual recertification of lenders (§ 1005.223), and requiring lenders to inform HUD of any changes in the lender’s legal structure or staffing, as well as any new sanctions against the lender (§ 1005.221).

Subpart C – Lending on Trust Land

Subpart C addresses lending on Trust Land by adding requirements for tribal participation in Section 184 when “Tribes want to make Trust Land or Restricted Fee Land available under the Section 184 Program.” Subpart C encompasses §§ 1005.301–313, which require tribes to submit applications for Section 184 opportunities on their Trust Lands, meet reporting requirements, provide certain assurances to HUD, and ensure certain safeguards in case a tribe defaults on a loan.

Subpart C further requires tribes to meet a variety of requirements to operate Section 184 on Trust Lands, including passing certain tribal ordinances, and showing HUD they “have the necessary legal structure in the event of a default on Trust Land and to ensure that HUD is provided first lien priority.” Subpart C also requires tribes to submit an annual recertification when there is no change in their legal and administrative framework. *Id.* at 16. Section 1005.309 under this Subpart also requires tribes to report to HUD any changes in contact information or legal framework. Additionally, Subpart C requires tribes to provide HUD notification of a borrower’s default on the tribal lease under § 1005.311. Finally, Subpart C creates reporting requirements for tribal participants under § 1005.313 at 17.

Subpart D - Underwriting

Subpart D outlines the requirements for a loan to be guaranteed under Section 184. Subpart D is broken down into four parts, addressing requirements for eligible borrowers, eligible properties, eligible loan types, and underwriting for the program, which are covered under §§ 1005.401–.361:

- Sections 1005.401–.411 discuss how HUD will determine eligibility of borrowers for Section 184. For instance, § 1005.401 governs how HUD determines eligibility for Section 184—specifically requiring a borrower to be an “Indian Family, Indian Tribe or TDHE.”
- Sections 1005.413–.433 cover provisions related to eligible property types, such as title restrictions (§ 1005.413), rental properties (§ 1005.425), the eligibility of loans covering manufactured homes (§ 1005.429), and requirements on properties that do not have access to a continuous supply of safe and potable water (§ 1005.431).
- Sections 1005.435–.453 cover eligible loan types and provisions that may be included in loan documents, such as the maximum age of loan documents (§ 1005.447), qualified mortgages (§ 1005.449), and amortization provisions (§ 1005.453). Important updates to this portion of the Subpart include HUD’s prohibition on lenders from using risk-based pricing based on a borrower’s credit score to determine the borrower’s interest rate (§ 1005.451) and the removal of the requirement for a 10-year warranty for new construction (§ 1005.433).
- Sections 1005.455–.461 cover underwriting requirements. Section 1005.455, for example, revises the current § 1005.106(a)’s outline of the direct guarantee process for “Direct Guarantee underwriters.”

Subpart E - Closing

Subpart E outlines the requirements for closing a Section 184 loan and for receiving endorsement approval from HUD.

- The closing portion of Subpart E encompasses sections 1005.501–1005.517 and covers topics including but not limited to: Direct Guarantee lender closing requirements (§ 1005.501); application payments (§ 1005.509); late fees (§ 1005.511); and borrower’s payments when Section 184 loans are executed (§ 1005.513). One noteworthy change to this portion includes the option for borrowers to use third-party tribal notifications in the case of a borrower’s default under the loan pursuant to § 1005.501(j), which HUD anticipates will facilitate tribal support of borrowers in the event of a default.
- The second portion of Subpart E (governing endorsement and post-closing matters) includes §§ 1005.519–.529 and covers topics related to: the creation of the contract related to the closing of the loan (§ 1005.519); the lender’s pre-endorsement review and requirements (§ 1005.521); HUD’s pre-endorsement review process and the deadline for the lender’s submission of endorsement documentation (§ 1005.523); the conditions under which HUD will issue loan guarantee certificates (§ 1005.525); HUD’s post-endorsement review process (§ 1005.527); and provisions requiring the originating Direct Guarantee Lender to indemnify HUD (§ 1005.529).

Subpart F -Guarantee Loan Fees

Subpart F outlines the requirements for a lender's and servicer's calculation, collection, and submission of Section 184 loan guarantee fees. This Subpart encompasses §§ 1005.601–.611, which: clarify the scope and method of payments for guaranteed loan fees (§ 1005.601); mandate that an up-front guarantee fee is to be paid at closing (§ 1005.603); and require remittance of up-front loan guarantee fees from the lender and specifies conditions for the same (§ 1005.605). This Subpart further requires: the collection of an annual loan guarantee fee from the borrower on a monthly basis (§ 1005.607); that servicers submit to HUD the annual loan guarantee fees collected from the borrower no later than the 15th day of each month, and the meeting of collection requirements of such fees on the servicer (§ 1005.609). Finally, this Subpart provides circumstances under which HUD can impose civil monetary penalties on Direct Guarantee lenders and servicers related to the collection and submission of loan guarantee fees (§ 1005.611).

Subpart G – Servicing

Subpart G outlines requirements for services to manage Section 184 guaranteed loans and the steps required to mitigate loss when a borrower defaults on the loan. *Id.* at 36. This Subpart is organized into the following four subgroups: (1) “Servicing Section 184 Loans Generally”; (2) “Servicing Default Section 184 Guaranteed Loans”; (3) “Servicing Default Section 184 Guaranteed Loans Under the Loss Mitigation Program”; and (4) “Assignment of the loan to HUD, Foreclosure & Conveyance.”

Subgroup 1. “Servicing Section 184 Loans Generally” - §§ 1005.701–.727

These sections have a wide variety of functions, including, but not limited to: providing an overview of HUD's servicing expectations and requirements (§ 1005.701); requiring lenders to meet certain eligibility expectations and go through an application process (§ 1005.703); establishing “what constitutes HUD approval for [lenders] and other financial institutions applying to be servicers in the Section 184 Program” (§ 1005.705); imposing responsibilities on servicers for servicing the Section 184 program (e.g., compliance; using a sub-servicer; and records retention) (§ 1005.707); requiring servicers to inform borrowers about the Section 184 program (1005.709); and imposing requirements and laying out the process for assumption of a Section 184 guaranteed loan (§ 1005.711).

Further, these sections: mandate a due-on-sale clause permitting acceleration for all Section 184 guaranteed loans (§ 1005.713); establish the order in which the servicer applies borrower payments authorized under § 1005.509 (governing application payments) (§ 1005.715); establish requirements for administering escrow accounts and deposits from a Section 184 guaranteed loan (§ 1005.717); provide allowable fees and changes from the servicer to the borrower after HUD endorses a loan (§ 1005.719); propose when and how late charges must be applied by a servicer (§ 1005.721); require the servicer to have a written policy available to the public regarding how it handles partial payments and acceptable actions when a servicer receives a partial payment from a buyer (§ 1005.723); require the servicer to accept pre-payments at any time and outline how the interest on debt is calculate for prepayments (§ 1005.725); and the process related to when a borrower requests substitution for a co-borrower on a Section 184 guaranteed loan.

Subgroup 2. “Servicing Default Section 184 Guaranteed Loans” - §§ 1005.729–.737.

These sections: require “the Servicer to take prompt action to collect amounts due from borrowers and exhaust all reasonable possibilities of collection before foreclosure or assignment” (§ 1005.729); outline requirements for contacting a defaulted borrower, including live contact and written notice (§ 1005.731); provide specific expectations when a servicer processes a borrower’s loss mitigation application, including providing written notice to the borrower of their loss mitigation options (§ 1005.733); outline the occupancy inspection process and requirements for servicers in conducting such inspections (1005.735); and requirements for when a property has been determined vacant or abandoned based on an occupancy or occupancy follow-up inspection (§ 1005.737).

Subgroup 3. “Servicing Default Section 184 Guaranteed Loans Under the Loss Mitigation Program”-- §§ 1005.739–.755.

These sections: cover loss mitigation options and requirements when a borrower defaults on a Section 184 loan (§ 1005.739); codify HUD’s current practice of notifying the Bureau of Indian Affairs (BIA) when a borrower defaults on a loan, as well as add a requirement for servicers to notify the borrower’s tribe when a borrower defaults on a loan, provided the borrower gives his or her consent to the servicer (§ 1005.741); and provide relief options for borrowers in military service, such as postponement of principal payments and foreclosure (§ 1005.743).

Further, these sections: provide forbearance options a servicer may offer to defaulting borrowers (§ 1005.745); require servicers to “explore loan assumption as a Loss Mitigation option” (§ 1005.747); provide loan modifications as a loss mitigation option and establish eligibility and qualifications necessary for a servicer to approve a borrowers application and the required property conditions (§ 1005.749); provide authority for pre-foreclosure sale as a loss mitigation option; and require the use of “deed-in-lieu/lease-in-lieu of foreclosure as a loss mitigation option (§ 1005.753).

Subgroup 4. “Assignment of the loan to HUD, Foreclosure & Conveyance.” - §§ 1005.757–.771.

Subpart G, “Assignment of the loan to HUD, Foreclosure & Conveyance,” covers these sections, which establish the following: provide a timeframe in which a servicer must contact a tribe or TDHE and offer an option to assume or purchase the Property or the Note under § 1005.757(a) when a defaulted loan is tied to property on Trust Land (§ 1005.757); require servicers to initiate foreclosure or request the ability to assign a defaulted property to HUD (§ 1005.759); provide a timeline for the initiation of a foreclosure by the servicer on defaulted Section 184 guaranteed loans (§ 1005.761); provide requirements for assigning a defaulted Section 184 guaranteed loan to HUD (§ 1005.763); require servicers to comply with inspection requirements under § 1005.737 (inspection of vacant or abandoned properties) (§ 1005.765); place conditions on the property and servicer’s responsibilities at the time a property is transferred to HUD through conveyance or assignment (§ 1005.767); provide methods and a timeframe in which a servicer

may convey a property to HUD after foreclosure, such as notifying HUD of the conveyance (§ 1005.769); and establish the date on which HUD is deemed to have accepted an assignment of a Section 184 Guaranteed Loan or title to and possession of a property (§ 1005.771).

Subpart H – Claims

Subpart H outlines requirements for servicers to submit claims to HUD. Subpart H is composed of five subgroups: (1) claims application, submission categories, and types; (2) submission of claims; (3) property title transfers and title waivers; (4) condition on the property; and (5) payment of guarantee benefits.

Subgroup 1: Claims Application, Submission Categories, and Types - §§ 1005.801–.809.

These sections: propose the purpose of this subpart, “which is to set forth the requirements applicable to a submission of an application for loan guarantee benefits” or claim submission (§ 1005.801); require servicers to maintain a claim case binder for a minimum of five years after the final claim has been paid and allow HUD to access the case binder (§ 1005.803); and establish actions HUD may take if a claim case binder does not comply with the requirements of Subpart D (§ 1005.805). *Id.* at 53–55. These sections also outline the three claim submission categories, which include: (1) payment of the unpaid principal balance; (2) reimbursement of eligible reasonable expenses up to assignment, conveyance or transfer of the property; and (3) “supplemental claims for eligible expenses incurred that were omitted from the Servicer’s prior submission or for a calculation error made by the Servicer or HUD” (§ 1005.807).

Subgroup 2: Submission of Claims - §§ 1005.811–.815

These sections govern the process for submitting claims, including, but not limited to: the required supporting documentation for claims (§ 1005.811) and the conditions for the withdrawal of a claim (§ 1005.815).

Subgroup 3: Property Title and Title Transfers - §§ 1005.817–.825

These sections require: that a property has good and marketable title when conveyed to HUD from a lender (§ 1005.817); and the subsequent execution of evidence of title “or Title Status Report . . . to the filing for record of the deed or assignment to HUD” (§ 1005.821). This subgroup also allows a showing of six types of title evidence that may be submitted with a claim submission (e.g., fee or owner’s title policy; lender’s policy of title insurance; an abstract and legal opinion) (§ 1005.819).

Subgroup 4: Condition of Property - §§ 1005.827–.831

These sections: (1) outline a lender’s “responsibilities when a property has suffered damage or neglect and HUD’s remedy when a damaged property is conveyed to HUD without prior notice or approval” (§ 1005.827); (2) require a servicer to submit a certificate of property condition as

part of the claim submission (§ 1005.829); and (3) provide that servicers “shall cancel any hazard insurance policy as of the date of the filing for record of the deed to HUD” (§ 1005.831).

Subgroup 5: Payment of Guarantee Benefits - §§ 1005.833–.851

These sections: establish that HUD will pay guarantee benefits by electronic transfer of funds for all approved claim submissions (§ 1005.833); provide that any payment of a claim by HUD is not exclusive evidence of a servicer’s compliance with Section 184 program requirements (§ 1005.835); provide that HUD “will pay claims for unpaid principal balance submitted under § 1005.807(a), minus any receipts for the sale or transfer of the Property” (§ 1005.837); and establish the payment timeframe for interest payments on the unpaid principal balance (§ 1005.839).

Additionally, these sections, among other things, work to: establish conditions for final payment (§ 1005.847); outline actions HUD may take when there is a reconveyance of a property or a reassignment of the deed of trust or mortgage back to the holder (§ 1005.849); and establish a holder’s or lender’s reimbursement responsibilities when “HUD determines it will reconvey a property previously conveyed to HUD under the claims process” (§ 1005.851).

Subpart I – Lender Monitoring, Reporting, Sanctions and Appeals

Subpart I of the Proposed Rule outlines HUD’s ability to conduct periodic performance reviews, reporting requirements for lenders and servicers, and sanctions for noncompliance with regulations. Subpart I does so by: (1) establishing HUD’s authority to conduct periodic performance reviews of lenders, holders, and servicers (§ 1005.901); (2) mandating lenders and servicers to provide timely and accurate reports and certifications to HUD (§ 1005.903); require HUD to provide notice to lenders, holders, or services of any non-compliance and provide them with an opportunity to remedy their noncompliance, and provide notice of any pending sanctions against them (§ 1005.905); and permit HUD to impose sanctions and civil money penalties when a lender, holder, or servicer fails to comply with 24 C.F.R. part 1005. Subpart I further allows for appeals of a determination by HUD to deny a lender’s participation in the Section 184 program (§ 1005.909).

Part 58 Regulations

Currently tribes may elect to assume environmental responsibility for Section 184 guaranteed loans pursuant to 24 CFR part 58, which requires tribes to ensure applicable environmental requirements are met. HUD proposes to amend the rule so as to remove the option for tribes to assume environmental review responsibility for the Section 184 Program for fee simple properties that are located outside of a reservation “in order to streamline the environmental review process and relieve the burden upon Tribes.” While HUD asserts that “it is impractical to have a Tribe assume environmental responsibilities for Section 184 guaranteed loans on fee simple Properties outside of a reservation, which may be located far from the reservation of the Borrower’s Tribe,” it does not explain why it should not be up to the tribe to decide whether to assume such burdens or not, only stating that it will increase HUD’s efficiency. The Proposed Rule further changes Part 58 by expanding the types of activities that are categorically excluded from environmental assessment under the National Environmental Policy Act. Specifically, the

Proposed Rule will add as categorically excluded activity: the “guarantee of loans for one- to four-family dwellings under the Direct Guarantee procedure for the Section 184 program when there is no review or approval of the application for the loan guarantee by HUD or the responsible entity, or approval of the loan guarantee by HUD, before the execution of the contract for construction or rehabilitation and the loan closing.” *Id.*

C. December 7, 2022 NAIHC Listening Session

As part of the process of creating and revising the Proposed Rule, HUD has and is currently conducting outreach and listening sessions with Indian tribes and organizations. A breakout session at the Native American Indian Housing Council (NAIHC) Legal Symposium on December 7, 2022 served as one such listening session. Krisa Johnson, Director, HUD ONAP Office of Loan Guarantee, Andrew Lee, Senior Advisor, HUD ONAP Office of Loan Guarantee, and Deana O’Hara, HUD ONAP Senior Advisor (collectively, “HUD Staff”), conducted the listening session and provided an overview of some of the Proposed Rule’s changes to the regulations.

The HUD Staff stated the HUD Proposed Rule will be published within the next two weeks. They explained HUD has incorporated some of the tribal feedback it had previously received. The HUD Staff emphasized that HUD conducted 18 tribal consultations prior to drafting this proposed rule. Additionally, they explained HUD is now seeking tribal feedback on the proposed rule before it is finalized. If any tribes have comments or concerns, they explained that tribes can submit feedback through the Federal Register portal once the proposed rule is published. The HUD Staff noted they would particularly like tribal feedback on properties that go into default. They also stated HUD wants to know what it can do to better address situations in which properties go into default or are abandoned. HUD is also looking for tribal feedback on the minimum level of participation on trust land. The presenters also stated that HUD will be drafting and publishing a handbook that provides more detail on the processes and procedures of implementing this proposed rule.

The HUD staff explained they drafted the Proposed Rule with the intent that the new rules will increase the willingness of lenders to invest in Indian Country. They further explained that HUD had received feedback from tribes and lenders that the lenders needed better HUD regulations that would make the lenders feel more comfortable lending in Indian Country. The HUD staff also noted that lenders can submit comments on the proposed rule during the comment period before March 6, 2023.

One audience participant commented that the Proposed Rule regulation allowing for HUD to demand data is concerning because it gives HUD too much leeway to demand significant data from tribes later in the process, and this could be a burden. The HUD Staff replied that if tribal feedback includes strong push back against these regulations, then HUD will consider those concerns and decide whether to include provisions allowing for HUD to require such data. The HUD Staff further responded that tribes could comment on what types of data tribes are comfortable with HUD requiring, and what data tribes would not be comfortable with HUD requiring.

Another participant commented on his concern regarding risk management under the Proposed Rule. Specifically, he requested for more information about HUD's insurance requirements for homeowners and HUD's requirements for protecting lenders. The HUD Staff replied to the participant's comment, in part, stating that Congress makes those determination based on default rate (2.93 percent for 2022).

D. Tribal Consultation Schedule

HUD has published the following Tribal Consultation Schedule for the Section 184 regulation amendments discussed above.

- **December 14, 2022** Welch, Minnesota, Treasure Island Resort & Casino (In conjunction with Midwest Alliance of Sovereign Tribes (MAST) winter meeting)
- **December 15, 2022** Rapid City, South Dakota, USDA Service Center.
- **January 10, 2023** Norman, Oklahoma, Riverwind Hotel & Casino (In conjunction with Southern Plains Indian Housing Association (SPIHA) meeting)
- **January 20, 2023** Albuquerque, New Mexico, Dennis Chavez Federal Building
- **January 24, 2023** Arlington, Washington (in conjunction with Northwest Indian Housing Association (NWIHA) meeting)
- **January 31, 2023** *Alaska Region Webinar*
- **February 2, 2023** *National Webinar*
- **February 6 or 7, 2023** *Tentative*. Arlington, VA, (In conjunction with United Southern and Eastern Tribes (USET) meeting)

HUD suggests visiting the Section 184 Tribal Consultation webpage for up-to-date information on these Tribal Consultation sessions.

Conclusion

If you have any questions about this memorandum or any of the topics discussed in this memorandum, please contact Ed Clay Goodman (egoodman@hobbsstrauss.com) or Cari Baermann (cbaermann@hobbsstrauss.com); both may be reached by phone at 503-242-1745.