



1899 L Street, NW, Suite 1200
Washington, DC 20036

T 202.822.8282
F 202.296.8834

HOBBSSTRAUS.COM

MEMORANDUM

March 27, 2020

To: Tribal Clients
From: Hobbs, Straus, Dean & Walker, LLP
Re: *COVID-19 Economic Response Update*

Today, President Trump signed into law the \$2 trillion Phase 3 COVID response bill, known as H.R. 748, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). This stimulus package is designed to flood the economy with money in an effort to stabilize households and businesses that have been negatively impacted by the COVID-19 outbreak.

We reviewed the bill to gather and analyze provisions in it that are of interest to Indian Country regarding economic development and employment issues. The legislation provides for vast economic relief in all sectors of the economy, including for tribes and tribal entities. Major updates include:

- An \$8 billion set aside for tribal governments in Coronavirus Relief Funds, that will be distributed to tribes and tribal entities for necessary expenditures related to the COVID-19 emergency.
- Tribal businesses that employ fewer than 500 workers will be eligible for forgivable SBA 7(a) loans accessible through banks to pay workers, benefits, overhead, and other business expenditures to ensure continuity through the public health emergency. \$349 billion is appropriated for 7(a) loans, and over \$127 billion for other SBA programs.
- \$454 billion of loan availability for the Federal Reserve to make loans, loan guarantees, investments, or to purchase debts to increase liquidity broadly across the economy, including tribes, states, and municipalities. The Federal Reserve has indicated it would have small business programs via a Main Street Business Lending Program.
- The bill clarified that tribes paying unemployment claims through state systems on a "reimbursement" basis will be eligible for repayment of those claims through 2020 under federal funding for unemployment due to the health emergency.

We set forth the details of these and other relevant provisions below.

We are available to assist you with steps needed to take advantage of the bill's provisions. Please call us if we can help you in this regard and with engaging the federal agencies as they implement the bill and move resources out to Indian Country.

Discussion

DIVISION A—KEEPING WORKERS PAID AND EMPLOYED, HEALTH CARE SYSTEM ENHANCEMENTS, AND ECONOMIC STABILIZATION

TITLE I—KEEPING AMERICAN WORKERS PAID AND EMPLOYED ACT

Small Business Assistance

\$349 billion is authorized for the 7(a) Small Business Loan Program, which as we have previously reported is the primary vehicle through which the SBA provides assistance. Tribal business concerns and 501(c)(3) non-profits will be eligible for loans so long as they employ 500 or fewer persons or, if applicable, meet size standards established by the SBA for the industry. Loan values will be determined based on the business' costs, up to a maximum of \$10 million.

Loans may be used for payroll costs; costs associated with continuation of group health care benefits during periods of paid sick, medical or family leave; insurance premiums; employee salaries, commissions, and other compensation; mortgage interest; rent; utilities; and interest on any other debt that was incurred before February 15, 2020. Certain fees and personal guarantee requirements would be waived, and borrowers would be eligible for forgiveness of certain loan amounts related to continuing to employ workers during the COVID-19 crisis.

Rather than considering repayment ability, lenders would only determine whether a business was operational and had employees on February 15, 2020. The federal guarantee for 7(a) loans, however, would increase to 100% through December 31, 2020.

The bill provides loan forgiveness for qualifying payments made for payroll costs; mortgage interest; rent; and covered utility payments.

Additionally, the bill:

- Expands the permitted value of SBA express loans from \$350,000 to \$1 million through December 31, 2020;
- Appropriates \$17 billion for covering up to 6 months of payments for entities with existing SBA loans;

- Appropriates \$10 billion for Economic Injury Disaster Loans and makes entities in all states eligible to apply due to the President's national emergency declaration;
- Provides \$100 billion in secondary market loan guarantees through September 30, 2021;
- Appropriates \$265 million for small business development centers and women's business centers, and \$10 million for the Department of Commerce Minority Business Development Agency to provide technical assistance to small business concerns; and
- Provides certain bankruptcy relief with regard to amounts expended related to the national emergency.

The bill would mandate that emergency regulations to carry out these provisions be promulgated within 15 days of enactment.

TITLE II—ASSISTANCE FOR AMERICAN WORKERS, FAMILIES, AND BUSINESSES

Clarification of Unemployment Payments

There is language clarifying that Tribes reimbursing states for unemployment claims will be eligible for federal payment of those claims like other employers will receive due to COVID-19 related employment losses. The current language includes provisions directing the Secretary of Labor to tell states to apply maximum flexibility for entities that "reimburse" the state unemployment fund for claims, and providing federal funding for states to refund those entities. These entities include tribes, governmental employers, and some nonprofits.

The legislation greatly expands unemployment benefits in general, with Federal funding for the new coverage for displaced workers.

Recovery Tax Credits to Individual

Individuals will receive a 2020 tax credit of \$1,200 for adults and \$500 for children, which will be sent out to taxpayers as an advanced rebate. The amount will be reduced for taxpayers with an adjusted gross income of more than \$75,000 a year and phases out completely for those with incomes of \$99,000 or more.

Employment Tax Relief

The bill provides expanded relief as "employee retention tax credits" for employers subject to closure due to COVID-19. This appears to be applicable to all employers, including tribes, as it is a partial credit of the employer-share of Federal Insurance Contribution Act taxes, provided they are at least partially shut down and have less than 50 percent of gross receipts for the applicable quarter, compared to the same quarter in 2019. The employee retention tax credit is not available for any employer taking a Small Business Interruption Loan as created by this same law.

The bill contains a deferral of payment of some payroll taxes until January 1, 2021.

Incentive for Employers to Provide Student Loan Payment Benefit

The bill includes tax credits that encourages employers to implement student loan repayment programs for employees. This provision will exclude up to \$5,250 in qualifying student loan repayments paid by the employer on behalf of the employee from income for income tax purposes. This program is eligible for payments made between the date of enactment and December 31, 2020.

TITLE III—SUPPORTING AMERICA'S HEALTH CARE SYSTEM IN THE FIGHT AGAINST THE CORONAVIRUS

SUBTITLE C—LABOR PROVISIONS

Clarification of Employment Law and Leave Provisions from the "Phase 2" Relief Act

This bill clarifies that for the purposes of the portion of the Family Medical Leave Act (FMLA)-style Public Health Emergency Leave available to parents whose children's schools or childcares are closed, that the limitation of payment for that leave cannot exceed \$200 a day or \$10,000 in the aggregate for each employee. If 2/3 of an employees' pay is less than this cap (but above minimum wage), the employer may pay that lesser amount. It also includes a similar clarification for the caps contained in the two-week Emergency Paid Sick Leave provision to ensure the applicable caps apply to each employee.

The legislation includes amendments that would allow the Director of the Office of Management and Budget (OMB) to exclude Executive Branch and civil service employees from the paid leave provisions, including by exempting Executive Branch employers.

The bill includes language that will ensure employees laid off after March 1 for COVID-19 reasons would still be eligible for Public Health Emergency Leave (the FMLA-style leave). That provision requires an employee to have worked for an employer at least 30 days to be eligible to take that leave. The bill clarifies that an employer would need to include time the employee worked pre-COVID-19 layoffs in that time, if an employee was employed with the employer in the 60 days prior to the layoff.

The bill contains provisions that would allow the Secretary of Treasury to "advance" the tax credits employers subject to the required leave provisions in the Families First Coronavirus Relief Act (FFCRA)—the Phase 2 law—will receive for the two types of leave paid out to employees, as applicable. This does not clarify whether tribes are assured this reimbursement. The tax credits operate through FICA payroll taxes that tribes do pay as employers (and from which tribes are not exempt).

The changes do not clarify whether the paid leave provisions in the Phase 2 legislation apply to tribes and tribal entity or not; this ambiguity remains given Phase 2 is silent as to tribes.

TITLE IV—ECONOMIC STABILIZATION AND ASSISTANCE TO SEVERELY DISTRESSED SECTORS OF THE UNITED STATES ECONOMY

SUBTITLE A—CORONAVIRUS ECONOMIC STABILIZATION ACT OF 2020

Assistance to Severely Distressed Sectors

The bill would provide liquidity assistance in the form of \$500 billion in loans, loan guarantees, and other investments to eligible businesses, municipalities, and states—the definition of which expressly includes Indian tribes. Eligible businesses are air carriers or "a United States business that has not otherwise received adequate economic relief in the form of loans or loan guarantees provided under this Act." This title now includes the addition of an inspector general and congressional commission to provide oversight and a prohibition on businesses controlled by the President, Vice President, Members of Congress, and heads of Executive Departments and their families from receiving loans or investments under this title.

Of the \$500 billion, \$454 billion would be available to make loans and loan guarantees to, and other investments in, programs or facilities established by the Board of Governors of the Federal Reserve System for the purpose of providing liquidity to the financial system that supports lending to eligible businesses, municipalities, or states (including tribes). Loans issued through these programs or facilities could not be reduced through loan forgiveness. Eligibility requirements include being U.S. based, restrictions for business entities, such as a ban on stock buybacks or paying out of dividends and a restriction on increases in executive pay.

Provisions for Mid-Sized Businesses and Nonprofit Organizations

The bill provides for certain assistance for mid-sized businesses and nonprofit organizations. It states that the Treasury Secretary shall endeavor to use some of the \$454 billion to provide financing to banks and other lenders that make loans directly to eligible entities with between 500 and 10,000 employees. No principal or interest would be due for 6 months on these loans. The applicant would have to make a number of certifications, including that the funds will be used to retain at least 90% of its workforce at full compensation until September 30, 2020; it intends to restore not less than 90% of its workforce that existed as of February 1, 2020; and adhere to restrictions on various items including pay, offshoring, and union agreements.

The bill also contains provisions that address troubled debt restructurings, community banks, credit unions, and related matters.

TITLE V—CORONAVIRUS RELIEF FUNDS

Section 5001 creates a new "Coronavirus Relief Fund." This Fund would provide \$150 billion in response to the coronavirus public health emergency. The bill states that the Secretary of the Treasury shall reserve \$8 billion of the \$150 billion to make payments to tribal governments. Importantly, the payment amounts to tribes will be based on the increased expenditures of each tribe relative to its previous year's spending.

The bill would require payment to tribes of relief funds in 30 days for FY 2020, though we note that is optimistic given the uncertainty about how the tribal funds will be distributed among tribes.

Unlike for states and local government, the language says that the amount paid to a tribal government will be the amount the Secretary shall determine, "in consultation with the Secretary of the Interior and Indian tribes" that is based on "increased expenditures of each such Tribal government (or a tribally-owned entity of such tribal government) relative to aggregate expenditures in Fiscal Year 2019 by the Tribal government (or tribally-owned entity) and determined in such manner as the Secretary determines appropriate to ensure that all amounts available [outlined in this title of the bill] for fiscal year 2020 are distributed to Tribal governments."¹ There is no clarity in

¹ We note that in contrast, states will receive payments from the \$150 billion fund based on the state's relative population, but with no payment being under \$1.25 billion. *Id.* at (c)(1)-(2). Because tribes receive SNAP funding and other federal benefits through states, it is unclear how the population-based payments may affect tribes.

the bill as to what figures will be used, what is included or excluded from "aggregate expenditures," or other guidance on how this will be determined. We expect tribes will seek to be closely involved in any negotiations over this distribution methodology, and we know that this issue will be discussed at the Treasury Tribal Advisory Committee meeting on March 31.

Significantly, the bill also states that tribal governments must use the funds provided to only cover costs of the tribal government that:

- (1) Are necessary expenditures incurred due to the public health emergency with respect to the [COVID-19];
- (2) Were not accounted for in the budget most recently approved as of the date of enactment of this section for the government; and
- (3) Were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020.

State and local governments are subject to this same limitation, which has already caused concern among state leaders. This limitation has been discussed by tribal advocates as well, and efforts are underway to provide administrative guidance to interpret this provision as broadly as possible.

The Inspector General of the Department of Treasury will monitor and oversee the receipt and distribution of these funds. If a tribal government does not comply with the use of funds requirement outlined above, the amount equal to the funds used in violation of that section will be catalogued as a debt to the Federal Government.

DIVISION B—EMERGENCY APPROPRIATIONS FOR CORONAVIRUS HEALTH RESPONSE AND AGENCY OPERATIONS

Division B sets forth specific appropriations language for responding to the COVID-19 outbreak. We reviewed the text for relevant provisions and found the following items in the appropriations language specific to tribes and programs in Indian Country.

- \$300,000 appropriated for Assistance to Fishery Participants available until September 30, 2021
 - Includes assistance for Tribal subsistence, commercial, and charter fishery participants, which may include direct relief payments and assistance for tribes, persons, and fishing communities; and
 - Begins when fisheries have incurred losses greater than 35% as compared to prior 5-year average or there are any negative impacts to subsistence, cultural, or ceremonial fisheries.

- \$15.81 billion in additional funding for the Supplemental Nutrition Assistance Program available until September 30, 2021, of which
 - \$100 million is for the Food Distribution Program on Indian Reservations
 - \$50,000,000 shall be for facility improvements and equipment upgrades; and
 - \$50,000,000 shall be for the costs relating to additional food purchases.
- \$453 million in additional funding for Bureau of Indian Affairs Operation of Indian Programs until September 30, 2021, of which
 - Not less than \$400 million available to meet the direct needs of tribes; and
 - Funds may be available for distribution through tribal priority allocations for tribal response and capacity building activities.
- \$69 million in additional funding for Bureau of Indian Education Operation of Indian Education Programs until September 30, 2021, of which
 - Not less than \$20 million for tribal colleges and universities.
- \$1.032 billion in additional funding for Indian Health Services until September 30, 2021, which includes
 - A maximum of \$65 million is for electronic health record stabilization and support;
 - \$450 million shall be distributed through IHS directly operated programs and to tribes and tribal organizations under ISDEAA and through contracts or grants with urban Indian organizations under title V of the Indian Health Care Improvement Act; and
 - \$125 million may be transferred to and merged with the "Indian Health Service, Indian Health Facilities" appropriation at the discretion of the Director.
- \$4.3 billion in additional funding for Department of Health and Human Services Centers for Disease Control-Wide Activities and Program Support" available until September 30, 2024, of which
 - Not less than \$1.5 billion for grants to or cooperative agreements with States, localities, territories, tribes, tribal organizations, urban Indian health organizations, or health service providers to tribes, of which;
 - Not less than \$125 million of this funding allocated to tribes, tribal organizations, urban Indian health organizations, or health service providers to tribes.
- \$78,000 in additional funding for the Institute of American Indian and Alaska Native Culture and Arts Development available until September 30, 2021.
- \$425 million in additional funding for SAMHSA Health Surveillance and Program Support available through September 30, 2021, of which

- No less than \$15 million for SAMHSA Health Surveillance Program allocated to tribes, tribal organizations, urban Indian health organizations, or health or behavioral service providers to tribes.
- \$27,014,500,000 in additional funding for the Public Health and Social Services Emergency Fund available until September 30, 2024, of which
 - No less than \$15 million allocated to tribes, tribal organizations, urban Indian health organizations, or health service providers to tribes.
- \$300 million in additional funding for Indian housing programs available until September 30, 2024, which includes
 - No less than \$200 million for Native American Housing Block Grants program authorized under NAHASDA, using the same formula as was used to allocate FY 2020 Indian Housing Block Grant funding, which **shall** be used by recipients "to prevent, prepare for, and respond to coronavirus, including to maintain normal operations and fund eligible affordable housing activities under NAHASDA during the period that the program is impacted by coronavirus," and which **may** be used "to cover or reimburse allowable costs to prevent, prepare for, and respond to coronavirus that are incurred by a recipient, including for costs incurred prior to the date of enactment of this Act." The HUD Secretary is given authority to waive applicable requirements;
 - Up to \$100 million in grants for tribes under the Indian Community Development Block Grant program, which must be used to prevent, prepare for, and respond to coronavirus, for emergencies that constitute imminent threats to health and safety. As this is a competitive program, the HUD Secretary is required to "prioritize, without competition, allocations of these amounts for activities and projects designed to prevent, prepare for, and respond to coronavirus." No more than 20 percent of any grant made with funds appropriated under this paragraph shall be expended for planning and management development and administration. The HUD Secretary is given authority to waive applicable requirements.
- \$50 million in grants for the Institute of Museum and Library Services available until September 30, 2021
 - No set tribal allocation, but matching fund requirements are waived for these grants; and
 - Grant funds to be used to expand digital network access, purchase internet accessible devices, and provide technical support services.
- \$3.5 billion in additional funding in Payments to States for the Child Care and Development Block Grant available until September 30, 2021
 - This supplements, not supplants State, Territory, and Tribal general revenue funds for child care assistance for low-income families; and

- In addition to assisting low-income families who meet the standard income eligibility requirements, funds may be used to provide child care for health care workers, sanitation employees, emergency workers, and other workers deemed essential without regard to income eligibility requirements.
- \$1.25 billion in additional funding for Public and Indian Housing, Tenant-Based Rental Assistance available until expended.
- \$30.75 billion in allocations for the Education Stabilization Fund available through September 30, 2021, of which
 - Programs operated or funded by BIE may receive one-half of one percent of the amount allocated to the Fund (approximately 153,750,000).

Conclusion

Indian Country will need to closely coordinate with the relevant federal agencies on proper and effective implementation of these provisions. The NCAI-coordinated Indian Country team, of which we are members, plans to stay intact for the effort with the agencies.

We are available to assist you in next steps to take advantage of the bill's provisions. Please do not hesitate to contact us if you have any questions or if we can help you engage with federal agencies as they implement the bill in Indian Country.