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## MEMORANDUM

August 19, 2016

To: Tribal Health Clients

From: Hobbs, Straus, Dean & Walker, LLP

Re: IHS Tribal Consultation Teleconference on the CHEF Proposed Rule

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As previously reported, the Indian Health Service (IHS) announced that it would engage in additional tribal consultation before deciding whether or how to move forward with its proposed rule for the Catastrophic Health Emergency Fund (CHEF) that it initially published on January 26, 2016. The IHS held the first of these additional tribal consultations by teleconference on August 16, 2016. The consultation was led by Terri Schmidt, Acting Director of the Office of Resources Access and Partnership. As discussed below, the IHS has scheduled additional consultations via one additional teleconference and two in-person sessions.

*Alternate Resource Issue.* Tribal representatives were unanimous in their adamant opposition to that portion of the proposed rule which would define alternate resources to include tribal self-insured plans. Tribal representatives made the following points regarding this issue:

- Defining tribal resources as alternate resources for purposes of the CHEF program is unacceptable. The IHS lacks statutory authority to promulgate regulations that include tribal programs as alternate resources, and doing so would be inconsistent with the federal trust responsibility to provide healthcare for Indians and Alaska Natives.
- IHS failed to consult with tribes before promulgating the proposed rule, and it should be withdrawn in its entirety.
- The IHS should appoint a tribal/federal workgroup regarding development of CHEF regulations.

*IHS Pushback.* Terri Schmidt disagreed with some of the arguments made by tribal representatives on the call. She said that if a tribe has its own health insurance it is an alternate resource unless tribes include an exclusionary clause. In response to criticism that IHS issued the proposed CHEF rule prior to tribal consultation, Ms. Schmidt pointed to two Dear Tribal Leader letters and an IHS talk at a tribal health

summit on the issue prior to the draft rule being published. A tribal representative cautioned that tribal consultation should be formal as it is a government-to-government relationship.

As discussed in our January 28, 2016 memorandum summarizing the proposed rule, the IHS decision to include “tribes” and tribal self-insured plans as alternate resources is not permitted by the Indian Health Care Improvement Act. Section 202(d)(5) of the IHCA, only gives the Secretary rulemaking authority to establish a procedure to limit CHEF payments when a provider is eligible to receive payment for treatment “from any other Federal, State, local or private source of reimbursement for which the patient is eligible.” The term “Tribal” is not included in the list, and as a result the IHS’s proposal goes beyond what was authorized by statute.

In response to this argument, Ms. Schmidt stated that the IHS has always interpreted the term "local" in the IHCA CHEF reimbursement provision to include tribal self-insurance. We strongly disagree with that interpretation, as the term “local” in a statute generally refers to local governments, not tribal programs.

*Lowering of the Threshold.* Terri Schmidt inquired of people's views of lowering the CHEF threshold from \$25,000 to \$19,000 as is in the proposed rule, and several people expressed support for it. But the part of the proposal that would increase the CHEF annually by the Consumer Price Index brought some skepticism and it was suggested that alternate ideas be explored. Terri Schmidt pointed out that capping annual increases in the CHEF threshold would require a statutory fix.

*ISDEAA.* One person expressed the view that the draft rule provision which says CHEF is not subject to ISDEAA is an overstatement and should be removed; even though the program is centrally run, tribes receive their funding as part of their ISDEAA compacts. The point was made that the proposed rule would encroach on tribes' authority to maximize resources and to develop programs under the ISDEAA.

*Other Needed Improvements.* Tribal representatives made suggestions for other improvements to the CHEF program. Several people said that the criteria for CHEF claims – what is allowable and what is not -- are not clear in the proposed rule, and that as a result it granted IHS too much discretion in determining how to grant requests for CHEF funding. Tribal representatives also stated that there needs to be clarification in the definitions of the difference between "referral" versus "authorization for payment." Finally they argued there needs to be a procedure to determine distribution of CHEF funds.

*Upcoming Consultations.*

Teleconference: Monday, October 24, 2016  
Call-in Number: 888-790-3108  
Participant Passcode: 4110567

In-Person: September 19, 2016, 9 a.m.  
National Indian Health Board's 33<sup>rd</sup> Annual Tribal health Conference  
Scottsdale, AZ

In-Person: October 9, 2016, 1 p.m.  
National Congress of American Indians 73<sup>rd</sup> Annual Convention  
Phoenix, AZ

If you have any questions about the proposed regulations or would like assistance drafting comments, please do not hesitate to contact Elliott Milhollin ([emilhollin@hobbsstrauss.com](mailto:emilhollin@hobbsstrauss.com) or 202-822-8282), or Geoff Strommer ([gstrommer@hobbsstrauss.com](mailto:gstrommer@hobbsstrauss.com) or 503-242-1745).