

# DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

## 24 CFR Part 1000

[Docket No. FR-4938-F-03]

RIN 2577-AC57

### Native American Housing Assistance and Self-Determination Act (NAHASDA); Revisions to the Indian Housing Block Grant Program Formula

**AGENCY:** Office of the Assistant Secretary for Public and Indian Housing, HUD.

**ACTION:** Final rule.

**SUMMARY:** This final rule makes several revisions to the regulations for the Indian Housing Block Grant (IHBG) program allocation formula. Through the IHBG program, HUD provides federal housing assistance to Indian tribes in a manner that recognizes the right of Indian self-determination and tribal self-government. This final rule follows publication of a February 25, 2005, proposed rule and takes into consideration the public comments received on the proposed rule. Other than one conforming change, this final rule adopts the February 25, 2005, proposed rule without change. HUD negotiated the proposed rule and final rule with active tribal participation and using the procedures of the Negotiated Rulemaking Act of 1990.

**DATES:** Effective Date. May 21, 2007.

#### FOR FURTHER INFORMATION CONTACT:

Rodger J. Boyd, Deputy Assistant Secretary for Native American Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4126, Washington, DC 20410-5000; telephone (202) 401-7914 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On February 25, 2005, HUD published a proposed rule (70 FR 9490) to revise the regulations for the Indian Housing Block Grant (IHBG) program allocation formula. The IHBG program is authorized by the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*) (NAHASDA), which changed the way that housing assistance is provided to Native Americans. NAHASDA eliminated several separate assistance programs and replaced them with a single block grant program.

NAHASDA and its implementing regulations at 24 CFR part 1000 recognize tribal self-determination and self-governance while establishing reasonable standards of accountability. The part 1000 regulations were developed with active tribal participation using the procedures of the Negotiated Rulemaking Act of 1990 (5 U.S.C. 561-570).

Under the IHBG program, HUD makes assistance available to eligible Indian tribes for affordable housing activities. The amount of assistance made available to each Indian tribe is determined in accordance with the allocation formula that was developed as part of the NAHASDA negotiated rulemaking process (IHBG Formula). A regulatory description of the IHBG Formula is located in subpart D of 24 CFR part 1000 (§§ 1000.301-1000.340).

The current IHBG Formula consists of two components: Need and Formula Current Assisted Stock (FCAS). Generally, the amount of annual funding for an Indian tribe is the sum of the Need component (subject to a minimum funding amount authorized by § 1000.328) and the FCAS component. Based on the amount of funding appropriated annually for the IHBG program, HUD calculates the annual grant for each Indian tribe and provides this information to the Indian tribes. An Indian Housing Plan (IHP) for the Indian tribe is then submitted to HUD. If the IHP is found to be in compliance with statutory and regulatory requirements, the grant is made.

Section 1000.306 of the IHBG program regulations provides that the IHBG Formula shall be reviewed within 5 years after issuance. Accordingly, HUD established the IHBG Formula Negotiated Rulemaking Committee (Committee) for the purposes of reviewing the regulations at 24 CFR part 1000, subpart D, and negotiating recommendations for a possible proposed rule modifying the IHBG Formula. The Committee membership consisted of 24 elected officers of tribal governments (or authorized designees of those tribal governments). The Committee membership reflected a balanced representation of Indian tribes, both geographically and based on size. In addition to the tribal members, there were two HUD representatives on the Committee. The first meeting of the Committee took place in April 2003 and the Committee continued to meet thereafter on approximately a monthly basis. The Committee met a total of seven times to negotiate the proposed rule, with the final meeting being held in January 2004. All of the Committee

sessions were announced in the **Federal Register** and were open to the public, and interested members of the public actively participated in the workgroup sessions. The February 25, 2005, proposed rule reflected the consensus decisions reached by the Committee during the negotiated rulemaking process on the best way to address certain areas of the IHBG Formula that the Committee determined required clarification, were outdated, or were not operating as intended by the original Negotiated Rulemaking Committee. The preamble to the February 25, 2005, proposed rule provides additional details regarding the proposed regulatory changes to the IHBG Formula, and the negotiated rulemaking process used to develop the proposed changes.

##### II. This Final Rule; Conforming Change to the February 25, 2005, Proposed Rule

This final rule follows publication of the February 25, 2005, proposed rule and takes into consideration the public comments received on the proposed rule. The public comment period on the proposed rule closed on April 26, 2005. HUD received 49 public comments from Indian tribes on the proposed rule. The Committee met on January 31 through February 1, 2006, to review and consider responses to the public comments. A drafting workgroup was charged with developing the preamble to this final rule. The membership of the workgroup consisted of HUD and tribal representatives. The 2-day meeting, which was open to the public, was announced in the **Federal Register** through a notice published on January 13, 2006 (71 FR 2176).

Conforming changes to appendices A and B were required based on the regulatory changes adopted by the Committee in this final rule. Therefore, these conforming changes to appendices A and B are adopted in this final rule. No other changes are made to the appendices.

After careful consideration of the comments, the Committee reached consensus on making a conforming typographical change to § 1000.316(a)(2) and (a)(3). Other than these conforming changes (which are discussed below in this preamble), the regulatory revisions that were proposed in the February 25, 2005, proposed rule are unchanged in this final rule.

##### III. Discussion of Public Comments on the February 25, 2005, Proposed Rule

This section of the preamble presents a summary of the significant issues raised by the public commenters on the February 25, 2005, proposed rule and

the Committee's responses to these comments. For the convenience of readers, the discussion of the public comments is organized into three sections. The first section discusses the general comments that were received on the proposed rule. The second section discusses the public comments received on specific proposed regulatory changes contained in the proposed rule. The third section discusses the public comments received on non-consensus issues (i.e., those issues on which the Committee could not reach agreement on proposed regulatory language).

#### A. General Comments

*Comment.* Twenty-eight commenters praised the IHBG Formula negotiated rulemaking process and offered support that all revisions to NAHASDA regulations be developed using negotiated rulemaking. Further, these commenters requested that all public comments be considered by the Committee in a face-to-face meeting before HUD develops the final rule.

*Response:* The Committee appreciates the commenters' support for the negotiated rulemaking process and for the Committee's efforts. As noted above, this Committee met during January 31 through February 1, 2006, to consider the public comments and develop this final rule.

#### B. Comments on Specific Proposed Regulatory Changes

*Comment regarding the revised definition of Formula Area.* The February 25, 2005, rule proposed to revise the definition of the term "Formula Area" located in § 1000.302. Many comments were received on various aspects of this revised definition. For example, five commenters objected to the inclusion of Oklahoma Tribal Statistical Areas (OTSAs), as defined by the U.S. Census, in the list of acceptable formula areas. The commenters wrote that the inclusion of OTSAs as formula areas will "shift funding from Reservation restricted trust lands to Fee Simple State lands." Other commenters suggested that the rule be revised to remove Tribal Designated Statistical Areas (TDSAs) from the list of formula areas. These commenters recommended that the final rule should instead use the listing of federally recognized tribes published by the Department of Interior.

*Response:* The final rule has not been revised in response to these comments. The Committee continues to believe that the proposed changes to the definition of Formula Area help to clarify the current definition and better address the different types of geographic areas

served by Indian tribes. In response to the comments objecting to the inclusion of OTSAs, the Committee does not agree that the inclusion of such areas will necessarily result in a shift in funding and notes that the final rule continues to provide for challenges to the "grandfathering" of the current formula areas for such tribal areas in Oklahoma. Additionally, geographic areas encompassed by OTSAs are not new to the formula, but rather reflect a change in terminology used by the Census Bureau. These geographic areas were previously referred to as Tribal Jurisdictional Statistical Areas and have historically been included in the IHBG formula. With regard to the commenters recommending the use of the list of federally recognized tribes, some federally recognized tribes do not have a reservation or trust land. Additionally, five state recognized tribes have been grandfathered into the IHBG program by statute. As noted above, the inclusion of TDSAs simply provides Indian tribes with another Formula Area option that may better reflect the geographic areas they serve.

*Comments regarding the definition of Alaska Formula Area.* Several commenters raised concerns about the proposed definition of Alaska Formula Area. Some of these commenters were concerned about the procedures contained in the definition for crediting Alaska needs data. One of these commenters wrote that NAHASDA does not authorize HUD to grant IHBG funds to "Alaska Native Villages," only to sovereign Indian or Alaska Native tribes, and suggested that the definition be revised accordingly. Some of the commenters raised concern about the provision for expanding Alaska Formula Areas. Several of these commenters objected to the perceived "ability of any corporation to be able to expand their service or formula areas." Another commenter, however, requested that the final rule clarify the ability of Alaska Indian tribes to expand their Formula Area.

*Response:* The rule has not been revised in response to these comments. The regulatory provision regarding Alaska Formula Areas addresses the unique circumstances of Indian tribes in Alaska, and is consistent with the statutory requirements of NAHASDA. The language regarding the crediting of formula data is identical to that found in § 1000.327 of the current regulations. The change proposed by the February 25, 2005, rule was simply to transfer this language to the definition of Formula Area for purposes of clarity. With regard to the expansion of Alaska Formula Areas, the proposed and final

rules make clear that Alaska tribes may seek to expand their Formula Areas in the same manner as any other Indian tribe. Alaska Native Villages have been listed and are recognized as "federally recognized Indian tribes" by the Secretary of Interior (70 FR 71194). Additionally, NAHASDA defines Alaska Native Villages, regional corporations, and village corporations as Indian tribes, expressly making them eligible for provisions under the statute.

*Comments on the population cap used to determine formula area.* Several commenters wrote in support of the continued use of the "cap" on the population data that will be attributed to an Indian tribe within its Formula Area. In particular, the commenters supported the clarification that for state-recognized tribes the population data and formula allocation shall be limited to tribal enrollment figures reflecting tribal enrollment criteria in effect in 1996. The commenters wrote that the cap must be enforced to prohibit state recognized tribes from being credited with any new members.

*Response:* The Committee agrees that the cap is necessary to maintain fairness for all Indian tribes. As explained in the preamble to the February 25, 2005, proposed rule, the provision regarding state-recognized Indian tribes is statutorily based. The definition of state-recognized tribe in section 4(12)(C)(ii) of NAHASDA requires that the allocation for such a tribe shall be determined based on tribal membership eligibility criteria in existence on the date of enactment (October 26, 1996). The language of the proposed rule (and adopted by this final rule) helps to ensure that state-recognized tribes will not be credited for any new members who do not meet the 1996 enrollment criteria. However, the rule does not prohibit a state-recognized Indian tribe from being credited with new members who meet the enrollment criteria in place in 1996 and it does not freeze a state-recognized Indian tribe's population data or formula allocation at 1996 levels.

*Comments regarding the expansion and redefinition of Formula Area.* The proposed rule described new procedures governing the expansion or re-definition of an Indian tribe's Formula Area. One tribe objected to reducing the new area to the "smallest U.S. Census unit or units" when there are other reasonable boundaries that can be followed, such as municipal or tribal boundaries.

*Response:* The rule has not been revised in response to this comment. The new requirements were carefully crafted by the Committee to ensure that

an Indian tribe seeking to include additional geography within its approved Formula Area has the authority to provide housing services within the new geography and will serve the housing needs of Native Americans within the expanded Formula Area. The provision noted by the commenter is consistent with these goals because it limits expansion to those U.S. Census units for which the tribe can verify that it has the requisite legal authority and the ability to provide housing services. Despite differing views on its limitations, the Committee decided to base the limitation on U.S. Census data because such data is uniformly collected and accessible to all Indian tribes and because no acceptable alternative source has yet been developed and agreed upon.

*Comments regarding the definition of Substantial Housing Services.* Among the required criteria for expanding its Formula Area, the Indian tribe must demonstrate that it is providing "substantial housing services" (as defined in the rule) within the new geographic area. Several of the commenters objected to the requirement that the tribe demonstrate affordable housing activities equal to at least 100 percent of the increase in its IHBG Formula allocation or 51 percent of the tribe's current formula allocation. The commenters wrote that this requirement establishes an excessively high and difficult threshold for expansion. Several commenters wrote that the definition would make it especially difficult for small tribes in California and Nevada, whose IHBG Formula allocation is based largely on the FCAS component needed for maintaining current housing stock, to include locations outside their existing Formula Areas even if they provide housing services to their enrolled members in those areas.

*Response:* The rule has not been revised in response to these comments. As noted above in this preamble, the new requirements regarding the expansion of Formula Area were carefully crafted by the Committee. The definition of substantial housing services intentionally contains thresholds that are designed to ensure that an Indian tribe seeking to include additional geography within its approved Formula Area has the authority to provide housing services within the new geography and will serve the housing needs of Native Americans within the expanded Formula Area. However, the definition also contains the necessary flexibility to help address geographic and other differences among Indian tribes.

Specifically, the rule permits Indian tribes to satisfy the substantial housing services requirements in one of two ways: to either provide 100 percent of the increase in its IHBG Formula allocation or 51 percent of the tribe's current formula allocation if certain other conditions are satisfied.

*Comments regarding the use of U.S. Census data in overlapping Formula Areas.* Current regulations at § 1000.326 specify how IHBG funds will be allocated where the Formula Areas of one or more tribes overlap. Among other factors, the allocation will be based upon the Indian tribe's proportional share of the population in the geographic area. Tribal membership in the geographic area (not including dually enrolled tribal members) will be based on data that all Indian tribes involved agree to use. The current regulation lists several suggested data sources, including tribal enrollment lists, Indian Health Service User Data, and Bureau of Indian Affairs data. This list is not exclusive, and the data used for this purpose has sometimes included U.S. Census data. For purposes of clarity, the proposed rule expanded the list of suggested data sources to explicitly include data from the U.S. Census. Five commenters objected to the use of Census data, suggesting that HUD instead utilize official enrollment data from the tribe.

*Response:* The change clarifies that the U.S. Census data is one of several data sources that may be used to determine tribal population. The Committee notes that the regulation does not require the use of Census data and does not preclude the use of other data, including the tribal enrollment figures recommended by the commenters. Accordingly, the Committee determined that a change to the rule was not necessary.

*Comments regarding the required use of the Formula Response Form for reporting changes to FCAS.* The February 25, 2005, rule proposed to add a new § 1000.315 and § 1000.319, both clarifying policies and procedures relating to the reporting of changes to FCAS. New § 1000.315 clarifies that the Formula Response Form is the only mechanism a recipient may use to report changes to the FCAS. New § 1000.319 provides that if a recipient receives an overpayment of funds because it failed to report changes on the Formula Response Form in a timely manner, the recipient must repay the funds within 5 fiscal years. Conversely, HUD has agreed to provide back funding for any undercount of units that occurred and was reported or challenged prior to October 30, 2003. In

their comments, 34 tribes offered support for these rule changes. The commenters supported the change on over- and under-counting of FCAS, as well as the formula response form change at § 1000.319.

*Response:* The Committee appreciates the support of the comments. The final rule adopts the provisions of proposed §§ 1000.315 and 1000.319 without change.

*Comments regarding the calculation of the operating subsidy component of FCAS.* For clarity, the February 25, 2005, rule proposed to make a minor, non-substantive modification to § 1000.316(a)(1). The current language of the regulation provides that the first of the three variables comprising the operating subsidy component of FCAS is "the number of low-rent FCAS units multiplied by the FY 1996 national per unit subsidy (adjusted to full funding level) multiplied by an adjustment factor for inflation." The proposed provision would simplify this provision by establishing a separate definition of the term "national per unit subsidy" in § 1000.302, which contains the definitions applicable to the IHBG program.

Twenty-eight commenters wrote in support of the change. However, one of the commenters identified a typographical inconsistency between § 1000.316(a)(1) and paragraphs (a)(2) and (a)(3) of § 1000.316. Specifically, the proposed rule inadvertently failed to include the same changes to paragraphs (a)(2) and (a)(3) as were proposed for paragraph (a)(1). The commenter requested that the final rule correct this error. Two other commenters submitted comments related to § 1000.316, but that were outside the scope of the proposed rule and therefore not appropriate for inclusion at this final rule stage. Specifically, one commenter advocated the participation of all Indian tribes in the Section 8 voucher program, while the other commenter advocated for increased IHBG funding.

*Response:* The Committee appreciates the support expressed by the commenters on the clarifying change. As noted above in this preamble, the final rule makes the necessary correction to paragraphs (a)(2) and (a)(3) of § 1000.316.

*Comments regarding the FCAS modernization allocation for small Indian tribes.* The February 25, 2005, rule proposed to implement a statutory amendment to NAHASDA by making various conforming changes to the IHBG regulations. Section 1003(g) of the Omnibus Indian Advancement Act (Pub. L. 106-568, approved December 27, 2000) added a new subsection

302(d)(1)(B) to NAHASDA regarding operating and modernization funding for Indian tribes with Indian Housing Authorities (IHAs) that owned or operated fewer than 250 units developed under the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*) (1937 Act). The proposed rule contained conforming changes to § 1000.316 and § 1000.340 to codify this statutory requirement.

Twenty-nine commenters offered support for the proposed regulatory changes to accommodate the statutory amendment to NAHASDA regarding operating and modernization funding for tribes that owned or operated fewer than 250 units. Five commenters, although acknowledging that the regulatory changes were statutorily based, wrote that the statutory amendment is unfair to those tribes that did not receive the one-time competitive modernization grant in 1997. One commenter requested clarification regarding the effect of the regulatory change for Indian tribes that had more than 250 units on October 1, 1997.

*Response:* The rule has not been revised in response to these comments. As the commenters acknowledged, the regulatory change conforms the IHBG regulations to the statutory language of section 302(d)(1)(B) of NAHASDA. In response to the commenter requesting additional clarification, the statutory change does not affect the calculation of operating and modernization funding for Indian tribes that had more than 250 units on October 1, 1997.

*Comments regarding small programs/minimum funding.* The February 25, 2005, rule proposed numerous revisions to the minimum funding provisions at § 1000.328. Among other changes, the rule proposed to remove the current provisions regarding the minimum IHBG Formula Need allocation for an Indian tribe in its first year of participation in the IHBG program. The rule also proposed to revise the minimum formula allocation an Indian tribe will receive under the Need component of the IHBG Formula after its first year of participation in the program. The February 25, 2005, proposed rule also proposed new eligibility requirements for minimum funding.

Thirty-four comments offered support for the revised minimum funding provisions, and 28 of these commenters recommended that the provisions be adopted without change. Five commenters wrote that the minimum funding provisions will not provide small tribes with adequate funds to meaningfully address their housing needs. These commenters recommended

that FCAS should not be considered in providing minimum funding, as these funds go toward maintenance of existing housing and do not address the unmet need for housing assistance. These commenters also objected to the requirement that the Indian tribe demonstrate a need for the minimum funding, writing that this requirement is unnecessary and duplicative because each tribe's IHP already contains a statement of needs.

*Response:* The rule has not been revised in response to these comments. As noted in the preamble to the proposed rule, the minimum funding provision provides for a minimum needs allocation of \$50,000 based on current IHBG appropriations. The Committee continues to believe that this provision is fair to all Indian tribes while helping to ensure an adequate minimum level of funding for smaller tribes. With regard to the eligibility requirements, the Committee concluded they are necessary to ensure that the minimum funding provisions benefit Indian tribes that would otherwise be unable to provide even minimal housing services and that have a demonstrated need for such services. The requirement is not duplicative because tribes will demonstrate the presence of any households at or below 80 percent of median income only in the IHP.

*Comments regarding the adjustment of the Need variables using birth and death rate data.* Section 1000.330 describes the data sources used for the Need component. The February 25, 2005, rule proposed to revise this section to codify existing procedures by specifying that the data for the Need variables shall be adjusted annually beginning the year after the Need data is collected, using Indian Health Service projections based upon birth and death rate data as provided by the National Center for Health Statistics.

Twenty-eight commenters wrote in support of the consensus position on birth and death rates. Five commenters wrote that, while death and birth rates are a fair method to adjust the Need component, it should be the responsibility of the tribes to report annual enrollment certification instead of HUD.

*Response:* The birth and death rate provision has been adopted without change. As noted, the regulatory change codifies an existing procedure that both Indian tribes and HUD have determined works effectively and fairly in adjusting the Formula Need component for birth and death rates. Procedures at § 1000.336 have also been revised to include challenges of birth and death

rate data used in computing Indian Health Service projections.

*Comments regarding data challenges and appeals of HUD formula determinations.* The September 25, 2005, rule proposed to clarify and elaborate upon existing § 1000.336, which describes the procedures that an Indian tribe, tribally designated housing entities (TDHE), and HUD may use to challenge data. Under the proposed rule, § 1000.336 would continue to authorize data challenges, but also provide for appeal of certain HUD formula determinations. Thirty-four commenters wrote in support of the proposed rule provisions regarding data challenges and appeals. However, five commenters objected to the use of U.S. Census data to determine need.

*Response:* The consensus position as described in the proposed rule remains unchanged in the final rule. The Committee appreciates the support expressed by the majority of comments on this provision, and believes that the new regulatory language will assist both tribes and HUD by clarifying the policies and procedures for challenging data and appealing formula determinations.

#### *C. Comments Regarding Nonconsensus Items*

*Comments regarding formula median income.* During negotiations, the Committee considered removing the definition of "formula median income" used in calculating the Need component of the IHBG Formula and, in its place, using the definition of "median income" provided under section 4 of NAHASDA. The Committee was unable to reach consensus on this issue and therefore a regulatory change was not contained in the February 25, 2005, proposed rule.

A majority of commenters requested that the Committee revisit the issue. Twenty-nine commenters explained that there was not enough time to properly address the issue during the negotiations. They wrote that the use of two separate definitions of median income (one for the formula and the other for use elsewhere in the IHBG regulations) was confusing and contradictory to the intent of NAHASDA. The commenters also wrote that the formula definition unfairly results in some Indian tribes not receiving IHBG funding for low-income Indian families who must be served by the tribe.

*Response:* No change has been made to the rule in response to these comments. As noted above and discussed in detail in the preamble to the proposed rule, the Committee could

not reach consensus on whether to revise the definition of formula median income. Because decision-making during the negotiated rulemaking process was based on consensus, the absence of consensus on formula median income, even after full consideration of public comments, precluded the Committee from adopting the changes proposed by the commenters. Moreover, such a revision would not have been appropriate at this final rule stage, as it would require additional notice and public comment.

*Comments regarding the Section 8 inflation factor.* During negotiations on the proposed rule, the Committee considered various proposals to remove the inflation adjustment factor for Section 8 units in calculating FCAS, but was unable to reach consensus on a regulatory change. There were several comments received that made suggestions outside the scope of the proposed rule. Specifically, five commenters suggested that the regulations be revised to provide that as an individual Section 8 voucher expires, the associated funding be placed in a "pot" in the same way as other FCAS are conveyed. One commenter raised an objection to the statutory language of section 502(a) of NAHASDA, which, according to the commenter, effectively includes Section 8 assistance to be treated as FCAS.

*Response:* The rule has not been revised in response to these comments. This was an item on which the Committee was unable to reach consensus. Further, the change recommended by the commenters could not be made at this final rule stage without additional notice and comment rulemaking. The comment objecting to section 502(a) of NAHASDA pertains to statutory language that may be revised only through legislative amendment.

*Comments regarding substantial noncompliance.* Section 1000.534 of the IHBG program regulations describes those tribal actions that constitute substantial noncompliance with IHBG program requirements. As explained in § 1000.538, HUD may take certain actions against an Indian tribe that has failed to comply substantially with the IHBG program requirements, but only after reasonable notice and opportunity for a hearing conducted in accordance with 24 CFR part 24. The Committee considered expanding the actions deemed to constitute substantial noncompliance and, therefore, entitle the Indian tribe to a formal hearing prior to any reduction or adjustment of its IHBG grant. During negotiations, there were two objections to the proposed expansion of substantial noncompliance

and, therefore, consensus was not reached on this proposal. Several commenters expressed concern on the failure of the Committee to find consensus on the proposal to amend §§ 1000.534 and 1000.538.

*Response:* No change has been made to the rule in response to these comments. As noted above, the Committee could not reach consensus on whether to revise the regulatory provisions concerning substantial noncompliance. Because the negotiated rulemaking process required consensus and because consensus was not reached on this item, the Committee did not adopt the changes recommended by the commenters. Moreover, such revisions would not be appropriate at this final rule stage because they would require additional notice and opportunity for public comment.

*Comments regarding the replacement of the Allowable Expense Level (AEL).* The IHBG Formula currently uses an adjustment factor known as the Allowable Expense Level (AEL), which serves as a substitute measurement of geographic and other differences in the monthly per-unit operating costs incurred by an Indian tribe to operate Current Assisted Stock. During negotiations, some members of the Committee expressed dissatisfaction with the AEL, stating that it is not reflective of the true costs of operating affordable housing units and that individual AEL levels were often inaccurately calculated. Other Committee members, however, felt that general use of the AEL is an acceptable method for allocating IHBG operating funds among the Indian tribes but that individual AEL determinations should be subject to challenge by individual Indian tribes. The Committee was unable to reach consensus on this issue and, therefore, a regulatory change was not contained in the February 25, 2005, proposed rule. HUD agreed to a study of the use of the AEL. This Indian housing cost study is currently underway. Twenty-nine commenters submitted comments regarding possible changes to the AEL, but were divided in their opinions. Some of the commenters were concerned about the failure of the Committee to find consensus on AEL and expressed support for changes through legislation or future regulatory changes. Others supported the continued use of AEL as an adjustment factor to account for the higher costs associated with differing geographic locations.

*Response:* No change has been made to the rule in response to the comments. As noted, the Committee was unable to reach consensus on a proposed

regulatory change and, therefore, did not adopt the commenters' suggested change in this final rule. Accordingly, a revision to the AEL would not be appropriate at this final rule stage, since it would require additional notice and public comment.

*Comments regarding the use of multi-race U.S. Census data.* In calculating the Need component, pursuant to § 1000.330, HUD uses U.S. Census population data. The 2000 U.S. Census reported for the first time both those persons who identify themselves solely as American Indian/Alaska Native (AIAN) and those who also identify with another race. HUD made the determination to use the 2000 Census data. HUD's current calculation of the Need component incorporates all persons who identify as AIAN, without regard to whether they also identify as another race. During the negotiations for the proposed rule, proponents of using this data stated that the use of single-race data does not reflect the best available information and would exclude some persons who identified as multi-race and are eligible to be served under NAHASDA. Other Committee members, however, expressed objections to the use of this multi-race data, stating that the purpose of NAHASDA, which is to assist Native Americans, would be better served by limiting the population data to those persons designating themselves as being solely AIAN. The Committee was unable to reach consensus on this issue and, therefore, a regulatory change was not contained in the February 25, 2005, proposed rule. Thirty-four commenters opposed the use of multi-race Census data and urged the Committee to revisit this issue. The tribes stated that the change to multi-race data has the effect of drastically increasing some tribes' funding and decreasing that of others. In particular, one commenter wrote that the use of multi-race data would shift funding from traditional Native Villages to more urban areas. Several commenters suggested a compromise position providing for calculation of the Need component based on the average of individuals designating themselves solely as AIAN and the number of persons also designating themselves as belonging to other racial categories. One commenter suggested that tribal enrollment criteria should be used as the determining factor where eligibility is in question. Four commenters wrote in support of the multi-race Census data. One of these commenters stated that tribal members can be more than one race provided they meet the criteria established by the tribe. Two

commenters wrote that not using multi-race data would result in undercounting of tribal membership. Another commenter offered general support for the use of multi-race Census data in the IHBG allocation formula.

**Response:** The rule has not been revised in response to these comments. As discussed above, the Committee was unable to reach consensus on the issue of multi-race data and, therefore, a regulatory change at this final rule stage would be inappropriate without advance notice and the opportunity for public comment. Further, Senate Report 109–109 accompanying the Fiscal Year 2006 HUD Appropriations Act (Pub. L. 109–115; approved November 30, 2005) provides for HUD to reassess, using notice and comment rulemaking procedures, its decision to use multi-race data. Consistent with the language of the Senate Report, on December 12, 2006, HUD published a notice in the **Federal Register** (71 FR 74748) that solicited public comment on the use of multi-race data in the computation of the IHBG allocation formula.

#### IV. Findings and Certifications

##### *Regulatory Planning and Review*

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866 (entitled “Regulatory Planning and Review”). OMB determined that this rule is a “significant regulatory action” as defined in section 3(f) of the Order (although not an economically significant action, as provided under section 3(f)(1) of the Order). The docket file is available for public inspection in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an advance appointment to review the docket file by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number).

##### *Paperwork Reduction Act*

The information collection requirements contained in this proposed rule have been approved by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB control number 2577–0218. In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

##### *Environmental Impact*

A Finding of No Significant Impact (FONSI) with respect to the environment was made at the proposed rule stage in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). That FONSI remains applicable to this final rule and is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an advance appointment to review the FONSI by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number).

##### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule would not impose substantive new requirements on Indian tribes. Rather, the rule addresses those areas of the IHBG Formula that HUD and Indian tribal representatives determined require clarification, are outdated, or are not operating as intended. Moreover, HUD negotiated the amendments contained in this final rule with representatives of Indian tribes, and the rule reflects the consensus decisions reached by HUD and its tribal negotiating partners on the best way to address the required changes to the IHBG Formula. The potential burden of the regulatory changes on Indian tribes was considered and addressed as part of the negotiated rulemaking process. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

##### *Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531–1538) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and on the private sector. This rule does not impose any federal mandate on state, local, or tribal governments, or on the

private sector within the meaning of UMRA.

##### *Catalog of Federal Domestic Assistance*

The Catalog of Federal Domestic Assistance number for the IHBG program is 14.867.

##### **List of Subjects in 24 CFR Part 1000**

Aged, Grant programs—housing and community development, Grant programs—Indians, Individuals with disabilities, Low and moderate income housing, Public housing, Reporting and recordkeeping requirements.

■ Accordingly, for reasons discussed in the preamble, HUD amends 24 CFR part 1000 as follows:

#### **PART 1000—NATIVE AMERICAN HOUSING ACTIVITIES**

■ 1. The authority citation for 24 CFR part 1000 continues to read as follows:

**Authority:** 25 U.S.C. 4101 *et seq.*; 42 U.S.C. 3535(d).

■ 2. In § 1000.302, revise the definition of “*Formula Area*” and add, in alphabetical order, definitions of the terms “*National Per Unit Subsidy*” and “*Substantial Housing Services*” to read as follows:

##### **§ 1000.302 What are the definitions applicable to the IHBG formula?**

\* \* \* \* \*

*Formula area.* (1) Formula areas are:

- (i) Reservations for federally recognized Indian tribes, as defined by the U.S. Census;
- (ii) Trust lands;
- (iii) Department of the Interior Near-Reservation Service Areas;
- (iv) Former Indian Reservation Areas in Oklahoma Indian Areas, as defined by the U.S. Census as Oklahoma Tribal Statistical Areas (OTSAs);
- (v) Congressionally Mandated Service Areas;
- (vi) State Tribal Areas as defined by the U.S. Census as State Designated American Indian Statistical Areas (SDAISAs);
- (vii) Tribal Designated Statistical Areas (TDSAs);
- (viii) California Tribal Jurisdictional Areas established or reestablished by federal court judgment; and
- (ix) Alaska formula areas described in paragraph (4) of this definition.

(2)(i) For a geographic area not identified in paragraph (1) of this definition, and for expansion or redefinition of a geographic area from the prior year, including those identified in paragraph (1) of this definition, the Indian tribe must submit, on a form agreed to by HUD, information about the geographic area it wishes to include in

its Formula Area, including proof that the Indian tribe, where applicable, has agreed to provide housing services pursuant to a Memorandum of Agreement (MOA) with the tribal and public governing entity or entities of the area, or has attempted to establish such an MOA; and either:

(A) Could exercise court jurisdiction; or

(B) Is providing substantial housing services and will continue to expend or obligate funds for substantial housing services, as reflected in the form agreed to by HUD for this purpose.

(ii) Upon receiving a request for recognition of a geographic area not identified in paragraph (1) of this definition, HUD shall make a preliminary determination. HUD shall notify all potentially affected Indian tribes of the basis for its preliminary determination by certified mail and provide the Indian tribes with the opportunity to comment for a period of not less than 90 days. After consideration of the comments, HUD shall announce its final determination through **Federal Register** notice.

(iii) No Indian tribe may expand or redefine its Formula Area without complying with the requirements of paragraphs (2)(i) and (ii) of this definition, notwithstanding any changes recognized by the U.S. Census Bureau.

(iv) The geographic area into which an Indian tribe may expand under this paragraph (2) shall be the smallest U.S. Census unit or units encompassing the physical location where substantial housing services have been provided by the Indian tribe.

(3) Subject to a challenge by an Indian tribe with a Formula Area described under paragraph (1)(iv) of this definition, any federally recognized Indian tribe assigned Formula Area geography in Fiscal Year 2003 not identified in paragraphs (1) and (2) of this definition, shall continue to be assigned such Formula Area in subsequent fiscal years, provided that the Indian tribe continues to provide an appropriate level of housing services within the Formula Area as monitored by HUD using the definition of substantial housing services contained in this section as a guideline but not as a requirement.

(4) Notwithstanding paragraphs (1), (2), and (3) of this definition, Alaska needs data shall be credited as set forth in § 1000.327 to the Alaska Native Village (ANV), the regional Indian tribe, or to the regional corporation established pursuant to the Alaska Native Claims Settlement Act (33 U.S.C. 1601 *et seq.*) (ANCSA). For purposes of § 1000.327 and this definition:

(i) The formula area of the ANV shall be the geographic area of the village or that area delineated by the TDSA established for the ANV for purposes of the 1990 U.S. Census or the Alaska Native Village Statistical Area (ANVSA) established for the ANV. To the extent that the area encompassed by such designation may substantially exceed the actual geographic area of the village, such designation is subject to challenge pursuant to § 1000.336. If the ANVSA or the TDSA is determined pursuant to such challenge to substantially exceed the actual area of the village, then the geographic formula area of the ANV for purposes of § 1000.327 shall be such U.S. Census designation as most closely approximates the actual geographic area of the village.

(ii) The geographic formula area of the regional corporation shall be the area established for the corporation by the ANCSA.

(iii) An Indian tribe may seek to expand its Alaska formula area within its ANCSA region pursuant to the procedures set out in paragraph (2) of this definition. Formula Area added in this way shall be treated as overlapping pursuant to § 1000.326, unless the Indian tribe's members in the expanded area are less than 50 percent of the AIAN population. In cases where the Indian tribe is not treated as overlapping, the Indian tribe shall be credited with population and housing data only for its own tribal member residents within the new or added area. All other population and housing data for the area shall remain with the Indian tribe or tribes previously credited with such data.

(5) In some cases the population data for an Indian tribe within its Formula Area is greater than its tribal enrollment. In general, to maintain fairness for all Indian tribes, the tribe's population data will not be allowed to exceed twice an Indian tribe's enrolled population. However, an Indian tribe subject to this cap may receive an allocation based on more than twice its total enrollment if it can show that it is providing housing assistance to substantially more non-member Indians and Alaska Natives who are members of another federally recognized Indian tribe than it is to members. For state-recognized Indian tribes, the population data and formula allocation shall be limited to their tribal enrollment figures as determined under enrollment criteria in effect in 1996.

(6) In cases where an Indian tribe is seeking to receive an allocation more than twice its total enrollment, the tribal enrollment multiplier will be determined by the total number of Indians and Alaska Natives to whom the

Indian tribe is providing housing assistance (on July 30 of the year before funding is sought) divided by the number of members to whom the Indian tribe is providing housing assistance. For example, an Indian tribe that provides housing to 300 Indians and Alaska Natives, of which 100 are members, the Indian tribe would then be able to receive an allocation for up to three times its tribal enrollment if the Indian and Alaska Native population in the area is three or more times the tribal enrollment.

\* \* \* \* \*

*National per unit subsidy* is the Fiscal Year 1996 national per unit subsidy (adjusted to full funding level) multiplied by an adjustment factor for inflation.

\* \* \* \* \*

*Substantial housing services* are:

(1) Affordable housing activities funded from any source provided to AIAN households with incomes 80 percent of the median income as defined in NAHASDA (25 U.S.C. 4103 (14)) or lower, equivalent to 100 percent or more of the increase in the IHBG formula allocation that the Indian tribe would receive as a result of adding the proposed geography; or

(2) Affordable housing activities funded with IHBG funds provided to AIAN households with incomes 80 percent of the median income as defined in NAHASDA (25 U.S.C. 4104(14)) or lower, equivalent to 51 percent or more of the Indian tribe's current total IHBG grant; and either:

(i) Fifty-one percent or more of the Indian tribe's official enrollment resides within the geographic area; or

(ii) The Indian tribe's official enrollment constitutes 51 percent or more of the total AIAN persons within the geography.

(3) HUD shall require that the Indian tribe annually provide written verification, on a form approved by HUD, that the affordable housing activities it is providing meet the definition of substantial housing services.

\* \* \* \* \*

■ 3. Revise § 1000.306(b) to read as follows:

**§ 1000.306 How can the IHBG Formula be modified?**

\* \* \* \* \*

(b) The IHBG Formula shall be reviewed not later than May 21, 2012 to determine if a subsidy is needed to operate and maintain NAHASDA units or if any other changes are needed in respect to funding under the Formula



Current Assisted Stock component of the formula.

\* \* \* \* \*

■ 4. Add § 1000.315 to read as follows:

**§ 1000.315 Is a recipient required to report changes to the Formula Current Assisted Stock (FCAS) on the Formula Response Form?**

(a) A recipient shall report changes to information related to the IHBG formula on the Formula Response Form, including corrections to the number of Formula Current Assisted Stock (FCAS), during the time period required by HUD. This time period shall be not less than 60 days from the date of the HUD letter transmitting the form to the recipient.

(b) The Formula Response Form is the only mechanism that a recipient shall use to report changes to the number of FCAS.

■ 5. In § 1000.316, revise paragraphs (a)(1), (a)(2), and (a)(3) and paragraph (b) to read as follows:

**§ 1000.316 How is the Formula Current Assisted Stock (FCAS) Component developed?**

\* \* \* \* \*

(a) \* \* \*

(1) The number of low-rent FCAS units multiplied by the national per unit subsidy;

(2) The number of Section 8 units whose contract has expired but had been under contract on September 30, 1997, multiplied by the FY 1996 national per unit subsidy; and

(3) The number of Mutual Help and Turnkey III FCAS units multiplied by the national per unit subsidy.

(b) *Modernization allocation.* (1) For Indian tribes with an Indian Housing Authority that owned or operated 250 or more public housing units on October 1, 1997, the modernization allocation equals the number of Low Rent, Mutual Help, and Turnkey III FCAS units multiplied by the national per-unit amount of allocation for FY 1996 modernization multiplied by an adjustment factor for inflation.

(2) For Indian tribes with an Indian Housing Authority that owned or operated fewer than 250 public housing units on October 1, 1997, the modernization allocation equals the average amount of funds received under the assistance program authorized by section 14 of the 1937 Act (not including funds provided as emergency assistance) for FYs 1992 through 1997.

■ 6. Add § 1000.319 to read as follows:

**§ 1000.319 What would happen if a recipient misreports or fails to correct Formula Current Assisted Stock (FCAS) information on the Formula Response Form?**

(a) A recipient is responsible for verifying and reporting changes to their Formula Current Assisted Stock (FCAS) on the Formula Response Form to ensure that data used for the IHBG Formula are accurate (see § 1000.315). Reporting shall be completed in accordance with requirements in this Subpart D and the Formula Response Form.

(b) If a recipient receives an overpayment of funds because it failed to report such changes on the Formula Response Form in a timely manner, the recipient shall be required to repay the funds within 5 fiscal years. HUD shall subsequently distribute the funds to all Indian tribes in accordance with the next IHBG Formula allocation.

(c) A recipient will not be provided back funding for any units that the recipient failed to report on the Formula Response Form in a timely manner.

(d) HUD shall have 3 years from the date a Formula Response Form is sent out to take action against any recipient that fails to correct or make appropriate changes on that Formula Response Form. Review of FCAS will be accomplished by HUD as a component of A-133 audits, routine monitoring, FCAS target monitoring, or other reviews.

■ 7. Revise § 1000.326(b) to read as follows:

**§ 1000.326 What if a formula area is served by more than one Indian tribe?**

\* \* \* \* \*

(b) Tribal membership in the geographic area (not to include dually enrolled tribal members) will be based on data that all Indian tribes involved agree to use. Suggested data sources include tribal enrollment lists, the U.S. Census, Indian Health Service User Data, and Bureau of Indian Affairs data.

\* \* \* \* \*

■ 8. Revise § 1000.328 to read as follows:

**§ 1000.328 What is the minimum amount that an Indian tribe may receive under the need component of the formula?**

(a) Subject to the eligibility criteria described in paragraph (b) of this section, the minimum allocation in any fiscal year to an Indian tribe under the need component of the IHBG Formula shall equal 0.007826 percent of the available appropriations for that fiscal year after set asides.

(b) To be eligible for the minimum allocation described in paragraph (a) of this section, an Indian tribe must:

(1) Receive less than \$200,000 under the FCAS component of the IHBG Formula for the fiscal year; and

(2) Demonstrate the presence of any households at or below 80 percent of median income.

■ 9. In § 1000.330, revise the heading and designate the existing text of paragraph (a) and add new paragraphs (b) and (c) to read as follows:

**§ 1000.330 What are the data sources for the need variables?**

\* \* \* \* \*

(b) The data for the need variables shall be adjusted annually beginning the year after the need data is collected, using Indian Health Service projections based upon birth and death rate data as provided by the National Center for Health Statistics.

(c) Indian tribes may challenge the data described in paragraphs (a) and (b) of this section pursuant to § 1000.336.

■ 10. Revise § 1000.336 to read as follows:

**§ 1000.336 How may an Indian tribe, TDHE, or HUD challenge data or appeal HUD formula determinations?**

(a) An Indian tribe, TDHE, or HUD may challenge data used in the IHBG Formula and HUD formula determinations regarding:

- (1) U.S. Census data;
- (2) Tribal enrollment;
- (3) Formula area;
- (4) Formula Current Assisted Stock (FCAS);
- (5) Total Development Cost (TDC);
- (6) Fair Market Rents (FMRs); and
- (7) Indian Health Service projections

based upon birth and death rate data provided by the National Center for Health Statistics.

(b) An Indian tribe or TDHE may not challenge data or HUD formula determinations regarding Allowable Expense Level (AEL) and the inflation factor.

(c) The challenge and the collection of data and the appeal of HUD formula determinations is an allowable cost for IHBG funds.

(d) An Indian tribe or TDHE that seeks to appeal data or a HUD formula determination, and has data in its possession that are acceptable to HUD, may submit the data and proper documentation to HUD. Data used to challenge data contained in the U.S. Census must meet the requirements described in § 1000.330(a). Further, in order for a census challenge to be considered for the upcoming fiscal year allocation, documentation must be submitted by March 30th.



(e) HUD shall respond to all challenges or appeals not later than 45 days after receipt and either approve or deny the validity of such data or challenge to a HUD formula determination in writing, setting forth the reasons for its decision. Pursuant to HUD's action, the following shall apply:

(1) In the event HUD challenges the validity of the submitted data, the Indian tribe or TDHE and HUD shall attempt in good faith to resolve any discrepancies so that such data may be included in the formula allocation.

(2) Should the Indian tribe or TDHE and HUD be unable to resolve any discrepancy within 30 calendar days of receipt of HUD's denial, the Indian tribe or TDHE may request reconsideration of HUD's denial in writing. The request shall set forth justification for reconsideration.

(3) Within 20 calendar days of receiving the request, HUD shall reconsider the Indian tribe or TDHE's submission and either affirm or reverse its initial decision in writing, setting forth HUD's reasons for the decision.

(4) Pursuant to resolution of the dispute:

(i) If the Indian tribe or TDHE prevails, an adjustment to the Indian tribe's or TDHE's subsequent allocation for the subsequent year shall be made retroactive to include only the disputed fiscal year(s); or

(ii) If HUD prevails, it shall issue a written decision denying the Indian tribe or TDHE's petition for reconsideration, which shall constitute final agency action.

(f) In the event HUD questions that the data contained in the formula does not accurately represent the Indian tribe's need, HUD shall request the Indian tribe to submit supporting documentation to justify the data and to provide a commitment to serve the population indicated in the geographic area.

■ 11. Revise § 1000.340 to read as follows:

**§ 1000.340 What if an Indian tribe is allocated less funding under the IHBG Formula than it received in Fiscal Year (FY) 1996 for operating subsidy and modernization?**

(a) If an Indian tribe is allocated less funding under the modernization allocation of the formula pursuant to § 1000.316(b)(2) than the calculation of the number of Low Rent, Mutual Help, and Turnkey III FCAS units multiplied by the national per-unit amount of allocation for FY 1996 modernization multiplied by an adjustment factor for inflation, the Indian tribe's modernization allocation is calculated

under § 1000.316(b)(1). The remaining grants are adjusted to keep the allocation within available appropriations.

(b) If an Indian tribe is allocated less funding under the formula than an IHA received on its behalf in FY 1996 for operating subsidy and modernization, its grant is increased to the amount received in FY 1996 for operating subsidy and modernization. The remaining grants are adjusted to keep the allocation within available appropriations.

■ 12. Revise Appendices A and B to part 1000 to read as follows:

**APPENDIX A TO PART 1000—INDIAN HOUSING BLOCK GRANT FORMULA MECHANICS**

This appendix shows the different components of the IHBG formula. The following text explains how each component of the IHBG formula is calculated.

1. The Indian Housing Block Grant (IHBG) formula is calculated by initially determining the amount a tribe receives for Formula Current Assisted Stock (FCAS) (See §§ 1000.310 and 1000.312). FCAS funding is comprised of two components, Operating subsidy (§ 1000.316(a)) and Modernization (§ 1000.316(b)).

2. The operating subsidy component is calculated based on the national per unit subsidy (§ 1000.302 National Per Unit Subsidy) for operations for each of the following types of programs—Low Rent, Homeownership (Mutual Help and Turnkey III), and Section 8. A tribe's total count of units in each of the above categories is multiplied by the relevant national per unit subsidy. That amount is summed and multiplied by a local area cost adjustment factor for management.

3. The local area cost adjustment factor for management is called AELFMR. AELFMR is the greater of a tribe's Allowable Expense Level (AEL) or Fair Market Rent (FMR) factor, where the AEL and FMR factors are determined by dividing each tribe's AEL and FMR by their respective national weighted average (weighted on the unadjusted allocation under FCAS operating subsidy). The adjustment made to the FCAS component of the IHBG formula is then the new AELFMR factor divided by the national weighted average of the AELFMR (See § 1000.320).

4. The Modernization component is determined using two methods depending on the number of public housing units that a tribe's housing authority operated prior to NAHASDA.

(a) For Indian tribes with an Indian housing authority (IHA) that owned or operated 250 or more public housing units on October 1, 1997, the modernization allocation equals the number of Low Rent, Mutual Help, and Turnkey III FCAS units multiplied by the national per-unit amount of allocation for FY 1996 modernization multiplied by an adjustment factor for inflation (See § 1000.316(b)(1)).

(b) For Indian tribes with an IHA that owned or operated fewer than 250 units on

October 1, 1997, the modernization allocation equals the average amount of funds received under the assistance program authorized by section 14 of the 1937 Act (not including funds provided as emergency assistance) for FYs 1992 through 1997 (See § 1000.316(b)(2)).

(c) The modernization amount is then multiplied times a local area cost adjustment factor for construction, the TDC. The construction adjustment factor is the TDC for the area divided by the weighted national average for TDC (weighted on the unadjusted allocation for modernization (See § 1000.320)).

5. After determining the total amount allocated under FCAS for each tribe, it is summed for every tribe. The national total amount for FCAS is subtracted from the remaining available funds to determine the total amount to be allocated under the Need component of the IHBG formula.

6. The Need component of the IHBG formula is calculated using seven factors using data from sources defined in § 1000.330 weighted as set forth in § 1000.324 as follows: 22 percent of the allocated funds will be allocated by a tribe's share of the total Native American households paying more than 50 percent of their income for housing and living in the Indian tribe's formula area, 25 percent of the funds allocated under Need will be allocated by a tribe's share of the total Native American households overcrowded and/or without kitchen or plumbing living in their formula area, and so on. The current national totals for each of the need variables will be distributed annually by HUD with the Formula Response Form (See § 1000.332). The national totals will change as tribes update information about their formula area and data for individual areas are challenged (See §§ 1000.334 and 1000.336). The Need component is then calculated by multiplying a tribe's share of housing need by a local area cost adjustment factor for construction (the TDC) (See § 1000.338).

7. Tribes that receive less than \$200,000 under the FCAS component of the IHBG formula and that can demonstrate the presence of any households at or below 80 percent of median income are guaranteed to receive no less than a specified minimum under the Needs component of the formula. The specified minimum amount shall equal .007826 percent of the available appropriations for that FY after set asides. The increase in funding for the tribes receiving the minimum need amount is funded by a reallocation from other tribes whose needs allocation exceeds the minimum need amount. This is necessary in order to keep the total allocation within the appropriation level (See § 1000.328).

8. A tribe's preliminary grant is calculated by summing the FCAS and Need allocations. This amount is subject to two final adjustments:

(a) If an Indian tribe with an IHA that owned or operated fewer than 250 units on October 1, 1997, is allocated less funding under the averaging method (§ 1000.316(b)(2)) than the calculation of the number of Low Rent, Mutual Help, and Turnkey III FCAS multiplied by the national

per-unit amount of allocation for FY 1996 modernization multiplied by an adjustment factor for inflation, the Indian tribe's modernization allocation is calculated under § 1000.316(b)(1). The grants of all other tribes are proportionately adjusted to keep the allocation within available appropriations.

(b) Next, this preliminary grant is compared to how much a tribe received in FY 1996 for operating subsidy and modernization. If a tribe received more in FY 1996 for operating subsidy and modernization than it does under the IHBG formula allocation, its grant is adjusted up to the FY 1996 level (See § 1000.340(b)). Indian tribes receiving more under the IHBG formula than in FY 1996 "pay" for the upward adjustment for the other tribes by having their own grants adjusted downward. Because many more Indian tribes have grant amounts above the FY 1996 level than those with grants below the FY 1996 level, each tribe contributes very little, relative to their total grant, to fund the adjustment.

## Appendix B to Part 1000—IHBG Block Grant Formula Mechanisms

1. The Indian Housing Block Grant (IHBG) formula consists of two components, the Formula Current Assisted Stock (FCAS) and Need. Therefore, the formula allocation before adjusting for the statutory requirement that a tribe's minimum grant will not be less than the tribe's Fiscal Year (FY) 1996 Operating Subsidy and Modernization funding, can be represented by:

$$\text{unadjGRANT} = \text{FCAS} + \text{NEED}.$$

2. NAHASDA requires that the FCAS be provided for before allocating funds based on need. Therefore, FCAS must be calculated first. FCAS consists of two components, Operating Subsidy (OPSUB) and Modernization (MOD), such that:

$$\text{FCAS} = \text{OPSUB} + \text{MOD}.$$

3. OPSUB consists of three main parts: number of Low-Rent units; number of Section 8 units; and number of Mutual Help and Turnkey III units. Each of these main parts are adjusted by the national per unit subsidy (§ 1000.302 National Per Unit Subsidy) and local area costs as reflected by the greater of the AEL factor or FMR factor. The AEL factor is defined in § 1000.302 as the relative difference between a local area Allowable Expense Level (AEL) and the national weighted average for AEL (NAEL). The FMR factor is also defined in § 1000.302 as the relative difference between a local area Fair Market Rent (FMR) and the national weighted average for FMR.

$$\text{OPSUB} = [\text{LR} * \text{LRSUB} + (\text{MH} + \text{TK}) * \text{HOSUB} + \text{S8} * \text{S8SUB}] * \text{AELFMR}$$

Where:

LR = number of Low-Rent units.

LRSUB = national per unit subsidy for Low-Rent units (\$2,440\*INF).

MH+TK = number of Mutual Help and Turnkey III units.

HOSUB = national per unit subsidy for Homeownership units (\$528\*INF).

S8 = number of Section 8 units.

S8SUB = national per unit subsidy for Section 8 units = (\$3,625\*INF).

AELFMR = greater of AEL Factor or FMR Factor weighted by national average of AEL Factor and FMR Factor.

AEL FACTOR = AEL/NAEL.

AEL = local Allowable Expense Level.

NAEL = national weighted average for AEL.

FMR FACTOR = FMR/NFMR.

FMR = local Fair Market Rent.

NFMR = national weighted average for FMR.

NAELFMR = national weighted average for greater of AEL Factor or FMR factor.

Where:

INF = adjustment for inflation since 1995, as determined by the Consumer Price Index for housing.

4. The modernization component, MOD, is calculated by two different methods, depending on whether the tribe had an Indian housing authority (IHA) that owned or operated more than 250 public housing units on October 1, 1997.

a. MOD1996 is calculated for all tribes and considers the number of Low-Rent, and Mutual Help and Turnkey III FCAS units. Each of these is adjusted by the national per-unit modernization amount in 1996 adjusted for inflation.

$$\text{MOD1996} = [\text{LR} + \text{MH} + \text{TK}] * \text{MODPU} * \text{INF}.$$

Where:

LR = number of Low-Rent units.

MH = number of Mutual Help units.

TK = number of Turnkey III units.

MODPU = national per-unit amount for modernization in 1996 (\$1,974).

INF = adjustment for inflation since 1995, as determined by the Consumer Price Index for housing.

b. MODAVG is calculated only for tribes that had an IHA that owned or operated fewer than 250 public housing units on October 1, 1997, as the annual average amount they received for FYs 1992 through 1997 under the assistance program authorized by section 14 of the 1937 Act (not including emergency assistance).

$$\text{MODAVG} = \text{Average (FY 1992 to FY 1997) amount received by Section 14 of the 1937 Act}.$$

c. For Indian tribes with an IHA that owned or operated 250 or more public housing units on October 1, 1997, the modernization calculation is based on MOD1996, adjusted for local area costs:

$$\text{MOD} = \text{MOD1996} * \text{TDC} / \text{NTDC}.$$

Where:

TDC = Local Total Development Costs defined in § 1000.302.

NTDC = weighted national average for TDC of tribes with CAS.

d. For Indian tribes with an IHA that owned or operated fewer than 250 units on October 1, 1997, the modernization calculation is based on MODAVG, adjusted for local area costs.

$$\text{MOD} = \text{MODAVG} * \text{TDC} / \text{NTDC}.$$

5. Now that calculation for FCAS is complete, funds available for allocation using the Need component of the formula can be determined:

$$\text{NEED FUNDS} = \text{APPROPRIATION} - \text{NATCAS}.$$

Where:

APPROPRIATION = dollars provided for distribution through the IHBG formula.  
NATCAS = National summation of FCAS allocation for all tribes.

6. Two iterations are necessary to compute the final Need allocation. The first iteration consists of seven weighted criteria that allocate need funds based on a tribe's population and housing data. This allocation is then adjusted for local area cost differences based on TDC relative to the national weighted average. This can be represented by:

$$\text{NEED1} = [ (0.11 * \text{PER} / \text{NPER}) + (0.13 * \text{HHLE30} / \text{NHHLE30}) + (0.07 * \text{HH30T50} / \text{NHH30T50}) + (0.07 * \text{HH50T80} / \text{NHH50T80}) + (0.25 * \text{OCRPR} / \text{NOCRPR}) + (0.22 * \text{SCBTOT} / \text{NSCBTOT}) + (0.15 * \text{HOUSHOR} / \text{NHOUSHOR}) ] * \text{NEED FUNDS} * (\text{TDC} / \text{NATDC}).$$

Where:

PER = American Indian and Alaskan Native (AIAN) persons.

NPER = national total of PER.

HHLE30 = AIAN households less than 30% of median income.

NHHLE30 = national total of HHLE30.

HH30T50 = AIAN households 30% to 50% of median income.

NHH30T50 = national total of HH30T50.

HH50T80 = AIAN households 50% to 80% of median income.

NHH50T80 = national total of HH50T80.

OCRPR = AIAN households crowded or without complete kitchen or plumbing.

NOCRPR = national total of OCRPR.

SCBTOT = AIAN households paying more than 50% of their income for housing.

NSCBTOT = national total SCBTOT.

HOUSHOR = AIAN households with an annual income less than or equal to 80% of formula median income reduced by the combination of current assisted stock and units developed under NAHASDA.

NHOUSHOR = national total of HOUSHOR.

TDC = Local Total Development Costs defined in § 1000.302.

NATDC = weighted national average for TDC of tribes with need.

7. The second iteration in computing the Need allocation consists of adjusting the Need allocation computed above to take into account the minimum needs provision. Tribes that receive less than \$200,000 under the FCAS component of the IHBG formula and that can demonstrate the presence of any households at or below 80 percent of median income are guaranteed to receive no less than a specified minimum amount under the Needs component of the formula. The specified minimum amount shall equal .007826 percent of the available appropriations for that fiscal year after set asides.

$$\text{MINFUNDING} = \text{APPROPRIATION} * .00007826$$

If in the first Need computation, a qualified tribe is allocated less than the minimum Needs funding level, its Need allocation will go up. Other tribes whose Needs allocations are greater than the minimum needs amount will have their allocations adjusted downward to keep the total allocation within available funds:

If  $NEED1 < MINFUNDING$  and  $FCAS < \$200,000$  and  $(HHLE30 + HH30T50 + HH50T80) > 0$ , then  $NEED2 = MINFUNDING$ .

If  $NEED1 \geq MINFUNDING$ , then  $NEED2 = NEED1 - \{UNDERMIN\$ * [(NEED1 - MINFUNDING) / OVERMIN\$]\}$ .

Where:

$MINFUNDING$  = minimum needs amount

$UNDERMIN\$$  = for all tribes qualifying for an increase under the minimum needs provision, sum of the differences between  $MINFUNDING$  and  $NEED1$ .

$OVERMIN\$$  = for all tribes with needs allocations larger than the minimum needs amount, the sum of the difference between  $NEED1$  and  $MINFUNDING$ .

8. The next step is to compute a preliminary unadjusted grant allocation ( $unadjGRANT$ ) that will serve as the basis for further adjustments called for in § 1000.340.

$unadjGRANT = FCAS + NEED$ , where both  $FCAS$  and  $NEED$  are calculated above.

9. As required by § 1000.340(a), if an Indian tribe with an IHA that owned or operated fewer than 250 units on October 1, 1997, is allocated less funding under the averaging method (§ 1000.316(b)(2)) than the calculation of the number of Low-Rent, Mutual Help, and Turnkey III  $FCAS$  is multiplied by the national per-unit amount of

allocation for FY 1996 modernization multiplied by an adjustment factor for inflation, then, the Indian tribe's modernization allocation is calculated under § 1000.316(b)(1). The grants of all other tribes are proportionately adjusted to keep the allocation within available appropriations.

If  $MODAVG < MOD1996$ , then  $GRANT1 = unadjGRANT + (MOD1996 * (TDC/NTDC)) - (MODAVG * (TDC/NTDC))$ .

Otherwise,

$GRANT1 = unadjGRANT - [UNDERMOD\$ * (unadjGRANT / OVERMODGRANT\$)]$

Where:

$UNDERMOD\$$  = for all tribes qualifying for an increase to modernization, the sum of the differences between local cost adjusted  $MOD1996$  and local cost adjusted  $MODAVG$ .

$OVERMODGRANT\$$  = for all tribes not qualifying for an increase to modernization, the sum of their unadjusted grant amounts.

10. As called for in § 1000.340(b), a final adjustment occurs to ensure that no tribe is allocated less funding under the formula than an IHA received on its behalf in FY 1996 for operating subsidy and modernization. Indian tribes receiving more under the IHBC

formula than in FY 1996 "pay" for the upward adjustment for the other tribes by having their grants adjusted downward, so long as the adjustment does not reduce their grant below the minimum funding amount.

Let  $TEST = GRANT1 - OPMOD96$ .

If  $TEST$  is less than 0, then  $GRANT2 = OPMOD96$ .

If  $TEST$  is greater than 0 and  $GRANT1 > MINFUNDING$ , then  $GRANT2 = GRANT1 - [UNDER1996 * (TEST / OVER1996)]$ .

Where:

$OPMOD96$  = funding received by tribe in FY 1996 for Operating Subsidy and Modernization.

$UNDER1996$  = for all tribes with  $TEST$  less than 0, sum of the absolute value of  $TEST$ .

$OVER1996$  = for all tribes with  $TEST$  greater than 0, sum of  $TEST$ .

$GRANT2$  is the approximate grant amount in any given year for any given tribe.

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