

## Coronavirus Relief Fund

### Supplemental Explanation of Reallocations to Tribal Governments

November 3, 2023

The Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) established the Coronavirus Relief Fund (CRF), reserved \$8 billion from the CRF for payments to Tribal governments, and provided that the allocation of payments to Tribal governments is to be determined by the Secretary of the Treasury. In response to a ruling from the U.S. Court of Appeals for the D.C. Circuit, Treasury has adopted this additional explanation of the reallocation of amounts from the CRF to certain Tribal governments that was adopted in 2021.

#### *Background*

The CARES Act provided that the Tribal allocation from the CRF is to be “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 [of the Treasury] determines appropriate to ensure that all amounts available. . . are distributed to Tribal governments.”<sup>1</sup>

Treasury was required to adopt an allocation methodology and make payments pursuant to that methodology within thirty (30) days of the CARES Act’s passage.<sup>2</sup> No methodology would enable Treasury to perfectly capture each Tribe’s actual increased expenditures, so Treasury had to devise reasonable estimates using data that it could promptly access and utilize. Thus, in 2020,

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<sup>1</sup> See 42 U.S.C. § 801(c)(7).

<sup>2</sup> See *id.* § 801(b)(1).

Treasury adopted an allocation methodology pursuant to which 60% of the \$8 billion reserved for Tribal governments was allocated to Tribal governments based on the population of each Tribal government's formula area under the Indian Housing Block Grant (IHBG) program administered by the Department of Housing and Urban Development (HUD), with the remainder allocated based on data Treasury collected on the number of employees of Tribal governments and Tribal enterprises and the 2019 expenditures of Tribal governments.<sup>3</sup>

The IHBG program allocation formula uses the American Indian and Alaska Native population count, based on Census Bureau data, of each Tribe's "formula area." The definition of "formula area" was developed by HUD for the specific purpose of administering the IHBG program and corresponds broadly with the area of a Tribal government's jurisdiction and other areas to which the Tribal government's provision of services and economic influence extend, subject to adjustments to address overlapping jurisdictions and other particular circumstances. A Tribe's IHBG formula area population figure is distinct from the number of the Tribe's enrolled members, and for various reasons a few Tribes have a formula area population of zero despite having substantial enrollment. Under Treasury's initial allocation adopted in 2020, Tribes with zero formula area population received only the minimum allocation of \$100,000 as their population-based allocation, though such Tribes were eligible to receive additional amounts as part of the separate employment- and expenditure-based allocations.

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<sup>3</sup> See Coronavirus Relief Fund Allocations to Tribal Governments (May 5, 2020), available at <https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Tribal-Allocation-Methodology.pdf>; Coronavirus Relief Fund Allocations to Tribal Governments (June 17, 2020), available at <https://home.treasury.gov/system/files/136/Tribal-Allocation-Methodology-for-Second-Distribution.pdf> (setting the employment-based allocation at 30% and the expenditure-based allocation at 10% of the total amount reserved for Tribal governments).

In 2021, the U.S. Court of Appeals for the D.C. Circuit held that, with respect to Tribes with zero formula area population, formula area population is likely an unsuitable proxy for increased expenditures.<sup>4</sup> In response to this ruling, Treasury adopted a revised methodology by which it reallocated a portion of the remaining CRF funds largely reserved for Alaska Native Corporations (ANCs). Under this methodology—the 2021 Distribution—Treasury offered payments to the top 15 percent of Tribes as ranked by what Treasury refers to here as their “population ratio.”<sup>5</sup> Tribes with zero formula area population were offered the full amount of the difference between what they received under the formula area-based allocation and the amount the Tribe would have received under an enrollment-based allocation. Payments to the remainder of Tribes in the top 15 percent were phased out linearly according to Tribes’ population ratio.<sup>6</sup>

### ***Supplemental Explanation***

In March of this year, in connection with one Tribal government’s challenge to the 2021 Distribution, the D.C. Circuit Court of Appeals directed that Treasury provide additional explanation of the 2021 Distribution.<sup>7</sup> Treasury welcomes the opportunity to provide this elaboration of its previous explanation of the 2021 Distribution.

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<sup>4</sup> See *Shawnee Tribe v. Mnuchin*, 984 F.3d 94 at 102-103 (D.C. Cir. 2021).

<sup>5</sup> In 2021, Treasury referred to this as the “population-to-enrollment” ratio, but Treasury refers to it as the “population ratio” here to avoid confusion as to its meaning. This population ratio was calculated as the ratio of formula area population to enrollment subtracted from one, such that Tribes with zero formula area population have a population ratio of one and Tribes with positive formula area population have a population ratio of between one and zero.

<sup>6</sup> This methodology is described in further detail in the statement published by Treasury at the time of the reallocation. See Department of the Treasury, Coronavirus Relief Fund Allocations to Tribal Governments (April 30, 2021), available at <https://home.treasury.gov/system/files/136/Allocations-to-Tribal-Governments-April-30-2021.pdf>. As discussed in this statement, Treasury reallocated funds only to federally-recognized Tribes, not to ANCs. In this memorandum, Treasury uses “Tribes” to refer to the federally-recognized Tribes.

<sup>7</sup> See *Prairie Band Potawatomi Nation v. Yellen*, 63 F.4th 42, 47 (D.C. Cir. 2023).

## Treasury Use of Formula Area Population

As noted, in 2020, Treasury adopted an allocation methodology based on the population of each Tribal government's formula area under the IHBG, with the remainder allocated based on data Treasury collected on the number of employees of Tribal governments and Tribal enterprises and the 2019 expenditures of Tribal governments. Formula areas correspond broadly to the area of a Tribal government's service population and other areas to which the Tribal government's provision of services and economic influence extend. The CARES Act provided that CRF payments could only be used by recipients for "necessary expenditures incurred due to the public health emergency,"<sup>8</sup> so Treasury focused on an allocation that would relate to increased CRF-eligible expenditures. At the outset of the pandemic, Tribes faced extensive increased expenditures related to the provision of public health and safety and social services on Tribal lands.<sup>9</sup> Although Tribes and ANCs were permitted to use CRF payments to provide benefits such as rental assistance or burial expense assistance to Tribal members wherever they may live, Treasury expected that Tribes' largest increase in expenditures for the provision of services would relate to services provided on Tribal lands (or, in the case of those Tribes without Tribal lands, services provided in the area where the Tribal government and the principal focus of the Tribal community is located) and that, overall, Tribes with smaller populations of Tribal members and other American Indians or Alaska Natives living in such areas would face lesser

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<sup>8</sup> See 42 U.S.C. 801(d).

<sup>9</sup> See, e.g., First Amended Complaint at ¶ 22, *Agua Caliente Band of Cahuilla Indians v. Mnuchin*, 1:20-cv-1136, 2020 WL 8023750 (D.C. Cir. 2020) (explaining the urgent need for CRF funds). As stated in the complaint, "Tribal Plaintiffs have taken emergency protective measures and incurred substantial unbudgeted expenses to address the COVID-19 crises. For example, Plaintiff Tribes have procured additional personal protective equipment (PPE) for distribution to Tribal members and Tribal staff; procured and distributed water, toilet paper and food to Tribal members; increased spending on cleaning and sanitation supplies, including washing stations and thermometers, tents for testing facilities, medical equipment, testing supplies, public communication materials; services to tribal elders and food distribution programs; incurred additional IT and professional services related expenses; and incurred additional security expenses to secure closed facilities." *Id.*

increased expenditures related to the delivery of such services. IHBG formula area population provided a way to estimate this varying level of increased expenditures.<sup>10</sup>

Furthermore, IHBG formula area data provides certain other advantages over enrollment and shareholder numbers. Adjustments are made to IHBG formula area populations to address issues of overlapping jurisdiction, which is a particular problem in Alaska, given the overlapping memberships of Alaska Natives in federally-recognized Tribes, regional corporations, and village corporations.<sup>11</sup> Formula area population also provides a figure applicable to both federally-recognized Tribes and ANCs, whereas Tribal enrollment and ANC shareholder rolls do not represent the same concept.

In adopting the 2021 Distribution, Treasury recognized that, although formula area population figures may have generated inadequate expenditure estimates for certain Tribes, the expenditure estimates for most Tribes were satisfactory, and indeed, formula area population figures have

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<sup>10</sup> The comment letter submitted by the Navajo Nation as part of the 2021 reallocation consultation supports this position. In the letter, the Tribe observed that IHBG formula area population is “one of the only ways to objectively measure *those populations without sufficient access to non-Tribal governmental support.*” Letter from Jonathan Nez, President Navajo Nation, and Myron Lizer, Vice President, Navajo Nation, to Secretary Janet Yellen (Mar. 24, 2021) at 2 (emphasis in original). The letter continues as follows:

A tribe in an urban or peri-urban area with a small land base may only have a small percentage of their citizens living in the IHBG formula area, who will also have access to other governmental support in the communities in which they reside, whether it be state, county, or municipal. Whereas, for a rural tribe where almost all of their citizens live in the IHBG formula area, the Tribal government may be the only means of support during a crisis like the one we are experiencing today.

This is *not* to say that we feel those living away from the IHBG formula area are less deserving of their tribe’s support. Only that those living away from Tribal lands have greater access to essential resources than those who reside on Tribal lands. The Navajo Nation itself has only about half of its citizens living on the Reservation. While we were disappointed to see that the IHBG formula area population numbers for the Navajo Nation only recognized about half of our over 350,000 citizens, we also recognize that those living on Navajo Nation lands were more needing of support than our citizens who lived in surrounding urban or peri-urban communities. We tried to provide some support to all of our citizens regardless of where they lived with the earlier rounds of CARES funding, but most of the money went to support those living on Navajo Nation land. *Id.* at 2-3.

<sup>11</sup> See 24 CFR §§ 1000.302 (definition of “formula area”), 1000.327(a).

certain advantages over competing metrics.<sup>12</sup> Thus, Treasury has not repudiated its use of formula area population generally but rather sought to address the concerns raised by certain Tribes and by the D.C. Circuit that, for Tribes with zero formula area population and perhaps other similarly situated Tribes, formula area data may not have provided an adequate estimate of their increased expenditures.<sup>13</sup> The 2021 Distribution was intended to better align Tribal allocations with increased expenditures. The 2021 Distribution provided a supplemental population-allocation to Tribes for which formula area population figures may have served as an inadequate proxy for increased COVID-related expenditures.

A Tribe's formula area population figure may have proven inadequate where it appears that the Tribe's enrollment, rather than its formula area population, better represents the population for which it provides critical services. Presumably any Tribe with a Tribal government, including those with zero formula area population, provides relevant services to at least some individuals. A Tribe having a zero formula area population strongly suggests that, in that Tribe's case, formula area population does not track increased expenditures but rather is a result of the way formula area population is calculated for purposes of the IHBG program. Some Tribes have a

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<sup>12</sup> For example, the Chairman of the Suquamish Tribe during the Tribal consultation held regarding the reallocation noted differences among Tribes in enrollment criteria and observed that some Tribes may have lower enrollment numbers but play a "greater" role for "the regional tribal population in their area." Transcript of Treasury Tribal Consultation (Mar. 18, 2021) at 17-18. *See also* Letter from Sylvia P. Miller, Vice Chairwoman, Puyallup Tribe of Indians to Catherine Wolfram, Acting Asst. Secretary for Econ. Policy, Treasury (Mar. 24, 2021) (providing support for the initial allocation's use of IHBG formula area population in comment submitted as part of the 2021 reallocation consultation and noting that "using enrollment . . . does not provide an accurate picture of those that will benefit from relief").

<sup>13</sup> Treasury did not in 2020 or 2021 use formula area population as an estimate of or as a proxy for Tribes' enrollment. As the D.C. Circuit confirmed in its most recent opinion, there was no statutory requirement for Treasury to base any of the Tribal allocation on enrollment or population, however defined. *See* 63 F.4th at 46. Treasury had broad discretion to adopt an allocation methodology and in 2020 decided to base its allocations on IHBG formula area population, along with information on Tribes' expenditures and employment, rather than to use the information it had available on enrollment and ANC shareholders. As discussed below, the final allocation, after giving effect to the 2021 Distribution, is a function of three figures—formula area population, enrollment, and the ratio between the two.

zero formula population because they do not have a formula area at all. Some Tribes that have a formula area may have no formula area population because the formula area is very small, uninhabitable, or entirely non-residential. In addition, because under HUD’s formula, formula area population generally is subject to a cap of two times the Tribe’s enrollment, those Tribes that do not submit enrollment figures to HUD have their formula area population reduced to zero.<sup>14</sup> In other words, a zero formula area population indicates the limitations of using HUD’s formula area population for Treasury’s purposes—that the zero is a function of the particularities of the IHBG formula rather than a reflection of the Tribe’s increased COVID-related expenses. Given the indication in the case of zero population Tribes that formula area population may provide an insufficient proxy for increased expenditures and given that it was the zero population Tribes that were the focus of the D.C. Circuit’s 2021 decision, Treasury focused on providing additional funds to the zero population Tribes.

Under the 2021 Distribution, Treasury also issued supplemental payments to certain other Tribes that had a positive formula area population but that nonetheless had a high population ratio. To be sure, a high population ratio does not necessarily indicate an underestimate of increased expenditures. In some cases, Tribal enrollees not included in the formula area population live far from the Tribe’s land base or seat of government and for the most part do not receive relevant services from the Tribe.<sup>15</sup> However, in some cases, Tribes with low formula area population and

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<sup>14</sup> See 24 CFR 1000.302 (definition of “formula area”); 24 CFR part 1000 app. A, ¶ 5.a. Although HUD requests Tribal enrollment numbers annually, Tribes are not required to submit an updated Tribal enrollment number to receive an IHBG award. The majority of IHBG grants are not impacted by Tribal enrollment because they are not subject to the population cap, and some Tribes may not report Tribal enrollment because of this. *See also* Letter from Octavio Escobedo III, Chairman of the Tejon Indian Tribe, to Secretary Yellen (Mar. 24, 2021) (attributing its zero formula area population to its recent federal recognition as a Tribe).

<sup>15</sup> In addition, variations in increased expenditure are determined in part by factors unrelated to either formula area population or enrollment, including the existing condition of health care and sanitation facilities on Tribal lands, the extent to which Tribal lands and Tribal members are located near urban areas where health care and social services

a high population ratio may provide extensive services to enrollees, including those that live outside of the formula area. In light of time and resource constraints, Treasury was not able to perform a case-by-case analysis of each Tribe's situation, so Treasury made funds available not only to the zero formula area population Tribes but also to other Tribes that may have been adversely affected by the reliance on formula area population. In sum, the 2021 Distribution was intended to address potential issues with the original methodology to ensure that all CRF funds would be allocated based on increased COVID-related expenditures.

#### Use of Population Ratios and Phase-Out

Treasury utilized population ratios, and instituted a phase-out based on those ratios, in order to better focus its limited funds on the Tribes for which formula area population figures were most likely to provide inadequate estimates of COVID-related expenditures. As a threshold matter, Treasury had only a finite amount of funds available for reallocation. Any reallocation would have had to come from the remaining CRF funds, the vast majority of which were slated for ANCs who had been allocated funds on the same basis as the Tribal governments, but who, at the time, had not received any payment due to ongoing litigation. Furthermore, ANCs had made clear to Treasury the extent to which many Alaska Natives are not served by any Alaska Native village but rather rely on assistance from ANCs specifically.<sup>16</sup> Thus, in reallocating funds, Treasury had to ensure that it left sufficient funds for ANCs.

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are available from other sources, and the extent to which the population living on Tribal lands is dispersed over a wide area.

<sup>16</sup> See Letter from Andrew Guy, President and CEO of Calista Corporation to Catherine Wolfram, Acting Asst. Secretary for Econ. Policy, Treasury (Mar. 24, 2021) at 4; Letter from Sheri Buretta, Chairman and Interim CEO, Chugach Alaska Corporation (Mar. 24, 2021); Sophie Minich, President and CEO, Cook Inlet Region, Inc., to Secretary Yellen (Mar. 24, 2021) at 4; Letter from Julia Zaukar, President, Crooked Creek Traditional Council, to Catherine Wolfram (Mar. 24, 2021) at 3; Letter from Gwen Slim, Kipnuk Traditional Council President, to Catherine Wolfram (Mar. 24, 2021) at 4; Letter from Gabriel W. McKilly, Uyak Natives Inc. (Mar. 19, 2021).



Consequently, Treasury decided that its 2021 Distribution could only address those cases in which formula area populations may have served as an inadequate proxy for increased COVID-related expenditures. To do this, Treasury decided to rank Tribes based on population ratios, establish a cut-off point below which Tribes would not receive a payment, and then scale payments across the ranking. For several reasons, Treasury decided to rely on population ratios, rather than on the absolute differences between Tribes' formula area population figures and their enrollment figures. As an initial matter, a large, absolute disparity between a Tribe's formula area population figure and its enrollment figure does not necessarily mean that the Tribe's initial population-allocation was inadequate. As explained above, a Tribe with a substantial formula area population may have focused its resources on those living within its formula area, rather than on enrollees who live outside of the formula area. In that scenario, the enrollment figure—which includes those living off of the formula area—would overstate the Tribe's COVID-related expenditures.<sup>17</sup>

Focusing on population ratios would enable Treasury to focus the supplemental payments on the Tribes at issue in the D.C. Circuit's decision: the Tribes with zero formula area populations,

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<sup>17</sup> As a result of the 2021 Distribution, Tribes receiving top-up payments end up with different payment amounts per enrolled member. But prior to the 2021 Distribution, Tribes received payments in varying amounts as a proportion to their enrollment as well. Treasury never intended to achieve a uniform payment amount per enrolled member (just as it never intended to achieve a uniform payment per acre of Tribal land, another metric proposed by some Tribes during the 2020 consultation that Treasury considered but did not adopt). Instead, both the 2021 Distribution and the original allocation methodology intended to estimate and predict increased expenditures attributable to the COVID-19 pandemic, and Treasury decided that a population-based metric could correlate with the increased expenditures of Tribal governments relating directly to the public health emergency, such as increased costs to address medical and public health needs. Thus, the final allocation—consisting of both the 2021 Distribution and the original allocation methodology—takes account of three figures: formula area population, enrollment, and the ratio between the two, with the ratio being used to assign weights to the other two figures. This calculation may not perfectly correlate with the Tribes' relative COVID-related expenditures, but neither would any other metric, including just enrollment data. That data may underestimate increased expenditures by disregarding individuals to whom Tribes provide services but who are not members and may overestimate increased expenditures by counting Tribal members who live far from the Tribe's jurisdiction and receive relevant services from other sources. The weighted formula used in the final allocation is a logical and data-based effort to address these concerns and to estimate and predict increased expenditures.

which have high population ratios. If Treasury had decided to use the difference between formula area population and enrollment in determining eligibility, given the limitation on funds available, Treasury would only have been able to pay a small fraction of the difference between enrollment and formula area population to those Tribes with the largest differences. This is made evident by the case of the Cherokee Nation, for example, for which the difference between formula area population and enrollment is 267,973, which dwarfs the difference between these two figures in the case of the Prairie Band Potawatomi Nation (3,768), the Shawnee Tribe (3,140), or the Miccosukee Tribe of Indians of Florida (597)—the three Tribes that brought suit challenging Treasury’s CRF allocation methodology. More important, a reallocation for which eligibility was based on the difference between population and enrollment would not have provided sufficient funding to zero formula area population Tribes. For example, a reallocation provided to the Tribes in the top 15<sup>th</sup> percentile based on the difference between population and enrollment would have only provided funding to two zero formula area population Tribes.

Treasury instituted the “phase-out”—whereby Tribes in the top 15% received progressively lower percentages of their “enrollment allocations” as their population ratios decreased—for a similar reason. As noted above, Treasury had only a limited amount of funds it could reallocate, and it wanted to ensure it could focus those funds on the zero formula area population Tribes.

Those Tribes had the highest population ratios, and thus, pursuant to the “phase out,” they received the full amount of their “enrollment allocations.” Awarding all Tribes in the 15<sup>th</sup> percentile the full amount of the difference between their formula area-based allocations and their enrollment-based allocations would have required reallocating approximately twice as much funding away from ANCs and would have caused a sharp discontinuity in treatment between those Tribes on one side of the 15<sup>th</sup> percentile line and those on the other.

In sum, in 2021, Treasury responded to concerns from Tribes and the D.C. Circuit about the use of formula area population by reallocating funds from ANCs based on Tribal enrollment data. Treasury still believed formula area population provided a good proxy for increased expenditures in most cases, and Treasury had limited funds available for reallocation. It was the zero formula area population Tribes that were the most likely to be adversely affected by the use of formula area population and that were the focus of the D.C. Circuit's 2021 opinion. Treasury based the reallocation on the population ratio in order to target relief to these zero formula area population Tribes. By providing additional funding to these Tribes and others with similarly large population ratios, Treasury more closely aligned allocations with Tribes' increased expenditures.