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## MEMORANDUM

November 8, 2024

TO: TRIBAL HOUSING CLIENTS

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

RE: ***NAIHC November 7, 2024 Legislative Committee Meeting, ONAP Build America, Buy America Act (BABA) Training, and Other Housing Updates***

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This memorandum provides a synthesis of information presented during the National American Indian Housing Council (NAIHC) Legislative Committee Meeting held on October 3, 2024, the U.S. Department of Housing and Urban Development's (HUD) Office of Native American Programs (ONAP) Build America, Buy America Act (BABA) virtual training, also held on November 7, 2024 and updates on other housing matters.

### I. NAIHC Legislative Committee

NAIHC Executive Director Douglas Marconi, NAIHC Legislative & Program Aide Blythe McWhirter, and NAIHC Board Chair Bobby Yandell facilitated the Legislative Committee Meeting.

#### *a. U.S. Elections*

As you are all aware, Donald Trump has won the presidential election and will return to the White House in 2025. The Republicans have gained a number of seats in the Senate and will now be the majority. It is still uncertain whether Democrats or Republicans will control the House. It is also still uncertain how the election results will impact tribal housing.

#### *b. Budget and Appropriations*

Ms. McWhirter provided an update on the Fiscal Year (FY) 2025 appropriations. As we have reported previously, the House and Senate Appropriations Committees have released their respective FY 2025 bills for Transportation, Housing and Urban Development, and Related Agencies Appropriations Act (THUD). The House and Senate THUD bills both provide for \$1.455 billion total for Native American programs, which is an increase over both FY 2023 and FY 2024 funding. Here again for your reference is the chart we provided previously showing the FY 2024 appropriations, and the recently released THUD appropriations bills:

| <b>Native American Programs</b>                               | <b>FY 2024</b> | <b>House THUD Bill</b> | <b>Senate THUD Bill</b> |
|---|----------------|------------------------|-------------------------|
| Tribal HUD-VASH   | \$7.5 million  | \$8 million            | \$7.5 million           |
| Indian Housing Block Grant (IHBG)                             | \$1.11 billion | \$1.22 billion         | \$1.217 billion         |
| IHBG Competitive Grants                                       | \$150 million  | \$150 million          | \$150 million           |
| Title VI Loans  | \$1 million    | \$1 million            | \$1 million             |
| Indian Community Development Block Grant (ICDBG)              | \$75 million   | \$75 million           | \$80 million            |
| Training and Technical Assistance                             | \$7 million    | \$7 million            | \$7 million             |
| National Organization Funding (per Sec.703 of NAHASDA)        | \$2 million    | \$2 million            | \$2 million             |
| Section 184 Loans   | \$1.5 million  | \$2 million            | \$1.5 million           |
| Imminent threats to health and safety                         | \$5 million    | \$5 million            | \$5 million             |
| <b>Native Hawaiian Program</b>                                |                |                        |                         |
| Native Hawaiian Housing Block Grant (NHHBG)                   | \$22.3 million | \$0                    | \$22.3 million          |
| Native Hawaiian Housing Loan Guarantee Program (Section 184A) | \$28 million   | \$28 million           | \$28 million            |
| Native Hawaiian Training and Technical Assistance             | \$1 million    | \$0                    | \$1 million             |

However, Congress was not able to pass any full year appropriations bills for FY2025 before the end of the FY 2024 fiscal year. In order to avoid a government shutdown, Congress passed a continuing resolution (CR) (H.R.9747) on September 25, 2024 to fund the Federal Government at FY 2024 levels through December 20, 2024. Ms. McWhirter remarked that Congress may use an “omnibus” appropriations bill to pass FY 2025 appropriations before the December 20, 2024 deadline. “Omnibus” bills are massive, thousand-page pieces of legislation that include all twelve appropriations bills. However, Ms. McWhirter speculated that since the Republicans will control both the Senate and Presidency and possibly the House in 2025, Congress may instead decide to pass another CR and wait until the new year to pass the full appropriations.

*c. Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) Reauthorization*

As we have reported previously, on July 10, 2024, the Senate Committee on Indian Affairs (SCIA) Chair Brian Schatz (D-HI) and Vice Chair Lisa Murkowski (R-AK) added the NAHASDA reauthorization bill to the Senate’s National Defense Authorization Act (NDAA) (a must-pass bill). Unfortunately, the NAHASDA reauthorization provisions were not included in the “manager’s report” for the NDAA forwarded to conference. Mr. Yandell commented that if the Republicans control both the House and Senate in 2025, the Republicans in favor of the NAHASDA reauthorization (e.g., Senator Murkowski and House Appropriations Committee Chairman Tom Cole (R-OK)) will face less resistance from Democrats such as Representative Maxine Waters, who has repeatedly opposed the reauthorization. As a result, Mr. Yandell speculated that there is a chance that Congress will actually successfully pass the NAHASDA reauthorization in 2025.

*d. Other Tribal Housing Bills*

Ms. McWhirter commented that NAIHC will be advocating that Congress pass the Tribal Trust Land Homeownership Act (S.70/H.R.3579) before the end of the year. The Tribal Trust Land Homeownership Act (TTLHA) bill sets forth requirements for the processing of a proposed residential leasehold mortgage, business leasehold mortgage, land mortgage, or right-of-way document by the Bureau of Indian Affairs (BIA). Additionally, the bill sets forth requirements for the BIA regarding (1) response times for the completion of certified title status reports, (2) notification of delays in processing, and (3) the form of notices and delivery of certain reports.

*e. HUD and Indian Health Service (IHS) Joint Letter*

Ms. McWhirter briefly discussed the ongoing issue with using IHS funding for tribal housing projects. Currently, an annual appropriations rider prohibits tribes from using IHS sanitation facilities funding for new homes funded through HUD grant programs.<sup>1</sup> This includes IHBG funding. Many tribes need IHS sanitation funding to develop sanitation systems for housing construction projects. However, the appropriations rider forces tribes to choose between using HUD funding or IHS sanitation funding for the project.

On September 9, 2024, HUD and IHS issued a [Dear Tribal Leader Letter](#) (DTLL) addressing this issue. The DTLL states that HUD and IHS are seeking tribal “feedback and recommendations on how HUD and IHS programs can better address the housing-related water and sewer infrastructure needs of Tribal communities.” HUD and IHS are also seeking feedback on a number of specific questions, which can be found in the [DTLL](#). Tribes and TDHEs can email their comments and recommendations to: [consultation@hud.gov](mailto:consultation@hud.gov) and [consultation@ihs.gov](mailto:consultation@ihs.gov), using the subject line “HUD/IHS Housing-related Infrastructure for Tribal Communities.” The comment period closes on **November 9, 2024**. In addition to written comments, HUD and the IHS will hold a virtual Consultation session, details of which will be forthcoming. Please let us know if you would like assistance with drafting and submitting comments.

*f. Tribal Directory Assessment Tool (TDAT) Enhancement Project*

Ms. McWhirter commented that HUD is seeking feedback on the Tribal Directory Assessment Tool (TDAT) Enhancement Project. HUD’s Office of Environment and Energy (OEE) developed the TDAT “to help users identify federally recognized Tribes that may have an interest in the proposed location of a HUD-assisted project and to provide Tribal contact information to assist users with initiating Section 106 reviews under the National Historic Preservation Act (NHPA, 54 U.S.C. § 300101 et seq.). TDAT is intended to improve the consistency and capability of grantees seeking to appropriately and successfully begin meaningful consultation with Tribes and in so doing ensure project considerations are better incorporated into project design.”<sup>2</sup>

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<sup>1</sup> See, e.g., Consolidated Appropriations Act of 2024, Pub. L. 118-42, 138 Stat. 275 (2024) <https://www.congress.gov/bill/118th-congress/house-bill/4366/text>.

<sup>2</sup> U.S. Dep’t of Housing & Urban Devel., Dear Tribal Leader Letter, Tribal Directory Assessment Tool (TDAT) Enhancement Project (Sept. 11, 2024),

On September 11, 2024, HUD published a [Dear Tribal Leader Letter](#) requesting tribal feedback on how to enhance the TDAT. Ms. McWhirter commented that HUD will be hosting three listening sessions at 2:00 PM ET on **November 14th** and **December 5th, 2024**. More information is available [here](#).

*g. HUD handbook*

On March 20, 2024, HUD published a final rule (“Final Rule”) updating the regulations governing the Section 184 program, which is a 100% loan guarantee program provided by HUD to lenders for home loans provided to tribal members. The goal of the program is to increase lending opportunities for housing in Indian communities. Tribes, TDHEs, and individual tribal members can borrow funds with a Section 184 loan guarantee. Additionally, individual borrowers do not need to be low income. HUD’s Office of Loan Guarantee (OLG) has released proposed draft sections of the Section 184 Policy Handbook (“Handbook”) to implement the Final Rule’s amendments to the regulations.

OLG has now released Chapter II of the Handbook for comment. Comments are due by November 12, 2024. More information is available [here](#). Ms. McWhirter remarked that NAIHC is collecting comments from TDHEs on Handbook. TDHEs can submit their comments to NAIHC and NAIHC will submit the collected comments to HUD. NAIHC has compiled a number of comments already and has posted those comments [here](#).

*h. CoC Builds Notice of Funding Opportunity (NOFO)*

On July 19, 2024, HUD published the [Continuum of Care \(CoC\) Builds \(“CoCBUILDS”\) NOFO](#). The CoCBUILDS program will provide grants within CoC geographic areas to address and reduce homelessness by increasing the number of permanent supportive housing (PSH) units through new construction, acquisition, or rehabilitation. The CoCBUILDS NOFO provides incentives for tribes and TDHEs to apply for funds to develop new PSH units. HUD anticipates providing approximately 25 awards from the funds available under the CoCBUILDS NOFO. The CoCBUILDS NOFO sets aside up to three awards for the highest scoring project applications where the PSH units are located on tribal reservations or trust lands. The minimum award is \$1,000,000 and the maximum award is \$10,000,000. Applications are due **November 21, 2024**.

HUD has advised that tribes and TDHEs that are interested in forming a new CoC should contact the Office of Special Needs Assistance Programs [SNAPSinfo@hud.gov](mailto:SNAPSinfo@hud.gov) as soon as possible.

*i. HUD Tribal Intergovernmental Advisory Committee (TIAC)*

On November 5, 2024, HUD published a [list of the 2025 committee members](#) of HUD’s Tribal Intergovernmental Advisory Committee (TIAC). There are a number of new tribal representatives who will be serving on the TIAC.

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[https://content.govdelivery.com/attachments/USHUDPIH/2024/09/16/file\\_attachments/2999083/TDAT%20Dear%20Tribal%20Leader%20Final%20-%209.10.2024.pdf](https://content.govdelivery.com/attachments/USHUDPIH/2024/09/16/file_attachments/2999083/TDAT%20Dear%20Tribal%20Leader%20Final%20-%209.10.2024.pdf)

*j. NAIHC Legislative Committee Meetings and Future Conferences*

The NAIHC Legislative Committee meetings will continue to be held on the first Thursday of each month via Zoom. Anyone who would like to submit questions prior to the calls may do so through the link provided in the NAIHC email that is sent out before each call.

HUD and NAIHC are hosting a Homeownership and Asset Building Summit on November 20-21, 2024 in Oklahoma City, OK. More information is available [here](#).

NAIHC will hold its annual Legal Symposium on December 9–12, 2024 in Las Vegas, Nevada. Registration is open on the NAIHC website [here](#).

## **II. HUD ONAP BABA Guidance and Training**

As we described in our prior memorandum, on October 11, 2024, ONAP issued Implementation Guidance for Tribal Recipients, Notice PIH 2024-35 (“ONAP BABA Guidance”) on the BABA requirements. During ONAP’s November 7, 2024 virtual training, ONAP Director of Performance and Planning Jad Atallah, ONAP Specialist Daniel Cox, and ONAP Specialist Kristen Arnold discussed the ONAP BABA Guidance, as summarized below. ONAP will be posting a recording of the training on the Codetalk website.

*a. BABA Overview*

BABA was enacted on November 15, 2021, and establishes a domestic content procurement preference (“Buy America Preference,” or “BAP”) for federal infrastructure programs. BABA requires federal agencies to ensure that none of the funds made available for qualifying infrastructure projects (“Infrastructure Project”) may be obligated unless the federal agency has taken steps to ensure that all iron, steel, manufactured products, and construction materials used in an Infrastructure Project are produced in the United States. Infrastructure Projects include “the construction, alteration, maintenance, or repair of infrastructure in the United States.” The BAP applies to *all sources* of federal financial assistance (FFA), as defined in 2 CFR Section 200.1, provided to tribes, TDHEs, and other tribal entities (collectively “Tribal Recipients”) involving Infrastructure Projects. The ONAP BABA Guidance states that the term “infrastructure” encompasses, among other things, the structures, facilities, and equipment for “buildings and real property.” ONAP BABA Guidance at 3. Additional information on the BABA requirements and terminology is available in the BABA regulations, located at [2 CFR Part 184](#).

On May 14, 2022, HUD published a one-year general applicability public interest waiver (“Waiver”) of the BAP in connection with HUD funding provided to Tribal Recipients. That Waiver period ended on **September 30, 2024**. The BAP applies to any FFA obligated after **October 1, 2024**. Mr. Atallah stated that ONAP interprets “obligated” as the date that the Area ONAP Administrator signs the grant agreement, not the date that the TDHE obligates the funding.

The U.S. Office of Management and Budget (OMB) will be regulating and enforcing the BABA requirements, through its Made in America Office (MIOA). On August 23, 2023, OMB

published a final rule to implement BABA, located at 2 CFR Part 184 and, incorporated into 2 CFR 200. October 25, 2023 OMB published an “[Implementation Guidance on Application of BAP in FFA Programs for Infrastructure](#)” (OMB Implementation Guidance), which provides an overview of many of the BABA requirements.

*b. ONAP BABA Guidance*

Ms. Arnold provided an overview of the ONAP BABA Guidance. She noted that the ONAP BABA Guidance outlines the BABA requirements for all HUD Tribal Recipients when applying the BAP to covered projects. The ONAP BABA Guidance also clarifies which ONAP “grants are subject to BABA, how to determine if the BAP is applicable to a project, which HUD general waivers may apply to a project, how to document BAP compliance, and how to submit a specific waiver request for approval.” *Id.* at 1. Additionally, the ONAP BABA Guidance provides a checklist to help Tribal Recipients determine whether a project is subject to BABA. *See* ONAP BABA Guidance Appendix C.

**1. BABA Applicability and Requirements**

The ONAP BABA Guidance clarifies that the BAP applies to Infrastructure Projects funded under the following ONAP grants (“Covered Program”):

- Indian Housing Block Grant (IHBG) Formula
- IHBG Competitive
- Indian Community Development Block Grant (ICDBG) single purpose
- Native Hawaiian Housing Block Grant (NHHBG)
- Title VI loan guarantees under the Native American Housing Assistance and Self-Determination Act of 1996 (Title VI).

The ONAP BABA Guidance states that the BAP does not apply to Infrastructure Projects funded under the following ONAP grants (pre- and post-disaster or emergency response expenditures):

- IHBG-Coronavirus Aid Relief and Economic Security Act (CARES)
- ICDBG-CARES
- IHBG-American Rescue Plan Act (ARP)
- ICDBG-ARP
- ICDBG-Imminent Threat in cases involving Presidentially declared disasters or emergencies
- NHHBG-ARP

In addition, the ONAP BABA Guidance informs tribes that ICDBG-imminent threat grants made to address imminent threats or emergencies not covered under a declared disaster or emergency declaration are still exempt from the BAP under HUD’s Exigent Circumstances waiver, discussed below. *Id.* at 5 n.2. The ONAP BABA Guidance further states that the BAP does not apply to FFA for programs that do not fund public Infrastructure Projects. *Id.* Ms. Arnold emphasized that ONAP has interpreted this to mean that the BAP does not apply to the Tribal HUD-VASH, since that funding is specifically for rental assistance and associated administrative

fees in mostly non-public housing and is not public infrastructure. The ONAP BABA Guidance clarifies that Section 184 grants will not be subject to BABA requirements, because the Section 184 program funding is used to finance the acquisition, construction, or rehabilitation of single-family housing for private use. *Id.*

Mr. Atallah remarked that there is still some question as to whether BABA will apply to Infrastructure Projects involving private homes not open to the public. ONAP is seeking guidance from OMB on that question and will provide guidance to tribes in the future. Mr. Atallah also noted that ONAP is seek guidance from OMB on whether the applicability of BABA to an Infrastructure Project will depend on whether the project involves single family versus multi-family housing. ONAP will share any guidance from OMB on that question in the future.

Ms. Arnold commented that the ONAP BABA Guidance provides examples of the types of projects that could be subject to BABA. These include building tribal facilities such as a community center or health and nutrition clinic, water and sewer facilities, or electrical transmission facilities and systems. *Id.* at 6, 11–12. Tribal Recipients can reach out to the ONAP points of contact for each region about whether a certain project would be subject to BABA.

Mr. Atallah stated that if a Tribal Recipient funds an Infrastructure Project with FFA that is subject to BABA, the BABA requirements apply to the entire project. For example, if a Tribal Recipient starts an Infrastructure Project with a 2022 IHBG grant, but the Tribal Recipient adds 2026 IHBG funds to the project, the entire Infrastructure Project must comply with BABA. Mr. Atallah therefore recommended that if a Tribal Recipient is considering adding HUD funding to an Infrastructure Project that was not previously subject to BABA, the Tribal Recipient should contact the HUD BABA point of contact for guidance. Mr. Atallah also emphasized OMB will not issue any retroactive waivers. It is therefore important to submit a waiver request prior to using BABA-covered FFA on an existing project.

The ONAP BABA Guidance provides a brief overview of the responsibilities of Tribal Recipients implementing projects subject to the BAP. These responsibilities include determining whether the project will be subject to BABA; determining whether iron, steel, construction materials, or manufactured products will be used in the Infrastructure Project; and ensuring that all procurements, subrecipient agreements, cooperative agreements, purchase orders, contracts, and subcontracts incorporate terms and conditions requiring contractors, subrecipients, subcontractors, or other expending parties to comply with BABA. *Id.* at 7–9. Tribal Recipients must also maintain adequate records documenting compliance with BABA requirements. Ms. Arnold commented that the BABA records retention requirements will be the same as the records retention requirements for ONAP grants. IHBG records retention requirements are located at 24 CFR § 1000.552; the ICDBG requirements are located at 24 CFR § 1003.501(a)(10). The records retention requirements for other FFA are located at 2 CFR 200.334 (applicable when there are no program-specific records retention requirements).

## **2. General BABA Waivers**

The ONAP BABA Guidance provides a description of the three existing HUD general applicability waivers available to Tribal Recipients. These three HUD waivers are in effect

through November 23, 2027, or for a shorter time as HUD may determine. HUD may establish additional waivers or extend the duration of existing waivers.

- **Exigent circumstances waiver:** This waiver applies when there is an urgent need by a grantee to immediately complete an Infrastructure Project because of an exigent circumstance, or a threat to the life, safety, or property of residents or the community.
- **De minimis waiver:** The BAP requirements do not apply to a de minimis portion of an Infrastructure Project, waiving BABA requirements for a cumulative total of no more than 5% of the total cost of the Iron or Steel Products, Manufactured Products, and Construction Materials, up to a maximum of \$1 million.
- **Small grants waiver:** HUD's small grants waiver applies to infrastructure grants for which the total cost is equal to or less than the current simplified acquisition threshold of \$250,000 (set in the Federal Acquisition Regulations (FAR) at 48 CFR Part 2). HUD's small grants waiver also applies to Infrastructure Projects for which the total cost is equal to or less than the current simplified acquisition threshold, currently at \$250,000. However, if the Tribal Recipient combines the FFA provided by HUD with FFA from another federal agency, and the total amount of FFA in a single Infrastructure Project is greater than the simplified acquisition threshold, then the small grants waiver will not apply to HUD's FFA. *Id.* at 10.

In addition to the three waivers above, certain procurements may also fall under the NAHASDA *de minimis* exemption. The NAHASDA *de minimis* exemption applies to any procurement of \$5,000 or less using IHBG funds. Pursuant to Section 203(g) of NAHASDA (25 U.S.C. § 4133(g)),<sup>3</sup> any procurement using IHBG funds under \$5,000 is exempt from BABA, even if it is used for an Infrastructure Project.

A Tribal Recipient does not need to apply for the three waivers described above or the NAHASDA *de minimis* exemption. However, if a Tribal Recipient determines that one of these waivers applies to their project, they must maintain documentation to support the use of the waiver. Ms. Arnold emphasized that Tribal Recipients cannot artificially subdivide an Infrastructure Project in order to fit procurements within the scope of the small grants or *de minimis* waivers or *de minimis* exemption above. The ONAP BABA Guidance states that "HUD will evaluate the total cost of the infrastructure project as 'the activity, or a group of integrally related activities, designed by the recipient to accomplish, in whole or in part, a specific objective.'"

### 3. Project-Specific Waivers

Tribal Recipients can also request project-specific waivers from the BAP on a limited, case-by-case basis. There are three project-specific waivers available to Tribal Recipients for FFA from all federal agencies:

- **Non-availability waiver:** The product needed is not produced in the United States in sufficient quantities or of a satisfactory quality.

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<sup>3</sup> "Notwithstanding any other provision of law, a recipient shall not be required to act in accordance with any otherwise applicable competitive procurement rule or procedure with respect to the procurement, using a grant provided under this chapter, of goods and services the value of which is less than \$5,000." 25 U.S.C. § 4133(g).



- **Unreasonable cost waiver:** The inclusion of a product made in America will increase the cost of the overall project by more than 25%.
- **Public interest waiver:** Requiring the use of the American made product would be inconsistent with the public interest.

However, Tribal Recipients must submit a waiver request for these waivers in order for the waiver to apply and waive the applicability of the BAP to an Infrastructure Project. The ONAP BABA Guidance provides details on how to submit a project-specific waiver. *Id.* at 16. Additional instructions for submitting specific waivers is available on HUD's [What If I Need A Waiver](#) webpage. Tribal Recipients can apply for a waiver through HUD's BABA Waiver Portal, located at <https://babawaiver.hud.gov/s/>. Each specific waiver request requires supporting documentation demonstrating the need for the waiver.

HUD will review each waiver request through a multi-step process. After HUD has reviewed and approved the waiver request, HUD will then publish the waiver request in the federal register for fifteen days for public comment. After the public comment period, HUD will submit the waiver request to OMB for its final waiver determination and approval. Until OMB issues its final approval of the waiver request, a Tribal Recipient should not procure any materials on an Infrastructure Project subject to BABA unless those materials comply with the BAP. *Id.*

#### 4. Non-Availability Waivers for Unique Tribal Conditions

The ONAP BABA Guidance states that Tribal Recipients can apply for a non-availability waiver, based on unique tribal conditions that restrict the availability of the American-made products. *Id.* The ONAP BABA Guidance provides examples of some unique Tribal conditions that may justify a non-availability waiver:

- A. **Short construction season/extreme weather or environmental conditions** make it impractical to purchase BAP-compliant materials in a timely manner.
- B. **Shipping restrictions**, such as shipment by barge, air cargo, or other limited/extreme means of transportation, make it impractical to purchase BAP-compliant materials in a timely manner.
- C. **Lack of vendors** prevents effective access to BAP-compliant materials, where vendors will not ship the materials to remote locations, will not respond to material inquiries, or cannot provide cost estimates.
- D. **Lack of contractors** prevents effective access to BAP-compliant materials, where, after repeated attempts, an insufficient number of bids were collected from available contractors due to BAP requirements.
- E. **Compliance with Indian preference** (25 U.S.C. § 5307(b)) **or tribal preference** (e.g., 25 U.S.C. § 4111(k)) contracting requirements prevent compliance with BAP, demonstrated by lack of qualifying bids received.
- F. **Due to conditions beyond the control of the Tribal Recipient**, BAP-compliant material is not readily available.

c. *Comments from Participants*

ONAP then opened up the virtual training to participants to ask questions and provide feedback on the ONAP BABA Guidance. The questions and comments provided by participants are noted below, as well as ONAP staff's response to each question or comment.

- Will grants that fall under the \$250,000 small grants waiver be subject to BABA if combined with other grants?
  - If the FFA is under the \$250,000 small grants waiver threshold, the grant itself will not be subject to BABA. If that money is mixed with other grants also under that threshold, ONAP will not combine the small grants into a cumulative total amount to make it subject to BABA. However, if the Tribal Recipient also funds the project with an FFA grant that is more than \$250,000 (and is therefore subject to BABA), the entire project will then be subject to BABA.
- How long will the BABA waiver approval process take?
  - ONAP is not yet sure how long that process will take. At best, ONAP estimates that it will take at least a month for HUD and OMB to complete the BABA waiver request. The waiver approval process is proscribed by the BABA statute, so ONAP is unable to change that approval process.
- If a TDHE is not submitting a BABA waiver request, does the TDHE need to submit BABA compliance documentation?
  - No, just follow standard records retention requirements for each grant.
- Will public comments submitted during a waiver review process be anonymous? And will there be time for a rebuttal on public comments?
  - ONAP is not yet certain how the public comment period will be structured, but there will likely not be a rebuttal process. It will be set up similar to public comment periods for federal rulemaking.
- Is BABA applicability grant-related or project-related?
  - If a grant is under \$250,000, then BABA does not apply to a project funded by that grant. However, if a small grant is used on a project for which a TDHE also uses FFA that is subject to BABA, then BABA applies to entire project.
- If a TDHE uses a 2022 HUD grant for a project that it starts in 2025, does BABA apply?
  - If ONAP obligated the grant to the TDHE prior to October 1, 2024, that grant is not subject to BABA and will not become subject to BABA even if the TDHE does not use that grant on a project until 2025. However, the TDHE should determine whether any other FFA used on the project would make it subject to BABA.
- How will ONAP be monitoring BABA compliance?
  - ONAP will monitor BABA compliance in the same way that it monitors all other grant requirements.
- How far in advance should a TDHE prepare a BABA checklist waiver for a project?
  - It is best to complete the BABA checklist well in advance, so that the TDHE has time to incorporate BABA requirements into a project if needed.
- When will ONAP update monitoring plans to include BABA requirements?
  - ONAP will update monitoring plans for the grants that ONAP obligates after October 1, 2024.

- Does a TDHE need to complete a BABA checklist if the TDHE thinks a project is subject to BABA, but is not sure?
  - The ONAP BABA checklist is just a tool, not a requirement.
- Are projects serving five or more houses considered “public” and therefore subject to BABA?
  - ONAP is waiting on formal guidance from OMB on this exact question and will issue additional guidance on this question in the future.
- If a TDHE has three grants under \$250,000 each, can the TDHE blend those together for the same project without having BABA apply?
  - Yes, a project is not subject to BABA if a TDHE combines three grants that are each not subject to BABA. However, if a TDHE uses a grant under \$250,000 on a project that is funded in part by other FFA that *is* subject to BABA, then the entire project is subject to BABA.
- Does a TDHE need to alert ONAP if the TDHE starts a project using more than \$250,000 in FFA?
  - No, a TDHE does not need to proactively notify ONAP that the TDHE will be doing a project that is subject to BABA.
- If the TDHE discovers that a contractor did not comply with BABA, what are the TDHE’s remedies?
  - Remedies will be developed by each area ONAP. Remedies will also be fact-specific, dependent on the circumstances of each project. Generally speaking, ONAP’s remedies will be the normal ONAP remedies. ONAP will do what it can to help TDHEs and will be reasonable in enforcing BABA compliance, especially during the first couple years of BABA applicability. ONAP does not want TDHEs to stop spending FFA out of a fear of failing to comply with BABA.
- Can a TDHE submit a BABA waiver request before submitting a grant application?
  - Yes, there does not appear to be a prohibition on submitting a BABA waiver request for a project before the TDHE receives any grant funding for the project, if the TDHE suspects that the project will qualify for a waiver.
- If a tribe adds a 2025 FFA grant to an Infrastructure Project that the tribe started in 2023, will the project be subject to BABA?
  - If the 2025 FFA grant is subject to BABA and is used on an Infrastructure Project, the entire project will be subject to BABA. Reach out to ONAP on how to use FFA grants in a way that will avoid an existing project being subject to BABA.

### ***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](mailto:egoodman@hobbsstrauss.com)) or Cari Baermann ([cbaermann@hobbsstrauss.com](mailto:cbaermann@hobbsstrauss.com)). Both may also be reached at 503-242-1745.