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MEMORANDUM

March 21, 2025

TO: TRIBAL HOUSING CLIENTS

FROM: Ed Clay Goodman
HOBBS, STRAUS, DEAN & WALKER, LLP

RE: ***Funding Freeze Litigation Updates***

As discussed in our update on the funding freeze cases on March 7, both the U.S. District Court for the District of Columbia in the Nonprofits Case[1] and the U.S. District Court for the District of Rhode Island in the States Case[2] have issued preliminary injunctions enjoining categorical funding freezes and requiring certain funds to flow while the cases are litigated. Below, we summarize developments in each of these cases since our March 7 memorandum.

States Case. As discussed in our March 7 memorandum, the district court had ordered FEMA to file a status report by March 14 confirming the agency's compliance with the court's preliminary injunction ("PI") order. The district court had also denied the government's request to stay enforcement of its PI pending any appeal of that order to the First Circuit.

Since then, as ordered, the government filed a status report from FEMA. In the status report, the government asserted that FEMA's failure to disburse the "vast majority" of the withheld FEMA funding identified by the Plaintiffs is related to a "manual review process" that FEMA is using to "evaluate grant projects, activities, and source documentation before releasing funds for reimbursement paid to its grant recipients." It contends that this manual review process is in compliance with applicable legal authority governing such funds and FEMA's general authorities to manage its grant programs in compliance with federal law, and thus that it complies with the district court's PI. The government contends that any pause in disbursement of funds due to this manual review process does not constitute a pause or freeze of funding within the scope of the PI order but, rather, that the review process is merely an additional layer of "internal controls" being implemented before payments are released. It also asserts that FEMA has experienced technical issues with the system it uses for the processing payment requests, which it was not aware of prior to the Plaintiffs' motion concerning withheld FEMA funding, and that the agency is working to resolve these technical issues.

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[1] *Nat'l Council of Nonprofits v. Off. of Mgmt. & Budget*, No. 1:25-cv-00239 (D.D.C. filed Jan. 28, 2025).
[2] *New York v. Trump*, No. 1:25-cv-00039 (D.R.I. filed Jan. 28, 2025).

On March 17, the Plaintiff States filed a response to FEMA's status report. They report that none of the FEMA grants they initially identified as being frozen have opened in the intervening time and that, in fact, additional FEMA grants now appear frozen, as well. They contend that FEMA's actions "indisputably" amount to a pause on entire programs of FEMA funding—in violation of the district court's PI order—despite the government's arguments to the contrary. The manual review process, they argue, because of "its comprehensive scope and immediate effect" of pausing disbursement of funding, is not meaningfully different from the broad-sweeping order to pause federal funding pending review of individual grants that was initially announced in the OMB Memo that sparked this litigation. FEMA has, they argue, "frozen federal funding disbursements en masse in order to find irregularities it has not identified and has called for an individualized review of funding streams for grant recipients' compliance with obligations it has not specified, while providing no instructions to States on how to navigate the 'manual review' process or when they might expect the process to be resolved." The district court has yet to weigh in on the matter.

In addition, on March 10, the government filed a notice of appeal to the First Circuit of the district court's PI order. That same day, the government filed with the First Circuit an emergency motion to stay enforcement of the district court's PI order pending resolution of the appeal.

In its emergency motion to stay the PI order, the government argues that the PI is not grounded in law, is improperly broad, and that it improperly infringes on the President's authority to oversee and direct the policy of federal agencies. Specifically, the government takes issue with what it views as the Plaintiff States' impermissible "expan[sion of] their lawsuit to more than double the number of agency defendants and to recast their case as a challenge to . . . an 'indefinite pause on federal funds' that allegedly applies 'across myriad federal funding programs' and 'extend[s] to nearly all federal funding streams nationwide,'" rather than a challenge to the (now rescinded) OMB Memo, specifically. As a result, the government argues that the district court's PI is similarly—and impermissibly—overbroad. The government characterizes the PI as a "sweeping injunction that was not tethered to the supposed flaws in the OMB Memorandum, but instead broadly and unjustifiably prohibited actions based on other Executive Orders or directives." The government argues that it will ultimately prevail on the merits of the case and that a stay of the PI is warranted because, if not stayed, the PI will cause harm to the government (and thus, in turn, to the public, whose interest the government purports to be protecting) as funds will be disbursed that it will not later be able to claw back from the States. It also alleges that the PI will harm the government because it violates separation of powers principles that hold that the President has the ability to control his subordinates.

In a response in opposition to the emergency motion to stay enforcement of the PI filed on March 17, the Plaintiff States pushed back on the government's characterization

of their lawsuit as a challenge that shifted from one originally against the OMB Memo to, more recently, "a 'broad-based' attack on the President's authority" and policies evinced in individual Executive Orders. They maintain that they challenge "discrete and final agency actions" under the Administrative Procedure Act, which actions constituted indiscriminate decisions to pause already obligated federal funding pending review of such funding streams' compatibility with the President's policies. In that same vein, the Plaintiff States defend the propriety of the district court's PI, maintaining that it is properly circumscribed to prevent such indiscriminate, categorical funding freezes that have been implemented by federal agencies without regard to the legal authorities governing specific grants and funding sources or the terms of specific funding instruments. The PI, Plaintiffs maintain, "simply prohibits federal agencies from unlawfully freezing federal funds while they conduct the review the President has directed."

The Plaintiff States also pushed back in their response against the government's characterizations of the harm the government will allegedly suffer if a stay of the PI is not granted. The Plaintiffs underscore that their challenge—and the district court's PI—concern only funds that *have already been obligated*, and thus there is "no real risk" through enforcement of the PI that the government will be made to disburse funds the court may later find the government was legally entitled to withhold. With regard to *nonobligated* funds, even while the PI is in effect, agencies are free to make funding decisions in accordance with the relevant legal authorities governing federal spending. The PI is not, the Plaintiffs therefore maintain, some impermissible constriction of the President's powers over federal agencies as the government has argued.

The government has asked the First Circuit to impose a stay of the district court's PI by March 24, and the First Circuit has yet to rule on the request.

Nonprofits Case. As we discussed in our March 7 memorandum, in the Nonprofits case, the Plaintiff Nonprofits filed a motion seeking clarification of the scope of the Court's PI order and, specifically, the meaning of the term "open awards." On March 14, the district court denied the motion. The court noted that the government has consistently interpreted "open awards" to mean "'all forms of Federal financial assistance within the scope of'" the OMB Memo that "'have already been approved and partially disbursed'" since they filed their notice of compliance with the court's temporary restraining order ("TRO") on February 5. Plaintiff Nonprofits did not object to that interpretation at that time, and they in fact continued to seek a PI "'within the bounds originally described at the TRO stage . . . for open awards'" thereafter, despite the fact that the issue of withheld HUD funds that eventually gave rise to their motion clarify should have been apparent to them by early February.

While the court noted that it "does not expressly endorse [the government's] narrow reading of the TRO and the preliminary injunction, it acknowledge[d] that [the government] and . . . various agencies have been operating under [that] interpretation" for

some time now, and that the Plaintiffs "had multiple opportunities to dispute" that characterization of open awards but never did until their very recent motion for clarification. Given Plaintiffs' failure to object previously, the court declined to revisit the matter and denied Plaintiffs' motion.

The case will now presumably move into the merits stage, and the district court has ordered the government to file its answer to the Plaintiff States' complaint by April 14.

Conclusion

If you have questions or would like additional information about anything discussed above, please do not hesitate to contact me at egoodman@hobbsstraus.com or by telephone at (503) 242-1745.