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MEMORANDUM

April 4, 2017

To: Tribal Health Clients

From: HOBBS, STRAUS, DEAN & WALKER LLP

Re: *Health Care Updates from Tribal Self-Governance Advisory Committee Quarterly Meeting in Washington, D.C.*

The Indian Health Service (IHS) Tribal Self-Governance Advisory Committee (TSGAC) held its quarterly meeting in Washington, D.C. on March 28 and 29, 2017 and met with IHS Acting Director Chris Buchanan. The meeting was dominated by discussions of the unknowns with the new Administration and discussions on how to be proactive and get in front of potential issues that may impact the IHS. This memorandum summarizes additional health care-related updates from the meeting.

IHS Returning Funds to the Treasury Department

IHS has one-year spending authority for much of its funding, and five years to liquidate these obligations. Most recently, in FY 2016 IHS returned \$3.8 million from 2011 appropriations, which were not otherwise able to be used. Although a relatively small amount of funding, TSGAC stated that returning any funds is unacceptable due to the low level of IHS funding. In addition, TSGAC is concerned that any funds returned reflect poorly on the IHS during this fiscal and political environment.

Acting Director Buchanan emphasized that IHS was not returning significant amounts of money to the Treasury and the process is extremely complicated. Additionally, he wanted to make it clear that all of the funds that were returned are at the headquarters level and not at the service level. He noted that IHS has recently introduced a new accounting system that will give real-time accounting that should help with this in the future. On March 28, 2017, the Acting Director sent a Dear Tribal Leader letter addressing these concerns and reiterating that IHS only returned a fraction of one percent of IHS's total appropriated funding and that the Federal funding process can be very complex and technical, and is easily misunderstood.¹

¹ A copy of the Dear Tribal Leader letter is attached to this memo but is also available at the IHS website, https://www.ihs.gov/newsroom/includes/themes/newihssthem/display_objects/documents/2017_Letters/57343-1_DTLL_UIOLL_FundsReturnedTreasury_03282017.pdf.

TSGAC expressed concern that some Senators may be trying to distort this return of funds into mismanagement by IHS. TSGAC requested that the Acting Director get in front of this issue before it becomes something bigger and deliver the letter he sent to Tribal Leaders to the appropriate Senate committees.

IHS Budget Update and Discussion

There was little information for the IHS to share regarding the budget. With respect to the FY 2017 budget, the federal government is still under a Continuing Resolution. IHS does not have any information on what the final 2017 appropriations will include. IHS representatives were aware that House and Senate staff have been working on recommendations for IHS that will have potential impacts and stated that they would share updates as soon as they were available.

The only information that IHS had to report on the FY 2018 budget was that on March 16 the Administration released a budget blueprint in which IHS is specifically mentioned under Health and Human Services as a “safety net” program. TSGAC members noted that it was worrisome that the blueprint budget described IHS as a “safety net” as that description ignores treaty obligations and the trust responsibility of the U.S. to provide medical care to Native Americans. IHS officials stated that all of the budget blueprint discussions happened at a very high level and there was not much staff involvement. TSGAC discussed the importance of being proactive and trying to get more information about IHS’s existence to high level officials in the new Administration.

It was also noted that IHS will hold its evaluation of the FY 2019 budget and planning for the FY 2020 budget on April 24, 2017 in Spokane, Washington. Otherwise, the Agency continues to be in a holding pattern until they receive additional information from the new Administration.

S.465, IHS “Audit” Bill Introduced by Senator Rounds

S. 465,² the bill to require an independent audit of the IHS was introduced by Senator Rounds on February 28, 2017. TSGAC members noted that S.465 looks like it is modeled after the Veterans Affairs audit that was conducted some time ago. The bill is a result of the problems in IHS Direct Service, primarily the Great Plains Area, and several Tribes have expressed support for the bill. TSGAC expressed concern with the audit bill, however, and wanted to proceed cautiously and ensure that the serious problems in one area of IHS are not characterized as being widespread across the entire Agency. The concern is that such a large effort could negatively impact the IHS in other areas.

Suggestions from TSGAC include: (1) extending the time for the audit to be more reasonable; (2) instead of focusing only on failures of the IHS, also review best

² We reported in more detail on S. 465 in our memorandum to Tribal Health Clients dated March 6, 2017.

practices; and (3) include extensive Tribal consultation, which is lacking in the current bill. TSGAC stated that it will continue to work with Congress to hold them accountable for properly funding IHS, but asked Acting Director Buchanan to be proactive in responding to the audit bill. Specifically, they asked that he develop a plan that includes strategic interventions to address any identified deficiencies in the IHS system, including a specific audit for areas where all tribes in an area have requested one.

TSGAC also expressed concern that certain members of Congress have cited the failure of IHS to be responsive to information or data requests. IHS representatives responded that the agency has no records of congressional members reaching out for data that has not been fulfilled. In addition, IHS says that most requests for information have a turn-around time of about two weeks, with more complex requests taking longer. IHS officials stated that they strongly request that if Congress reaches out to regional offices or service units that the congressional staff also forward the information to headquarters so the requests can be tracked and not lost. TSGAC requested that Acting Director Buchanan get in front of this issue and be transparent in the process.

Government Accounting Office Reports

The Government Accounting Office (GAO) issued a “High Risk” report in February 2017, citing the IHS as among those federal programs “with greater vulnerabilities to fraud, waste, abuse, and mismanagement or the need for transformation to address economy, efficiency, or effectiveness challenges.”³ TSGAC members reported that the GAO has been asking tribes about a number of different federal programs and members had concerns that these questions may be part of an effort to identify programs for funding cuts. TSGAC recognizes that the issues discussed in the report stem largely from a lack of funding, but is concerned that highlighting the issues in this way may lead Congress to get more involved (as they did with the VA a few years ago) without meaningfully addressing the underlying cause. Acting Director Buchanan responded that the Quality Framework is being implemented to respond to recent GAO reports.

Contract Support Costs Overestimation

Contract Support Costs (CSC) was a major issue throughout the meeting. IHS has estimated that over \$80 million was requested in CSC funding above what was needed in 2017. Whereas, tribal estimates are as high as \$96 million. It is believed that this overestimation cannot be used for other health care service and was scored against IHS in the budget. There was concern from TSGAC that this overestimation could be used against IHS in the future.

³ The GAO report is available online, <http://www.gao.gov/products/GAO-17-375T>.

The Acting Director reported that he is open to convening a work group in the future to try and better estimate the CSC number. In regards to reprogramming the coverage for CSC, the Acting Director did not know if it was possible or what limitations may apply. TSGAC is planning to re-engage the CSC work group and set up a conference call or webinar to work on this issue.

VA and IHS Memorandum of Understanding and Payment of Copays

Stephanie Birdwell, Director, Office of Tribal Government Relations in the Department of Veterans Affairs (VA) gave an overview of the collaboration between the IHS and VA. In 2016, VA conducted three consultations with Tribes. The consultations involved: (1) priorities for serving veterans in Indian country; (2) accreditation of tribal veteran services offices; and (3) proposed consolidation of non-VA care into a more standardized system under the Choice Act. The priorities that were identified included, access to health care, homelessness, treatment for mental health, understanding benefits and transportation to services.

Ms. Birdwell reported that the Tribal Health Program (THP) Reimbursement Agreements Program has 100 agreements with THPs and has issued \$51 million in reimbursements impacting 7,941 unique veterans, and that these agreements are being extended through June 30, 2019. Additionally, she said that 500 HUD/VASH homeless vouchers have been distributed to 26 tribal grantees representing \$5.9 million to help tribal veterans securing access to housing.

TSGAC members raised S. 304, a bill that would require IHS to pay for copays for Native veterans receiving services at VA facilities. TSGAC members expressed their opinion that this legislation was unconscionable. No one thought that Native veterans should have to pay copays, but there was also agreement that it would be unconscionable to force IHS to pay copays given the vast funding differences between the two agencies. TSGAC members stated that the VA has a trust responsibility as an agency of the federal government to provide health care to Native Americans and that requiring IHS to divert scarce funding to pay the VA for healthcare services is not reasonable when the IHS is considered the payor of last resort. Ms. Birdwell stated that the copays are required by law, but that she would bring the concerns back to the VA administration.

TSGAC members also expressed concern about the rhetoric that IHS/Tribal reimbursement agreements with the VA are to be consolidated for purchasing care under the Choice Act. Chairwoman Lynn Malerba stated that tribal claims are superior to the Choice Act and that language used in the Choice Act could hinder care for Native veterans. TSGAC members stated that tribal reimbursement agreements with the VA must remain under the authority of the Indian Health Care Improvement Act provisions for VA reimbursement rather than Choice Act Provisions. Ms. Birdwell said that she agreed, but was not sure how that would be implemented. Furthermore, she brought up another issue involving Tribes as vendors to non-native veterans. Should the same terms of the Tribal reimbursement agreements apply or would a separate agreement be needed?

Recent Executive Actions

The TSGAC spent a substantial amount of time considering questions regarding the recent Executive Orders and Presidential memoranda issued by President Trump and what the implications are on IHS, as well as the level of tribal consultation that has been conducted. The Executive actions that were discussed included:

- Executive Order 13771 – “Reducing Regulation and Controlling Regulatory Costs,” which directs agencies to repeal two existing regulations for every new regulation;
- Executive Order 13777 – “Enforcing the Regulatory Reform Agenda,” which directs the head of each agency to designate a Regulatory Reform Officer to oversee the implementation of regulatory reform initiatives;
- Executive Order 13781 – “Comprehensive Plan for Reorganizing the Executive Branch,” which requires, within 180 days, the head of each agency to deliver a proposed plan to reorganize the agency; and
- Presidential Memorandum Regarding the Hiring Freeze which instituted a 90-day hiring freeze for United States federal employees, after which it is to be replaced by a long-term workforce reduction plan.

TSGAC members discussed various concerns about the implications of these orders on IHS. Acting Director Buchanan stated that Executive Orders go through the policy team and trying to keep the tribes up to date is one of the key things he has been working on. He stated that he has spoken with the policy team about the need for tribal consultation and the difficulty of doing so when last-minute changes are made.

Catastrophic Health Emergency Fund (CHEF) Proposed Regulations

As we have previously reported, the IHS published a Notice of Proposed Rulemaking for the CHEF program last year.⁴ There is also pending federal litigation, *Redding Rancheria v. Burwell*, that has the potential to impact the direction of the proposed CHEF rule. Specifically, one of the issues raised in that case is whether tribal self-insurance plans may be considered an alternate resource that is required to pay before CHEF coverage will apply. TSGAC suggested that IHS not finalize the proposed regulations until the pending case has been decided to avoid any conflict. Acting Director Buchanan agreed that this made sense and committed that he would wait for the pending litigation to settle before moving forward.

⁴ We reported in more detail on the Proposed Rule in our memorandum to tribal health clients dated October 25, 2016.

Conclusion

If you would like any assistance or further information regarding the topics discussed in this memorandum, please contact Elliott Milhollin at (202) 822-8282 or emilhollin@hobbsstrauss.com; Geoff Strommer at (503) 242-1745 or gstrommer@hobbsstrauss.com; or Caroline Mayhew at (202) 822-8282 or cmayhew@hobbsstrauss.com.