**[LETTERHEAD]**

May 8, 2018

Heidi J. Frechette, Deputy Assistant Secretary

Office of Native American Programs

U.S. Department of Housing and Urban Development

451 Seventh Street SW

Room 4126

Washington, DC 20410

**Re: Proposed Changes to Section 184 Indian Housing Loan Guarantee Program regulations**

Dear Ms. Frechette,

The **[NAME OF ENTITY]** (**[SHORT NAME]**), the **[**Tribally Designated Housing Entity for the **[NAME OF TRIBE]** (**[TRIBE][PUEBLO]][NAME OF TRIBE HOUSING PROGRAM]**), provides this letter to the U.S. Department of Housing and Urban Development (HUD) to communicate its comments and recommendations regarding proposed changes to the Section 184 Indian Housing Loan Guarantee Program (Section 184) regulations which comments and recommendations are focused on general concerns, negotiated rulemaking, tribal consultation, and specific regulatory provisions.

**GENERAL CONCERNS**

**Number of structures covered under Section 184 loan guarantees**. Section 1005.101 of the Section 184 regulations provides that loans guaranteed under the Section 184 program are to be used to acquire, construct, or rehabilitate 1- to 4-family homes. Section 1715z-13a(b)(2) of the statute provides that the 184 loan shall be used in relation to 1- to 4-family dwellings. Neither the statute nor the regulations define “home” or “dwelling.”

The regulations establish a residency requirement. Section 1005.105 of the Section 184 regulations provides that, for an Indian family, the family must occupy the home as a principal residence. Principal residence is defined in §1005.103 as

[T]he dwelling where the mortgagor maintains (or will maintain) his or her permanent place of abode, and typically spends (or will spend) the majority of the calendar year. A person may have only one principal residence at any one time.

These provisions, at least for an Indian family, means that the structure subject to the mortgage can only be one individual residence or a single multi-family unit of up to four residences in which one residence is occupied by the borrower. Because of this language, financial institutions apply the restrictions to eligible borrowers other than Indian families.

Section 1005.105 of Section 184 provides that a loan guarantee may be made homes for the following entities:

1. An Indian family who will occupy the home as a principle residence;
2. Indian Housing Authority or Tribally Designated Housing Entity (collectively “Tribal Housing Program”); or
3. Indian tribe.

Unfortunately, HUD is applying the same loan guarantee limit under Section 184 to Tribal Housing Programs and Indian tribes even though a residency requirement does not exist for such entities. Specifically, HUD is preventing Tribal Housing Programs and Indian tribes, entities that typically construct, acquire, or rehabilitate several housing units at one time, from bundling up to four of these housing units under one loan guarantee. [SHORT NAME] disagrees with this approach which is unsupported by the Section 184 regulations and places an unnecessary administrative burden on Tribal Housing Programs and Indian tribes that are simply trying to provide affordable housing to Indian families.

[SHORT NAME] finds that HUD has overreached its understanding of the Section 184 statute by requiring Tribal Housing Programs and Indian tribes to obtain loan guarantees in the same manner as individual Indian families. Specifically, HUD is requiring Tribal Housing Programs or Indian Tribes to service loans for individual residence if they choose not to construct or purchase multifamily housing units. As such, [SHORT NAME] recommends that proposed changes to the Section 184 regulations include allowing a Tribal Housing Program or Indian tribe to obtain a single loan guarantee for up to four housing units (e.g., four single family residences; two single family residences and one duplex; one single family residence and one triplex; or one fourplex).

**Jurisdiction.** Tribal entities have been advised by HUD that its attorneys, United States Attorneys (USAs) under the U.S. Department of Justice, have been refusing to prosecute foreclosures in tribal courts, instead forcing Indian borrowers to travel significant distances to attend foreclosure hearings in a foreign court. When tribes were encouraged to adopt mortgage and foreclosure ordinances, they were encouraged to establish jurisdiction over foreclosures in the tribal courts. The USAs’ refusal to litigate in tribal court is an affront to the tribes and results in an erosion of their sovereignty.

While [SHORT NAME] understands that this may more properly require a legislative fix in the statutory framework of the Native American Housing Assistance and Self-Determination Act (NAHASDA) or 12 USC §1715z-13a, HUD could resolve the issue by promulgation of a regulations that, when a USA refuses to appear in a tribal court, allows HUD to contract with a private attorney to litigate the matter.

**Negotiated Rulemaking.** Section 1005.101 of the Section 184 regulations reveals how the Section 184 program and the NAHASDA are interrelated:

Under the provisions of section 184 of the Housing and Community Development Act of 1992, as amended by the Native American Housing Assistance and Self-Determination Act of 1996 (12 U.S.C. 1715z-13a), the Department of Housing and Urban Development (the Department or HUD) has the authority to guarantee loans for the construction, acquisition, or rehabilitation of 1- to 4-family homes that are standard housing located on trust or restricted land or land located in an Indian or Alaska Native area.

Title 24 C.F.R. §1005.101 is not a specific NAHASDA regulation, but, as this provision reflects, there is a direct relationship between the two which could cause the NAHASDA regulations to be amended as well. Title 25 U.S.C. §4116(b)(2)(A) requires that all regulations under NAHASDA, including any amendments to such regulations, shall be subject to negotiated rulemaking. This necessitates that HUD appoint as committee members for such rulemaking, representatives of the federal government and representatives of diverse tribes and program recipients.[[1]](#footnote-1)

[SHORT NAME] finds that a failure by HUD to use negotiated rulemaking to amend NAHASDA based on proposed changes to the Section 184 regulations, whose impact to Tribal Housing Programs and Indian tribes that [SHORT NAME] considers significant, would be in violation of federal law. As such, [SHORT NAME] strongly recommends that HUD establish negotiated rulemaking for purposes of making necessary changes to the Section 184 and NAHASDA regulations.

**Consultation.** The overall approach by HUD reaching out to Indian tribes regarding proposed changes to the Section 184 regulations has been anything but meaningful government-to-government consultation between HUD and such tribes potentially impacted by these changes, the type of consultation to be conducted pursuant to Executive Order (EO) 13175, Consultation and Coordination with Indian Tribal Governments.

A unique government-to-government relationship exists between Indian tribes and the federal government. This relationship is grounded in the U.S. Constitution, numerous treaties, statutes, federal case law, regulations, and executive orders. Consultation is a core element of this government-to-government relationship. A central tenet of EO 13175 is the need for federal agencies to engage in meaningful government-to-government consultation with Indian tribes if any of the federal agencies’ policy actions could have impacts to tribal communities. The result of meaningful government-to-government consultation should be that substantive tribal input has been considered and incorporated into any actions having tribal implications. To be meaningful, and in the spirit of EO 13175, consultation by HUD with tribes regarding proposed changes to the Section 184 regulations should meet the following expectations:

1. Provide clear guidance on how HUD intends to assure that government-to-government consultation with tribes will result in meaningful dialogue rather than simply pro forma consultation.

HUD has failed to provide any assurances to Indian tribes about how it will engage in meaningful government-to-government consultation regarding proposed changes to the Section 184 regulations, other than holding several listening sessions with tribal representatives, and few, if any, tribal leaders authorized by their tribes to engage in consultation with HUD regarding the proposed changes. Further, there are 573 federally recognized tribes with the majority of such tribes unable to participate in these listening sessions.

1. Assign to the proposed changes to the Section 184 regulations a tribal liaison who has worked extensively with tribes on similar issues.

Neither [SHORT NAME] nor **[TRIBAL][PUEBLO]** leadership is aware of any tribal liaison having been assigned by HUD regarding proposed changes to the Section 184 regulations nor has anyone held himself or herself out to this effect.

1. Send a formal letter to tribal chairpersons with copies provided to appropriate tribal staff (*e.g.,* tribal administrator, tribal directors and managers) that asks tribes how they would like to be consulted regarding proposed changes to the Section 184 regulations, and a request for the names and addresses of other persons who should be notified or consulted.

HUD has failed to send a formal letter to **[TRIBAL][PUEBLO]** leadership or staff that asks the **[TRIBE][PUEBLO]** about how it would like to be consulted regarding proposed changes to the Section 184 regulations. The only letter sent to **[TRIBAL][PUEBLO]** leadership informed it about several listening sessions, and invited **[TRIBAL][PUEBLO]** leaderships to submit comments regarding such changes. Neither the listening sessions nor the invitation to submit comments qualifies as meaningful government-to-government consultation.

1. Provide assurances to tribes that the most senior-level HUD official will be engaged in meaningful government-to-government consultation regarding proposed changes to the Section 184 regulations since tribes will likely be represented by its highest-level officials such as tribal chairpersons and/or council members.

HUD has not clearly indicated whether you, as Deputy Assistant Secretary for the Office of Native American Programs, or another senior-level HUD official, shall be involved in meaningful government-to-government consultation with Indian tribes regarding the proposed changes to the Section 184 regulations. Your involvement and those of other senior-level HUD officials thus far has been limited to the HUD listening sessions in which [SHORT NAME] has participated in a few such sessions. However, as noted above, this does not equate to meaningful government-to-government consultation pursuant to EO 13175.

1. Provide assurances to tribes that communications and documents shared as part of government-to-government consultation shall remain confidential unless the parties involved agree to share any such communications or documents with outside parties.

No assurances were provided to the tribal representatives participating in the listening sessions that their communications, and any documents that they shared during these sessions, would remain confidential. In fact, this would unlikely be possible with HUD encouraging tribal representatives from different tribes having varying interests to participate in the same listening sessions.

[SHORT NAME] strongly recommends that HUD to move beyond these listening sessions and commit to meaningful one-on-one government-to-government consultation with the **[TRIBE][PUEBLO]** and other Indian tribes regarding proposed changes to the Section 184 regulations. Such consultation is necessary for several reasons. First, meaningful one-on-one government-to-government consultation provides an opportunity for more candid conversations between an individual tribe and HUD than what would occur otherwise during a group meeting. Second, each tribe’s circumstances are unique and must be treated as such by HUD. A group meeting of tribes only gives short shrift to these circumstances. Third, most cultural resources information is protected from release under statutory exemptions to the Freedom of Information Act. Discussion of such information by an individual tribe as part of a group meeting of tribes risks its release to the general public and potentially endangers tribal cultural sites and practices. Finally, the subject matter may be so unique that one-on-one government-to-government consultation between individual tribes and HUD provides the best opportunity for a resolution to the situation versus a group meeting of tribes where any number of tribal issues could be brought up with only a limited period of time to discuss them.

In addition, [SHORT NAME] recommends that HUD clearly identify its rationale about why changes to the Section 184 regulations are necessary (*e.g.,* more than just indicating that the number of loans and their amounts have increased under Section 184); and provide better insight as to the Section 184 provisions to which it is considering changes and any other provisions that it may want to add to these regulations. What are the problems that HUD sees with Section 184? Does HUD anticipate making changes to the Section 184 regulations that better address borrower protections, risk management, expansion of Section 184 availability or some other aspect of Section 184? Absent answers by HUD to these questions, it is difficult for the **[TRIBE][PUEBLO]** and other tribes to fully engage in meaningful government-to-government consultation with HUD regarding proposed changes to the Section 184 regulations.

Finally, on May 16, 2014, HUD sent out a notice of tribal consultation dealing with “possible regulatory changes” to the Section 184 regulations. At that time, the tribes were informed that HUD was considering modification to the regulations in borrower protections, loss mitigation, risk management, and expanding the 184 program availability. HUD indicated that, in achieving this goal it was planning to model the changes after the Federal Housing Administration (FHA) regulations. Specifically it was considering regulations found at 24 C.F.R. §203.3, §203.5, §203.500-502, §203.508, §203.510, §203.512, §203.550, §203.552, §203.554, §203.556, §203.558, §203.600, §203.606, §203.608, §203.610, §203.614, §203.616, §203.670, and 12 C.F.R. §§1024.39 and 1024.41. Are the use of these regulations as a model still under consideration? If so, we wish to remind HUD that, in 2014, the majority of Indian tribes opining on the 2014 proposal felt that an FHA type program was not appropriate for Indian communities and that incorporation of those regulations would not help the Section 184 program.

**SPECIFIC SECTION 184 REGULATORY PROVISIONS**

1. Section 1005.101 provides that Section 184 applies to homes located on trust or restricted land or land located in an Indian or Alaska Native area; this is a reflection of §1715z-13a(b)(2) of the Section 184 statute. While the regulation does not define the term “Indian area,” §1715z-13a(l)(4) defines Indian area as “the area within which an [Indian housing authority](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=12-USC-820184343-1917017608&term_occur=4&term_src=title:12:chapter:13:subchapter:II:section:1715z–13a) or Indian tribe is authorized to provide housing.” Because HUD has authorized an individual tribe to claim all lands within a state, not under the jurisdiction of another tribe, as its “Indian Area” for the 184 loan guarantee program, and because this is entirely different from the definition contained in NAHASDA, a clear definitions of “Indian Area” and “Alaska Native Area” should be incorporated into §1005.103.
2. Section 1005.103 of the Section 184 regulations:
   1. A definition of “Mortgagor should be added.
   2. The §1005.103 definition of “principal residence” should be modified to make it clear that it applies only to a mortgagor that is an Indian family.
3. Section 1005.105(e) deals with environmental compliance. While the requirements seem to be clear as to the construction of homes on located within the exterior boundaries of a reservation or Pueblo, it seems that the requirements related to the construction or purchase of a home in other areas of the state are less clear. This should be rectified.
4. Section 1005.105(f) provides that, if a loan guarantee is to be issued on lands not subject to trust or restrictions, the borrower must certify that he or she lacks access to private financial markets. This requirement is extremely vague and should be clarified.
5. Section 1005.107 should include a right of first refusal as a requirement contained in all form leases.
6. Section 1005.107(b)(1) provides that a form lease must be approved by both HUD and the Bureau of Indian Affairs (BIA).
   1. If an Indian tribe has assumed lease approval under the HEARTH Act, the form lease may not be BIA approved.
   2. While a basic form lease might conceivably be approved by both BIA and HUD, minor alterations of the form should only have to be approved by the BIA.
7. Section 1005.107(b)(4) presupposes that a tribal court will have jurisdiction to hear foreclosures if the Indian tribe has adopted laws related to priority of obligations. As stated above, this provision does not matter unless the USAs agree to litigate in tribal court or HUD agrees to hire private attorneys to process foreclosures.
8. Section 1715z-13a(j) of the Section 184 statute provides that “[t]he Secretary shall, by regulation, establish housing safety and quality standards under this section.” Section 1005.111 merely provides that “**Loans guaranteed under section 184 must be for dwelling units which meet the safety and quality standards set forth in section 184(j)**” (*i.e.*, 12 USC §1715z-13a(j)). This is rather circulatory. The regulatory provision should be more specific about required standards.
9. Section 1005.115 provides that a determination of eligibility for housing shall be made without regard to actual or perceived sexual orientation, gender identity, or marital status. It is, once more, important to point out that for Indian many tribes, especially those located in New Mexico, marital status remains important in relation to occupancy. In fact, many tribes still adhere to the federal code of Indian offenses that make cohabitation of a man and a woman without the benefit of a legal marriage a crime. This provision should be adjusted to allow for the application of traditional rules related to the use of real property.
10. Section 1005.120 provides that 184 guaranteed mortgages are safe harbor qualified mortgages and must meet the ability-to-repay requirements contained in 15 USC §1639c(a), which requirements prohibit mortgage arbitration clauses and balloon payments. For the financial institutions’ sake and for the protection of mortgagees under Section 184, the regulations should specifically include these restrictions.

**CONCLUSION**

In summary, [SHORT NAME] is pleased to provide the aforementioned comments and recommendations concerning proposed changes to the Section 184 regulations.

Sincerely,

**[name of entity]**

By:

**[NAME]**, **[TITLE]**

1. 24 C.F.R. §1000.9(a). [↑](#footnote-ref-1)