



MEMORANDUM

July 28, 2023

To: TRIBAL HOUSING CLIENTS

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

Re: *NAHASDA Reauthorization Passes the Senate!*

Tribal Consultation: Certification of Tribal Housing Counselors

This memorandum provides an update on the status of reauthorization of the Native American Housing Assistance Self-Determination Act (“NAHASDA”), as well as a report on the most recent Tribal Consultation on the Certification of Tribal Housing Counselors conducted by the Department of Housing and Urban Development (“HUD”).

I. NAHASDA Reauthorization

In very exciting news the Senate last night approved an amendment to the National Defense Authorization Act (“NDAA”) that would reauthorize the NAHASDA. Subsequently, the Senate voted to approve the NDAA with the NAHASDA amendment attached. The amendment language contains updates to a number of items in the NAHASDA statute that are beneficial to Tribes, which we reported on in our memo of July 24, 2023. A copy of the Senate NAHASDA amendment can be found [here](#).

Because the NDAA is a “must pass” bill, having the NAHASDA reauthorization attached to the Senate version of the NDAA is very good news. The House has already passed its version of the NDAA, but that version does not contain a NAHASDA reauthorization. The next step will be a conference between the House and Senate to negotiate a final version of the NDAA. Whether the NAHASDA amendment remains after the conference is uncertain. The fact that the amendment passed the Senate on a strongly bipartisan vote of 86-11 will be very helpful in that process. Tribal advocates will need to keep a close eye on the conference and continue to advocate to leadership in the House and Senate that Congress keep the NAHASDA reauthorization in the NDAA.

II. HUD Proposed Rule on Certification of Tribal Housing Counselors

On July 27, 2023, HUD held its third virtual Tribal Consultation on the Certification of Tribal Housing Counselors. HUD Office of Housing Counseling (“OHC”) Deputy Assistance Secretary David Berenbaum, HUD Office of Native American Programs (“ONAP”) Director of Performance and Planning Jad Atallah, and OHC staff Ruth Roman and David Valdez provided

opening remarks and an overview of the housing counseling (“Housing Counseling”) proposed rule (“Proposed Rule”). A copy of the HUD PowerPoint slides from the consultation are attached to this memo.

On December 14, 2016, the OHC published a Housing Counseling proposed rule “Proposed Rule, outlining housing counselor certification requirements for housing counseling conducted in connection with the Indian Housing Block Grant (“IHBG”) and the Indian Community Development Block Grant (“ICDBG”) programs. HUD held two prior consultations and six different listening sessions on the Proposed Rule. Information on the Proposed Rule as well as the first two tribal consultation sessions can be found [here](#). Comments on the Proposed Rule can be submitted via email to consultation@hud.gov and will be accepted through **August 28, 2023**.

HUD's Housing Counseling Program provides counseling to individuals about financing, maintaining, renting, or owning a home. The Dodd-Frank Wall Street Reform and Consumer Protection Act amended the Housing and Urban Development Act of 1968 to require entities and individual counselors to be certified by HUD in order to provide such counseling services. Most Tribes, TDHEs, and Tribal entities are currently ineligible to become HUD-approved housing counseling agencies and therefore are generally not eligible to receive HUD housing counseling grants.

After consulting with tribes following the 2016 publication of the Proposed Rule, HUD now proposes a separate housing counselor certification option for employees of tribes, TDHEs, and other tribal entities conducting housing counseling in relation to the IHBG and ICDBG programs. The preamble to the Proposed Rule states that HUD is incorporating tribal feedback into the Proposed Rule by streamlining the housing counselor certification option for employees of tribes, TDHEs, and other tribal entities. Certification of Tribal Housing Counselors, 88 Fed. Reg. at 4926. The preamble specifically noted concerns raised by tribes about the irrelevancy to tribes of some of the questions on the housing counseling certification examination, and the concern that the “current test requirements do not reflect the unique way that civil rights requirements apply to Tribes and other Tribal grantees under HUD programs.” Certification of Tribal Housing Counselors, 88 Fed. Reg. at 4925. The preamble also notes tribes’ concerns with their ability to meet the threshold requirement that the agency be a nonprofit (under section 501(c) of the Internal Revenue Code of 1986 (“IRC”)), the barriers created by tribes having limited resources, and the lack of availability of housing counselors in remote areas. Certification of Tribal Housing Counselors, 88 Fed. Reg. at 4926. While the Proposed Rule does not exempt tribes from the housing counseling requirement, it does address tribal comments by allowing housing counselors to work for tribes, TDHEs, and other tribal entities.

The Proposed Rule also added new definitions to address tribes, TDHEs and tribal entities. For example, HUD revised the definition of “HUD certified housing counselor” to include Indian tribes, TDHEs, and other tribal entities as places that a HUD-certified counselor may work. 24 CFR 214.3. An additional important change is that the Proposed Rule exempts tribes, TDHEs and tribal entities from compulsory participation in the existing housing counseling program (Subparts B–E) unless the entities also provide housing counseling under, or in connection with, other HUD programs (other than IHBG and ICDBG). Instead, the Proposed Rule adds a new Subpart F (24

CFR § 214.600) to the regulations that will establish housing counseling certification requirements for tribes, TDHEs, and other tribal entities.

Under the standard requirements of the current regulations (24 CFR Part 214) to become a HUD-approved housing counseling agency, the agency must be: (1) a nonprofit organization (under section 501(c) of the Internal Revenue Code of 1986 (IRC)); and (2) approved by HUD to provide housing counseling services to clients. To become a certified housing counselor, the individual must be employed by a participating agency (i.e. a HUD-approved housing counseling agency or a unit of state or local government). 24 CFR Part 214.

However, under the new Proposed Rule, an individual may become a HUD-certified housing counselor by meeting the standard requirements of Part 214 described above, **or** by meeting the requirements specific to tribes and TDHEs under Subpart F (§ 214.600). Under the tribe-specific requirements, an individual may become a HUD-certified housing counselor by (1) working for a tribe, TDHE, or other Tribal entity, and (2) passing a standardized, written housing counseling certification examination under Subpart F. § 214.600. Certification of Tribal Housing Counselors, 88 Fed. Reg. at 4928.

The housing counseling certification examination under Subpart F will be similar to the standard housing counseling certification examination. The certification examination will still test an individual's competency in the following areas: (1) Financial management; (2) property maintenance; (3) responsibilities of homeownership and tenancy; (4) fair housing laws and requirements; (5) housing affordability; and (6) avoidance of, and response to, rental or mortgage delinquency and avoidance of eviction or mortgage default." Certification of Tribal Housing Counselors, 88 Fed. Reg. at 4928. However, it will be tailored to fit tribal issues and reflect the unique status of trust land. 4925. The Proposed Rule provides for "a three-year transition period after the effective date of the final rule for individual counselors to be certified." Certification of Tribal Housing Counselors, 88 Fed. Reg. at 4928.

Additionally, the Proposed Rule would amend the IHBG and ICDBG regulations to provide that any housing counseling for these programs may only be conducted by individuals certified in accordance with 24 CFR Part 214. Certification of Tribal Housing Counselors, 88 Fed. Reg. at 4928. The Proposed Rule further recommends that any individual certified under Subpart F to provide housing counseling for IHBG and ICDBG programs should undergo training on tribe-specific issues, such as Federal Indian law, the unique status of trust land, the role of tribes in granting leases on trust land, etc. Certification of Tribal Housing Counselors, 88 Fed. Reg. at 4925.

Those tribes, TDHEs, and tribal entities not currently performing housing counseling are not required to provide housing counseling under the Proposed Rule. Such entities are free to continue to operate as they have been. Additionally, HUD staff reiterated that housing counselors providing housing counseling required by or provided in connection with other HUD grant programs would still need to comply with the existing requirement of passing the exam and working for a HUD approved agency as implied by the Proposed rule when:

- The HUD grant funds are being combined with NAHASDA funds for housing projects located outside tribal or civil jurisdiction; and

- The HUD grant funds are used to provide housing counseling services.

Housing counseling is independent, expert advice customized to the client to address their housing barriers and to help achieve their goals. Housing counseling elements include:

- Intake: obtaining information to determine if the agency can assist a potential client, schedule an appointment with a housing counselor, or refer a client to other resources. These activities, on their own, are not housing counseling.
- Client budget.
- Financial and housing affordability analysis.
- An action plan, except for reverse mortgage counseling.
- Reasonable efforts to follow-up with clients.

However, housing counseling does not include the following:

- Housing information, or placement or referral services.
- Routine administrative activities (such as program eligibility determinations and intake).
- Case management that is incidental to a larger case management and does not fund housing counseling.
- Group education without individualized housing counseling services.

HUD is seeking tribal feedback on the Proposed Rule, including specifically on whether there is a less burdensome alternative to the Proposed Rule that would still meets HUD's objectives.

III. Comments from Participants

HUD then opened up the call to participants to ask questions and provide feedback on the Proposed Rule. The questions and comments provided by participants are noted below. HUD did not provide a response to all comments, but where HUD did provide a response, we note the responses underneath the question or comment.

- **Tribal Question:** Will Native Community Development Financial Institutions (“CDFI”) be included the Proposed Rule as we are also providing housing counseling on Native Lands? [HUD answered yes to this later on, see below.]
- **Tribal Question:** Tribes recommend that HUD using existing materials to create housing counseling requirements, such as National American Indian Housing Council’s (“NAIHC”) Pathways Home Program. Many TDHEs and native CDFI's have been certified by these programs. [This was treated as a comment and there was no HUD response.]
- **Tribal Question:** Tribal housing counselors should have access to grants for training. [This was treated as a comment and there was no HUD response.]

- **Tribal Question:** HUD should further define TDHEs and tribal entities. Are these entities required to be 501(c)(3) nonprofits to obtain grant funds under OHC programs to provide housing counseling?
 - **HUD Response:** There will be an ongoing requirement that organizations approved as counseling groups must be 501(c)(3) nonprofits or government agencies. OHC is working with ONAP to create other grant opportunities. However, the nonprofit requirement is a statutory requirement for agencies providing services in all 50 states.
- **Tribal Question:** If a tribe uses IHBG funds for homeowners to receive downpayment assistance, but the homeowner receives housing counseling from a native CDFI, does the native CDFI have to be certified under the tribal program even if it does not provide any HUD-funded services?
 - **HUD Response:** There are a number of downpayment assistance programs. Some of those do not provide downpayment assistance. Programs that are funded through HUD will require HUD-approved housing counseling.
- **Tribal Question:** If a tribe uses Affordable Housing Program (AHP) funds as a match with IHBG or ICDBG funds on trust property for rehabilitation and use IHBG for housing counseling, would the tribe be required to have HUD certified housing counselors? [This was treated as a comment and there was no HUD response.]
- **Tribal Question:** If Tribes and TDHEs not currently providing housing counseling will not be required to provide housing counseling, this should be codified in the statute. [This was treated as a comment and there was no HUD response.]
- **Tribal Question:** Why has there not been an explanation as to why many tribal housing entities are considered as political subdivisions by the IRS under the Indian Tribal Tax Status Act? This should be explored as a 501(c)(3) equivalent, especially since housing is an essential governmental service. [This was treated as a comment and there was no HUD response.]
- **Tribal Question:** What parts of Subpart B–E apply to tribes?
 - **HUD Response:** None of the parts of Subparts B–E apply to tribes under the new exemption.
- **Tribal Question:** how would this housing counseling work across the board, since tribes vary significantly in developing housing, some on fee and some on trust land? Also, how will this work be paid for? If the costs of providing housing counseling come out of IHBG, that means less money for actual housing development and maintenance.
 - **HUD Response:** When the certification requirement of Dodd-Frank was adopted, the varieties of programs was also considered. These are very important issues. This is why HUD is following the recommendations of tribal leaders to work with

tribes to develop and fine-tune the standards. The intent of Dodd-Frank was to elevate the housing counseling to a higher level of certified expertise, for the protection of consumers, so that they know that a person who identifies as a housing counselor has some required training and certification. As far as funding, appropriations are up to Congress, but HUD is also working with private funders to bring in additional funds.

- **Tribal Question:** What additional certification is required of non-native counselors on tribal lands? Or are these requirements for working on Indian lands only applicable to Tribal counselors? Shouldn't non-native folks coming onto Tribal lands have Tribal-specific certification?
 - **HUD Response:** The prospective counselor will have the ability to choose. They can do a general training and that certification that would apply across the board, or they can take the training that is only tribal-specific.
- **Tribal Question:** will native CDFIs be subject to these requirements, since they provide counseling?
 - **HUD Response:** Yes, they are covered under the “other tribal entities” category.
- **Tribal Question:** How do you define “housing counselor”? How would it apply to TDHEs who are rural and do not have the funding to have a “counselor”? How will services be delivered? Will there be independent contractors who can do this work?
 - **HUD Response:** HUD has been very focused on this issue. There will be a separate set of directives addressing remote counseling for rural or underfunded areas. As far as independent contractors go, HUD asked that the speaker submit the question in writing, because HUD is working on developing specific standards to protect against scams by independent contractors.
- **Tribal Question:** How are you going to define “housing counseling” specific to Native communities?
 - **HUD Response:** OHC is working closely with HUD ONAP and in these consultations to come up with something that is appropriate and workable.
- **Tribal Question:** The draft regulations seem to suggest that the counselor must be employed by the Tribe/TDHE. However, many counselors are brought on as consultants, and not as employees. How does HUD plan to address this?
 - **HUD Response:** see prior answer regarding independent contractors above.
- **Tribal Question:** If a CDFI has a counselor who is certified, would that CDFI be eligible for OHC funding?

- **HUD Response:** Yes.
- **Tribal Question:** Delivery of services in Indian country should be done by people who are sensitive to and understand the specific needs of those communities.
 - **HUD Response:** HUD is working on that, and HUD's plan is to develop a distinct certification process for Indian country.
- **Tribal Question:** We have a small program with few staff. These requirements have stopped us from offering counseling because we are not certified. The rule is impeding us from moving at all, because we had been providing homeownership counseling before but cannot do that now. It would be unduly burdensome for our program to train up staff on all the HUD counseling requirements, most of which are not relevant. My staff also have taken the test for certification and feel that many of the questions are "trick" questions.
 - **HUD Response:** HUD is trying to develop the certification and training to be relevant and not burdensome. The goal is to ensure that counselors are competent; the goal is not to try to stump people.
- **Tribal Question:** HUD's cookie-cutter, one-size fits all approach is inappropriate for tribes and TDHEs. Such a one-size fits all approach is disrespectful of tribal sovereignty.
 - **HUD Response:** OHC is working with HUD ONAP and with Tribes, and is gathering information to make the program as appropriate and relevant as possible. HUD respects Tribal sovereignty.

HUD staff made closing remarks, noting that they look forward to receiving written comments from tribes and tribal advocates, and want to be sure HUD creates a rule that works for everyone.

Conclusion

If you have any questions about 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.