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## MEMORANDUM

January 29, 2016

To: Tribal Health Clients

From: HOBBS, STRAUS, DEAN & WALKER, LLP *Geoff Strommen* (by TAE)

Re: ***IHS Issues Draft Rule for Catastrophic Health Emergency Fund***

On January 26, 2016, the Indian Health Service (IHS) issued the attached proposed rule for the Catastrophic Health Emergency Fund (CHEF). *Comments are due March 11, 2016.*

As you know, the CHEF is funded via appropriations bills at \$51.5 million annually. Those funds are part of the Purchased and Referred Care (PRC) program, and they help meet the medical costs of disasters and catastrophic illnesses of CHEF-eligible persons. In FY 2014 the CHEF funded 1,829 cases. The IHS previously administered the CHEF program through internal CHEF guidelines. The permanent reauthorization of the Indian Health Care Improvement Act requires IHS to promulgate regulations for the operation of the CHEF, and thus the IHS has developed this set of proposed regulations to presumably replace the old guidelines.

The proposed regulations would establish definitions governing the CHEF program, including definitions of disasters and catastrophic illnesses, and would provide that an administrative entity of the IHS or a tribal health program is not eligible for reimbursement from the CHEF for the cost of treatment for an episode of care until its cost has reached a certain threshold. The IHS proposes to set the threshold level for FY 2016 CHEF eligibility at the FY 2000 level of \$19,000. In subsequent years it will be set at the prior fiscal year threshold plus the medical care category of the Consumer Price Index. The attached notice points out that the IHS Director's Workgroup on Improving Purchased and Referred Care strongly supported the initial \$19,000 threshold for FY 2016.

The proposed regulations provide that IHS will not pay CHEF for a catastrophic claim that exceeds the CHEF threshold if the patient is eligible for "alternate resources." Significantly, the proposed rule would define "alternate resources" to include any "Federal, State, *Tribal*, local, or private source of reimbursement for which the patient is eligible . . . [including] *Tribal* or local health care programs . . . and *private insurance*" (emphasis added). The preamble of the proposed rule further states that the IHS considers "private insurance" to include Tribal self-insured plans.

The IHS's prior, internal guidelines for CHEF did not define "alternate resources" to include any tribal source of reimbursement. The addition of "Tribal ... health care programs" and tribal self-insured plans to the list is inconsistent with Section 202(d)(5) of the Indian Health Care Improvement Act, which 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 proposed regulation appears to go beyond what was authorized by statute.

The proposed regulations would grant the IHS significant discretion in how to administer the CHEF. Under the proposed rule, requests for CHEF reimbursement must be made to the appropriate IHS Area Office, and will be reviewed by the Area Office PRC program according to the following criteria: Patient eligibility, medical necessity, notification requirements for emergent and non-emergent care, medical priorities, allowable expenditures, and eligibility for alternate resources. However, the proposed rule does not explain what those criteria are, or how they will be applied. In addition, the proposed rule notes that full CHEF reimbursement will be limited to the availability of funds, but does not explain how such determinations will be made. Finally, the proposed rule provides that all determinations as to whether an alternate resource is available are to be made by IHS Headquarters, but does not provide any criteria for such determinations.

The proposed regulations would also do the following:

- Establish a procedure for payments from the CHEF under medical circumstances which warrant treatment prior to authorization;
- Require a program to return those CHEF funds to the CHEF at IHS Headquarters if payment was made for a medical episode but then that same medical episode becomes eligible for and is paid by an alternate provider; and
- Provide that no part of the CHEF or its administration is to be subject to a contract or grant, including under the Indian Self-Determination Act.

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), Geoff Strommer ([gstrommer@hobbsstrauss.com](mailto:gstrommer@hobbsstrauss.com) or 503-242-1745), or Starla Roels ([sroels@hobbsstrauss.com](mailto:sroels@hobbsstrauss.com) or 503-242-1745).