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MEMORANDUM

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TO: TRIBAL HOUSING CLIENTS

FROM:  Ed Clay Goodman, Cari L. Baermann, and Julie C. Van Winkle
HOBBS, STRAUS, DEAN & WALKER, LLP

RE: ***Multi-Agency Tribal Build America, Buy America Act Waiver; NAIHC Legislative Committee Meeting; Scott Turner Nomination Hearing (for HUD Secretary)***

This memo reports on three recent developments impacting Indian housing: (1) the issuance of a multi-agency, Tribal-specific waiver of the Build America, Buy America (BABA) Act; (2) the monthly meeting of the National American Indian Housing Council (NAIHC) Legislative Committee; and (3) the nomination hearing for Scott Turner, President-elect Trump's nominee for the position of Secretary for the Department of Housing and Urban Development (HUD).

Multi-Agency Tribal Build America, Buy America Act (BABA) Waiver

On January 10, 2025, eight Federal agencies, including (1) HUD, (2) Department of the Interior, (3) Department of Agriculture, (4) Department of Commerce, (5) Department of Education, (6) Department of Energy, (7) Environmental Protection Agency, and (8) Federal Emergency Management Agency issued a final [General Applicability Public Interest Waiver to Indian Tribes](#) ("Tribal BABA Waiver"). The final Tribal BABA Waiver reflects the proposed Tribal BABA Waiver published on December 13, 2024, with minor clarifications.

In summary, the Tribal BABA Waiver (1) exempts awards and subawards to tribes and tribally designated housing entities (TDHEs) of \$2.5 million or less from BABA requirements for five years; and (2) exempts manufactured products from BABA requirements between January 10, 2025 (the effective date of the Tribal BABA Waiver) and September 30, 2026, regardless of the Federal award amount. We provide more details on these exemptions below.

We are awaiting further guidance from HUD Office of Native American Programs (ONAP) regarding its statement that the requirements of BABA do not apply to single family housing

projects, including buildings consisting of 1–4 dwelling units.¹ The new multi-agency Tribal BABA Waiver does not specifically address BABA’s application to single family housing projects.

a. BABA Overview

BABA requires Federal agencies to ensure that none of the funds made available for infrastructure projects may be obligated unless all iron, steel, manufactured products, and construction materials used for the infrastructure project are made in America (i.e. the “Buy America Preference” or “BAP”).² Infrastructure projects include “the construction, alteration, maintenance, or repair of infrastructure in the United States.”³ The Buy America Preference applies to all sources of Federal Financial Assistance, as defined in 2 CFR Section 200.1, provided to tribes, TDHEs, and other tribal entities involving Infrastructure Projects. Affordable housing has been determined to be an Infrastructure Project.

The various Buy America Preference requirements of BABA apply to the procurement of three types of materials used in the construction of infrastructure: (1) iron and steel; (2) construction materials; and (3) manufactured products. Manufactured products probably involve the most difficult compliance issues, as such products often have multiple components, and each and every one of those components must be made in America.

b. Tribal BABA Waiver

The Tribal BABA Waiver applies a general applicability, public interest waiver to Federal Financial Assistance in which the recipient, subrecipient or program participant is a tribe, as defined in 25 U.S.C. § 5304(e), to include TDHEs, governmental arms and instrumentalities, and tribal organizations (collectively, “Tribes”), and applies under the following two circumstances:

1. If the total prime Federal award or subaward (as defined in 2 C.F.R. § 200.1) does not exceed \$2.5 million for the life of the award, it is exempt from BABA requirements. This waiver is in effect for five years, until January 10, 2030.
2. Manufactured products are exempt from BABA requirements, regardless of the size of the award or subaward. This exemption is in effect until September 30, 2026.

The final Tribal BABA Waiver includes some modifications from the proposed waiver, based on comments received. The final Tribal BABA Waiver clarifies that the waiver applies to Alaska Native Corporations as well as other tribal organizations such as TDHEs and Tribally Controlled Colleges and Universities. Further, the Tribal BABA Waiver applies to non-Tribal entities to the extent a project is co-funded with award(s) or subaward(s) to Tribes. Despite comments from Tribes, the final Tribal BABA Waiver also clarifies that the \$ 2.5 million threshold

¹ U.S. Dep’t of Housing & Urban Devel. Email, What’s New on Codetalk – November 26, 2024, “New Guidance on Applicability of Build America Buy America Act (BABA) Requirements to Housing Projects” (November 26, 2024).

² Build America Buy America (BABA) Pub. L. 117–58 § 70914(a).

³ Pub. L. 117–58 § 70912(7).

applies to *award amounts* not *project amounts*. Further, this threshold applies to subawards to Tribes that are less than or equal to \$ 2.5 million, if the total prime award is in excess of \$2.5 million.

The Tribal BABA Waiver applies to Federal Financial Assistance provided by HUD, Department of the Interior, Department of Agriculture, Department of Education, Department of Energy, Environmental Protection Agency, Federal Emergency Management Agency, and Department of Commerce.

The Tribal BABA Waiver creates a limited timeframe during which the BABA requirements would apply to awards that are obligated by a Federal agency after September 30, 2024 (the expiration date of HUD's original tribal waiver) and before January 10, 2025 (the effective date of the Tribal BABA Waiver). However, the Tribal BABA Waiver states that “[f]or Federal Financial Assistance issued prior to the effective date of the final waiver, the waiver would apply to funds not yet expended.” That appears to mean that BABA would only apply to funds obligated between September 30, 2024 and January 10, 2025 if the funds were already expended.

NAIHC Legislative Committee Meeting: January 16, 2025

We attended the monthly NAIHC Legislative Committee meeting on Thursday, January 16, 2025. NAIHC Government Affairs Coordinator Blythe McWhirter led the meeting (the NAIHC Co-chairs were not able to attend).

Congress is now back in session, and the newly elected Senators and Congressional Representatives have been sworn in. The NAIHC Legislative Conference is in a few weeks, and since the new Congress is in office, and Ms. McWhirter urged members to plan to visit their Congressional delegation while in town for the NAIHC Conference. Senator Lisa Murkowski (R-AK), Senator Brian Schatz (D-HI) and Representative Gwen Moore (D-WI) are confirmed to speak at NAIHC, and there are invitations out to several other speakers. NAIHC is planning to have advocacy materials on Monday of next week that NAIHC members can use for their visits on Capitol Hill during the conference.

There were a number of confirmation hearings held this past week for President-elect Trump's nominees. On Thursday, there was a hearing for Scott Turner, President-Elect Trump's nominee for HUD Secretary. NAIHC submitted some sample questions, that Senator Rounds and Senator Lummus asked. Please see the next section of this report for a description of that hearing.

NAIHC is in the process of preparing a transition report for the new Administration and Congress, stating NAIHC's priorities. Also, NAIHC will be undertaking ongoing discussions about strategies, although the big push will again be for the NAHASDA reauthorization. There are opportunities with there being a unified government (both houses and the Presidency are in the hands of the same party). NAIHC will be walking through the prior NAHASDA reauthorization bills, and considering each provision. NAIHC will be sending out a survey on this topic to get input from its members on each provision, the need for it, the issues that it resolves, and whether there are other things that should be included. NAIHC wants to focus on what are the “essential” items, and which items can be put in a parking lot and perhaps addressed in a different way. Part

of this process will involve looking at those items that have been roadblocks to passage of the bill in prior Congresses, and to see if we can remove those or if they are items that Tribes really want to see included. The turnaround time for feedback will be pretty short, because NAIHC wants to get on the ground running with a proposed bill as soon as it can.

Ms. McWhirter shared the NAHASDA reauthorization matrix that NAIHC and its regional associations worked up in 2012. NAIHC is looking at developing something similar. She went through some of the items in that matrix as examples of key provisions: student voucher assistance, Indian Health Service sanitation facilities construction, maximum rent rules, leveraging IHBG funds with other programs, the Drug Elimination Program, and Tribal HUD-VASH authorization. This discussion will be kicked off at the Legislative Committee meeting in-person at the NAIHC Legislative Conference on Wednesday.

Specifically related to the NAIHC Conference, Ms. McWhirter noted that the deadline for getting a reservation for a room at the NAIHC Conference rate at the Capitol Hilton has been extended. In addition, on Thursday, February 6, at 3:00 PM, the Senate Committee on Indian Affairs will be meeting.

Joanna Donohoe provided an update on legislative matters related to Native Veterans. There was a bill passed at the end of last session that reauthorized the Veterans Affairs (VA) Native American Direct Loan Program. The amendments make the program more flexible (for example, the requirement for an MOU has been dropped), Community Development Financial Institutions Fund (CDFIs) are now authorized to provide loans, and Native Veterans will be allowed to use the program to refinance existing loans. However, the interest rate reduction pilot from VA (2.5%) will not be extended past March 31, 2025. On the other hand, Tribal HUD-VASH did not pass last session. It has been included in NAHASDA reauthorization in the past, but NAIHC will also support moving forward with a separate bill on Tribal HUD-VASH again this session.

Kayla Blackwell from National Low Income Housing Coalition (NLIHC) gave an update on her organization's conference coming up in March 2025. Here is the link to the conference details and registration: <https://nlihc.org/events/2025-nlihc-housing-policy-forum>. The Conference will take place at the Hilton Capitol Hill at 525 New Jersey Ave. This is NLIHC's annual policy conference. While NLIHC is not a Native organization, there will be several sessions addressing Indian housing issues at the Conference.

Ed Clay Goodman from Hobbs Straus gave a brief update on new BABA waivers, discussed in the first section of this memo.

Nomination Hearing for Scott Turner (HUD Secretary)

President-elect Trump nominated Scott Turner to be the Secretary of the HUD. Mr. Turner's previous work involved leading a council that promoted investment and economic development in distressed communities during President Trump's first term, and in that capacity he worked closely with then-HUD Secretary Ben Carson. He also spent nine seasons in the NFL, was twice elected as a Texas State Representative, and has worked on education at the America First Policy Institute, a Trump-allied think-tank. He has also recently served

as chief visionary officer at the multifamily housing developer JPI, and he and his wife co-founded a faith-based nonprofit focused on economic opportunity.

The nomination hearing was before the Senate Committee on Banking, Housing, and Urban Affairs. Mr. Turner told senators he overcame extreme adversity growing up in Texas and that HUD's work focuses on "things that my family and I have experienced through the years." He said his wife grew up "on government assistance" and that at one point his family took in an uncle who had fallen into homelessness. He also said the housing crisis leaves people struggling every day, and he noted HUD's recent survey that found record high homelessness. "HUD, if you will, is failing at its most basic mission, and that has to come to an end," he said.

As noted above, there were some questions posed to him specific to Indian housing. Senator Mike Rounds (R-SD) touched on the importance of creating better opportunities for more Native Americans to become homeowners. He referenced the challenges of navigating the uniqueness of Tribal trust land and the issues impacting homeownership opportunities in rural Tribal communities. He highlighted the need for access to individuals who understand navigating a mortgage located on Tribal Trust land and asked Mr. Turner to work with the Senate to make that as simple as possible for these communities. Mr. Turner responded in the affirmative and voiced his appreciation for the Senator's care for his constituents, particularly those on tribal lands; he also shared a commitment to working with the Senator and visiting Tribal Leaders on Tribal lands and to ensure that the Administration can work to create efficient and affordable housing solutions for Tribal communities.

In another question, Senator Rounds made the following statement:

At a time when there is a growing demand for additional housing units, there's no question about that Federal regulations like Davis-Bacon, Environmental Review, Build America Buy America, and New Energy Standards are slowing the construction process and increasing costs nationwide, including on tribal lands. Breaking down some of this bureaucracy should be a part of the discussion as we try to incentivize housing development. My question for you [Mr. Turner] is under your leadership, will the department make it a priority to review and adjust program regulations to match the level of risk based on the type of activity, the location or the amount of federal funds involved?

Mr. Turner responded in the affirmative.

Senator Ruben Gallego (D-AZ) raised the topic of Native American Housing Block Grants. Senator Gallego highlighted that the previous Trump Administration had proposed cuts to the Native American Housing Block Grant Program, and asked Mr. Turner if he supported the President's proposals to cut funding for HUD-assisted housing for Native Americans. Mr. Turner shared that he would need to look more into the program and the proposal, thanked Senator Gallego for raising the question, and mentioned that Native American Tribes have the same difficulty in affordable housing because of tribal trust and other factors. Mr. Turner also mentioned opportunity zones as an excellent vehicle for building affordable housing and repeated his commitment to Tribal Nations.

Senator Cynthia Lummis (R-WY) referenced a prior meeting with Mr. Turner and shared her perspective that “Native CDFIs are important to fixing the housing crises in Indian Country. They're a way for tribes to attract capital that leaves Tribal members in control; and, in Indian Country, it's very important the Tribal members are in control.” The Senator further elaborated on the need for Native CDFIs to be allowed flexibility in the products they offer developers and home buyers and in how they operate their services to meet the needs of Tribal communities best. She asked for Mr. Turner’s commitment to improving the housing crises in Indian Country by working with the U.S. Treasury to ensure flexibility for Tribes and Native CDFIs. Mr. Turner affirmed his commitment to working with Senators Lummis and Warren on this issue.

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), Cari Baermann (cbaermann@hobbsstrauss.com), or Julie Van Winkle (jvanwinkle@hobbsstrauss.com). They may also be reached at 503-242-1745.