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MEMORANDUM

April 12, 2016

To: TRIBAL CLIENTS

From: HOBBS, STRAUS, DEAN & WALKER, LLP

Re: *IHS, Veterans Affairs, and Treasury Officials Update Self-Governance Tribes on Health Care Issues; Office of Tribal Self-Governance Policy Review Workgroup Reports to Tribes*

Tribal leaders and staff from Self-Governance Tribes recently received briefings from federal officials on a variety of health care issues at the Tribal Self-Governance Advisory Committee Quarterly Meeting on March 30-31, 2016 in Washington, DC. Topics of discussion included Affordable Care Act (ACA) implementation, the Veterans Affairs (VA)-Indian Health Service (IHS) Memorandum of Understanding (MOU), and the proposed rule on the Catastrophic Health Emergency Fund (CHEF). Tribes also received an initial report and recommendations from the Office of Tribal Self-Governance (OTSG) Policy Review Workgroup, a tribal-federal team that has been reviewing twenty years of IHS policies on Self-Governance.

ACA Implementation

Two U.S. Department of the Treasury tax attorneys addressed ACA implementation, in particular the Employer Mandate and the Cadillac Tax. Thomas C. West, Jr., Tax Legislative Counsel, Office of Economic Policy, and Kathryn Johnson, Attorney Advisor, Office of the Benefits Tax Counsel, said that Treasury understands the tribal position that tribes should be exempt from the Employer Mandate, which requires employers of 50 or more full-time equivalent employees to provide insurance coverage or face penalties. The mandate is inconsistent with the federal responsibility to provide health care to Indians and burdensome to tribal businesses that employ IHS-eligible employees.

Ms. Johnson said that Treasury is continuing to analyze correspondence on this issue—including a letter from the TSGAC—and that dialogue with the Department of Health and Human Services (HHS) is ongoing, but Treasury has yet to make a decision. Chief Lynn Malerba, TSGAC Chair, and Ron Allen, Chairman of the Department of the Interior Self-Governance Advisory Committee, intend to follow up with Treasury and continue to press for the exemption. In addition, Ms. Johnson said Treasury would be glad to meet with tribal technical representatives to explore details of the rationale for and

mechanism of the proposed exemption.

Ms. Johnson noted that implementation of the so-called Cadillac Tax—a tax on employers who offer premium health insurance plans that exceed specified cost limits—has been pushed back from 2018 to 2020. Tribal representatives pressed the argument that the ACA exempts tribes from the tax. By stating that “federal and state” coverage is subject to the Cadillac Tax, the statute infers that other governments, like tribal governments, are not. Ms. Johnson said that Treasury is working on a guidance document to address this issue, but she could not disclose the Department’s conclusion. In response to an audience question, she said there is no expected date for issuance of the guidance.

VA Update

Mary Smith, Principal Deputy Director of IHS, reported that IHS continues to press the VA for an addendum to the inter-agency MOU that would provide for VA to reimburse IHS and tribes for Purchased and Referred Care (PRC) provided to veterans. Ms. Smith indicated that VA has been less than enthusiastic but is “considering” the change, and that IHS hopes and expects to get this done before the end of the year. She said that the White House will convene a meeting between IHS and VA to help resolve the issue.

Stephanie Birdwell, the Director of VA’s Office of Tribal Government Relations, mentioned the MOU with IHS but did not discuss VA’s position on, or the process for addressing, inclusion of PRC. VA’s update was dominated by a discussion of the agency’s plan to consolidate and streamline existing community care programs and integrate the VA system with other federal and community health care providers, including tribes. Gina Capra, Director of the VA Office of Rural Health, said that this initiative will involve significant tribal consultation.

Proposed Rule on CHEF

IHS Principal Deputy Director Mary Smith indicated that IHS would consider pulling the proposed CHEF rule pending further tribal consultation. In a discussion with Ms. Smith, Chief Malerba summarized tribes’ concern that no tribal consultation was held before the proposed rule was issued, resulting in both a procedural deficiency and substantive problems that could have been averted. Ms. Smith noted that the comment period has been extended from February to May 10 to help address these concerns. Chief Malerba asked that IHS consider revoking the rule, holding consultation, then revising and re-issuing the proposed rule. Ms. Smith said that IHS would consider doing that if a formal request is made.

OTSG Policy Review

The IHS Tribal Self-Governance Program Information Review Workgroup has reviewed twenty years' worth of policy and guidance documents on implementation of the self-governance policy. Many of these documents need to be revised or updated to better reflect the Indian Self-Determination Act and its implementing regulations. Some of the documents also include good ideas that should be revitalized. Cyndi Ferguson of SENSE, Inc. and Melanie Fourkiller of the Choctaw Nation of Oklahoma presented the group's initial findings and recommendations, a copy of which is attached. Discussion of these issues focused on the following:

- **Role of OTSG in Negotiations:** Should OTSG play an expanded role in the negotiation of compacts and funding agreements? Tribal representatives mostly agreed with OTSG Director Ben Smith that the office should retain its limited, neutral role as a facilitator.
- **Role of OTSG in Payment:** Should OTSG assume full responsibility for payment, as the TSGAC recommended many years ago? This would streamline, and likely shorten, the payment process by providing direct payment from Headquarters to Tribes rather than through the Area Offices. But OTSG currently lacks the staffing to assume this function, and Mr. Smith said tribes could expect "major pushback" to such a proposal from the Areas. A technical workgroup of OTSG and tribal representatives will develop a document outlining the pros and cons of OTSG assuming payment responsibilities. OTSG will schedule a teleconference with the TSGAC in advance of the July meeting, and TSGAC will decide on a formal recommendation in July.
- **The Role of Agency Lead Negotiators (ALNs):** IHS has never had a formal job description, training curriculum, or performance measures for ALNs. Tribes believe this has resulted in inconsistent implementation of Self-Governance across the Areas. The group discussed whether ALNs should be formal positions reassigned to OTSG and trained through a standardized curriculum. These ideas will require further study, but are timely given the current shortage of experienced ALNs.
- **IHS Documents, including PSFA Manuals:** The TSGAC adopted the workgroup's recommendations to ask IHS to share documents regularly and timely, including funding tables; information on residuals; and Headquarters and Area Programs, Services, Functions, and Activities (PSFA) Manuals.

Although the TSGAC did not have time to address all of the policy review workgroup's recommendations, the attached outline summarizes additional significant issues to address in coordination with OTSG.

Conclusion

Please contact Elliott Milhollin (emilhollin@hobbsstrauss.com or 202-822-8282), Geoff Strommer (gstrommer@gmail.com or 503-242-1745), or Steve Osborne (sosborne@hobbsstrauss.com or 503-242-1745) if we may provide additional information or assistance regarding these issues.

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