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MEMORANDUM

January 30, 2018

TO: Contract Support Cost Clients

FROM: Hobbs, Straus, Dean & Walker, LLP /s/

RE: **IHS Revocation of 97/3 Option Discussed at Self-Governance and STAC Meetings; Final Judgment Entered in *Sage Memorial* Case**

Last week, officials from the Indian Health Service (IHS) came under fire at the self-governance meetings and the Secretary's Tribal Advisory Committee (STAC) meeting for IHS's mishandling of contract support cost (CSC) policy issues—in particular its unilateral rescission of the "97/3" option for determining indirect CSC on recurring service unit shares. And a federal court in New Mexico issued its final judgment in the *Sage Memorial* case, paving the way for an appeal of its ruling that IHS owes CSC on third-party revenues used to fund health care services.

IHS Revocation of 97/3 Option Discussed at Self-Governance and STAC Meetings

At the Tribal Self-Governance Advisory Committee (TSGAC) meeting in Washington, DC, tribal representatives questioned Acting Director Michael Weahkee about the IHS's abrupt withdrawal of the 97/3 option. Admiral Weahkie reported that after a year of implementing the new policy, IHS became aware that the 97/3 offset had, in at least one case, resulted in exceeding payment limitations imposed by the Indian Self-Determination and Education Assistance Act (ISDEAA). He stated that the Office of General Counsel (OGC) is currently litigating CSC-related issues that overlap with the 97/3 option, such as duplication between CSC and program or "Secretarial" funding. He explained that the IHS has immediately and temporarily suspended the 97/3 offset provision, pending tribal consultation.

TSGAC delegates admonished IHS for what they perceived as a poor handling of the situation. Mickey Percy, Choctaw Nation of Oklahoma, reported that tribal leaders increasingly feel that the IHS misleads them during face-to-face meetings and then returns to IHS Headquarters with a completely different position. Mr. Percy's conclusion drawn from such incidents, including the 97/3 suspension, is simply that IHS cannot be trusted to uphold its agreements. Chairman Ron Allen of the Jamestown S'Klallam Tribe added that the TSGAC is deeply disturbed by the unilateral way in which OGC recommended suspension of the policy. He reminded the Acting Director that the revised CSC policy represented the culmination of a difficult negotiation process between tribal nations and the IHS. He stated that the IHS should err on the side of tribal nations in difficult situations as required by the agency's status as federal trustee.

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Mr. Weahkee expressed his respect for the work of OGC in general. However, he acknowledged the TSGAC's concerns in this instance, stating "the OGC is our advisor, not our decision-maker." He candidly shared that the IHS is being cautious about how it discusses the negotiation of policies due to pressure from higher-ranked officials. He admitted that the decision reflected a mixture of legal, political, and financial considerations. He stated that he knew there would be ramifications when the December 21, 2017 letter was released, including engaging in this 'uncomfortable conversation' with the TSGAC. Mr. Weahkee reported that IHS and OGC are looking into how to share the factual bases for the IHS's decision without violating privacy laws. He also reported that the IHS will continue the discussion during the next meeting of the CSC Workgroup on March 6–7, 2018, in Albuquerque, New Mexico.

STAC members pressed the issue with other high-ranking HHS officials. Victor Joseph, Chief/Chairman of the Tanana Chiefs Conference in Alaska, reminded HHS leadership that the offset was agreed to following a two-year negotiation process that reflected good faith and the government-to-government relationship. He also reported that the CSC Workgroup sent a letter to Acting Director Weahkee requesting that the suspension be withdrawn pending tribal consultation on the issue, which has not taken place.¹ The STAC requested that the Secretary exercise his authority to reinstate the policy. Acting Director Weahkee explained that the suspension is only temporary, and that the IHS intends to hold "robust" tribal consultation before making a final decision. The STAC noted that the letter also requested that IHS share the materials on which the agency relied in making its decision. Julia Pierce, Senior Attorney with OGC, noted the litigation mentioned above, as well as the tension between sharing the relevant data and maintaining the privacy of the affected tribe(s). IHS did commit to answering the CSC Workgroup's letter within two weeks.

STAC delegates rebuked IHS for suspending the policy for litigation reasons in the absence of a court order. They stressed that where IHS identifies problematic contracts, the appropriate course of action is to address the situation individually so that the offending contracts are brought into alignment with federal law. Suspending the entire policy, they noted, has the potential to cause undue harm to countless tribes.

Final Judgment Entered in *Sage Memorial* Case

An important CSC decision may be headed for a federal appeals court. In *Navajo Health Foundation—Sage Memorial Hospital, Inc. v. Burwell*, the district court held that IHS must pay CSC to support health care services provided under ISDEAA agreements and funded by third-party revenues.² On January 25, 2018, the court entered final judgment in the case and awarding the hospital \$8 million. The Department now has 60 days to file a notice of appeal, which it is almost certain to do given the potential impact

¹ The tribal letter was described in, and attached to, our report of January 3, 2018.

² Please see our memorandum of November 5, 2016 for a detailed description of the court's ruling.

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on IHS's CSC obligations. The appeal would be heard by the Tenth Circuit Court of Appeals—the same court that issued two landmark rulings in favor of tribes in the Ramah class action.

Conclusion

If you have any questions about this memorandum, please do not hesitate to contact Joe Webster (jwebster@hobbsstrauss.com or 202-822-8282), Geoff Strommer (gstrommer@hobbsstrauss.com or 503-242-1745), or Steve Osborne (sosborne@hobbsstrauss.com or 503-242-1745).