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## MEMORANDUM

March 5, 2021

To: TRIBAL HOUSING CLIENTS

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

Re: *NAIHC Legislative Committee Meeting – March 4, 2021*

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On March 4, 2021, the Native American Indian Housing Council ("NAIHC") convened its monthly Legislative Committee Call via Zoom. NAIHC Executive Director Tony Walters presided over the meeting. The updates below are a synthesis of information provided during the calls and other updates we have received regarding COVID-19 relief.

### I. Congressional Updates

#### *a. New Congress and Coronavirus Relief.*

Since the beginning of 2021, Congress has largely focused its efforts on the confirmation hearings for President Biden's cabinet members and a new COVID-19 relief package. On March 4, 2021, the Senate Committee on Energy and Natural Resources advanced Representative Debra Haaland's (D-N.M.) nomination for Secretary of the Department of Interior to the full Senate for a vote. If confirmed, Representative Haaland would be the first Native American to join a presidential cabinet.

The main issue that Congress is currently working on is the new COVID-19 relief package. Congressional leaders are moving this legislation – the "American Rescue Plan Act of 2021" (H.R. 1319) – through the expedited legislative process of "budget reconciliation," which narrows the scope of the package to purely budgetary matters. Doing so requires only 51 votes to get through the U.S. Senate, as opposed to the usual 60 votes due to the filibuster rule. Because the Senate is split 50/50 between Democrats and Republicans, with Vice President Harris presiding as the tie-breaker, this approach would allow Democrats to advance and pass this legislation without any Republican votes. Congress' goal is to pass the legislation by March 14, 2021, when the current enhanced unemployment benefits expire. During the last two weeks of February, the House of Representatives finalized their \$1.9 trillion COVID-19 package. On February 27, 2021, the House passed this legislation by a mostly party line vote of 219-212. The legislation is being considered by the Senate this week. The House version of the bill provides funding for tribes and tribal housing programs, including \$750 million in funding for programs funded under the Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA"), allocated as follows:

- Indian Housing Block Grant ("IHBG") - \$450 million
- Native Hawaiian Housing Block Grant ("NHHBG") - \$5 million ()
- Indian Community Development Block Grant ("ICDBG") - \$280 million (non-competitive) (, similar to the Imminent Threat grants issued last summer)
- Technical Training and Assistance - \$10 million
- Administration - \$5 million

The American Rescue Plan Act legislation also provides for approximately \$500 million in funding to tribes for the Homeowner Assistance Program. The Homeowner Assistance Program provides mortgage assistance to homeowners to prevent foreclosure or post-foreclosure eviction of a homeowner due to the COVID-19 pandemic. While the funding will be allocated to the U.S. Department of Treasury ("Treasury") for distribution, the U.S. Department of Housing and Urban Development ("HUD") has been advising Treasury on how to work with tribes and tribal housing programs. The program will be operated very similarly to the Treasury's Emergency Rental Assistance ("ERA") Program, but focused on homeowners in economic distress at risk of losing their homes. However, unlike the ERA Program, the Homeowner Assistance Program does provide for use of the higher of either the local or national area median income ("AMI").

The American Rescue Plan Act legislation further provides \$20 billion for tribes through the Tribal Relief Fund, which will be similar to the Coronavirus Aid, Relief, and Economic Security ("CARES") Act funding provided to tribes in 2020. However, Treasury is consulting with tribes on how to allocate this funding to tribes. This new funding will not be allocated through the NAHASDA formula, unlike the funding allocated last year. Finally, the legislation includes \$1,400 additional stimulus payments for individuals.

## **II. Grants and Administration**

### *a. Emergency Rental Assistance Program*

On December 27, 2020, as part of the Consolidated Appropriations Act, 2021 (Pub. L. No. 116-260, Division N § 501, Dec. 27, 2020) (the "Act"), Congress passed, and the President signed, an updated COVID-19 relief package that included \$25 billion for the ERA Program. The funds are provided directly to states, U.S. territories, local governments, and Indian tribes. Tribes received an \$800 million set-aside from this fund to assist eligible households who are facing eviction due to unpaid rents and utilities, or the inability to pay prospective rents and utilities. While the allocation of tribal funding was determined by the annual IHBG formula operated by HUD, the ERA Program, itself, is overseen by Treasury.

On January 19, 2021, Treasury published an initial set of Frequently Asked Questions ("FAQs") to serve as guidance for the ERA Program. Tribes, as well as other housing providers, had a number of questions and criticisms regarding the first iteration of FAQs, and urged the new Administration to update and clarify them. On February 22, 2021, Treasury published a revised set of FAQs that replaced and superseded the prior version. We understand Treasury developed the updated FAQs in consultation with HUD, and they do provide for some additional flexibility

and clarification requested by Tribes and other stakeholders. The updated FAQs are available by clicking [here](#).

One issue with the ERA Program raised by many tribes is the Act provides that household eligibility would be based on the local AMI, instead of the higher of either the local or national AMI. Use of the local AMI is a concern for many tribes, as it will exclude many households from eligibility (since the local AMI in economically distressed areas, like reservations, is often lower than the national average. The updated Treasury FAQs did not resolve the AMI issue (Treasury's position appears to be that the statutory language does not allow for use of the national AMI, but only the local). Mr. Walters commented he will verify if the American Rescue Plan Act retroactively revises the Act to address the AMI issue.

One participant on the call noted the FAQs provided some relief regarding the AMI. The FAQs include a categorical eligibility provision which provides:

If an applicant's household income has been verified to be at or below 80 percent of the area median income in connection with another local, state, or federal government assistance program [such as NAHASDA], grantees are permitted to rely on a determination letter from the government agency that verified the applicant's household income, provided that the determination for such program was made on or after January 1, 2020.

The participant noted through this categorical eligibility provision, households whose income was determined through NAHASDA based on the national AMI would be eligible for the ERA Program. However, only households that currently participate in a tribe's housing program would be eligible under this categorical eligibility provision.

Another participant asked whether ERA Program funds could be used to cover rent deposits. Mr. Walters responded that, while the FAQs do not specifically state rent deposits are covered, it does state "rental fees" are included in the definition of "other expenses related to housing." Mr. Walters encouraged tribes to interpret "rental fees" broadly in order to include rent deposits.

One participant asked whether a tribe, through the ERA Program, can recuperate rent it waived for tenants. Mr. Walters responded that if a tribe waived rent, the rent would no longer be considered to be in arrears, as the tenant no longer has an obligation to pay that rent. ERA Program rent assistance for rent arrearages can only be provided when there is an existing rent debt. He noted the analysis may change, case by case, depending on how the tribe treats the waived rent. However, if a tribe issued a formal waiver, it is likely the tribe would not be able to recuperate costs through the ERA Program for waived rent.

Mr. Walters remarked everyone is waiting for additional guidance from Treasury to determine what to include in the tribal ERA Program policies. However, the NAIHC website, <http://naihc.net/covid-19-resource/>, has posted policies received from tribes that may be used as a template. He encouraged participants to visit the website if they are looking for ERA Program policy suggestions.

One participant asked whether "Stability Services" under the ERA Program include the purchase of laptops for counseling/training. Mr. Walters responded he does not know whether laptops would be covered but will try to find out whether they are.

Another participant asked whether it is too late to reach out to members of Congress to advocate for the new COVID-19 relief package revise the ERA Program to allow use of the higher of either the local or national AMI. Mr. Walters responded it is too late to advocate that change, as the Senate is already considering the bill. However, Congressional members had enough awareness of the AMI issue to provide for use of the higher of the local or national AMI for the Homeowner Assistance Program. They may choose to retroactively address the ERA Program AMI issue through the new legislation.

An additional participant asked whether units used for lease-to-own agreements qualify as rental units under the ERA Program. Mr. Walters commented this is a grey area based on the language in the Treasury FAQs. It would probably depend on a specific tribe's tribal program policy. He noted if the tribal program uses the language 'lease-to-own' and ownership does not transfer until certain requirements are met, the unit may qualify as a rental unit for purposes of the ERA Program. Treasury has indicated it will be providing further guidance and may address this issue at that time. Mr. Walters recommended tribal housing entities contact their legal counsel if they wish to use ERA Program funds for lease-to-own units. Another participant commented that for a traditional lease-to-own unit, it is owned by the housing entity until the time the ownership transfers to the tenant. The tenant is required to pay the lease payment, which makes that payment a rental payment for all intents and purposes. He noted lease-to-own units should be treated as rentals until such time as the ownership is conveyed/transferred at the end of the lease term.

Treasury continues to seek input and guidance for the ERA Program and encourages stakeholders to submit inquiries to [EmergencyRentalAssistance@treasury.gov](mailto:EmergencyRentalAssistance@treasury.gov).

*b. Housing Counseling Consultation*

HUD has been conducting tribal consultation sessions to obtain feedback on a number of different topics. The first tribal consultation concerns implementation of a housing counseling regulatory amendment to the Housing and Urban Development Act of 1968 as it applies to the IHBG and the ICDBG programs. On December 14, 2016, HUD published a final rule addressing certification requirements for housing counseling. The rule implements the amendment by requiring that within 36 months of the availability of a certification examination, housing counseling (as required by or provided in connection with HUD programs) could only be provided by HUD-certified housing counselors working for a participating agency. The rule will only apply to the IHBG and the ICDBG programs after completion of tribal consultation and rulemaking. In future rulemaking, informed by this tribal consultation and other public comment, HUD will codify how the certification requirements are applicable to the IHBG and ICDBG programs, and eligibility requirements for tribes to participate in the HUD Housing Counseling Program.

Application of the certification requirement to IHBG and ICDBG programs could create a problem for tribes and the housing counseling services they offer. HUD is trying to determine how the requirements would apply to tribes. NAIHC is working with HUD to make sure an exception applies to tribes. Prior discussions with HUD have indicated that tribes are currently not eligible to be certified for providing housing counseling. The current rules do not particularly fit tribes, as they were designed for non-tribal public housing entities. The final rule and tribal consultations are being implemented through the HUD Office of Housing Counseling. That office does not have much experience or knowledge about tribal housing, so NAIHC is working with that office to help educate them about tribal housing. The written comments for the final rule are due March 19, 2021.

The second HUD consultation concerns HUD's Tribal Consultation Policy. On January 26, 2021, President Biden issued a Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships that affirmed the Administration's commitment to Tribal sovereignty and to fulfilling its Federal trust responsibility. The Memorandum also reaffirmed the policy announced in the Presidential Memorandum of November 5, 2009 (Tribal Consultation), which directed Federal agencies to develop and periodically revise their tribal consultation policies to ensure Federal agencies consider Tribal feedback when developing policies that have Tribal implications, consistent with Executive Order 13175.

On February 25, 2021, HUD hosted a consultation with tribes regarding the current HUD Tribal Consultation Policy. (Numerous other federal agencies have also been conducting similar consultations with tribes.) The call was recorded and will be uploaded on the HUD Office of Native American Programs ("ONAP") website. HUD is now developing a plan of action to implement the policies and directives of Executive Order 13175. To develop its plan, HUD is seeking feedback from tribal leaders on how it may strengthen tribal consultation with tribes. HUD has directed anyone who has any recommendations or comments on how HUD can improve its tribal consultation practices and policy to submit their feedback via email to [tribalconsultationpolicy@hud.gov](mailto:tribalconsultationpolicy@hud.gov). HUD has asked tribal members and leaders provide feedback by April 5, 2021, as HUD's action plan is due to the U.S. Office of Management and Budget by April 26, 2021. The current HUD consultation policy, last revised in 2016, is found at [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/ih/regs/govtogo tcp](https://www.hud.gov/program_offices/public_indian_housing/ih/regs/govtogo tcp).

The third topic on which HUD is engaging in tribal consultation is the Continuum of Care ("CoC") Program. The Consolidated Appropriations Act, 2021 (Public Law 116-260, approved December 27, 2020) included language allowing participation of Indian Tribes and Tribally Designated Housing Entities ("TDHE") in the CoC Program. HUD published a Dear Tribal Leader letter on March 1, 2021, discussing the CoC Program and seeking feedback from tribal leaders. Specifically, HUD is seeking comments on the following points:

- Participation in the upcoming fiscal year 2021 CoC Program Competition process and availability to coordinate with neighboring CoCs;
- Homeless needs within tribal areas and how CoC Program funds may help address homelessness;
- Challenges related to homelessness and recommendations where CoC Program funds may assist with housing and services; and

- Based on the statutory and regulatory requirements and restrictions, what obstacles are anticipated along with recommendations to assist Indian tribes and TDHE's towards addressing, reducing, and ending homelessness.

The full text of the Dear Tribal Leader letter is available on the HUD Codetalk website and [here](#). HUD is hosting a tribal consultation on the Continuum of Care Program on March 24, 2021, at 1:00 PM Eastern time. Information for joining the call is:

Dial-in: 888-251-2949 or 215-861-0694

Access Code: 5227235#

Or you can join the conference from your computer: Entry Link:  
<https://ems8.intellor.com/login/837527>

### **III. Other Matters**

The NAIHC Legislative Committee meetings will continue to be held the first Thursday of each month. The next NAIHC Legislative Committee meetings will be held April 1, 2021, and May 6, 2021. Anyone who would like to submit questions prior to the call may do so through the link provided in the NAIHC email sent out prior to each call. Sending in questions and comments ahead of time allows NAIHC to provide detailed responses during the call. NAIHC will continue to host the calls via a Zoom platform. Mr. Walters encouraged participants to reach out to NAIHC staff with any questions and comments.

#### ***Conclusion***

If you have any questions about this memorandum, please contact Ed Clay Goodman at 503-242-1745 or at [egoodman@hobbsstrauss.com](mailto:egoodman@hobbsstrauss.com).