

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers are 14.129, 14.155, and 14.188.

List of Subjects*24 CFR Part 207*

Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements, Solar energy.

24 CFR Part 251

Low and moderate income housing, Mortgage insurance, Reporting and recordkeeping requirements.

24 CFR Part 252

Health facilities, Loan programs—health, Loan programs—housing and community development, Mortgage insurance, Nursing homes, Reporting and recordkeeping requirements.

24 CFR Part 255

Low and moderate income housing, Mortgage insurance, Reporting and recordkeeping requirements.

24 CFR Part 266

Aged, Fair housing, Intergovernmental relations, Mortgage insurance, Low and moderate income housing, Reporting and recordkeeping requirements.

Accordingly, the Department proposes to amend Subtitle B, Chapter II, Subchapter B, of Title 24 of the Code of Federal Regulations as follows:

PART 207—MULTIFAMILY HOUSING MORTGAGE INSURANCE

1. The authority citation for part 207 continues to read as follows:

Authority: 12 U.S.C. 1701z-11(e), 1713, and 1715b; 42 U.S.C. 3535(d).

2. A new § 207.252e to subpart B is added to read as follows:

§ 207.252e Method of payment of mortgage insurance premiums.

In the cases that the Commissioner deems appropriate, the Commissioner may require, by means of instructions communicated to all affected mortgagees, that mortgage insurance premiums be remitted electronically.

PART 251—COINSURANCE FOR THE CONSTRUCTION OR SUBSTANTIAL REHABILITATION OF MULTIFAMILY HOUSING PROJECTS

3. The authority citation for part 251 continues to read as follows:

Authority: 12 U.S.C. 1515b, 1715z-9; 42 U.S.C. 3535(d).

4. A new § 251.6 is added to read as follows:

§ 251.6 Method of payment of mortgage insurance premiums.

In the cases that the Commissioner deems appropriate, the Commissioner may require, by means of instructions communicated to all affected lenders, that mortgage insurance premiums be remitted electronically.

PART 252—COINSURANCE OF MORTGAGES COVERING NURSING HOMES, INTERMEDIATE CARE FACILITIES, AND BOARD AND CARE HOMES

5. The authority citation for part 252 continues to read as follows:

Authority: 12 U.S.C. 1515b, 1715z-9; 42 U.S.C. 3535(d).

6. A new § 252.6 is added to read as follows:

§ 252.6 Method of payment of mortgage insurance premiums.

The provisions of 24 CFR 251.6 shall apply to this part.

PART 255—COINSURANCE FOR THE PURCHASE OR REFINANCING OF EXISTING MULTIFAMILY HOUSING PROJECTS

7. The authority citation for part 255 is revised to read as follows:

Authority: 12 U.S.C. 1515b, 1715z-9; 42 U.S.C. 3535(d).

8. A new § 255.6 is added to read as follows:

§ 255.6 Method of payment of mortgage insurance premiums.

The provisions of 24 CFR 251.6 shall apply to this part.

PART 266—HOUSING FINANCE AGENCY RISK-SHARING PROGRAM FOR INSURED AFFORDABLE MULTIFAMILY PROJECT LOANS

9. The authority citation for part 266 continues to read as follows:

Authority: 12 U.S.C. 1707 note; 42 U.S.C. 3535(d).

10. A new § 266.610 is added to read as follows:

§ 266.610 Method of payment of mortgage insurance premiums.

In the cases that the Commissioner deems appropriate, the Commissioner may require, by means of instructions communicated to all affected mortgagees, that mortgage insurance premiums be remitted electronically.

Dated: May 30, 1997.

Nicolas P. Retsinas,

Assistant Secretary for Housing-Federal Housing Commissioner.

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**24 CFR Parts 950, 953, 955, 1000, 1003 and 1005**

[Docket No. FR-4170-P-10]

RIN 2577-AB74

Implementation of the Native American Housing Assistance and Self-Determination Act of 1996; Proposed Rule

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

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). NAHASDA reorganizes the system of Federal housing assistance to Native Americans by eliminating several separate programs of assistance and replacing them with a single block grant program. In addition to simplifying the process of providing housing assistance, the purpose of NAHASDA is to provide Federal assistance for Indian tribes in a manner that recognizes the right of Indian self-determination and tribal self-governance. As required by section 106(b)(2) of NAHASDA, HUD has developed this proposed rule with active tribal participation and using the procedures of the Negotiated Rulemaking Act.

DATES: Comments on the proposed rule are due on or before August 18, 1997. Comments on the proposed information collection requirements are due on or before September 2, 1997.

ADDRESSES: Interested persons are invited to submit written comments regarding this proposed rule to the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410. Comments should refer to the above docket number and title. A copy of each comment submitted will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address. Facsimile (FAX) comments will not be accepted.

For additional information concerning the information collection requirements contained in this rule, please see the "Findings and Certifications" section of this preamble. A copy of any comment regarding the information collection requirements must be sent to: Joseph F. Lackey, Jr., HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT:

Dominic Nessi, Deputy Assistant Secretary for Native American Programs, 1999 Broadway, Suite 3390, Denver, CO 80202; telephone (303) 675-1600. Speech or hearing-impaired individuals may access this number via TTY by calling the Federal Information Relay Service at 1-800-877-8339. (With the exception of the "800" number, these telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION:

I. Statutory Background

On October 26, 1996, President Clinton signed into law the Native American Housing Assistance and Self-Determination Act of 1996 (Pub. L. 104-330) (NAHASDA). NAHASDA streamlines the process of providing housing assistance to Native Americans. Specifically, it eliminates several separate programs of assistance and replaces them with a single block grant program. Beginning on October 1, 1997, the first day of Fiscal Year (FY) 1998, a single block grant program will replace assistance previously authorized under:

1. The United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*) (1937 Act);
2. The Indian Housing Child Development Program under Section 519 of the Cranston-Gonzalez National Affordable Housing Act (12 U.S.C. 1701z-6 note);
3. The Youthbuild Program under subtitle D of title IV of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12899 *et seq.*);
4. The Public Housing Youth Sports Program under section 520 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 11903a);
5. The HOME Investment Partnerships Program under title II of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 12721 *et seq.*); and
6. Housing assistance for the homeless under title IV of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11361 *et seq.*) and the Innovative Homeless Demonstration Program under section 2(b) of the HUD Demonstration Act of 1993 (42 U.S.C. 11301 note).

In addition to simplifying the process of providing housing assistance, the

purpose of NAHASDA is to provide Federal assistance for Indian tribes in a manner that recognizes the right of Indian self-determination and tribal self-governance.

Section 106 of NAHASDA sets out the general procedure for the implementation of the new Indian housing block grant (IHBG) program. The procedure described is a two-step process. First, section 106(a) requires the publication of a notice in the **Federal Register** not later than 90 days after enactment of NAHASDA. The purpose of the notice is to establish any requirements necessary for the transition from the provision of assistance for Indian tribes and Indian housing authorities under the 1937 Act and other related provisions of law to the provision of assistance in accordance with NAHASDA. Secondly, section 106(b) requires that HUD issue final regulations implementing NAHASDA no later than September 1, 1997. Section II of this preamble discusses the transition requirements established by HUD. The remainder of the preamble presents an overview of the development and contents of the proposed regulations.

II. Transition Requirements

On January 27, 1997 (62 FR 3972), HUD published the transition notice required by section 106(a) of NAHASDA. HUD subsequently amended the January 27, 1997 notice to extend the Indian Housing Plan (IHP) submission deadline to November 3, 1997 (62 FR 8258, February 24, 1997).

The January 27, 1997 notice focused on the information which must be included in an Indian tribe's IHP and the treatment of activities and funding under programs repealed by NAHASDA. Although section 106(b) of NAHASDA requires that HUD issue final regulations by September 1, 1997, the "old" system of funding expires on the first day of FY 1998 (October 1, 1997). The submission of an IHP and a determination by HUD that the IHP complies with NAHASDA is a prerequisite for funding under NAHASDA. Accordingly, the January 27, 1997 notice established IHP submission requirements in order to ensure that there is sufficient time for Indian tribes to prepare their IHPs, and for HUD to review them. Similarly, the January 27, 1997 notice provided guidance for the treatment of activities and funding under programs repealed by NAHASDA in order to permit Indian tribes to have the greatest time available under the new law to consider and prepare for the transition from the "old" programs to the new IHBG program.

The deadline for submission of an IHP is November 3, 1997. Indian tribes wishing to participate in the new IHBG program in FY 1998 should familiarize themselves with the transition requirements established in the **Federal Register** notices described above.

III. Negotiated Rulemaking

As described above, section 106(b) of NAHASDA requires that HUD issue final implementing regulations no later than September 1, 1997. Further, section 106(b)(2)(A) of NAHASDA provides that all regulations required under NAHASDA be issued according to the negotiated rulemaking procedure under subchapter III of chapter 5 of title 5, United States Code. The rulemaking procedure referenced is the Negotiated Rulemaking Act of 1990 (5 U.S.C. 561-570). Accordingly, the Secretary of HUD established the Native American Housing Assistance & Self-Determination Negotiated Rulemaking Committee (Committee) to negotiate and develop a proposed rule implementing NAHASDA.

Prior to the establishment of the Committee, HUD held a series of meetings with tribal representatives to discuss the regulatory implementation of NAHASDA. These meetings were preliminary to the formal negotiated rulemaking process required by NAHASDA. The preliminary meetings provided a valuable exchange of ideas that assisted in focusing the efforts of the Committee.

The Committee consists of 58 members. Forty-eight of these members represent geographically diverse small, medium, and large Indian tribes. There are ten HUD representatives on the Committee. Additionally, three individuals from the Federal Mediation and Conciliation Service served as facilitators. While the Committee is much larger than usually chartered under the Negotiated Rulemaking Act, its larger size was justified due to the diversity of tribal interests, as well as the number and complexity of the issues involved.

Tribal leaders recommended and the Committee agreed to operate based on consensus rulemaking and its approved charter. The protocols adopted by the Committee define "consensus" as general agreement demonstrated by the absence of expressed disagreement by a Committee member in regards to a particular issue. Procedures recommended by tribal leaders on the negotiated rulemaking process were also adopted by the Committee. HUD committed to using, to the maximum extent feasible consistent with its legal obligations, all consensus decisions as

the basis for the proposed rule. The Committee further agreed that any Committee member or his/her constituents could comment on this proposed rule. The Committee will consider all comments in drafting the final rule.

In order to complete the proposed regulations by the statutory deadline, the Committee divided itself into six workgroups. Each workgroup was charged with analyzing specified provisions of the statute and drafting any regulations it believed were necessary for implementing those provisions. The draft regulations developed by the workgroups were then brought before the full Committee for review, amendment, and approval. A seventh workgroup was assigned the task of reviewing the approved regulations for format, style, and consistent use of terminology. The seven workgroups were: (1) Preamble, Policy and Definitions; (2) IHP Preparation and Submission, Monitoring, Review and Compliance; (3) Allocation Formula; (4) Affordable Housing Activities; (5) Transition Requirements; (6) Alternative Financing; and (7) Drafting Coordination.

The first meeting of the Committee was in February of 1997. At that meeting the Committee established workgroups, a protocol for deliberations and a meeting schedule. During February, March and April 1997 the Committee met four times. The meetings were divided between workgroup sessions at which regulatory language was developed and full Committee sessions to discuss the draft regulations produced by the workgroups. Each of these meetings lasted between four and eight days. Tribal leaders were encouraged to attend the meetings and participate in the rulemaking process.

It was the Committee's policy to provide for public participation in the rulemaking. All of the Committee sessions were announced in the **Federal Register** and were open to the public.

IV. Summary of New 24 CFR Part 1000

The rule proposes to implement NAHASDA in a new 24 CFR part 1000. Part 1000 would be divided into six subparts (A through F), each describing the regulatory requirements for a different aspect of NAHASDA. For the convenience of readers, part 1000 is in Question and Answer format. Additionally, the rule will as much as practicable not repeat statutory language but rather make reference to specific provisions. A reader of the rule must therefore have the statute available while reading the rule.

The full Committee reached consensus on the individual subparts of this proposed rule. However, the Committee has yet to endorse an integrated proposed rule. The full Committee asks for public comment on the workgroup products, and suggestions regarding any modifications necessary to produce an integrated rule. The full Committee will meet to consider the public comments and to produce an integrated final rule.

The following is a brief description of the contents of each subpart:

Subpart A—General

Subpart A would contain the legal authority and scope of the regulations. It would also set forth definitions for key terms used in the balance of the regulations. Additionally, subpart A would cross-reference to other applicable Federal laws and regulations. Although HUD encourages readers to familiarize themselves with all of the provisions of subpart A, it wishes to highlight the following sections contained in this subpart:

Section 1000.8. Section 1000.8 provides that HUD may waive any non-statutory provision of this rule in accordance with 24 CFR 5.110. This section requires that any waivers be based upon a determination of good cause. In making this determination, HUD may consider such factors as undue hardship. Under section 106 of the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. 3545) waivers will be in writing and published in the **Federal Register**.

Section 1000.10. Section 1000.10 sets forth the generally applicable definitions used throughout 24 CFR part 1000. The Committee has adopted without change many of the definitions set forth in section 4 of NAHASDA. Section 1000.10 proposes to define the terms "Adjusted income," "Affordable housing," "Drug-related criminal activity," "Elderly families and near-elderly families," "Elderly person," "Grant beneficiary," "Indian," "Indian housing plan (IHP)," "Indian tribe," "Low-income family," "Median income," "Near-elderly persons," "Nonprofit," "Recipient," "Secretary," "State," and "Trially designated housing entity (TDHE)" by cross-referencing to section 4. Further, the term "Affordable housing activities" is defined by cross-referencing to the list of eligible activities set forth in section 202 of NAHASDA.

In the case of the definitions of "Family" and "Indian area," the Committee determined that it was necessary to make minor clarifying changes to the statutory definitions in

section 4 of NAHASDA. Specifically, the definition of "Family" has been revised to clarify that the term includes, but is not limited to, the types of families identified in the statutory definition. Similarly, the Committee has added a sentence to the statutory definition of "Indian area" to specify that "[w]henver the term 'jurisdiction' is used in NAHASDA it shall mean 'Indian area,' except where specific reference is made to the jurisdiction of a court."

Section 4 of NAHASDA required that the Committee develop additional language expanding upon the statutory definitions of "Income" and "Person with disabilities." In both cases, the Committee elected to use the language of existing HUD definitions codified in title 24 of the CFR.

Section 4 of NAHASDA defines "Income" to mean income from all sources of each member of the household "as determined in accordance with criteria prescribed by" HUD. The Committee chose to use the term "annual income," rather than the term "income." Further, the Committee elected to adopt the income criteria set forth in HUD's current Indian housing program regulations at 24 CFR part 950. Accordingly, the definition of "Annual income" set forth in this proposed rule is nearly identical to the existing definition of the term at 24 CFR 950.102.

The statutory definition of "Person with disabilities" requires a regulatory definition of the term "physical, mental, or emotional impairment." The Committee elected to model this definition on the definition of "physical or mental impairment" set forth in HUD's regulations implementing section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) (24 CFR part 8). Although the definition of "physical, mental, or emotional impairment" contained in this proposed rule makes several minor editorial changes to the definition of "physical or mental impairment" at 24 CFR 8.3, these changes do not alter the intent or meaning of the definition in part 8.

The definitions of "Annual contributions contract (ACC)" and "Indian housing authority (IHA)" set forth in this proposed rule are also modelled on the existing definitions of these terms in 24 CFR part 950.

Section 1000.12. This section sets forth the nondiscrimination requirements which are applicable to NAHASDA. Specifically, § 1000.12 provides that the following civil right authorities are applicable to NAHASDA: (1) The requirements of the Age Discrimination Act of 1975 (42 U.S.C.

6101-6107) and HUD's implementing regulations in 24 CFR part 146; (2) section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and HUD's regulations at 24 CFR part 8; and (3) title II of the Civil Rights Act of 1968 (25 U.S.C. 1301-1303), to the extent such title is applicable, and other applicable Federal civil rights statutes. Additionally, this section provides that title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*) do not apply to actions by Indian tribes under section 201(b) of NAHASDA.

HUD has revised the regulatory language developed by the Committee by adding the reference to title II of the Civil Rights Act of 1968. This addition reflects the statutory language of section 102(c)(5)(A) of NAHASDA, which requires that recipients include a certification of compliance with title II in their IHP.

Section 1000.14. This section sets forth the relocation and real property acquisition policies which are applicable to NAHASDA. Except for minor editorial and formatting changes, § 1000.14 is identical to the corresponding provision in HUD's regulations for the Indian Community Development Block Grant program (See 24 CFR 953.602).

Section 1000.16. This section describes the labor standards applicable to NAHASDA. Section 1000.16 provides, in accordance with section 104(b) of NAHASDA, that contracts and agreements for assistance, sale or lease under NAHASDA must require prevailing wage rates determined under the Davis-Bacon Act (40 U.S.C. 276a-276a-5) to be paid to laborers and mechanics employed in the development of affordable housing projects. HUD has added a sentence to the regulatory language developed by the Committee to reflect an additional statutory requirement. Specifically, § 1000.16 now provides that section 104(b) also mandates that these contracts and agreements require that prevailing wages determined by HUD shall be paid to maintenance laborers and mechanics employed in the operation, and to architects, technical engineers, draftsmen and technicians employed in the development, of such projects.

Section 1000.20. Section 1000.20 provides that an Indian tribe is not required to assume environmental review responsibilities. Rather, this proposed rule states it is an option an Indian tribe may choose. If an Indian tribe declines to assume the environmental review responsibilities,

HUD will perform the environmental review in accordance with 24 CFR part 50. HUD has added a sentence to the regulatory language adopted by the Committee to clarify that a HUD environmental review must be completed for any activities not excluded from review under 24 CFR 50.19(b) before a recipient may acquire, rehabilitate, convert, lease, repair or construct property, or commit HUD or local funds to such activities with respect to the property.

HUD's resources may be such that it may be unable to undertake environmental reviews if the Indian tribe chooses not to assume environmental review responsibilities. HUD needs to examine its resources and further consider this issue. In addition, HUD is reviewing whether a conflict exists between the 60 day maximum period permitted in section 103(a)(2) of NAHASDA for HUD to review the IHP and, in cases where an Indian tribe declines to assume environmental review responsibilities and an activity requires an Environmental Impact Statement (EIS), the greater time required for finalizing EISs prepared and circulated for review and comment in accordance with the National Environmental Policy Act of 1969 prior to a Federal decision being made (including a general minimum of 90 days between publication of a notice of draft EIS and the agency decision). HUD is also reviewing possible options for reconciling the conflict, if any. Accordingly, HUD wishes to alert the public that it may not be legally permissible both to provide for a choice and to give full effect to the requirements of the National Environmental Policy Act of 1969 and related statutes. In particular, if HUD determines that a statutory conflict exists, one of the options for reconciling the conflicts may result in HUD not being able to implement the policy of allowing an Indian tribe the option of not assuming environmental review for actions that are subject to the statutory 60 day approval period.

Further, conforming changes will need to be made at the final rule stage to HUD's regulations at 24 CFR part 58 (Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities) to reflect the environmental review procedures established in new part 1000.

Section 1000.30. This section describes the conflict of interest provisions applicable to 24 CFR part 1000. Paragraph (a) of § 1000.30 cross-references to certain requirements of 24 CFR part 85 (Administrative Requirements for Grants and

Cooperative Agreements to State, Local and Federally Recognized Indian Tribal Governments). Specifically, § 1000.30(a) as adopted by the Committee provided that "[i]n the procurement of supplies, equipment, construction and services by recipients and subrecipients, the conflict of interest provisions of 24 CFR 85.36 or 24 CFR 85.42 (as applicable) shall apply." HUD has added the phrase "other property" after the word "equipment" in § 1000.30 to clarify that the conflict of interest provisions in 24 CFR 85.36 and 24 CFR 85.42 apply to property as well as services.

HUD welcomes public comment on additional ways it may strengthen the conflict of interest provisions to ensure that affordable housing activities are conducted effectively without fraud, waste, or mismanagement. In particular, HUD invites comment on whether the regulation should require persons who participate in the decision-making process to recuse themselves from decisions that directly affect the provision of assistance to themselves or their relatives. During the public comment period, HUD also will be considering additional ways to strengthen the conflict of interest provisions to ensure that affordable housing activities are conducted effectively without fraud, waste, or mismanagement. Additionally, HUD will be considering whether the final rule should require persons who participate in the decision-making process to recuse themselves from decisions that directly affect the provision of assistance to themselves or their relatives. Accordingly, the final rule may reflect stronger conflict of interest provisions than are set forth in this proposed rule based on any public comments received and HUD's further consideration of the subject matter.

Section 1000.32. This section provides that HUD may make case-by-case exceptions to the conflict of interest provisions set forth in § 1000.30(b). As originally adopted by the Committee, this section would have permitted an Indian tribe or TDHE to grant exceptions. HUD has revised the language adopted by the Committee to specify that only HUD may allow an exception to the conflict of interest provisions. HUD has determined that this change is necessary to ensure that exceptions are granted fairly and without abuse. Further, the change conforms § 1000.32 to its counterpart provision in HUD's regulations governing the Community Development Block Grant (CDBG) program (see 24 CFR 570.611(d)).

Section 1000.38. This section describes the flood insurance

requirements applicable to NAHASDA. Specifically, § 1000.38 provides that under the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001–4128), a recipient may not permit the use of Federal financial assistance for acquisition and construction purposes (including rehabilitation) in an area identified by the Federal Emergency Management Agency (FEMA) as having special flood hazards unless certain specified conditions are met.

Subpart B—Affordable Housing Activities

Subpart B would contain the regulations necessary for the implementation of title II of NAHASDA. Among the topics addressed by subpart B would be eligible affordable housing activities, low-income requirements, lease requirements and tenant selection. Although HUD encourages readers to familiarize themselves with all of the provisions of subpart B, it wishes to highlight the following sections contained in this subpart:

Section 1000.104. This section lists the types of families which are eligible for affordable housing activities under NAHASDA. Paragraphs (b) and (c) of § 1000.104 set forth the conditions under which a non low-income Indian family or a non-Indian family may receive housing assistance under NAHASDA. Such families are presumed to meet the requirements of § 1000.104 if they are currently residing in housing assisted under the 1937 Act. HUD has added language to the regulatory text adopted by the Committee which clarifies that the presumption applies only if there is no evidence to the contrary.

Sections 1000.106 to 1000.116. Title II of NAHASDA requires HUD approval of certain eligible affordable housing activities under NAHASDA. Specifically, section 202(6) of NAHASDA permits recipients to conduct housing activities under model programs that are designed to carry out the purposes of NAHASDA and that are specifically approved by HUD for such purposes. Further, section 201(b)(2) of NAHASDA permits a recipient to provide certain assistance to non low-income Indian families with HUD approval.

Sections 1000.106 to 1000.116 of this proposed rule concern HUD approval of eligible affordable housing activities. These sections refer to HUD approval of model activities and “other housing programs.” This phrase does not appear in the statutory language of NAHASDA. HUD interprets the phrase “other housing programs” to apply solely to the provision of assistance to non low-

income Indian families under section 201(b)(2) of NAHASDA.

Section 1000.124. Section 1000.124 provides that a recipient may charge a low-income rental tenant or homebuyer payments not to exceed thirty percent of the adjusted income of the family. HUD interprets the phrase “homebuyer payments” to be limited to lease-purchase payments, such as those in the existing Mutual Help Homeownership Opportunity Program (See 24 CFR part 950, subpart E).

HUD has made one modification to the regulatory language adopted by the Committee. That regulation provided that the thirty-percent (30%) requirement “applies only to NAHASDA grant amounts.” HUD has removed this phrase from § 1000.124 since the statutory limitation on the amount of the rent and homebuyer payment is not limited to the grant amounts.

Section 1000.134. Section 1000.134 establishes the conditions under which a recipient (or an entity funded by the recipient) may demolish or dispose of Indian housing units owned or operated pursuant to an Annual Contribution Contract. Paragraph (c) of § 1000.134 provides that in any disposition sale of a housing unit, the recipient will use a sale process designed to maximize the sale price. Further, § 1000.134(c) provides that “[t]he sale proceeds from the disposition of any housing unit are program income under NAHASDA and must be used in accordance with the requirements of NAHASDA and this part.” HUD revised this sentence to more closely track the statutory language of section 104(a)(1)(B) of NAHASDA. As originally adopted by the Committee, the sentence read: “The sale proceeds from the disposition of any housing unit are program income under NAHASDA and must be used for appropriate purposes under NAHASDA.” Section 104(a)(1)(B) requires that the recipient use any “program income for affordable housing activities in accordance with the provisions of this Act.”

Section 1000.136. Section 1000.136 describes the insurance requirements which apply to housing units assisted with NAHASDA grants. Specifically, this section requires that a recipient provide adequate insurance either by purchasing insurance or by indemnification against casualty loss by providing insurance in adequate amounts to indemnify the recipient against loss from fire, weather, and liability claims for all housing units owned or operated by the recipient. HUD has added a sentence to the regulatory language adopted by the

Committee which clarifies that these requirements are in addition to the applicable flood insurance requirements set forth in § 1000.38.

Section 1000.142. Section 205 of NAHASDA sets forth the criteria for affordable housing under NAHASDA. Among other criteria, section 205(a)(2) requires that affordable housing remain affordable “for the remaining useful life of the property (as determined by the Secretary).” Section 1000.142 of this proposed rule reflects the statutory useful life requirement. The Committee developed the following regulatory language for § 1000.142: “Each recipient shall describe in its IHP the useful life of each assisted housing unit in each of its developments.” HUD has modified this language by inserting the phrase “for Secretarial determination” after the word “IHP.” The addition of this phrase clarifies that through approval of the IHP, the Secretary will determine the useful life of the affordable housing as required by section 205.

Section 1000.148. Section 1000.148 describes the information which must be contained in a notice of eviction or termination. The regulatory language adopted by the Committee provided that “[t]he owner or manager will apply the law applicable to the jurisdiction.” For purposes of clarity, HUD has revised § 1000.148 to more closely track the statutory requirements set forth in section 207(a)(5) of NAHASDA. Section 1000.148 now requires that the owner or manager must give adequate written notice of termination of the lease, in accordance with the period of time required under State, tribal, or local law. Further, § 1000.148 provides that, notwithstanding any State, tribal, or local law, the notice must inform the resident of the opportunity, prior to any hearing or trial, to examine any relevant documents, records, or regulations directly related to the eviction or termination.

Section 1000.152. Section 1000.152 tracks the statutory language of section 208(c) of NAHASDA. Section 208(c) concerns the recipient’s use of criminal conviction information on adult applicants and tenants. Section 1000.152 provides that recipients shall use this information solely for purposes of applicant screening, lease enforcement and eviction actions. Further, § 1000.152 provides that “[t]he information may be disclosed only to a person who has a job related need for the information and who is an officer, employee, or authorized representative of the recipient or the owner of housing assisted under NAHASDA.” HUD revised the regulatory language developed by the Committee by

inserting the phrase "or the owner" after the word "recipient." The addition of this phrase conforms § 1000.152 to section 208(c) of NAHASDA, which authorizes the release of criminal conviction information to an officer, employee, or authorized representative of an owner.

Section 1000.156. This section sets forth the housing development cost limits applicable to ensure modest housing construction under NAHASDA. Section 1000.156 provides that, unless approved by HUD, the total development cost (TDC) per unit will be no more than 100% of the TDC. HUD has added a sentence to the regulatory language adopted by the Committee to clarify that TDC shall include the costs of making a project meet the accessibility requirements of 24 CFR part 8 (Nondiscrimination Based on Handicap in Federally Assisted Programs and Activities of the Department of Housing and Urban Development) for new construction and alterations of existing housing facilities.

Subpart C—Indian Housing Plan (IHP)

Subpart C would set forth the regulatory requirements concerning the preparation, submission, and review of an Indian tribe's IHP. Although HUD encourages readers to familiarize themselves with all of the provisions of subpart C, it wishes to highlight the following sections contained in this subpart:

Section 1000.214. This section provides that there are no separate IHP requirements for small Indian tribes. The IHP requirements set forth in subpart C are minimal. Further, HUD has general authority under section 101 of NAHASDA to waive IHP requirements when an Indian tribe cannot comply with IHP requirements due to circumstances beyond its control. The waiver authority under section 101 provides flexibility to address the needs of every Indian tribe, including small Indian tribes. The original regulatory language for § 1000.214 developed by the Committee referred to the Secretary's authority under section 101 to waive IHP requirements for an "Indian tribe or TDHE." HUD has revised § 1000.214 to clarify that the section 101 waiver provision applies only to Indian tribes.

Section 1000.216. Section 102(c)(5) of NAHASDA requires that a recipient include certain certifications of compliance in its IHP. Among other certifications, the recipient must certify that it will comply with title II of the Civil Rights Act of 1968 in carrying out NAHASDA, to the extent that title II is applicable, and other applicable Federal

statutes. Section 101(b)(2) of NAHASDA permits HUD to waive these certification requirements if HUD determines that an Indian tribe has not complied or cannot comply with the certification requirements due to circumstances beyond the control of the Indian tribe. Section 1000.216 cross-references to this statutory provision. HUD has added a sentence to the regulatory text adopted by the Committee which clarifies that although HUD may waive the certification requirement, the recipient must still comply with the nondiscrimination requirements listed in § 1000.12.

Section 1000.226. Section 1000.226 of this proposed rule sets forth a non-exclusive list of eligible administrative and planning expenses under the IHBG program. HUD has made two revisions to the list developed by the Committee. First, HUD has removed staff and overhead costs directly related to carrying out affordable housing activities from the list of eligible expenses. These costs do not constitute administrative and planning expenses. Additionally, HUD has amended the list by adding the expenses related to the collection of data necessary to challenge the data used in the IHBG formula. This addition reflects the language of § 1000.320(a), which provides that the collection of data for this purpose is an allowable cost for IHBG funds.

Section 101(h) of NAHASDA requires that HUD authorize, by regulation, each recipient to use a percentage of its NAHASDA grant amounts for administrative and planning expenses relating to carrying out NAHASDA and activities assisted with such amounts. This proposed rule, however, does not set forth such a percentage. HUD is considering the appropriate percentage which it is statutorily required to establish at the final rule stage.

Section 1000.228. Section 101(c) of NAHASDA prohibits HUD from awarding NAHASDA grant funds to a recipient unless the governing body of the locality within which any affordable housing to be assisted with grant amounts will be situated has entered into a local cooperation agreement with the recipient. Section 1000.228 of this proposed rule provides that the requirement for a local cooperation agreement "applies to assistance of rental and lease-purchase homeownership units under the 1937 Act or NAHASDA which are owned by the Indian tribe or TDHE." HUD has revised the regulatory language developed by the Committee by using the word "assistance" rather than "development." This change clarifies

that section 101(c) covers all assistance, and not just development.

HUD also notes that a cooperation agreement is not required in those cases where the affordable housing will be located on an Indian reservation and the Indian tribe is the recipient, since a tribal government could not enter into an agreement with itself.

Section 1000.230. Section 101(d)(1) of NAHASDA requires that affordable housing assisted with NAHASDA grant amounts be exempt from all real or personal property taxes levied or imposed by any State, tribe, city, county, or other political subdivision. Section 1000.230 of this proposed rule provides that the tax-exemption requirement "applies only to assistance of rental and lease-purchase homeownership units under the 1937 Act or NAHASDA which are owned by an Indian tribe or TDHE." As is the case with § 1000.228, HUD has revised § 1000.230 by substituting the word "development" with the word "assistance." This revision clarifies that section 101(d)(1) applies to all assistance of rental and lease-purchase homeownership units.

Subpart D—Allocation Formula

Subpart D would implement title III of NAHASDA. Specifically, it would establish the components, definitions, and data sources used in the NAHASDA block grant formula. The allocation formula is set forth in an appendix to this proposed rule. Although the formula is currently set forth in an appendix, it may be incorporated in the regulatory text at the final rule stage.

Subpart E—Federal Guarantees for Financing of Tribal Housing Activities

Subpart E would describe the regulatory requirements necessary for the implementation of title VI of NAHASDA. This subpart would establish the terms and conditions by which HUD will guarantee the obligations issued by an Indian tribe or TDHE for the purposes of financing affordable housing activities.

Subpart E does not contain a provision setting forth the requirements for eligible lenders. HUD believes that the establishment of lender eligibility requirements will help to ensure the stability and integrity of the title VI loan guarantee program. HUD proposes the use of the lender eligibility criteria used in the Indian loan guarantee program authorized by section 184 of the Housing and Community Development Act of 1992 (Pub. L. 102-550, approved October 28, 1992) (currently codified at 24 CFR part 955). The section 184 program has been highly successful in

providing access to sources of private financing to Indian families and Indian housing authorities who otherwise could not acquire housing financing because of the unique legal status of Indian trust land. Accordingly, HUD believes the section 184 lender eligibility requirements provide a good model for loan guarantees under title VI of NAHASDA. HUD invites public comment on the proposed lender eligibility criteria. The regulatory provision proposed by HUD would read as follows:

Who Are Eligible Lenders Under This Subpart?

The loan shall be made only by a lender approved by and meeting qualifications established in this subpart, except that loans otherwise insured or guaranteed by any agency of the Federal Government, or made by an organization of Indians from amounts borrowed from the United States shall not be eligible for guarantee under this part. The following lenders are deemed to be approved under this part:

- (a) Any mortgagee approved by HUD for participation in the single family mortgage insurance program under title II of the National Housing Act.
- (b) Any lender whose housing loans under chapter 37 of title 38, United States Code are automatically guaranteed pursuant to section 1802(d) of such title.
- (c) Any lender approved by the Department of Agriculture to make guaranteed loans for single family housing under the Housing Act of 1949.
- (d) Any other lender that is supervised, approved, regulated, or insured by any agency of the Federal Government.

HUD encourages readers to familiarize themselves with all of the provisions of subpart E; however, it wishes to highlight the following section contained in this subpart:

Section 1000.408. This section sets forth the conditions which HUD will prescribe when providing a guarantee for notes or other obligations issued by an Indian tribe. The regulatory language developed by the Committee would have authorized a repayment period in excess of twenty years if the period was commercially reasonable or was an industry standard. HUD has revised § 1000.408 to provide that the repayment period may not exceed twenty years. This change is based on HUD's legal interpretation of section 601(c) of NAHASDA which provides that HUD "may not deny a guarantee under [title VI of NAHASDA] on the basis of the proposed repayment period for the note or other obligation unless the period is more than 20 years or the Secretary determines that the period causes the guarantee to constitute an unacceptable financial risk." HUD has determined that the statutory language

of section 601(c) prohibits a repayment period of greater than 20 years.

Subpart F—Recipient Monitoring, Oversight and Accountability

Subpart F would implement title IV of NAHASDA. Among other topics, this subpart would address monitoring of compliance, performance reports, HUD and tribal review, audits, and remedies for noncompliance. Sections 1000.504 and 1000.524 of this subpart discuss performance measures. The newness of the IHBG program makes it difficult to establish detailed performance objectives. As the IHBG program evolves, and greater programmatic experience is developed, it will be possible to set forth the necessary performance measurements with greater clarity and detail.

Although HUD encourages readers to familiarize themselves with all of the provisions of subpart F, it wishes to highlight the following sections contained in this subpart:

Section 1000.502. This section describes the monitoring responsibilities of the recipient, the grant beneficiary and HUD under NAHASDA. HUD has revised the language adopted by the Committee to reference the periodic reviews required under the applicable nondiscrimination requirements set forth in § 1000.12 (See § 1000.502(c)).

Section 1000.508. This section provides that if the recipient's monitoring activities identify programmatic concerns, it must take one of several specified corrective actions. As originally adopted by the Committee, this section listed the actions the recipient "may" take to remedy identified concerns. HUD has strengthened this language to specify that a recipient is required to take one of the listed remedial actions.

Section 1000.510. This section sets forth the Indian tribe's responsibility if the tribal monitoring identifies compliance concerns. The language adopted by the Committee provided that "[t]he Indian tribe should ensure that appropriate corrective action is taken." HUD has strengthened and clarified this provision by revising it to read: "The Indian tribe's responsibility is to ensure that appropriate corrective action is taken."

Section 1000.526. This section lists the types of information HUD may use in conducting a performance review of the recipient. HUD has expanded the list adopted by the Committee to provide that HUD may also consider "any other relevant information" (see § 1000.526(i)).

Section 1000.528. This language in this section is closely modelled on section 405(c) of NAHASDA. Specifically, § 1000.528 provides that HUD may make appropriate adjustments in the amount of the annual grants under NAHASDA in accordance with the finding of HUD pursuant to reviews and audits under section 405 of NAHASDA. HUD may adjust, reduce, or withdraw grant amounts, or take other action as appropriate in accordance with the reviews and audits, except that grant amounts already expended on affordable housing activities may not be recaptured or deducted from future assistance provided on behalf of an Indian tribe.

HUD added § 1000.528 subsequent to the completion of the negotiated rulemaking meetings. Accordingly, the Committee did not have the opportunity to approve the language of § 1000.528. HUD believes the addition of this provision is necessary to provide Indian tribes with a fuller picture of the review and audit authority provided to HUD by NAHASDA. HUD emphasizes that the language of § 1000.528 is nearly identical to the language of section 405(c). Section 1000.528 does not establish any requirements or procedures in addition to those authorized under NAHASDA.

Section 1000.532. This section sets forth the hearing requirements that will be used under NAHASDA. HUD has revised the language adopted by the Committee to clarify that for hearings under section 504 of the Rehabilitation Act of 1973 or the Age Discrimination Act of 1975, the procedures in 24 CFR part 180 must be used.

Section 1000.538. This section describes the recipient audits required under NAHASDA. Specifically, § 1000.538 provides that a recipient must comply with the requirements of the Single Audit Act which requires annual audits of recipients that expend Federal funds equal to or in excess of \$300,000. The audit shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

V. Nonconsensus Provisions and Rationale

The Committee was unable to reach consensus on five issues. On four of the issues, HUD and tribal representatives disagreed on proposed regulatory language. These issues involve legal determinations which must be made by HUD. In the case of the allocation formula, tribal representatives could not reach consensus on the use of a performance variable. The following

section of the preamble summarizes these issues and presents the different positions. The summaries were drafted by proponents of the position on the Drafting Coordination Workgroup.

1. Issue: Indian Preference for Procurement

Is one time HUD approval necessary for alternative Indian Preference methods for procurement? The Committee drafted a proposed regulatory provision on this issue which was not approved by the Committee. The proposed provision is reproduced below.

Tribal Position: The tribes believe that a certification of compliance with the requirements of section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b) is sufficient to satisfy the requirements for alternative Indian Preference methods.

HUD's Position: HUD approval for alternative Indian Preference methods is intended to ensure that the minimum procurement requirements of 24 CFR 85.36 are met in the implementation of alternative methods of providing Indian Preference.

The proposed regulatory provision which was *not* approved reads:

What Indian Preference Requirements Are Applicable?

(a) **Applicability.** HUD has determined that grants under this part are subject to Section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b). Section 7(b) provides that any contract, subcontract, grant or subgrant pursuant to an act authorizing grants to Indian organizations or for the benefit of Indians shall require that, to the greatest extent feasible:

(1) Preference and opportunities for training and employment shall be given to Indians, and

(2) Preference in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452).

(b) **Definitions.**

(1) The Indian Self-Determination and Education Assistance Act defines "Indian" to mean a person who is a member of an Indian tribe and defines "Indian tribe" to mean any Indian tribe, band, nation, or other organized group or community including any Alaska Native village or regional or village urban corporation as defined or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(2) In section 3 of the Indian Financing Act of 1974 "economic enterprise" is defined as any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit, except that Indian

ownership must constitute not less than 51 percent of the enterprise. This act defines "Indian organization" to mean the governing body of any Indian tribe or entity established or recognized by such governing body.

(c) **Preference in administration of grant.** To the greatest extent feasible, preference and opportunities for training and employment in connection with the administration of grants awarded under this part shall be given to Indians.

(d) **Preference in contracting.** To the greatest extent feasible, recipients shall give preference in the award of contracts for projects funded under this part to Indian organizations and Indian-owned economic enterprises.

(1) Each recipient shall:

(i) Advertise for bids or proposals limited to qualified Indian organizations and Indian-owned enterprises; or

(ii) Use a two-stage preference procedure, as follows:

(A) **Stage 1.** Invite or otherwise solicit Indian-owned economic enterprises to submit a statement of intent to respond to a bid announcement or request for proposals limited to Indian-owned firms.

(B) **Stage 2.** If responses are received from more than one Indian enterprise found to be qualified, advertise for bids or proposals limited to Indian organizations and Indian-owned economic enterprises; or

(iii) Develop, subject to HUD one-time approval, the recipient's own method of providing preference. An Indian preference policy which was previously approved by HUD for a recipient under the provisions of 24 CFR part 1003 will meet the requirements of this section.

(2) If the recipient selects a method of providing preference that results in fewer than two responsible qualified organizations or enterprises submitting a statement of intent, a bid or a proposal to perform the contract at a reasonable cost, then the recipient shall:

(i) Re-advertise the contract, using any of the methods described in paragraph (d)(1) of this section; or

(ii) Re-advertise the contract without limiting the advertisement for bids or proposals to Indian organizations and Indian-owned economic enterprises; or

(iii) If one approvable bid or proposal is received, request Area ONAP review and approval of the proposed contract and related procurement documents, in accordance with 24 CFR 85.36, in order to award the contract to the single bidder or offeror.

(3) Procurements that are within the dollar limitations established for small purchases under 24 CFR 85.36 need not follow the formal bid or proposal procedures of paragraph (d) of this section, since these procurements are governed by the small purchase procedures of 24 CFR 85.36. However, a recipient's small purchase procurement shall, to the greatest extent feasible, provide Indian preference in the award of contracts.

(4) All preferences shall be publicly announced in the advertisement and bidding or proposal solicitation documents and the bidding and proposal documents.

(5) A recipient, at its discretion, may require information of prospective

contractors seeking to qualify as Indian organizations or Indian-owned economic enterprises. Recipients may require prospective contractors to include the following information before submitting a bid or proposal, or at the time of submission:

(i) Evidence showing fully the extent of Indian ownership and interest;

(ii) Evidence of structure, management and financing affecting the Indian character of the enterprise, including major subcontracts and purchase agreements; materials or equipment supply arrangements; and management salary or profit-sharing arrangements; and evidence showing the effect of these on the extent of Indian ownership and interest; and

(iii) Evidence sufficient to demonstrate to the satisfaction of the recipient that the prospective contractor has the technical, administrative, and financial capability to perform contract work of the size and type involved.

(6) The recipient shall incorporate the following clause (referred to as the Section 7(b) clause) in each contract awarded in connection with a project funded under this part:

(i) The work to be performed under this contract is on a project subject to Section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b) (Indian Act). Section 7(b) requires that to the greatest extent feasible (A) preferences and opportunities for training and employment shall be given to Indians and (B) preferences in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned economic enterprises.

(ii) The parties to this contract shall comply with the provisions of Section 7(b) of the Indian Act.

(iii) In connection with this contract, the contractor shall, to the greatest extent feasible, give preference in the award of any subcontracts to Indian organizations and Indian-owned economic enterprises, and preferences and opportunities for training and employment to Indians.

(iv) The contractor shall include this Section 7(b) clause in every subcontract in connection with the project, and shall, at the direction of the recipient, take appropriate action pursuant to the subcontract upon a finding by the recipient or HUD that the subcontractor has violated the Section 7(b) clause of the Indian Act.

(e) **Complaint procedures.** The following complaint procedures are applicable to complaints arising out of any of the methods of providing for Indian preference contained in this part, including alternate methods enacted and approved in a manner described in this section.

(1) Each complaint shall be in writing, signed, and filed with the recipient.

(2) A complaint must be filed with the recipient no later than 20 calendar days from the date of the action (or omission) upon which the complaint is based.

(3) Upon receipt of a complaint, the recipient shall promptly stamp the date and time of receipt upon the complaint, and immediately acknowledge its receipt.

(4) Within 20 calendar days of receipt of a complaint, the recipient shall either meet, or communicate by mail or telephone, with

the complainant in an effort to resolve the matter. The recipient shall make a determination on a complaint and notify the complainant, in writing, within 30 calendar days of the submittal of the complaint to the recipient. The decision of the recipient shall constitute final administrative action on the complaint.

2. Issue: Interest Income

Can interest income earned on advances of grant funds be retained by a recipient?

Tribal Position: For the following reasons, the tribal position is that recipients can retain interest income earned on advances of NAHASDA grant funds to be used for affordable housing activities:

(a) Under Public Law 93-638 self-determination contracts and self-governance compacts, federal policy allows tribes to receive lump-sum distributions for their programs and to keep any interest they earn on such funds before expending the funds on their programs. The Congress directed through NAHASDA that "Federal assistance to meet these responsibilities [federal housing responsibilities to Indians] should be provided in a manner that recognizes the right of Indian self-determination and tribal self-governance by making such assistance available directly to the Indian tribes or TDHEs under authorities similar to those accorded Indian tribes in Public Law 93-638 (25 U.S.C. 450 et seq.)" (NAHASDA section 2(7)—Congressional Findings). The tribal representatives believe that this language authorizes HUD to make NAHASDA grant amounts available to recipients in lump-sum distributions and that recipients can then keep any interest earned on this money before the recipient expends the money on eligible affordable housing activities.

(b) The tribal representatives also believe that NAHASDA expressly authorizes recipients to invest grant amounts and retain any interest. NAHASDA states: "A recipient may invest grant amounts for the purposes of carrying out affordable housing activities in investment securities and other obligations as approved by the Secretary" (NAHASDA section 204(b)).

HUD's Position: HUD believes that the Congressional findings in NAHASDA do not overcome the longstanding opinions of the Comptroller General that recipients may not augment appropriation amounts by earning interest on grant funds pending disbursement for a program purpose and that interest earned on grant advances belongs to the Federal Government. A more explicit statutory provision is needed which authorizes the recipient

to draw down grant funds in a lump sum and to retain any interest earned.

HUD construes section 204(b) of NAHASDA consistent with the above stated opinions of the Comptroller General. Accordingly, the statute permits recipients to invest grant amounts for the purposes of carrying out affordable housing activities, but this does not permit recipients to invest grant funds solely for the purpose of earning interest to augment the grant amount.

A workgroup of the Committee developed the following definition of "Program Income" but HUD could not agree on the underlined language:

(1) Program income is defined as any income that is realized from the disbursements of grant amounts. Program income includes income from fees for services performed from the use of real or rental of real or personal property acquired with grant funds, from the sale of commodities or items developed, acquired, etc. with grant funds, and from payments of principal and interest on loans made with grant funds. *Program income includes interest income earned on grant funds prior to disbursement.*

(2) Any program income over the amount of \$250 per annum can be retained by a recipient provided it is used for affordable housing activities in accordance with section 202 of NAHASDA. Any program income realized that is less than \$250 per annum shall be excluded from consideration as program income. Such funds may be retained but are not classified and treated as program income.

(3) If program income is realized from an eligible activity funded with both grant funds as well as other funds, i.e., funds that are not grant funds, then the amount of program income realized will be based on a percentage calculation that represents the proportional share of funds provided for the activity generating the program income that are grant funds.

(4) Costs incident to the generation of program income shall be deducted from gross income to determine program income.

3. Issue: Reducing Grant Amounts

Should HUD be allowed to reduce, adjust, or withdraw NAHASDA grant funds without giving notice and a hearing to a recipient?

Tribal Position: Tribal representatives felt that before the Secretary takes any actions to adjust, reduce, or withdraw grant amounts the Secretary must comply with the due process requirements set forth in section 401 of NAHASDA to give a recipient reasonable notice and an opportunity for a hearing.

HUD's Position: Section 405(c) of NAHASDA expressly permits HUD to adjust, reduce, or withdraw grant amounts in accordance with HUD's

review and audits of recipients. This authority is in addition to the authority in section 401 to take actions based on the recipient's substantial noncompliance with the requirements of NAHASDA.

4. Issue: Substantial Noncompliance

How is substantial noncompliance defined under NAHASDA section 401(a) before the Secretary may terminate, reduce, or limit the availability of payments under NAHASDA or replace the TDHE?

Tribal Position: The tribal representatives proposed a definition for substantial noncompliance, as follows:

For HUD to conclude that a recipient has failed to comply substantially with any provision of NAHASDA, HUD must find:

- (a) An act or omission or series of acts or omissions; or
- (b) A pattern or practice or activities constituting willful noncompliance with the requirements under NAHASDA; or
- (c) Criminal activity; or
- (d) Such other activity or activities—by the recipient which place the housing program at sufficient risk with the primary objectives of NAHASDA to warrant HUD taking the remedial actions set forth under sections 401 and 402 of NAHASDA.

HUD's Position: HUD disagrees with the tribal representatives' proposed definition for four reasons. First, the "sufficient risk" standard may prove to be essentially rudderless, leaving to HUD the question of whether actions pose such a sufficient risk, without any clear standard. Second, the standard is limited to such risk to the primary objectives of the law, which term will not necessarily cover "any provision" of NAHASDA, as section 401 compels. Third, subjecting *any* act or omission to the "sufficient risk" standard could have the unintended effect of converting minor actions to "substantial" ones. Fourth, the test ignores the statute's emphasis on *past* noncompliance. This statutory provision, like many others in NAHASDA, is patterned after the community development block grant (CDBG) legislation at title I of the Housing and Community Development Act of 1974, as amended (42 U.S.C. 5301 et seq.). While little case law exists in this area, it is apparent that the CDBG provision in question is one which has been viewed with as much emphasis on its past nature as on substantiality (See *Kansas City v. HUD*, 861 F.2d 739 (D.C.Cir. 1988)). The proposed definition fails to take this aspect of the standard into account. HUD welcomes public comment on what would be an appropriate standard for this term or, for

that matter, whether the term should be defined in the regulation.

5. Issue: Performance Variable

Should a measure of performance be used as a variable within the allocation formula for NAHASDA Block Grant funds? This issue was not agreed to among tribal representatives.

Position Opposing the Use of a Performance Variable: Taking a stand against the use of a performance variable in the allocation formula does not mean taking a stand against quality performance; rather, it means taking a stand against the use of an unnecessary and penal method of evaluating how tribes serve their own people.

It is unnecessary because both the statute and the proposed compliance regulations already address how to deal with poor performance.

It is penal in that it disciplines a failing tribe, instead of focusing on assisting that tribe.

NAHASDA requires the development of a formula for the allocation of block grant funds based on need and maintenance of current housing stock. It does not mandate or even suggest that such a formula address an individual tribe's performance, presumably because NAHASDA itself deals adequately with the issue by requiring annual performance reports, providing for audits and monitoring, and specifying remedies for non-compliance with NAHASDA (including failure to expend monies on low-income activities).

The relief available to the Secretary allows him to make adjustments in future grant amounts, to require the repayment of misspent amounts, to seek civil remedies, and to appoint a replacement TDHE, among other things. If these remedies are not the same as the penalty imposed by the performance factor, then those who favor the performance factor essentially are opting for an additional penalty. If the remedies are the same, then by definition they are duplicative.

Those who favor a performance factor in the allocation formula skirt the fact that failure to perform to standard would absolutely result in the lowering of one tribe's subsequent allocations, thereby resulting in the raising of the allocation of other tribes whose performance was excellent. Such a position has merit at first blush, but fails in the final analysis, for Indian tribes do not need to raise themselves on the backs of their fallen brothers and sisters.

Technical assistance will be available to a tribe that performs poorly, but that is the case with or without the use of a performance variable, and the real

trigger should come before failure, not in its wake. Supporters of the performance factor argue that the penalty comes only after the first full year of performance; they neglect to mention that it can continue to come each year, year after year, with each new application for a block grant. None of us has any experience with NAHASDA or how it will affect the ability to provide quality housing assistance in the first few years, especially for the smaller tribes and newer TDHEs. To include a performance variable at this stage is premature.

A performance variable in the allocation formula is neither required nor contemplated by NAHASDA. Even without a performance variable, all tribes will be required to develop performance objectives and to describe how they intend to use their block grant funds. Even without a performance factor, HUD will not continually provide funds to a poorly performing tribe. With a performance factor many tribes will unnecessarily perform their work under greater pressure and with less of the support from their fellow tribes who will benefit from their failure. The performance variable is unnecessary and insidious and serves as just another way in which to divide tribes, just as it has divided the rulemaking committee and resulted in nonconsensus.

Position in favor of the Performance Variable: Some Committee members feel that in order for a tribe or TDHE to efficiently and effectively meet the housing needs of its constituents its performance should be quantified through tribally initiated performance objectives. Towards this end, a system that will measure the performance of a tribe or TDHE against objectives determined by each individual tribe was developed by these members and presented to the Committee for consideration. These members feel development of such objectives, provided they respect and accommodate the diversity of tribal needs, will not impose an undue burden on tribes or their TDHEs, but instead will allow them to more effectively meet the needs of their constituents. Development of such performance objectives will encourage all recipients of NAHASDA funds to clearly describe objectives and describe how they will use the limited resources made available by the Congress in a timely and businesslike manner.

Crucial to the implementation of any performance objectives and their codification in the formula allocation is a commitment to promote and develop the technical and administrative

capacity among all tribes that administer affordable housing activities. The variable must trigger the provision of technical assistance to those tribes or their TDHEs that encounter difficulty meeting the objectives they set for themselves. Towards this end, the variable is a proactive means for tribes and their TDHEs that obligates the Secretary to promote and develop greater technical and administrative capacity so that both tribes and the Department are assured NAHASDA funds will be used to provide affordable housing to deserving Native Americans.

The performance variable proposed for Committee consideration will not measure performance against tribally set objectives until the end of the year—as such it does not take effect until the second year of NAHASDA. Throughout the year, tribes would have an opportunity to update or change their objectives should events occur that are beyond their control. The performance variable only reduces funding in the following year to those tribes or TDHEs that fail to accomplish what they said they would accomplish and then only if they fail to meet several of their objectives set for the year.

While the temporary reduction in funds was construed by many Committee members as a punitive measure, the proponents of the performance variable feel it addresses a broader reality facing Indian housing—continued provision of funds to a poorly performing entity is not an efficient use of limited appropriations, poorly performing recipients do not put as many people in housing as could otherwise be done, and the current political climate will not continue to subsidize poorly run programs that will not or do not use appropriated funds in a timely manner for the purposes for which they were allocated. Accordingly, members supporting the incorporation of the performance variable in the allocation of NAHASDA funds feel it is imperative that tribes be the driving force that initiate measures that assure the maximum number of deserving Native Americans are provided a house to call home and the technical and administrative capacities of all tribes are increased to accomplish this objective. Rather than rely on the Department or others to establish the criteria by which tribes will perform, it is time for tribes to take the initiative and set their own high standards—the performance variable and tribally determined objectives as proposed take this important step.

VI. Items Highlighted for Comment

Public comment is invited on this proposed rule in its entirety, including those issues highlighted in this preamble. The Committee especially seeks comments on the following issues.

1. Local Cooperation Agreements and Tax Exemption Issues

Sections 101(c), (d), and (e) of NAHASDA, governing local co-operation agreements, tax exemption, and user fees proved to be problematic, and the statutory requirements were generally agreed to be inappropriate and unreasonable in the context of a formula block grant program. The Committee's tribal caucus approved and forwarded to the Congress a technical amendment intended to deal with the problems. However, in the event that the Congress does not act on this amendment, potential recipients should be aware of the following issues:

(a) How to handle situations in which local governing bodies refuse to enter into local cooperation agreements with recipients;

(b) How to handle payments where more than one local governing body provides services;

(c) Should there be a limit on assistance to a unit or individual below which the requirements of this section should not apply; and

(d) How to deal with local governing bodies that fail to comply with their cooperation agreements. Should there be a certification by the recipient each year that the local governing body has complied with the certification agreement?

HUD is interpreting the statutory provisions for local cooperation agreements, tax exemption, and user fees in the context of the long-standing history of the requirements in the 1937 Act. Accordingly, the applicability of these provisions is limited in the regulations to rental housing (including homebuyer programs for lease-purchase of homes) owned by the Indian tribe or TDHE.

2. Labor Standards of NAHASDA

NAHASDA requires prevailing wage rates determined under the Davis-Bacon Act (40 U.S.C. 276a-276a-5) to be paid to laborers and mechanics employed in the development of affordable housing projects. NAHASDA also requires prevailing wages determined by HUD to be paid to maintenance laborers and mechanics employed in the operation, and to architects, technical engineers, draftsmen and technicians employed in the development of such projects. Some Committee members felt that applying

prevailing wage standards to all development and maintenance assisted in any way by NAHASDA is not practical or reasonable and that some minimum exemption is needed. Placing these requirements on small development and maintenance activities and certain types of projects leveraged with other funds and with other owners would make many such activities infeasible. Many committee members also felt that in accordance with the Congressional findings of NAHASDA, Indian tribes should have the right to apply their own wage standards or Tribal Employment Rights Office (TERO) standards in an effort to encourage tribal employment and that those should supersede Davis-Bacon and HUD wage rates. Since Davis-Bacon and HUD rates are a statutory requirement, the Congress must act to address or remove this provision.

3. Formula Used to Allocate NAHASDA Block Grant Funds

The Committee encourages comment on the following two issues—(a) whether or not the definition of “formula area” accurately reflects the geography that most tribes serve; and (b) how to develop a better data source than the U.S. Census that is uniformly and consistently collected throughout Indian areas for purposes of future formula allocations.

Although not to be commented on in respect to the proposed rule, tribes should be aware that their individual allocations under the Needs component of the formula are based on two primary pieces of information: (a) Geography—HUD will inform each tribe of the geography being used for its “formula area” so that tribes may correct or challenge the geographic definition for their area; and (b) data for Native Americans living in the “formula area”—the U.S. Census is known to have made an undercount, each tribe should review the data for its area (provided by HUD) to determine if it wishes to challenge the Census data as allowed under the proposed rule.

4. Formula Set-Aside for Emergency and Disaster Relief

Some Committee members felt it was important that an emergency and disaster relief fund be established with a portion of the Indian Housing Block Grant funds. The initial proposal was that the fund be capitalized at \$10 million in its first year and that it be replenished in future years such that it begins each year with a balance of \$10 million. Other Committee members suggested that the fund should address only disaster relief and that each Tribe

or TDHE develop its own reserves for emergency circumstances. The Committee is requesting comments on (a) whether or not an emergency and/or disaster relief fund should be developed and (b) if so, how it should be administered.

5. When May NAHASDA Block Grant Funds be Drawn-Down?

The Committee held informal discussions about whether NAHASDA grant amounts will be drawn-down in lump-sum payments or whether they will be drawn-down as the funds are due to be spent by a recipient. Tribal leaders expressed the view that grant amounts should be distributed in lump-sum up-front distributions so that recipients can invest the grant amounts and earn and retain interest on the funds as tribes do in Public Law 93-638 self-determination contracts and self-governance compacts. Lump-sum distributions are also consistent with the Congressional findings in NAHASDA. As set forth in section V.2. of this preamble (nonconsensus issue regarding interest income), HUD has determined that NAHASDA does not authorize the recipient to drawdown grant funds in a lump sum.

6. Applicability of Section 3 of the Housing and Urban Development Act of 1968 and the Lead Based Paint Requirements of 24 CFR Part 35

Tribal members expressed strong disagreement of the applicability of these laws on the basis of their burdensome reporting requirements or high compliance costs. Tribal members believed that compliance with Indian preference requirements under NAHASDA and its regulations should also be deemed as meeting the requirements of section 3 requiring a preference for low and very low-income persons. HUD does not agree with this tribal position. The Committee requested that HUD look at how the section 3 and lead based paint requirements would be applied to the IHBG program and whether NAHASDA's lead based paint requirements would be the same as they are for the HOME program.

HUD's current regulations setting forth its section 3 requirements (24 CFR part 135) and lead-based paint hazard requirements (24 CFR part 35) were published prior to the enactment of NAHASDA. HUD is currently developing final rules revising 24 CFR parts 35 and 135. HUD will address the impact of its section 3 and lead-based paint regulatory requirements on Native American housing assistance, especially in light of the changes made by

NAHASDA, in the development of the final rules.

7. The Applicability of 24 CFR Part 85—Uniform Administrative Requirements for Grants

The Committee decided that some portions of 24 CFR part 85 may not be applicable to the IHBG program. At the conclusion of the comment period, the Committee will review the sections of part 85 and make a determination as to which of the sections will apply. The public is encouraged to submit comments on this issue to assist the Committee in their determination.

8. Rents and Utilities

The Committee decided to give flexibility to recipients to determine whether or not rent includes utilities. HUD believes this implementation of NAHASDA is legally permissible, but notes that this position is a departure from the long-standing HUD policy of including utilities in rents.

VII. Reorganization of Existing Indian Housing Regulations

In addition to establishing a new 24 CFR part 1000, this rule proposes to make several conforming amendments to HUD's existing Indian housing regulations. For example, this proposed rule would remove 24 CFR part 950 from the Code of Federal Regulations. Part 950 sets forth the regulatory requirements for the "old" system of funding which expires on September 30, 1997. Accordingly, the removal of part 950 is necessary to ensure that title 24 does not contain outdated regulations.

This proposed rule would also redesignate 24 CFR part 953 (Community Development Block Grants for Indian Tribes and Alaskan Native Villages) and 24 CFR part 955 (Loan Guarantees for Indian Housing) as 24 CFR parts 1003 and 1005, respectively. These redesignations would consolidate HUD's Indian housing regulations in the

"1000 series" of title 24, and assist program participants by presenting uniformity. In addition to the changes in designation, this proposes to make amendments to the regulations currently set forth in part 955. These revisions will reflect the amendments made by NAHASDA to section 184 of the Housing and Community Development Act of 1992 (12 U.S.C. 1515z-13a).

As a result of these redesignations, several conforming amendments must be made at the final rule stage to other HUD regulations that cross-reference to 24 CFR parts 950, 953, and 955.

VIII. Justification for Reduced Comment Period

It is HUD's policy generally to afford the public not less than sixty days for submission of comments on its notices of proposed rulemaking (24 CFR 10.1). It was determined that it would not be practicable to provide a public comment period greater than 45 calendar days. As noted above, section 106(b)(1) of NAHASDA requires that HUD issue final regulations implementing NAHASDA by September 1, 1997. In developing a schedule for completing its work, the Committee has attempted to strike a balance between the need for public input in the regulatory implementation of NAHASDA, and the necessity of meeting the statutory publication deadline. Given the number and complexity of negotiated rulemaking issues, it was determined that it would not be possible to issue proposed regulations before today. In order to permit the publication of a final rule by September 1, 1997, and provide the Committee with sufficient time to review and address public comments on this proposed rule, HUD requests that comments be submitted by August 18, 1997. The Committee believes that this 45-day comment period will provide interested persons with sufficient time to develop and submit their comments.

The Committee recognizes the value and necessity of public comment in the development of final regulations implementing NAHASDA and welcomes comments on this proposed rule. All comments will be addressed in the final rule. Further, the Committee has sought public input throughout the negotiated rulemaking process. All Committee meetings were announced in the **Federal Register** and were open to the public without advance registration. Members of the public were also invited to make statements during the negotiated rulemaking meetings and to submit written statements for the Committee's consideration.

The Committee also notes that the negotiated rulemaking process provided for the development of proposed regulations with the active participation of Indian tribes. Forty-eight of the fifty-eight Committee members were representatives of geographically diverse small, medium, and large Indian tribes. These Committee members represented tribal concerns and interests in the development of regulations implementing NAHASDA and the proposals contained in this rule reflect the consensus decisions of the Committee.

IX. Findings and Certifications

Paperwork Reduction Act of 1995

(a) The information collection requirements contained in this proposed rule have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). 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 valid control number.

(b) Estimate of the total reporting and recordkeeping burden that will result from the collection of information:

Type of collection	Proposed section of 24 CFR affected	Number of respondents	Frequency of response	Est. avg. response time (hrs.)	Annual burden hrs.
Real property acquisition requirements; information a recipient must provide an owner.	1000.14 (a)(1) and (a)(2).	400	1	24	9,600
Advance written notice to residential tenants and homebuyers.	1000.14(c)(2)	400	1	.30	9,000
Maintenance of Uniform Relocation Act records	1000.14(f)(3)	400	1	.15	60
Maintenance of conflict of interest records	1000.36	400	1	.15	60
HUD approval for model activities and non-Indian families.	1000.108 and 1000.118(b).	400	1	16	6,400
Income verification and document maintenance	1000.128	400	1	40	16,000
Notification to HUD of demolition/disposition	1000.134(b)	400	1	6	2,400
Obtaining and maintenance of criminal conviction information.	1000.154	400	1	24	9,600
IHP submission requirements	1000.212, 1000.142, 1000.222.	400	1	120	42,000

Type of collection	Proposed section of 24 CFR affected	Number of respondents	Frequency of response	Est. avg. response time (hrs.)	Annual burden hrs.
Appeal of HUD determination regarding non-compliance or IHP modification.	1000.224	400	1	16	6,400
Certification and document maintenance for title VI of NAHASDA.	1000.406	400	1	1	400
Demonstration requirement for multiple guarantees	1000.410	400	1	3	1,200
Demonstration requirement for financial capacity	1000.412	400	1	3	1,200
Procedures and requirements for title VI loan guarantee applications.	1000.420, 1000.422.	400	1	20	8,000
Amendment procedure for approved guarantees	1000.430	400	1	1	400
Monitoring responsibility under NAHASDA	1000.502(a), 1000.512, 1000.538.	400	1	30	12,000
Public comment on performance reports	1000.518	400	1	3	1,200
Program records maintenance	1000.548	400	1	1	400
Certification and document maintenance for lack of financial market access requirement in section 184 loan guarantees.	1005.105(f)	400	1	1	400
Section 184 certification of compliance with tribal laws ..	1005.112	400	1	.15	42

Total Burden, 126,762.

(c) In accordance with 5 CFR 1320.8(d)(1), the Department is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

(d) OMB is required to make a decision concerning the collection of information contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not effect the deadline for the public to comment on the proposed rule. Comments on the paperwork collection requirements contained in this rule must be submitted to those persons indicated in the **ADDRESSES** section of this preamble.

Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50,

implementing section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). The Finding of No Significant Impact is available for public inspection during business hours in the Office of the Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-0500.

Executive Order 12612, Federalism

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that the policies contained in this rule have no federalism implications, and that the policies are not subject to review under the Order.

Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks

This rule will not pose an environmental health risk or safety risk on children.

Unfunded Mandates Reform Act

The Secretary has reviewed this rule before publication and by approving it certifies, in accordance with the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532), that this rule does not impose a Federal mandate that will result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year.

Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, *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 economically significant, as provided in section 3(f)(1) of the Order). Any changes made to the final rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection in the office of the Department's Rules Docket Clerk, Room 10276, 451 Seventh Street, SW, Washington, DC 20410-0500.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) has reviewed and approved this rule, and in so doing certifies that this rule would not have a significant economic impact on a substantial number of small entities.

List of Subjects

24 CFR Part 950

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

24 CFR Part 953

Alaska, Community development block grants, Grant programs—housing and community development, Indians, Reporting and recordkeeping requirements.

24 CFR Part 955

Indians, Loan programs—Indians, Reporting and recordkeeping requirements.

24 CFR Part 1000

Aged, Community development block grants, Grant programs—housing and community development, Grant

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

24 CFR Part 1003

Alaska, Community development block grants, Grant programs—housing and community development, Indians, Reporting and recordkeeping requirements.

24 CFR Part 1005

Indians, Loan programs—Indians, Reporting and recordkeeping requirements.

Accordingly, for the reasons described above, in title 24 of the Code of Federal Regulations, Chapter IX is proposed to be amended as follows:

PART 950—[REMOVED]

1. Part 950 is removed.

PART 953 [REDESIGNATED]

2. Part 953 is redesignated as part 1003.
3. Part 1000 is added to read as follows:

PART 1000—NATIVE AMERICAN HOUSING ACTIVITIES

Subpart A—General

Sec.

- 1000.1 What is the applicability and scope of these regulations?
 1000.2 What are the Guiding Principles in the implementation of NAHASDA?
 1000.4 What is the objective of the IHBG program?
 1000.6 What is the nature of the IHBG program?
 1000.8 May provisions of these regulations be waived?
 1000.10 What definitions apply in these regulations?
 1000.12 What nondiscrimination requirements are applicable?
 1000.14 What relocation and real property acquisition policies are applicable?
 1000.16 What labor standards are applicable?
 1000.18 What environmental review requirements apply?
 1000.20 Is an Indian tribe required to assume environmental review responsibilities?
 1000.22 Are the costs of an environmental review an eligible cost?
 1000.24 If an Indian tribe assumes environmental review responsibility, how will HUD assist the Indian tribe in performing the environmental review?
 1000.26 What are the administrative requirements under NAHASDA?
 1000.28 May a self-governance Indian tribe be exempted from the applicability of 24 CFR part 85?
 1000.30 What prohibitions regarding conflict of interest are applicable?

- 1000.32 May exceptions be made to the conflict of interest provisions?
 1000.34 What factors must be considered in making an exception to the conflict of interest provisions?
 1000.36 How long must a recipient retain records regarding exceptions made to the conflict of interest provisions?
 1000.38 What flood insurance requirements are applicable?
 1000.40 Do lead-based paint poisoning prevention requirements apply to affordable housing activities under NAHASDA?
 1000.42 Are the requirements of section 3 of the Housing and Urban Development Act of 1968 applicable?
 1000.44 What prohibitions on the use of debarred, suspended or ineligible contractors apply?
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Subpart B—Affordable Housing Activities

- 1000.101 What is affordable housing?
 1000.102 What are eligible affordable housing activities?
 1000.104 What families are eligible for affordable housing activities?
 1000.106 What activities under title II of NAHASDA require HUD approval?
 1000.108 How is HUD approval obtained by a recipient for housing for non low-income Indian families and model activities?
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 1000.114 What should HUD do before declining a model housing activity or other housing program?
 1000.116 What recourse does a recipient have if HUD disapproves a model housing activity or other program?
 1000.118 Under what conditions may non low-income Indian families participate in the program?
 1000.120 May a recipient use Indian preference or tribal preference in selecting families for housing assistance?
 1000.122 May NAHASDA grant funds be used as matching funds to obtain any leverage funding, including any federal or state program and still be considered an affordable housing activity?
 1000.124 What is the maximum and minimum rent or homebuyer payment a recipient can charge a low-income rental tenant or homebuyer?
 1000.126 May a recipient charge flat or income-adjusted rents?
 1000.128 Is income verification required for assistance under NAHASDA?
 1000.130 May a recipient charge a non low-income family rents or homebuyer payments which are more than 30% of the family's adjusted income?
 1000.132 Are utilities considered a part of rent or homebuyer payments?

- 1000.134 When may a recipient (or entity funded by a recipient) demolish or dispose of Indian housing units owned or operated pursuant to an ACC?
 1000.136 What insurance requirements apply to housing units assisted with NAHASDA grants?
 1000.138 What constitutes adequate insurance?
 1000.140 May a recipient use grant funds to purchase insurance for privately owned housing to protect NAHASDA grant amounts spent on that housing?
 1000.142 What is the "useful life" during which low-income rental housing and low-income homebuyer housing must remain affordable as required in sections 205(a)(2) and 209 of NAHASDA?
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Subpart C—Indian Housing Plan (IHP)

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 1000.210 Who prepares and submits an IHP?
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 1000.222 Can an Indian tribe or TDHE amend its IHP?
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1000.302 What are the definitions applicable for the IHBG formula?

1000.304 May the IHBG formula be modified?

1000.306 Who can make modifications to the IHBG formula?

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1000.326 What is formula current assisted stock?

1000.328 How is the Formula Current Assisted Stock (FCAS) Component developed?

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Subpart E—Federal Guarantees for Financing of Tribal Housing Activities

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1000.404 What constitutes tribal approval to issue notes or other obligations under title VI of NAHASDA?

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1000.408 What conditions shall HUD prescribe when providing a guarantee for notes or other obligations issued by an Indian tribe?

1000.410 Can an issuer obtain a guarantee for more than one note or other obligation at a time?

1000.412 How is an issuer's financial capacity demonstrated?

1000.414 What is a repayment contract in a form acceptable to HUD?

1000.416 Can grant funds be used to pay costs incurred when issuing notes or other obligations?

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1000.428 When will HUD issue notice to the applicant if the application is approved at the requested or reduced amount?

1000.430 Can an amendment to an approved guarantee be made?

1000.432 How will HUD allocate the availability of loan guarantee assistance?

1000.434 How will HUD monitor the use of funds guaranteed under this subpart?

Subpart F—Recipient Monitoring, Oversight and Accountability

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1000.516 What reporting period is covered by the annual performance report?

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1000.524 What are HUD's performance measures for the review?

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1000.530 What are remedies available for substantial noncompliance?

1000.532 What hearing procedures will be used?

1000.534 When may HUD require replacement of a TDHE?

1000.536 When does failure to comply substantially cease?

1000.538 What audits are required?

1000.540 Who is the cognizant audit agency?

1000.542 Are audit costs an eligible program expense?

1000.544 Must a copy of the recipient's audit pursuant to the Single Audit Act be submitted to HUD?

1000.546 If the TDHE is the recipient, does it have to submit a copy of its audit to the Indian tribe?

1000.548 How long must the recipient maintain program records?

1000.550 Which agencies have right of access to the recipient's records relating to activities carried out under NAHASDA?

1000.552 Does the Freedom of Information Act (FOIA) apply to recipient records?

1000.554 Does the Federal Privacy Act apply to recipient records?

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

Subpart A—General

§ 1000.1 What is the applicability and scope of these regulations?

Under the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*) (NAHASDA) the Department of Housing and Urban Development (HUD) provides grants, loan guarantees, and technical assistance to Indian tribes and Alaska Native villages for the development and operation of low-income housing in Indian areas. The policies and procedures described in this part apply to grants to eligible recipients under the Indian Housing Block Grant (IHBG) program for Indian tribes and Alaska Native villages. This part also applies to loan guarantee assistance under title VI of NAHASDA. This part supplements the statutory requirements set forth in NAHASDA.

§ 1000.2 What are the Guiding Principles in the implementation of NAHASDA?

The Secretary shall use the following Congressional findings set forth in section 2 of NAHASDA as the guiding principles in the implementation of NAHASDA:

(a) The Federal government has a responsibility to promote the general welfare of the Nation:

(1) By using Federal resources to aid families and individuals seeking affordable homes in safe and healthy environments and, in particular,

assisting responsible, deserving citizens who cannot provide fully for themselves because of temporary circumstances or factors beyond their control;

(2) By working to ensure a thriving national economy and a strong private housing market; and

(3) By developing effective partnerships among the Federal government, state, tribal, and local governments, and private entities that allow government to accept responsibility for fostering the development of a healthy marketplace and allow families to prosper without government involvement in their day-to-day activities.

(b) There exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people;

(c) The Constitution of the United States invests the Congress with plenary power over the field of Indian affairs, and through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people.

(d) The Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with Indian tribes and their members to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition.

(e) Providing affordable homes in safe and healthy environments is an essential element in the special role of the United States in helping Indian tribes and their members to improve their housing conditions and socioeconomic status.

(f) The need for affordable homes in safe and healthy environments on Indian reservations, in Indian communities, and in Native Alaskan villages is acute and the Federal government should work not only to provide housing assistance, but also, to the extent practicable, to assist in the development of private housing finance mechanisms on Indian lands to achieve the goals of economic self-sufficiency and self-determination for Indian tribes and their members.

(g) Federal assistance to meet these responsibilities should be provided in a manner that recognizes the right of Indian self-determination and tribal self-governance by making such assistance directly to the Indian tribes or tribally designated entities under authorities

similar to those accorded Indian tribes in Public Law 93-638 (25 U.S.C. 450 *et seq.*)

§ 1000.4 What is the objective of the IHBG program?

The primary objective of the IHBG program is the provision of affordable, decent, safe and sanitary housing and a suitable living environment, principally for Native American and Alaskan Native persons of low-income.

§ 1000.6 What is the nature of the IHBG program?

The IHBG program is a formula grant program whereby eligible recipients of funding receive an equitable share of periodic appropriations made by the Congress, based upon formula components specified under subpart D of this part. IHBG recipients must have the administrative capacity to undertake the affordable housing activities proposed, including the systems of internal control necessary to administer these activities effectively without fraud, waste, or mismanagement.

§ 1000.8 May provisions of these regulations be waived?

Provisions of this part may be waived in accordance with 24 CFR 5.110.

§ 1000.10 What definitions apply in these regulations?

Except as noted in a particular subpart, the following definitions apply in this part:

(a) The terms "*Adjusted income*," "*Affordable housing*," "*Drug-related criminal activity*," "*Elderly families and near-elderly families*," "*Elderly person*," "*Grant beneficiary*," "*Indian*," "*Indian housing plan (IHP)*," "*Indian tribe*," "*Low-income family*," "*Median income*," "*Near-elderly persons*," "*Nonprofit*," "*Recipient*," "*Secretary*," "*State*," and "*Tribally designated housing entity (TDHE)*" are defined in section 4 of NAHASDA.

(b) In addition to the definitions set forth in paragraph (a) of this section, the following definitions apply to this part:

Affordable Housing Activities are those activities identified in section 202 of NAHASDA.

Annual Contributions Contract (ACC) means a contract under the 1937 Act between HUD and an IHA containing the terms and conditions under which HUD assists the IHA in providing decent, safe, and sanitary housing for low-income families.

Annual income. Annual income is the anticipated total income from all sources received by the family head and spouse (even if temporarily absent) and by each additional member of the family, including all net income derived

from assets, for the 12-month period following the effective date of the initial determination or reexamination of income, exclusive of certain types of income as provided in paragraph (2) of this definition.

(1) Annual income includes, but is not limited to:

(i) The full amount, before any payroll deductions, of wages and salaries, overtime pay, commissions, fees, tips and bonuses, and other compensation for personal services;

(ii) The net income from operation of a business or profession. Expenditures for business expansion or amortization of capital indebtedness shall not be used as deductions in determining net income. An allowance for depreciation of assets used in a business or profession may be deducted, based on straight line depreciation, as provided in Internal Revenue Service regulations. Any withdrawal of cash or assets from the operation of a business or profession will be included in income, except to the extent the withdrawal is reimbursement of cash or assets invested in the operation by the family;

(iii) Interest, dividends, and other net income of any kind from real or personal property. Expenditures for amortization of capital indebtedness shall not be used as deductions in determining net income. An allowance for depreciation is permitted only as authorized in paragraph (1)(ii) of this definition. Any withdrawal of cash or assets from an investment will be included in income, except to the extent the withdrawal is reimbursement of cash or assets invested by the family. Where the family has net family assets in excess of \$5,000, annual income shall include the greater of the actual income derived from all net family assets or a percentage of the value of such assets based on the current passbook savings rate as determined by HUD;

(iv) The full amount of periodic amounts received from social security, annuities, insurance policies, retirement funds, pensions, disability, or death benefits and other similar types of periodic receipts, including a lump-sum amount or prospective monthly amounts for the delayed start of a periodic amount (except as provided in paragraph (2)(xiv) of this definition):

(v) Payments in lieu of earnings, such as unemployment and disability compensation, worker's compensation, and severance pay (except as provided in paragraph (2)(iii) of this definition);

(vi) *Welfare assistance*. If the welfare assistance payment includes an amount specifically designated for shelter and utilities that is subject to adjustment by the welfare assistance agency in

accordance with the actual cost of shelter and utilities, the amount of welfare assistance income to be included as income shall consist of:

(A) The amount of the allowance or grant exclusive of the amount specifically designated for shelter or utilities; plus

(B) The maximum amount that the welfare assistance agency could, in fact, allow the family for shelter and utilities. If the family's welfare assistance is ratably reduced from the standard of need by applying a percentage, the amount calculated under paragraph (1)(vi)(B) of this definition shall be the amount resulting from one application of the percentage;

(vii) Periodic and determinable allowances, such as alimony and child support payments, and regular contributions or gifts received from persons not residing in the dwelling; and

(viii) All regular pay, special pay, and allowances of a member of the Armed Forces (but see paragraph (2)(vii) of this definition).

(2) Annual income does not include the following:

(i) Income from employment of children (including foster children) under the age of 18 years;

(ii) Payments received for the care of foster children or foster adults (usually individuals with disabilities, unrelated to the tenant family, who are unable to live alone);

(iii) Lump-sum additions to family assets, such as inheritances, insurance payments (including payments under health and accident insurance and worker's compensation), capital gains, and settlement for personal or property losses (but see paragraph (1)(v) of this definition);

(iv) Amounts received by the family that are specifically for, or in reimbursement of, the cost of medical expenses for any family member;

(v) Income of a live-in aide;

(vi) The full amount of student financial assistance paid directly to the student or to the educational institution;

(vii) The special pay to a family member serving in the Armed Forces who is exposed to hostile fire;

(viii)(A) Amounts received under training programs funded by HUD;

(B) Amounts received by a disabled person that are disregarded for a limited time for purposes of Supplemental Security Income eligibility and benefits because they are set aside for use under a Plan for Achieving Self-Support (PASS);

(C) Amounts received by a participant in other publicly assisted programs that are specifically for or in reimbursement

of out-of-pocket expenses incurred (special equipment, clothing, transportation, child care, etc.) and that are made solely to allow participation in a specific program;

(D) Amounts received under a student service stipend. A resident service stipend is a modest amount (not to exceed \$200 per month) received by an Indian housing resident for performing a service for the IHA, on a part-time basis, that enhances the quality of life in the development. Such services may include, but are not limited to fire patrol, hall monitoring, lawn maintenance and resident initiatives coordination. No resident may receive more than one such stipend during the same period of time.

(E) Incremental earnings and benefits resulting to any family member from the participation in qualifying state or local employment training programs (including training programs not affiliated with local government) and training of a family member as resident management staff. Amounts excluded by this provision must be received under employment training programs with clearly defined goals and objectives and are excluded only for the period during which the family member participates in the employment training.

(ix) Temporary, nonrecurring, or sporadic income (including gifts);

(x) Earnings in excess of \$480 for each full-time student 18 years old or older (excluding the head of household and spouse);

(xi) Adoption assistance payments in excess of \$480 per adopted child;

(xii) The earnings and benefits to any family member resulting from the participation in a program providing employment training and supportive services in accordance with the Family Support Services Act of 1988, section 22 of the 1937 Act, or any comparable Federal, state, tribal, or local law during the exclusion period. For purposes of this paragraph (2)(xii) of this definition, the following definitions apply:

(A) Comparable Federal, state, tribal, or local law means a program providing employment training and supportive services that—

(1) Is authorized by Federal, state, tribal, or local law;

(2) Is funded by Federal, state, tribal, or local government;

(3) Is operated or administered by a public agency; and

(4) Has as its objective to assist participants in acquiring employment skills.

(B) *Exclusion period* means the period during which the family member participates in a program described in this definition, plus 18 months from the

date the family member begins the first job acquired by the family member after completion of such program that is not funded by public housing assistance under the 1937 Act. If the resident is terminated from employment with good cause, the exclusion period shall end.

(C) *Earnings and Benefits* means the incremental earnings and benefits resulting from a qualifying employment training program or subsequent job;

(xiii) Deferred periodic amounts from supplemental security income and social security benefits that are received in a lump sum amount or in prospective monthly amounts;

(xiv) Amounts received by the family in the form of refunds or rebates under state or local law for property taxes on the dwelling unit;

(xv) Amounts paid by a state agency to a family with a developmentally disabled family member living at home to offset the cost of services and equipment needed to keep the developmentally disabled family member at home; or

(xvi) Amounts specifically excluded by any other Federal statute from consideration as income for purposes of determining eligibility or benefits under a category of assistance programs that includes assistance under the 1937 Act. A notice is published from time to time in the **Federal Register** and distributed to recipients identifying the benefits that qualify for this exclusion. Updates will be published and distributed when necessary.

(3) If it is not feasible to anticipate a level of income over a 12-month period, the income anticipated for a shorter period may be annualized subject to a redetermination at the end of the shorter period.

Assistant Secretary means the Assistant Secretary for Public and Indian Housing.

Department or HUD means the Department of Housing and Urban Development.

Family includes, but is not limited to, a family with or without children, an elderly family, a near-elderly family, a disabled family, a single person, as determined by the Indian tribe.

Homeless family means a family who is without safe, sanitary and affordable housing even though it may have temporary shelter provided by the community, or a family who is homeless as determined by the Indian tribe.

IHBG means Indian Housing Block Grant.

Income means annual income as defined in this subpart.

Indian Area means the area within which an Indian tribe operates or a TDHE is authorized by one or more

Indian tribes to provide assistance under NAHASDA for affordable housing. Whenever the term "jurisdiction" is used in NAHASDA it shall mean "Indian Area" except where specific reference is made to the jurisdiction of a court.

Indian Housing Authority (IHA) means an entity that:

(1) Is authorized to engage or assist in the development or operation of low-income housing for Indians under the 1937 Act; and

(2) Is established:

(i) By exercise of the power of self-government of an Indian tribe independent of state law; or

(ii) By operation of state law providing specifically for housing authorities for Indians, including regional housing authorities in the State of Alaska.

NAHASDA means the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*).

1937 Act means the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*)

Office of Native American Programs (ONAP) means the office of HUD which has been delegated authority to administer programs under this part. An "Area ONAP" is an ONAP field office.

Person with Disabilities means a person who—

(1) Has a disability as defined in section 223 of the Social Security Act;

(2) Has a developmental disability as defined in section 102 of the Developmental Disabilities Assistance and Bill of Rights Act;

(3) Has a physical, mental, or emotional impairment which—

(i) Is expected to be of long-continued and indefinite duration;

(ii) Substantially impedes his or her ability to live independently; and

(iii) Is of such a nature that such ability could be improved by more suitable housing conditions.

(4) The term "person with disabilities" includes persons who have the disease of acquired immunodeficiency syndrome or any condition arising from the etiologic agent for acquired immunodeficiency syndrome.

(5) Notwithstanding any other provision of law, no individual shall be considered a person with disabilities, for purposes of eligibility for housing assisted under this part, solely on the basis of any drug or alcohol dependence. The Secretary shall consult with Indian tribes and appropriate Federal agencies to implement this paragraph.

(6) For purposes of this definition, the term "physical, mental or emotional

impairment" has the same meaning as an "individual with handicaps" set forth at 24 CFR 8.3, which includes, but is not limited to:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological condition, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(iii) The term "physical, mental, or emotional impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction and alcoholism.

Total development cost. The sum of all HUD-approved costs for a project including all undertakings necessary for administration, planning, site acquisition, demolition, construction or equipment and financing (including the payment of carrying charges), and for otherwise carrying out the development of the project. The maximum total development cost excludes off-site water and sewer facilities development costs; costs normally paid for by other entities, but included in the development cost budget for the project for contracting or accounting convenience; and any donations received from public or private sources.

§ 1000.12 What nondiscrimination requirements are applicable?

(a) The requirements of the Age Discrimination Act of 1975 (42 U.S.C. 6101–6107) and HUD's implementing regulations in 24 CFR part 146.

(b) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and HUD's regulations at 24 CFR part 8 apply.

(c) Title II of the Civil Rights Act of 1968 (25 U.S.C. 1301–1303), to the extent that such title is applicable, and other applicable Federal civil rights statutes. Title II provides that no Indian tribe, in exercising powers of self government, shall deny to any person within its jurisdiction equal protection of its laws or deprive any person of liberty or property without due process of law.

(d) In accordance with section 201(b)(5) of NAHASDA, title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*) do not apply to actions by Indian tribes under section 201(b) of NAHASDA.

§ 1000.14 What relocation and real property acquisition policies are applicable?

The following relocation and real property acquisition policies are applicable to programs developed or operated under NAHASDA:

(a) *Real Property acquisition requirements.* The acquisition of real property for an assisted activity is subject to 49 CFR part 24, subpart B. Whenever the recipient does not have the authority to acquire the real property through condemnation, it shall:

(1) Before discussing the purchase price, inform the owner:

(i) Of the amount it believes to be the fair market value of the property. Such amount shall be based upon one or more appraisals prepared by a qualified appraiser. However, this provision does not prevent the recipient from accepting a donation or purchasing the real property at less than its fair market value.

(ii) That it will be unable to acquire the property if negotiations fail to result in an amicable agreement.

(2) Request HUD approval of the proposed acquisition price before executing a firm commitment to purchase the property if the proposed acquisition payment exceeds the fair market value. The recipient shall include with its request a copy of the appraisal(s) and a justification for the proposed acquisition payment. HUD will promptly review the proposal and inform the recipient of its approval or disapproval.

(b) *Minimize displacement.* Consistent with the other goals and objectives of this part, recipients shall assure that they have taken all reasonable steps to minimize the displacement of persons (households, businesses, nonprofit organizations, and farms) as a result of a project assisted under this part.

(c) *Temporary relocation.* The following policies cover residential tenants and homebuyers who will not be required to move permanently but who must relocate temporarily for the project. Such residential tenants and homebuyers shall be provided:

(1) Reimbursement for all reasonable out-of-pocket expenses incurred in connection with the temporary relocation, including the cost of moving to and from the temporarily occupied

housing and any increase in monthly housing costs (e.g., rent/utility costs).

(2) Appropriate advisory services, including reasonable advance written notice of:

(i) The date and approximate duration of the temporary relocation;

(ii) The location of the suitable, decent, safe and sanitary dwelling to be made available for the temporary period;

(iii) The terms and conditions under which the tenant may occupy a suitable, decent, safe, and sanitary dwelling in the building/complex following completion of the repairs; and

(iv) The provisions of paragraph (c)(1) of this section.

(d) *Relocation assistance for displaced persons.* A displaced person (defined in paragraph (g) of this section) must be provided relocation assistance at the levels described in, and in accordance with the requirements of, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (URA)(42 U.S.C. 4601-4655) and implementing regulations at 49 CFR part 24.

(e) *Appeals to the recipient.* A person who disagrees with the recipient's determination concerning whether the person qualifies as a "displaced person," or the amount of relocation assistance for which the person is eligible, may file a written appeal of that determination with the recipient.

(f) *Responsibility of recipient.* (1) The recipient shall certify that it will comply with the URA, the regulations at 49 CFR part 24, and the requirements of this section. The recipient shall ensure such compliance notwithstanding any third party's contractual obligation to the recipient to comply with the provisions cited in this paragraph.

(2) The cost of required relocation assistance is an eligible project cost in the same manner and to the same extent as other project costs. However, such assistance may also be paid for with funds available to the recipient from any other source.

(3) The recipient shall maintain records in sufficient detail to demonstrate compliance with this section.

(g) *Definition of displaced person.* (1) For purposes of this section, the term "displaced person" means any person (household, business, nonprofit organization, or farm) that moves from real property, or moves his or her personal property from real property, permanently, as a direct result of rehabilitation, demolition, or acquisition for a project assisted under this part. The term "displaced person" includes, but is not limited to:

(i) A tenant-occupant of a dwelling unit who moves from the building/complex permanently after the submission to HUD of an IHP that is later approved.

(ii) Any person, including a person who moves before the date described in paragraph (g)(1)(i) of this section, that the recipient determines was displaced as a direct result of acquisition, rehabilitation, or demolition for the assisted project.

(iii) A tenant-occupant of a dwelling unit who moves from the building/complex, permanently, after the execution of the agreement between the recipient and HUD, if the move occurs before the tenant is provided written notice offering him or her the opportunity to lease and occupy a suitable, decent, safe and sanitary dwelling in the same building/complex, under reasonable terms and conditions, upon completion of the project. Such reasonable terms and conditions include a monthly rent and estimated average monthly utility costs that do not exceed the greater of:

(A) The tenant-occupant's monthly rent and estimated average monthly utility costs before the agreement; or

(B) 30 percent of gross household income.

(iv) A tenant-occupant of a dwelling who is required to relocate temporarily, but does not return to the building/complex, if either:

(A) The tenant-occupant is not offered payment for all reasonable out-of-pocket expenses incurred in connection with the temporary relocation, including the cost of moving to and from the temporarily occupied unit, any increased housing costs and incidental expenses; or

(B) Other conditions of the temporary relocation are not reasonable.

(v) A tenant-occupant of a dwelling who moves from the building/complex after he or she has been required to move to another dwelling unit in the same building/complex in order to carry out the project, if either:

(A) The tenant-occupant is not offered reimbursement for all reasonable out-of-pocket expenses incurred in connection with the move; or

(B) Other conditions of the move are not reasonable.

(2) Notwithstanding the provisions of paragraph (g)(1) of this section, a person does not qualify as a "displaced person" (and is not eligible for relocation assistance under the URA or this section), if:

(i) The person moved into the property after the submission of the IHP to HUD, but, before signing a lease or commencing occupancy, was provided

written notice of the project, its possible impact on the person (e.g., the person may be displaced, temporarily relocated or suffer a rent increase) and the fact that the person would not qualify as a "displaced person" or for any assistance provided under this section as a result of the project.

(ii) The person is ineligible under 49 CFR 24.2(g)(2).

(iii) The recipient determines the person is not displaced as a direct result of acquisition, rehabilitation, or demolition for an assisted project. To exclude a person on this basis, HUD must concur in that determination.

(3) A recipient may at any time ask HUD to determine whether a specific displacement is or would be covered under this section.

(h) *Definition of initiation of negotiations.* For purposes of determining the formula for computing the replacement housing assistance to be provided to a person displaced as a direct result of rehabilitation or demolition of the real property, the term "initiation of negotiations" means the execution of the agreement covering the rehabilitation or demolition (See 49 CFR part 24).

§ 1000.16 What labor standards are applicable?

(a) As described in section 104(b) of NAHASDA, contracts and agreements for assistance, sale or lease under NAHASDA must require prevailing wage rates determined under the Davis-Bacon Act (40 U.S.C. 276a-276a-5) to be paid to laborers and mechanics employed in the development of affordable housing projects. Section 104(b) also mandates that these contracts and agreements require that prevailing wages determined by HUD shall be paid to maintenance laborers and mechanics employed in the operation, and to architects, technical engineers, draftsmen and technicians employed in the development, of such projects.

(b) The requirements in 24 CFR part 70 concerning exemptions for the use of volunteers on projects subject to Davis-Bacon and HUD-determined wage rates are applicable.

§ 1000.18 What environmental review requirements apply?

The environmental effects of each activity carried out with assistance under this part must be evaluated in accordance with the provisions of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321) and the related authorities listed in HUD's implementing regulations at 24 CFR parts 50 and 58.

§ 1000.20 Is an Indian tribe required to assume environmental review responsibilities?

(a) No. It is an option an Indian tribe may choose. If an Indian tribe declines to assume the environmental review responsibilities, HUD will perform the environmental review in accordance with 24 CFR part 50. The timing of HUD undertaking the environmental review will be subject to the availability of resources. A HUD environmental review must be completed for any activities not excluded from review under 24 CFR 50.19(b) before a recipient may acquire, rehabilitate, convert, lease, repair or construct property, or commit HUD or local funds to such activities with respect to the property.

(b) If an Indian tribe assumes environmental review responsibilities:

(1) Its certifying officer must certify that he/she is authorized and consents on behalf of the Indian tribe and such officer to accept the jurisdiction of the Federal courts for the purpose of enforcement of the responsibilities of the certifying officer as set forth in section 105(c) of NAHASDA; and

(2) The Indian tribe must follow the requirements of 24 CFR part 58.

(3) No funds may be committed to a grant activity or project before the completion of the environmental review and approval of the request for release of funds and related certification required by sections 105(b) and 105(c) of NAHASDA, except as authorized by 24 CFR part 58.

§ 1000.22 Are the costs of the environmental review an eligible cost?

Yes, costs of completing the environmental review are eligible costs.

§ 1000.24 If an Indian tribe assumes environmental review responsibility, how will HUD assist the Indian tribe in performing the environmental review?

As set forth in section 105(a)(2)(B) of NAHASDA and 24 CFR 58.77, HUD will provide for monitoring of environmental reviews and will also facilitate training for the performance for such reviews by Indian tribes.

§ 1000.26 What are the administrative requirements under NAHASDA?

Except as specified in this part, the uniform administrative requirements for grants and cooperative agreements set forth in 24 CFR part 85 are applicable to grants under this part. In the event that there are conflicts between the requirements of part 85 and the requirements of this part, the requirements of this part shall govern.

§ 1000.28 May a self-governance Indian tribe be exempted from the applicability of 24 CFR part 85?

A self-governance Indian tribe may request that it be exempt from 24 CFR part 85 and instead follow its own laws, regulations, administrative requirements, standards and systems. Upon receipt of such written request, HUD shall conduct a timely review of the Indian tribe's administrative requirements, standards and systems to determine if they fulfill the fundamental purposes of 24 CFR part 85. If so, the Indian tribe will be obligated to follow its own laws, regulations and policies. If HUD determines that the Indian tribe must comply with part 85, the Indian tribe may ask for a redetermination from HUD.

§ 1000.30 What prohibitions regarding conflict of interest are applicable?

(a) *Applicability.* In the procurement of supplies, equipment, other property, construction and services by recipients and subrecipients, the conflict of interest provisions of 24 CFR 85.36 or 24 CFR 84.42 (as applicable) shall apply. In all cases not governed by 24 CFR 85.36 or 24 CFR 84.42, the provisions of this part shall apply.

(b) *Conflicts Prohibited.* No person who participates in the decision-making process or who gains inside information with regard to NAHASDA assisted activities may obtain a personal or financial interest or benefit from such activities, except for the use of NAHASDA funds to pay salaries or other related administrative costs. Such persons include anyone with an interest in any contract, subcontract or agreement or proceeds thereunder, either for themselves or others with whom they have business or family ties.

§ 1000.32 May exceptions be made to the conflict of interest provisions?

(a) Yes. HUD may make exceptions to the conflict of interest provisions set forth in § 1000.30(b) on a case-by-case basis when it determines that such an exception would further the primary objective of NAHASDA and the effective and efficient administration or implementation of the recipient's program, activity, or project.

(b) A public disclosure of the conflict must be made and a determination that the exception would not violate tribal laws on conflict of interest (or any applicable state laws) must also be made.

§ 1000.34 What factors must be considered in making an exception to the conflict of interest provisions?

The following factors must be considered.

(a) Whether undue hardship will result, either to the recipient or to the person affected, when weighed against the public interest served by avoiding the prohibited conflict. In evaluating the hardship which would result to the person affected, HUD will consider if the person is a member of a group or class of intended beneficiaries of the assisted activities and if they would receive generally the same benefits as would be provided to the group as a class.

(b) Whether the exception would provide a significant cost benefit or essential expert knowledge to the program, activity, or project which would otherwise not be available.

(c) Whether an opportunity was provided for open competitive bidding or negotiations.

(d) Any other relevant considerations.

§ 1000.36 How long must a recipient retain records regarding exceptions made to the conflict of interest provisions?

A recipient must maintain all such records for a period of at least 5 years after an exception is made.

§ 1000.38 What flood insurance requirements are applicable?

Under the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001-4128), a recipient may not permit the use of Federal financial assistance for acquisition and construction purposes (including rehabilitation) in an area identified by the Federal Emergency Management Agency (FEMA) as having special flood hazards, unless the following conditions are met:

(a) The community in which the area is situated is participating in the National Flood Insurance Program in accord with section 202(a) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4106(a)), or less than a year has passed since FEMA notification regarding such flood hazards. For this purpose, the "community" is the governmental entity, such as an Indian tribe or authorized tribal organization, an Alaska Native village, or authorized Native organization, or a municipality or county, that has authority to adopt and enforce flood plain management regulations for the area; and

(b) Where the community is participating in the National Flood Insurance Program, flood insurance on the building is obtained in compliance with section 102(a) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012a(a)).

§ 1000.40 Do lead-based paint poisoning prevention requirements apply to affordable housing activities under NAHASDA?

Yes, the provisions of 24 CFR part 35 which provide lead-based paint poisoning prevention requirements are applicable.

§ 1000.42 Are the requirements of section 3 of the Housing and Urban Development Act of 1968 applicable?

Yes. Recipients shall comply with section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u) and HUD's implementing regulations in 24 CFR part 135, to the maximum extent feasible and consistent with, but not in derogation of, compliance with section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)). The purpose of Section 3 is to ensure that employment and other economic opportunities generated by certain HUD financial assistance for housing (including public and Indian housing) shall, to the greatest extent feasible, and consistent with existing Federal, state, and local laws and regulations, be directed to low-and very low-income persons, particularly those who are recipients of government assistance for housing, and to business concerns which provide economic opportunities to low-and very low-income persons residing in the area where the work is to be performed.

§ 1000.44 What prohibitions on the use of debarred, suspended or ineligible contractors apply?

The prohibitions in 24 CFR part 24 on the use of debarred, suspended or ineligible contractors apply.

§ 1000.46 Do drug-free workplace requirements apply?

Yes, the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*) and HUD's implementing regulations in 24 CFR part 24 apply.

Subpart B—Affordable Housing Activities

§ 1000.101 What is affordable housing?

Affordable housing is defined in section 4(2) of NAHASDA and is described in title II of NAHASDA.

§ 1000.102 What are eligible affordable housing activities?

Eligible affordable housing activities are those described in section 202 of NAHASDA.

§ 1000.104 What families are eligible for affordable housing activities?

The following families are eligible for affordable housing activities:

(a) Low income Indian families on a reservation or Indian area.

(b) A non-low income Indian family may receive housing assistance in accordance with § 1000.118. Non-low income Indian families currently residing in housing assisted under the 1937 Act are presumed to have met the requirements of this section, absent evidence to the contrary.

(c) A non-Indian family may receive housing assistance on a reservation or Indian area if the non-Indian family's housing needs cannot be reasonably met without such assistance and the recipient determines that the presence of that family on the reservation or Indian area is essential to the well-being of Indian families. Non-Indian families currently residing in housing assisted under the 1937 Act are presumed to have met the requirements of this section, absent evidence to the contrary.

§ 1000.106 What activities under title II of NAHASDA require HUD approval?

(a) Activities under NAHASDA sections 201(b)(2) (Housing for non-low income Indian families) and 202(6) (Model activities), require HUD approval.

(b) Activities under section 201(b)(3) of NAHASDA for non-Indian families do not require HUD approval but only require that the recipient determine that the presence of that family on the reservation or Indian area is essential to the well-being of Indian families and the non-Indian family's housing needs cannot be reasonably met without such assistance.

§ 1000.108 How is HUD approval obtained by a recipient for housing for non low-income Indian families and model activities?

Recipients are required to submit proposals to operate model housing activities or other housing programs as defined in NAHASDA sections 201(b)(2) and 202(6) for non low-income families. Proposals may be submitted in the recipient's IHP one year plan or at any time by amendment of the IHP, or by special request to HUD at any time.

§ 1000.110 How will HUD determine whether to approve model housing activities or other housing programs?

HUD will review all proposals with the goal of approving the program and encouraging the flexibility, discretion, and self-determination granted to Indian tribes under NAHASDA to formulate and operate innovative housing programs that meet the intent of NAHASDA.

§ 1000.112 How long does HUD have to review and act on a model housing activity or other housing program proposal?

Whether submitted in the IHP one year plan or at any other time by amendment, HUD will have sixty days after receiving the proposal to notify the recipient that the proposal for model activities or other housing programs is approved or disapproved. If no decision is made by HUD within sixty days of receiving the proposal, the proposal is deemed to have been approved by HUD.

§ 1000.114 What should HUD do before declining a model housing activity or other housing program?

HUD shall consult with a recipient regarding the recipient's model housing activity or other housing program before disapproval. To the extent resources are available, HUD shall provide technical assistance to the recipient in amending and modifying the proposal if necessary. In case of a denial, HUD shall give the specific reasons for the denial.

§ 1000.116 What recourse does a recipient have if HUD disapproves a model housing activity or other program?

(a) Within thirty days of receiving HUD's denial of a model housing activity or other program, the recipient may request reconsideration of the denial, in writing. The request shall set forth justification for the reconsideration.

(b) Within twenty-one days of receiving the request, HUD shall reconsider the recipient's request and either affirm or reverse its initial decision in writing, setting forth its reasons for the decision. If the decision was made by the Assistant Secretary, the decision will constitute final agency action. If the decision was made at a lower level, then paragraphs (c) and (d) of this section will apply.

(c) The recipient may appeal any denial of reconsideration by filing an appeal with the Assistant Secretary within twenty days of receiving the denial. The appeal shall set forth the reasons why the recipient does not agree with HUD's decision and set forth justification for the reconsideration.

(d) Within twenty days of receipt of the appeal, the Assistant Secretary shall review the recipient's appeal and act on the appeal, setting forth the reasons for the decision.

§ 1000.118 Under what conditions may non low-income Indian families participate in the program?

(a) A recipient may provide the following types of assistance to non low-income Indian families under the conditions specified in paragraphs (b), (c) and (d) of this section:

(1) Homeownership activities under section 202(2) of NAHASDA;

(2) Model activities under section 202(6) of NAHASDA; and

(3) Loan guarantee activities under title VI of NAHASDA.

(b) A recipient must demonstrate to HUD that there is a need for housing for each family which cannot reasonably be met without such assistance. HUD shall make approvals consistent with the intent of NAHASDA.

(c) A recipient may use up to ten percent of the recipient's annual grant amount for families whose income falls within 80 to 100% of the median income without HUD approval. HUD approval is required if a recipient plans to use more than ten percent of its annual grant amount for such assistance or to provide housing for families over 100% of median income.

(d) The non low-income Indian family must pay back, at a minimum:

(1) The amount a low income family at 80% median income is paying back for the assistance; plus

(2) The fair market value of the assistance multiplied by the percentage by which the income of the non-low income Indian family exceeds 80% of median income.

§ 1000.120 May a recipient use Indian preference or tribal preference in selecting families for housing assistance?

Yes. The IHP may set out a preference for the provision of housing assistance to Indian families who are members of the Indian tribe or to other Indian families if the recipient has adopted the preference in its admissions policy. The recipient shall ensure that housing activities funded under NAHASDA are subject to the preference.

§ 1000.122 May NAHASDA grant funds be used as matching funds to obtain and leverage funding, including any federal or state program and still be considered an affordable housing activity?

There is no prohibition in NAHASDA against using grant funds as matching funds.

§ 1000.124 What is the maximum and minimum rent or homebuyer payment a recipient can charge a low-income rental tenant or homebuyer?

A recipient can charge a low-income rental tenant or homebuyer payments not to exceed thirty percent (30%) of the adjusted income of the family. The recipient may also decide to compute its rental and homebuyer payments on any lesser percentage of adjusted income of the family.

§ 1000.126 May a recipient charge flat or income-adjusted rents?

Yes, providing rental or homebuyer payment of the low-income family does not exceed thirty percent (30%) of the family's adjusted income.

§ 1000.128 Is income verification required for assistance under NAHASDA?

(a) Yes, the recipient must verify that the family is income eligible based on anticipated annual income. The family is required to provide documentation to verify this determination. The recipient is required to maintain the documentation on which the determination of eligibility is based.

(b) The recipient may require a family to periodically verify its income in order to determine housing payments or continued occupancy consistent with locally adopted policies. When income verification is required, the family must provide documentation which verifies its income, and this documentation must be retained by the recipient.

§ 1000.130 May a recipient charge a non low-income family rents or homebuyer payments which are more than 30% of the family's adjusted income?

Yes. A recipient may charge a non low-income family rents or homebuyer payments which are more than 30% of the family's adjusted income.

§ 1000.132 Are utilities considered a part of rent or homebuyer payments?

Utilities may be considered a part of rent or homebuyer payments if a recipient decides to define rent or homebuyer payments to include utilities in its written policies on rents and homebuyer payments required by section 203(a)(1) of NAHASDA. A recipient may define rents and homebuyer payments to exclude utilities.

§ 1000.134 When may a recipient (or entity funded by a recipient) demolish or dispose of Indian housing units owned or operated pursuant to an ACC?

(a) A recipient (or entity funded by a recipient) may undertake a planned demolition or disposal of Indian housing units owned or operated pursuant to an ACC when:

(1) The recipient has performed a financial analysis demonstrating that it is more cost-effective or housing program-effective for the recipient to demolish or dispose of the unit than to continue to operate or own it;

(2) The housing unit has been condemned by the government which has authority over the unit;

(3) The housing unit is an imminent threat to the health and safety of housing residents; or

(4) Continued habitation of a housing unit is inadvisable due to cultural or historical considerations.

(b) The recipient cannot take any action to demolish or dispose of the property other than performing the analysis cited in paragraph (a) of this section until HUD has been notified in writing of the recipient's intent to demolish or dispose of the housing units consistent with section 102(c)(4)(H) of NAHASDA. The written notification must set out the recipient's analysis used to arrive at the decision to demolish or dispose of the property and may be set out in a recipient's IHP or in a separate submission to HUD.

(c) In any disposition sale of a housing unit, the recipient will use a sale process designed to maximize the sale price. The sale proceeds from the disposition of any housing unit are program income under NAHASDA and must be used in accordance with the requirements of NAHASDA and this part.

§ 1000.136 What insurance requirements apply to housing units assisted with NAHASDA grants?

(a) The recipient shall provide adequate insurance either by purchasing insurance or by indemnification against casualty loss by providing insurance in adequate amounts to indemnify the recipient against loss from fire, weather, and liability claims for all housing units owned or operated by the recipient. These requirements are in addition to applicable flood insurance requirements under § 1000.38.

(b) The recipients shall not require insurance (other than flood insurance where required under § 1000.38) on units assisted by grants to families for privately owned housing if there is no risk of loss or exposure to the recipient or if the assistance is in an amount less than \$5000, but will require insurance when repayment of all or part of the assistance is part of the assistance agreement.

(c) The recipient shall require contractors and subcontractors to either provide insurance covering their activities or negotiate adequate indemnification coverage to be provided by the recipient in the contract.

§ 1000.138 What constitutes adequate insurance?

Insurance is adequate if it is a purchased insurance policy from an insurance provider or a plan of self-insurance in an amount that will protect the financial stability of the recipient's IHBG program.

§ 1000.140 May a recipient use grant funds to purchase insurance for privately owned housing to protect NAHASDA grant amounts spent on that housing?

Yes. All purchases of insurance must be in accord with §§ 1000.136 and 1000.138.

§ 1000.142 What is the "useful life" during which low-income rental housing and low-income homebuyer housing must remain affordable as required in sections 205(a)(2) and 209 of NAHASDA?

Each recipient shall describe in its IHP for Secretarial determination the useful life of each assisted housing unit in each of its developments.

§ 1000.144 Are Mutual Help homes developed before NAHASDA subject to the useful life provisions of section 205(a)(2)?

No.

§ 1000.146 Is a homebuyer required to remain low-income throughout the term of their participation in a housing program funded under NAHASDA?

No. The low income eligibility requirement applies only at the time of purchase.

§ 1000.148 What law will an owner or manager follow in providing adequate written notice of eviction or termination of a lease?

Section 207(a) of NAHASDA requires that the owner or manager give adequate written notice of termination of the lease, in accordance with the period of time required under State, tribal, or local law. Notwithstanding any State, tribal, or local law, the notice must inform the resident of the opportunity, prior to any hearing or trial, to examine any relevant documents, records, or regulations directly related to the eviction or termination.

§ 1000.150 How may Indian tribes and TDHEs receive criminal conviction information on adult applicants or tenants?

(a) As required by section 208 of NAHASDA, the National Crime Information Center, police departments, and other law enforcement agencies shall provide criminal conviction information to Indian tribes and TDHEs upon request. Information regarding juveniles shall only be released to the extent such release is authorized by the law of the applicable state, Indian tribe or locality.

(b) For purposes of this section, the term "tenants" includes homebuyers who are purchasing a home pursuant to a lease-purchase agreement.

§ 1000.152 How is the recipient to use criminal conviction information?

The recipient shall use the criminal conviction information described in § 1000.150 only for applicant screening,

lease enforcement and eviction actions. The information may be disclosed only to any person who has a job related need for the information and who is an officer, employee, or authorized representative of the recipient or the owner of housing assisted under NAHASDA.

§ 1000.154 How is the recipient to keep criminal conviction information confidential?

(a) The recipient will keep all the criminal conviction record information it receives from the official law enforcement agencies listed in § 1000.150 in files separate from all other housing records.

(b) These criminal conviction records will be kept under lock and key and be under the custody and control of the recipient's housing executive director/lead official and/or his designee for such records.

(c) These criminal conviction records may only be accessed with the written permission of the Indian tribe's or TDHE's housing executive director/lead official or his designee and are only to be used for the purposes stated in section 208 of NAHASDA and the regulations in this part.

§ 1000.156 What housing development cost limits are applicable to ensure modest housing construction under NAHASDA?

Unless approved by HUD, the total development cost (TDC) per unit will be no more than 100% of the TDC. HUD will make every effort to ensure that TDC accurately reflects the cost of construction. TDC shall include the costs of making a project meet the accessibility requirements of 24 CFR 8.22 and 24 CFR 8.23 for new construction and alterations of existing housing facilities.

Subpart C—Indian Housing Plan (IHP)

§ 1000.201 How are funds made available under NAHASDA?

Every fiscal year HUD will make grants under the IHBG program to Indian tribes or their designated recipients who have submitted to HUD for that fiscal year an IHP in accordance with § 1000.212 to carry out affordable housing activities.

§ 1000.202 Who are eligible recipients?

Eligible recipients are Indian tribes, or TDHEs when authorized by one or more tribes.

§ 1000.204 How does an Indian tribe designate itself as a recipient of the grant?

(a) By resolution of the Indian tribe; or

(b) When such authority has been delegated by an Indian tribe's governing

body to a tribal committee(s), by resolution or other written form used by such committee(s) to memorialize the decisions of that body, if applicable.

§ 1000.206 How is a TDHE designated?

(a)(1) By resolution of the Indian tribe or Indian tribes to be served; or

(2) When such authority has been delegated by an Indian tribe's governing body to a tribal committee(s), by resolution or other written form used by such committee(s) to memorialize the decisions of that body, if applicable.

(b) In the absence of a designation by the Indian tribe, the default designation as provided in section 4(21) of NAHASDA shall apply.

§ 1000.208 Is submission of an IHP required?

Yes. An Indian tribe or, with the consent of its Indian tribe(s), the TDHE, must submit an IHP to HUD to receive funding under NAHASDA, except as provided in section 101(b)(2) of NAHASDA.

§ 1000.210 Who prepares and submits an IHP?

An Indian tribe, or with the authorization of an Indian tribe, in accordance with section 102(d) of NAHASDA a TDHE may prepare and submit a plan to HUD.

§ 1000.212 What are the minimum requirements for the IHP?

The minimum IHP requirements are set forth in sections 102(b) and 102(c) of NAHASDA. Recipients are only required to provide IHPs that contain these minimum elements in a form prescribed by HUD. However, Indian tribes are encouraged to perform comprehensive housing needs assessments and develop comprehensive IHPs and not limit their planning process to only those housing efforts funded by NAHASDA. An IHP should be locally driven.

§ 1000.214100 Are there separate IHP requirements for small Indian tribes?

No. HUD requirements for IHPs are minimal and HUD has general authority under section 101(b)(2) of NAHASDA to waive the IHP requirements when an Indian tribe cannot comply with IHP requirements due to circumstances beyond its control. The waiver authority under section 101(b)(2) of NAHASDA provides flexibility to address the needs of every Indian tribe, including small Indian tribes.

§ 1000.216 Can the certification requirements of section 102(c)(5) of NAHASDA be waived by HUD?

Yes, HUD may waive these certification requirements as provided

in section 101(b)(2) of NAHASDA. Recipients granted such a waiver must still comply with the nondiscrimination requirements set forth in § 1000.12.

§ 1000.218 If HUD changes its IHP format will Indian tribes be involved?

Yes. HUD will first consult with Indian tribes before making any substantial changes to HUD's IHP format.

§ 1000.220 What is the process for HUD review of IHPs and IHP amendments?

HUD will conduct the IHP review in the following manner:

(a) HUD will conduct a limited review of the IHP to ensure that its contents:

(1) Comply with the requirements of section 102 of NAHASDA which outlines the IHP submission requirements;

(2) Are consistent with information and data available to HUD;

(3) Are not prohibited by or inconsistent with any provision of NAHASDA or other applicable law; and

(4) Include the appropriate certifications.

(b) If the IHP complies with the provisions of paragraphs (a)(1), (a)(2), and (a)(3) of this section, HUD will notify the recipient of IHP compliance within 60 days after receiving the IHP. If HUD fails to notify the recipient, the IHP shall be considered to be in compliance with the requirements of section 102 of NAHASDA and the IHP is approved.

(c) If the submitted IHP does not comply with the provisions of paragraphs (a)(1), (a)(2), and (a)(3) of this section, HUD will notify the recipient of the determination of non-compliance. HUD will provide this notice no later than 60 days after receiving the IHP. This notice will set forth:

(1) The reasons for noncompliance;

(2) The modifications necessary for the IHP to meet the submission requirements; and

(3) The date by which the revised IHP must be submitted.

(d) If the recipient does not submit a revised IHP by the date indicated in the notice provided under paragraph (c) of this section, the IHP will be determined by HUD to be in non-compliance unless a waiver is approved under section 101(b)(2) of NAHASDA. If the IHP is determined by HUD to be in non-compliance and no waiver is granted, the recipient may appeal this determination following the appeal process in § 1000.224.

(e)(1) If the IHP does not contain the certifications identified in paragraph (a)(4) of this section, the recipient will

be notified within 60 days of submission of the IHP that the plan is incomplete. The notification will include a date by which the certifications must be submitted.

(2) If the recipient has not complied or cannot comply with the certification requirements due to circumstances beyond the control of the Indian tribe(s), within the timeframe established, the recipient can request a waiver in accordance with section 101(b)(2) of NAHASDA. If the waiver is approved, the recipient is eligible to receive its grant in accordance with any conditions of the waiver.

§ 1000.222 Can an Indian tribe or TDHE amend its IHP?

Yes. Section 103(c) of the NAHASDA specifically provides that a recipient may submit modifications or revisions of their IHP to HUD for review and determination of compliance. Unless the initial IHP certification provided by an Indian tribe allowed for the submission of IHP amendments without further tribal certifications, a tribal certification must accompany submission of IHP amendments by a TDHE to HUD. HUD will consider modifications to the IHP in accordance with § 1000.220. HUD will act on amended IHPs within 60 days.

§ 1000.224 Can HUD's determination regarding the non-compliance of an IHP or a modification to an IHP be appealed?

(a) Yes. Within 30 days of receiving HUD's disapproval of an IHP or of a modification to an IHP, the recipient may submit a written request for reconsideration of the determination. The request shall include the justification for the reconsideration.

(b) Within 21 days of receiving the request, HUD shall reconsider its initial determination and provide the recipient with written notice of its decision to affirm, modify, or reverse its initial determination. This notice will also contain the reasons for HUD's decision.

(c) The recipient may appeal any denial of reconsideration by filing an appeal with the Assistant Secretary within 21 days of receiving the denial. The appeal shall set forth the reasons why the recipient does not agree with HUD's decision and include justification for the reconsideration.

(d) Within 21 days of receipt of the appeal, the Assistant Secretary shall review the recipient's appeal and act on the appeal. The Assistant Secretary will provide written notice to the recipient setting forth the reasons for the decision. The Assistant Secretary's decision constitutes final agency action.

§ 1000.226 What are eligible administrative and planning expenses?

Eligible administrative and planning expenses of the IHBG program include, but are not limited to:

(a) Costs of overall program management;

(b) Coordination monitoring and evaluation;

(c) Preparation of the IHP;

(d) Preparation of the annual performance report; and

(e) Collection of data for purposes of challenging data used in the IHBG formula (see § 1000.320(a)).

§ 1000.228 When is a local cooperation agreement required for affordable housing activities?

The requirement for a local cooperation agreement applies to assistance of rental and lease-purchase homeownership units under the 1937 Act or NAHASDA which are owned by the Indian tribe or TDHE.

§ 1000.230 When does the requirement for exemption from taxation apply to affordable housing activities?

The requirement for exemption from taxation applies only to assistance of rental and lease-purchase homeownership units under the 1937 Act or NAHASDA which are owned by the Indian tribe or TDHE.

Subpart D—Allocation Formula

§ 1000.301 What is the purpose of the IHBG formula?

The IHBG formula is used to allocate equitably and fairly funds made available through NAHASDA among eligible Indian tribes. A TDHE may be a recipient on behalf of an Indian tribe.

§ 1000.302 What are the definitions applicable for the IHBG formula?

Allowable Expense Level (AEL) factor.

In rental projects, AEL is the per-unit per-month dollar amount of expenses (excluding utilities and expenses allowed under § 950.715) computed in accordance with § 950.710 which is used to compute the amount of operating subsidy. The "AEL factor" is the relative difference between a local area AEL and the national weighted average for AEL.

Annual Income. For purposes of the IHBG formula, annual income is a household's total income as defined by the U.S. Census Bureau.

Date of Full Availability (DOFA) means the last day of the month in which substantially all the units in a housing development are available for occupancy.

Fair Market Rent (FMR) factors are gross rent estimates; they include

shelter rent plus the cost of all utilities, except telephones. HUD estimates FMRs on an annual basis for 354 metropolitan FMR areas and 2,355 nonmetropolitan county FMR areas. The "FMR factor" is the relative difference between a local area FMR and the national weighted average for FMR.

Formula area is the geographic area over which the Indian tribe exercises jurisdiction or for which an Indian tribe or TDHE has an executed local cooperation agreement. The term "*Formula area*" includes, but is not limited to:

- (1) A reservation;
- (2) Trust land;
- (3) Alaska Native Village Statistical Area;
- (4) Alaska Native Claims Settlement Act Corporation Service Area;
- (5) Tribal Jurisdictional Statistical Area;
- (6) Tribal Designated Statistical Area;
- (7) Former Indian Reservation Areas in Oklahoma;
- (8) Congressionally Mandated Service Area; and
- (9) Department of the Interior Near-Reservation Service Area.

Indian Housing Authority (IHA) financed means a homeownership program where title rests with the homebuyer and a security interest rests with the IHA.

Mutual Help Occupancy Agreement (MHOA) means a lease with option to purchase contract between an IHA and a homebuyer.

Overcrowded means households with more than 1.01 persons per room as defined by the U.S. Decennial Census.

Section 8 means the making of housing assistance payments to eligible families leasing existing housing pursuant to the provisions of the 1937 Act.

Section 8 unit means the contract annualized housing assistance payments (certificates, vouchers, and project based) under the Section 8 program.

Without kitchen or plumbing means, as defined by the U.S. Decennial Census, an occupied house without one or more of the following items:

- (1) Hot and cold piped water;
- (2) A flush toilet;
- (3) A bathtub or shower;
- (4) A sink with piped water;
- (5) A range or cookstove; or
- (6) A refrigerator.

§ 1000.304 May the IHBG formula be modified?

Yes, as long as any modification does not conflict with the requirements of NAHASDA. The formula may be modified:

- (a) Upon development of a set of measurable and verifiable data directly

related to Native American housing need. Any data set developed shall be compiled with the consultation and involvement of Indian tribes and examined and/or implemented not later than 5 years from the date of issuance of these regulations and periodically thereafter; or

(b) If it is determined by HUD that subsidy is needed to operate and maintain NAHASDA units.

§ 1000.306 Who can make modifications to the IHBG formula?

HUD can make modifications in accordance with § 1000.304 provided that any changes proposed by HUD are published and made available for public comment in accordance with applicable law before their implementation.

§ 1000.308 What are the components of the IHBG formula?

The IHBG formula consists of three components:

- (a) Need;
- (b) Formula Current Assisted Housing Stock (CAS); and
- (c) Section 8.

§ 1000.310 How is the need component developed?

The need component consists of seven criteria. They are:

- (a) American Indian and Alaskan Native (AIAN) Households with housing cost burden greater than 50% of annual income;
- (b) AIAN Households which are overcrowded or without kitchen or plumbing;
- (c) Housing Shortage which is the number of AIAN households with an annual income less than 80% of median income reduced by the combination of current assisted stock and units developed under NAHASDA;
- (d) AIAN households with annual income less than 30% of median income;
- (e) AIAN households with annual income between 30% and 50% of median income;
- (f) AIAN households with annual income between 50% and 80% of median income;
- (g) AIAN persons.

§ 1000.312 What if a formula area is served by more than one Indian tribe?

(a) If an Indian tribe's formula area overlaps with the formula area of one or more other Indian tribes, the funds allocated to that Indian tribe for the geographic area in which the formula areas overlap will be divided based on:

- (1) The Indian tribe's proportional share of the population in the overlapping geographic area; and

(2) The Indian tribe's commitment to serve that proportional share of the population in such geographic area.

(b) Tribal membership in the geographic area will be based on data that all Indian tribes involved agree to use. Suggested data sources include tribal enrollment lists, Indian Health Service User Data, and Bureau of Indian Affairs data. If the Indian tribes involved cannot agree on what data source to use, HUD will make the decision on what data will be used to divide the funds between the Indian tribes 60 days before formula allocation.

§ 1000.314 What are data sources for the need variables?

The sources of data for the need variables shall be data available that is collected in a uniform manner that can be confirmed and verified for all AIAN households and persons living in an identified area. Initially, the data used are U.S. Decennial Census data.

§ 1000.316 May Indian tribes, TDHEs, or HUD challenge the data from the U.S. Decennial Census or provide an alternative source of data?

Yes. Provided that the questions asked in a tribal survey are consistent with those asked in the U.S. Decennial Census and responses are gathered and presented in a method acceptable to HUD.

§ 1000.318 Will data used by HUD to determine an Indian tribe's or TDHE's formula allocation be provided to the Indian tribe or TDHE before the allocation?

Yes. HUD shall provide notice to the Indian tribe or TDHE of the data and projected allocation to be used for the formula not less than 120 days before an allocation.

§ 1000.320 How may an Indian tribe, TDHE, or HUD challenge data?

(a) An Indian tribe, TDHE, or HUD may challenge data used in the IHBG formula. Collection of data for this purpose is an allowable cost for IHBG funds.

(b) An Indian tribe or TDHE that has data in its possession that it contends are more accurate than data contained in the U.S. Decennial Census, and the data are collected in a manner acceptable to HUD, should submit the data and proper documentation to HUD no later than 90 days prior to scheduled distribution of NAHASDA block grant funds. HUD shall respond to such data submittal not later than 45 days after receipt of the data and either approve or challenge the validity of such data. 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 formula allocation. Should the Indian tribe or TDHE and HUD be unable to resolve any discrepancy by the date of formula allocation, the dispute shall be carried forward to the next funding year and resolved in accordance with the dispute resolution procedures set forth in this part for model housing activities (§ 1000.116).

(2) 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, no further action shall be required.

(c) 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 provide a commitment to serve the population indicated in the geographic area.

§ 1000.322 How is the need component adjusted for local area costs?

The need component is adjusted by the TDC factor.

§ 1000.324 What is current assisted stock?

Current assisted stock consists of housing units owned or operated pursuant to an ACC. This includes all low rent, Mutual Help, and Turnkey III housing units under management as of September 30, 1997, as indicated in the IHP.

§ 1000.326 What is formula current assisted stock?

Formula current assisted stock is current assisted stock as described in § 1000.324 plus housing units in the development pipeline as of September 30, 1997 when they are owned or operated by the Indian tribe or TDHE and are under management as indicated in the IHP.

§ 1000.328 How is the Formula Current Assisted Stock (FCAS) Component developed?

The Formula Current Assisted Stock component consists of two elements. They are:

(a) *Operating subsidy*. The operating subsidy consists of two variables which are:

(1) 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; and

(2) The number of Mutual Help and Turnkey III FCAS units multiplied by the FY 1996 national per unit subsidy (adjusted to full funding level) multiplied by an adjustment factor for inflation.

(b) *Modernization allocation*.

Modernization allocation consists 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.

§ 1000.330 How is the Section 8 criteria developed?

The Section 8 criteria includes one variable: The number of Section 8 units under contract on September 30, 1997 where the Section 8 contract has expired or is due to expire in any subsequent Fiscal Year (as shown in an Indian tribe's or TDHE's IHP) multiplied by the national per unit average for Section 8 subsidy adjusted for inflation.

§ 1000.332 How long will Section 8 units be counted for purposes of the formula?

Section 8 units shall continue as rental units and be included in the formula as long as they continue to be operated as low income rental units as included in the Indian tribe's or TDHE's IHP.

§ 1000.334 How will the formula allocation be affected if an Indian tribe or TDHE removes some or all of its Formula Current Assisted Stock from inventory?

The formula allocation will be reduced by the number of units removed from the inventory. Such information shall be indicated through the Annual Performance Report.

§ 1000.336 Do units under Formula Current Assisted Stock ever expire from inventory used for the formula?

Yes. Mutual Help and Turnkey III units shall be removed from the Formula Current Assisted Stock when the Indian tribe or TDHE no longer has the legal right to own, operate, or maintain the unit, whether such right is lost by conveyance, demolition, or otherwise. Provided, that conveyance of each Mutual Help or Turnkey III unit occurs when a unit becomes eligible for conveyance by the terms of the MHOA and further provided that the Indian tribe or TDHE actively enforces strict compliance by the homebuyer with the terms and conditions of the MHOA, including the requirements for full and timely payment. Rental units shall continue to be included for formula

purposes as long as they continue to be operated as low income rental units.

§ 1000.338 How are Formula Current Assisted Stock and Section 8 adjusted for local area costs?

There are two adjustment factors that are used to adjust the allocation of funds for the Current Assisted Stock portion of the formula. They are:

(a) Operating Subsidy as adjusted by the greater of the AEL factor or FMR factor (AELFMR); and

(b) Modernization as adjusted by the TDC factor.

§ 1000.340 Are IHA financed units included in the determination of Formula Current Assisted Stock?

No. If these units are not owned or operated at the time (September 30, 1997) pursuant to an ACC then they are not included in the determination of Formula Current Assisted Stock.

Subpart E—Federal Guarantees for Financing of Tribal Housing Activities

§ 1000.401 What terms are used throughout this subpart?

As used throughout title VI of NAHASDA and in this subpart:

Applicant means the entity that requests a HUD guarantee under the provisions of this subpart.

Borrower means an Indian tribe or TDHE that receives funds in the form of a loan with the obligation to repay in full, with interest, and has executed notes or other obligations that evidence that transaction.

Issuer means an Indian tribe or TDHE that issues or executes notes or other obligations. An issuer can also be a borrower.

§ 1000.402 Are state recognized Indian tribes eligible for guarantees under title VI of NAHASDA?

Those state recognized Indian tribes that meet the definition set forth in section 4(12)(C) of NAHASDA are eligible for guarantees under title VI of NAHASDA.

§ 1000.404 What constitutes tribal approval to issue notes or other obligations under title VI of NAHASDA?

Tribal approval is evidenced by a written tribal resolution that authorizes the issuance of notes or obligations by the Indian tribe or a TDHE on behalf of the Indian tribe.

§ 1000.406 How does an Indian tribe or TDHE show that it has made efforts to obtain financing without a guarantee and cannot complete such financing in a timely manner?

The Indian tribe or TDHE shall submit a certification that states that the Indian

tribe has attempted to obtain financing and can not do so in a timely manner without a guarantee from the HUD. Written documentation shall be maintained by the Indian tribe or TDHE to support the certification.

§ 1000.408 What conditions shall HUD prescribe when providing a guarantee for notes or other obligations issued by an Indian tribe?

HUD shall provide that:

(a) Any loan, notes or other obligation guaranteed under title VI of NAHASDA, including the security given for the note or obligation, may be sold or assigned by the lender to any financial institution that is subject to examination and supervision by an agency of the Federal Government, any state, or the District of Columbia without destroying or otherwise negatively affecting the guarantee; and

(b) Indian tribes and housing entities are encouraged to explore creative financing mechanisms and in so doing shall not be limited in obtaining a guarantee. These creative financing mechanisms include but are not limited to:

(1) Borrowing from private or public sources or partnerships;

(2) Issuing tax exempt and taxable bonds where permitted; and

(3) Establishing consortiums or trusts for borrowing or lending, or for pooling loans.

(c) The repayment period may not exceed twenty years; and

(d) Lender and issuer/borrower must certify that they acknowledge and agree to comply with all applicable tribal laws.

§ 1000.410 Can an issuer obtain a guarantee for more than one note or other obligation at a time?

Yes. To obtain multiple guarantees, the issuer shall demonstrate that:

(a) The issuer will not exceed a total for all notes or other obligations in an amount equal to five times its grant amount, excluding any amount no longer owed on existing notes or other obligations; and

(b) Issuance of additional notes or other obligations is within the financial capacity of the issuer.

§ 1000.412 How is an issuer's financial capacity demonstrated?

An issuer must demonstrate its ability to meet its obligations and to protect and maintain the viability of housing developed or operated pursuant to the 1937 Act.

§ 1000.414 What is a repayment contract in a form acceptable to HUD?

(a) The Secretary's signature on a contract shall signify HUD's acceptance

of the form, terms and conditions of the contract.

(b) In loans under title VI of NAHASDA, involving a contract between an issuer and a lender other than HUD, HUD's approval of the loan documents and guarantee of the loan shall be deemed to be HUD's acceptance of the sufficiency of the security furnished. No other security may be required by HUD at a later date.

§ 1000.416 Can grant funds be used to pay costs incurred when issuing notes or other obligations?

Yes. Other costs that can be paid using grant funds include but are not limited to the costs of servicing and trust administration, and other costs associated with financing of debt obligations.

§ 1000.418 May grants made by HUD under section 603 of NAHASDA be used to pay net interest costs incurred when issuing notes or other obligations?

Yes. Other costs that can be paid using grant funds include but are not limited to the costs of servicing and trust administration, and other costs associated with financing of debt obligations, not to exceed 30 percent of the net interest cost.

§ 1000.420 What are the procedures for applying for loan guarantees under title VI of NAHASDA?

(a) The borrower applies to the lender for a loan using a guarantee application form prescribed by HUD.

(b) The lender provides the loan application to HUD to determine if funds are available for the guarantee. HUD will reserve these funds for a period of 90 days if the funds are available and the applicant is otherwise eligible under this subpart. HUD may extend this reservation period for an extra 90 days if additional documentation is necessary.

(c) The borrower and lender negotiate the terms and conditions of the loan in consultation with HUD.

(d) The borrower and lender execute documents.

(e) The lender formally applies for the guarantee.

(f) HUD reviews and provides a written decision on the guarantee.

§ 1000.422 What are the application requirements for guarantee assistance under title VI of NAHASDA?

The application for a guarantee must include the following:

(a) An identification of each of the activities to be carried out with the guaranteed funds and a description of how each activity qualifies as an affordable housing activity as defined in section 202 of NAHASDA.

(b) A schedule for the repayment of the notes or other obligations to be guaranteed that identifies the sources of repayment, together with a statement identifying the entity that will act as the borrower.

(c) A copy of the executed loan documents, if applicable, including, but not limited to, any contract or agreement between the borrower and the lender.

(d) Certifications by the borrower that:

(1) The borrower possesses the legal authority to pledge and that it will, if approved, make the pledge of grants required by section 602(a)(2) of NAHASDA.

(2) The borrower has made efforts to obtain financing for the activities described in the application without use of the guarantee; the borrower will maintain documentation of such efforts for the term of the guarantee; and the borrower cannot complete such financing consistent with the timely execution of the program plans without such guarantee.

(3) The drug-free workplace certification required under 24 CFR part 24.

(4) The certification regarding debarment and suspension required under 24 CFR part 24.

(5) It possesses the legal authority to borrow or issue obligations and to use the guaranteed funds in accordance with the requirements of this subpart;

(6) Its governing body has duly adopted or passed as an official act a resolution, motion, or similar official action that:

(i) Identifies the official representative of the borrower, and directs and authorizes that person to provide such additional information as may be required; and

(ii) Authorizes such official representative to issue the obligation or to execute the loan or other documents, as applicable.

(7) The borrower has complied with the regulations of section 602(a) of NAHASDA.

(8) The borrower will comply with the requirements governing displacement, relocation, and real property acquisition described in subpart A of this part.

(9) The borrower has complied and will comply with the other provisions of NAHASDA, applicable regulations, and other applicable laws.

§ 1000.424 How does HUD review a guarantee application?

The procedure for review of a guarantee application includes the following steps:

(a) HUD will review the application for compliance with title VI of

NAHASDA and the implementing regulations in this part.

(b) HUD will accept the certifications submitted with the application. HUD may, however, consider relevant information that challenges the certifications and require additional information or assurances from the applicant as warranted by such information.

§ 1000.426 For what reasons may HUD disapprove an application or approve an application for an amount less than that requested?

HUD may disapprove an application or approve a lesser amount for any of the following reasons:

(a) HUD determines that the guarantee constitutes an unacceptable risk. Factors that will be considered in assessing financial risk shall include, but not be limited to, the following:

(1) The length of the proposed repayment period;

(2) The ratio of the expected annual debt service requirements to the expected available annual grant amount, taking into consideration the obligations of the borrower under the provisions of section 203(b) of NAHASDA;

(3) Evidence that the borrower will not continue to receive grant assistance under this part during the proposed repayment period;

(4) The borrower's ability to furnish adequate security pursuant to section 602(a) of NAHASDA;

(5) The amount of program income the proposed activities are reasonably estimated to contribute toward repayment of the guaranteed loan or other obligations;

(b) The loan or other obligation for which the guarantee is requested exceeds any of the limitations specified in sections 601(d) or section 605(d) of NAHASDA.

(c) Funds are not available in the amount requested.

(d) Evidence that the performance of the borrower under this part has been determined to be unacceptable pursuant to the requirements of subpart F of this part, and that the borrower has failed to take reasonable steps to correct performance.

(e) The activities to be undertaken are not eligible under Section 202 of NAHASDA.

(f) The loan or other obligation documents for which a guarantee is requested do not meet the requirements of this subpart.

§ 1000.428 When will HUD issue notice to the applicant if the application is approved at the requested or reduced amount?

(a) HUD shall make every effort to approve a guarantee within 30 days of

receipt of a completed application including executed documents and, if unable to do so, will notify the applicant of the need for additional time and/or if additional information is required.

(b) HUD shall notify the applicant in writing that the guarantee has either been approved, reduced, or disapproved. If the request is reduced or disapproved, the applicant will be informed of the specific reasons for reduction or disapproval.

(c) HUD shall issue a certificate to guarantee the debt obligation of the issuer subject to compliance with NAHASDA including but not limited to sections 105, 601(a), and 602(c) of NAHASDA, and such other conditions as HUD may specify in the commitment documents in a particular case.

§ 1000.430 Can an amendment to an approved guarantee be made?

(a) Yes. An amendment to an approved guarantee can occur if an applicant wishes to allow a borrower/ issuer to carry out an activity not described in the loan or other obligation documents, or substantially to change the purpose, scope, location, or beneficiaries of an activity.

(b) Any changes to an approved guarantee must be approved by HUD.

§ 1000.432 How will HUD allocate the availability of loan guarantee assistance?

(a) Each fiscal year HUD may allocate a percentage of the total available loan guarantee assistance to each Area ONAP equal to the percentage of the total NAHASDA grant funds allocated to the Indian tribes in the geographic jurisdiction of that office.

(b) These allocated amounts shall remain exclusively available for loan guarantee assistance for Indian tribes or TDHEs in the jurisdiction of that office until committed by HUD for loan guarantees or until the end of the third quarter of the fiscal year. During the last quarter of the fiscal year, any residual loan guarantee commitment amount in all Area ONAP allocations shall be made available to guarantee loans for Indian tribes or TDHEs regardless of their location.

(c) In approving applications for loan guarantee assistance, HUD shall seek to maximize the availability of such assistance to all interested Indian tribes or TDHEs. HUD may limit the proportional share approved to any one Indian tribe or TDHE to its proportional share of the block grant allocation based upon the annual plan submitted by the Indian tribe or TDHE indicating intent to participate in the loan guarantee allocation process.

§ 1000.434 How will HUD monitor the use of funds guaranteed under this subpart?

HUD will monitor the use of funds guaranteed under this subpart as set forth in section 403 of NAHASDA, and the lender is responsible for monitoring performance with the documents.

Subpart F—Recipient Monitoring, Oversight and Accountability

§ 1000.501 Who is involved in monitoring activities under NAHASDA?

The recipient, the grant beneficiary and HUD are involved in monitoring activities under NAHASDA.

§ 1000.502 What are the monitoring responsibilities of the recipient, the grant beneficiary and HUD under NAHASDA?

(a) The recipient is responsible for monitoring grant activities ensuring compliance with applicable Federal requirements and monitoring performance goals under the IHP. The recipient is responsible for preparing at least annually: a compliance assessment in accordance with section 403(b) of NAHASDA; a performance report covering the assessment of program progress and goal attainment under the IHP; and an audit in accordance with the Single Audit Act, as applicable. The recipient's monitoring should also include an evaluation of the recipient's performance in accordance with performance objectives and measures. At the request of a recipient, other Indian tribes and/or TDHEs may provide assistance to aid the recipient in meeting its performance goals or compliance requirements under NAHASDA.

(b) Where the recipient is a TDHE, the grant beneficiary (Indian tribe) is responsible for monitoring programmatic and compliance requirements of the IHP and NAHASDA by requiring the TDHE to prepare periodic progress reports including the annual compliance assessment, performance and audit reports.

(c) HUD is responsible for periodically reviewing and auditing the recipient as set forth in § 1000.520, 24 CFR 8.56, and 24 CFR 146.31.

(d) HUD monitoring will consist of on-site as well as off-site review of records, reports and audits. To the extent funding is available, HUD or its designee will provide technical assistance and training, or funds to the recipient to obtain technical assistance and training. In the absence of funds, HUD shall make best efforts to provide technical assistance and training.

§ 1000.504 What are the recipient performance objectives?

Performance objectives are developed by each recipient. Performance objectives are criteria by which the recipient will monitor and evaluate its performance. For example, if in the IHP the recipient indicates it will build new houses, the performance objective may be the completion of the homes within a certain time period and within a certain budgeted amount.

§ 1000.506 If the TDHE is the recipient, must it submit its monitoring evaluation/results to the Indian tribe?

Yes. The Indian tribe as the grant beneficiary must receive a copy of the monitoring evaluation/results so that it can fully carry out its oversight responsibilities under NAHASDA.

§ 1000.508 If the recipient monitoring identifies programmatic concerns, what happens?

If the recipient's monitoring activities identify areas of concerns, the recipient will take one or more of the following actions:

- (a) Depending upon the nature of the concern, the recipient may obtain additional training or technical assistance from HUD, other Indian tribes or TDHEs, or other entities.
- (b) The recipient may develop and/or revise policies, or ensure that existing policies are better enforced.
- (c) The recipient may take appropriate administrative action to remedy the situation.
- (d) The recipient may refer the concern to an auditor or to HUD for additional corrective action.

§ 1000.510 What is the Indian tribe's responsibility if the tribal monitoring identifies compliance concerns?

The Indian tribe's responsibility is to ensure that appropriate corrective action is taken.

§ 1000.512 Are performance reports required?

Yes. An annual report shall be submitted by the recipient to HUD in a format acceptable by HUD. Annual performance reports shall contain:

- (a) The information required by section 404(b) of NAHASDA;
- (b) Brief information on the following:
 - (1) A comparison of actual accomplishments to the objectives established for the period;
 - (2) The reasons for slippage if established objectives were not met; and
 - (3) Analysis and explanation of cost overruns or high unit costs; and
- (c) Any information regarding the recipient's performance in accordance with HUD's performance measures.

§ 1000.514 When must the annual performance report be submitted?

The annual performance report must be submitted within 45 days of the end of the program year. If a justified request is submitted by the recipient, the Area ONAP may extend the due date for submission of the performance report.

§ 1000.516 What reporting period is covered by the annual performance report?

For the first year of NAHASDA, the period to be covered by the annual performance report will be October 1, 1997 through September 30, 1998. Subsequent reporting periods will coincide with the recipient's fiscal year.

§ 1000.518 When must a recipient obtain public comment on its annual performance report?

The recipient must make its report publicly available to tribal members, non-Indians served under NAHASDA, and other citizens in the Indian area, in sufficient time to permit comment before submission of the report to HUD. The recipient determines the manner and times for making the report available. The recipient shall include a summary of any comments received by the grant beneficiary or recipient from tribal members, non-Indians served under NAHASDA, and other citizens in the Indian area.

§ 1000.520 What are the purposes of HUD review?

At least annually, HUD will review each recipient's performance to determine whether the recipient:

- (a) Has carried out its eligible activities in a timely manner, has carried out its eligible activities and certifications in accordance with the requirements and the primary objective of NAHASDA and with other applicable laws and has a continuing capacity to carry out those activities in a timely manner;
- (b) Whether the recipient has complied with the IHP of the grant beneficiary; and
- (c) Whether the performance reports of the recipient are accurate.

§ 1000.522 How will HUD give notice of on-site reviews?

Whenever an on-site review is to be conducted, HUD shall give written notice to the Indian tribe and TDHE that a review will be commenced. Prior written notice will not be required in emergency situations. All notices shall state the general nature of the review.

§ 1000.524 What are HUD's performance measures for the review?

HUD has the authority to develop performance measures which the

recipient must meet as a condition for compliance under NAHASDA. The performance measures are:

- (a) Within 2 years of grant award under NAHASDA, no less than 90 percent of the grant must be obligated.
- (b) The recipient has complied with the required certifications in its IHP and all policies and the IHP have been made available to the public.
- (c) Fiscal audits have been conducted on a timely basis and in accordance with the requirements of the Single Audit Act, as applicable. Any deficiencies identified in the audit report have been addressed within the prescribed time period.
- (d) Accurate annual performance reports were submitted to HUD within 45 days after the completion of the recipient's fiscal year.
- (e) The recipient has met the IHP goals and objectives in the 1-year plan and demonstrated progress on the 5-year plan goals and objectives.
- (f) The recipient has complied with the requirements of 24 CFR part 1000 and all other applicable Federal statutes and regulations.

§ 1000.526 What information will HUD use for its review?

In reviewing each recipient's performance, HUD may consider the following:

- (a) The approved IHP and any amendments thereto;
- (b) Reports prepared by the recipient;
- (c) Records maintained by the recipient;
- (d) Results of HUD's monitoring of the recipient's performance, including on-site evaluation of the quality of the work performed;
- (e) Audit reports;
- (f) Records of drawdowns of grant funds;
- (g) Records of comments and complaints by citizens and organizations within the Indian area;
- (h) Litigation; and
- (i) Any other relevant information.

§ 1000.528 What adjustments may HUD make in the amount of NAHASDA annual grants under section 405 of NAHASDA?

HUD may make appropriate adjustments in the amount of the annual grants under NAHASDA in accordance with the findings of HUD pursuant to reviews and audits under section 405 of NAHASDA. HUD may adjust, reduce, or withdraw grant amounts, or take other action as appropriate in accordance with the reviews and audits, except that grant amounts already expended on affordable housing activities may not be recaptured or deducted from future assistance provided on behalf of an Indian tribe.

§ 1000.530 What are remedies available for substantial noncompliance?

(a) If HUD finds after reasonable notice and opportunity for hearing that a recipient has failed to comply substantially with any provision of NAHASDA, HUD shall—

(1) Terminate payments under NAHASDA to the recipient;

(2) Reduce payments under NAHASDA to the recipient by an amount equal to the amount of such payments that were not expended in accordance with NAHASDA;

(3) Limit the availability of payments under NAHASDA to programs, projects, or activities not affected by the failure to comply; or

(4) In the case of noncompliance described in § 1000.534, provide a replacement TDHE for the recipient.

(b) HUD may on due notice suspend payments at any time after the issuance of the opportunity for hearing pending such hearing and final decision, to the extent HUD determines such action necessary to preclude the further expenditure of funds for activities affected by such failure to comply.

(c) If HUD determines that the failure to comply substantially with the provisions of NAHASDA is not a pattern or practice of activities constituting willful noncompliance and is a result of the limited capability or capacity of the recipient, HUD may provide technical assistance for the recipient (directly or indirectly) that is designed to increase the capability or capacity of the recipient to administer assistance under NAHASDA in compliance with the requirements under NAHASDA.

(d) In lieu of, or in addition to, any action described in this section, if HUD has reason to believe that the recipient has failed to comply substantially with any provision of NAHASDA, HUD may refer the matter to the Attorney General of the United States with a recommendation that appropriate civil action be instituted.

§ 1000.532 What hearing procedures will be used?

(a) The hearing procedures in 24 CFR part 26 shall be used.

(b) For hearings under section 504 of the Rehabilitation Act of 1973 or the Age Discrimination Act of 1975, the procedures at 24 CFR part 180 shall be used.

§ 1000.534 When may HUD require replacement of a TDHE?

(a) In accordance with section 402 of NAHASDA, as a condition of HUD making a grant on behalf of an Indian tribe, the Indian tribe shall agree that, notwithstanding any other provisions of

law, HUD may, only in the circumstances discussed in paragraph (b) of this section, require that a replacement TDHE serve as the recipient for the Indian tribe.

(b) HUD may require a replacement TDHE for an Indian tribe only upon a determination by HUD on the record after opportunity for hearing that the recipient has engaged in a pattern or practice of activities that constitute substantial or willful noncompliance with the requirements of NAHASDA.

§ 1000.536 When does failure to comply substantially cease?

HUD shall confirm the existence of certain conditions regarding the recipient's compliance. Such conditions shall have been described in HUD's finding of substantial noncompliance. A recipient may request HUD to review its situation to determine if it is now in compliance.

§ 1000.538 What audits are required?

The recipient must comply with the requirements of the Single Audit Act which requires annual audits of recipients that expend Federal funds equal to or in excess of \$300,000. The audit shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

§ 1000.540 Who is the cognizant audit agency?

For the purposes of the audit described in § 1000.538, the Department of the Interior is the cognizant agency.

§ 1000.542 Are audit costs an eligible program expense?

Yes, audit costs are an eligible administrative expense. For a recipient not covered by the Single Audit Act, but yet chooses to have an audit, the cost of such an audit would be an eligible program expense. If the Indian tribe is the recipient then program funds can be used to pay a prorated share of the tribal audit cost that is attributable to NAHASDA funded activities.

§ 1000.544 Must a copy of the recipient's audit pursuant to the Single Audit Act be submitted to HUD?

Yes. A copy of the latest recipient audit under the Single Audit Act must be submitted with the annual performance report.

§ 1000.546 If the TDHE is the recipient, does it have to submit a copy of its audit to the Indian tribe?

Yes. The Indian tribe as the grant beneficiary must receive a copy of the audit report so that it can fully carry out

its oversight responsibilities with NAHASDA.

§ 1000.548 How long must the recipient maintain program records?

(a) This section applies to all financial and programmatic records, supporting documents, and statistical records of the grantee which are required to be maintained by the statute, regulation, or grant agreement.

(b) Except as otherwise provided in this section, records must be retained for three years from the date the recipient submits to HUD the annual performance report that covers the last expenditure of grant funds under a particular grant.

(c) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

§ 1000.550 Which agencies have right of access to the recipient's records relating to activities carried out under NAHASDA?

(a) HUD and the Comptroller General of the United States, and any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of recipients and sub-recipients which are pertinent to the NAHASDA assistance, in order to make audits, examination, excerpts, and transcripts.

(b) The right of access in this section lasts as long as the records are maintained.

§ 1000.552 Does the Freedom of Information Act (FOIA) apply to recipient records?

FOIA does not apply to recipient records.

§ 1000.554 Does the Federal Privacy Act apply to recipient records?

The Federal Privacy Act does not apply to recipient records.

PART 955—[REDESIGNATED]

4. Part 955 is redesignated as part 1005 and amended as set forth below.

PART 1005—LOAN GUARANTEES FOR INDIAN HOUSING

5. The authority citation for newly designated 24 CFR part 1005 continues to read as follows:

Authority: 25 U.S.C. 4101 *et seq.*; 42 U.S.C. 1715z-13a and 3535(d).

6. Newly designated Section 1005.101 is revised to read as follows:

§ 1005.101 What is the applicability and scope of these regulations?

Under the provisions of section 184 of the Housing and Community Development Act of 1992, as amended by the Native American Housing Assistance and Self-Determination of 1996 (12 U.S.C. 1515z-13a), the Department of Housing and Urban Development (the Department) has the authority to guarantee loans for the construction, acquisition, or rehabilitation of 1- to 4-family homes to be owned by Native Americans on restricted Indian lands. This part provides requirements that are in addition to those in section 184.

7. Newly designated Section 1005.103 is amended by revising the section heading and by adding the definitions of the terms "Holder" and "Mortgagee" in alphabetical order, to read as follows:

§ 1005.103 What definitions are applicable to this program?

* * * * *

Holder means the holder of the guarantee certificate and is also referred to as the lender holder, the holder of the certificate, the holder of the guarantee, and the mortgagee.

* * * * *

Mortgagee means the same as "Holder."

* * * * *

8.-9. Newly designated Section 1005.105 is amended by:

- a. Revising the section heading;
- b. Revising paragraphs (b) and (d)(3); and
- c. Adding a new paragraph (f), to read as follows:

§ 1005.105 What are eligible loans?

* * * * *

(b) *Eligible borrowers.* A loan guarantee under Section 184 may be made to a borrower for which an Indian Housing Plan has been submitted and approved under 24 CFR part 1000, and that is:

- (1) An Indian who will occupy it as a principal residence and who is otherwise qualified under Section 184;
- (2) An Indian Housing Authority or Tribally Designated Housing Entity; or
- (3) An Indian tribe.

* * * * *

(d) * * *

(3) The principal amount of the mortgage is held by the mortgagee in an interest bearing account, trust, or escrow for the benefit of the mortgagor, pending advancement to the mortgagor's creditors as provided in the loan agreement; and

* * * * *

(f) *Lack of access to private financial markets.* In order to be eligible for a loan guarantee, the borrower must provide

written certification that it lacks access to private financial markets. Written documentation must be maintained to support the certification.

10.-11. Newly designated Section 1005.107 is amended by:

- a. Revising the section heading;
- b. Revising paragraph (a) introductory text;
- c. Revising paragraph (a)(2);
- d. Revising paragraph (b) introductory text;
- e. Redesignating paragraphs (b)(3) and (b)(4) as paragraphs (b)(4) and (b)(5), respectively; and
- f. Adding a new paragraph (b)(3), to read as follows:

§ 1005.107 What is eligible collateral?

(a) *In general.* A loan guaranteed under Section 184 may be secured by any collateral authorized under and not prohibited by Federal, state, or tribal law and determined by the lender and approved by the Department to be sufficient to cover the amount of the loan, and may include, but is not limited to, the following:

* * * * *

(2) A first and/or second mortgage on property other than trust land;

* * * * *

(b) *Trust land as collateral.* If trust land or restricted Indian land is used as collateral or security for the loan, the following additional provisions apply:

* * * * *

(3) *Liquidation.* The mortgagee or HUD shall only pursue liquidation after offering to transfer the account to an eligible tribal member, the tribe, or the Indian housing authority servicing the Indian tribe. The mortgagee or HUD shall not sell, transfer, or otherwise dispose of or alienate the property except to one of these three entities.

* * * * *

§ 1005.109 [Amended].

12.-13. Newly designated Section 1005.109 is amended by revising the section heading to read

"§ 1005.109 What is a guarantee fee?"

§ 1005.111 [Amended].

14.-15. Newly designated Section 1005.111 is amended by revising the section heading to read

"§ 1005.111 What safety and quality standards apply?"

16. Newly designated Section 1005.112 is added to read as follows:

§ 1005.112 How do eligible lenders and eligible borrowers demonstrate compliance with applicable tribal laws?

The lender/borrower will certify that they acknowledge and agree to comply with all applicable tribal laws. An

Indian tribe with jurisdiction over the dwelling unit does not have to be notified of individual Section 184 loans unless required by applicable tribal law.

17. Section 1005.113 is added to read as follows:

§ 1005.113 How does HUD enforce lender compliance with applicable tribal laws?

As provided in Section 184, failure of the lender to comply with applicable tribal law is considered to be a practice detrimental to the interest of the borrower.

Dated: June 9, 1997.

Note: The following appendix will not appear in the Code of Federal Regulations.

Kevin Emanuel Marchman,

Acting Assistant Secretary for Public and Indian Housing.

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix A to Part 1000—IHBG Formula Mechanics

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

The proposed IHBG formula is calculated by initially determining the amount a tribe receives for Formula Current Assisted Stock (FCAS) and Section 8. FCAS funding is comprised of two components, operating subsidy and modernization. The operating subsidy component is calculated based on the national per unit subsidy provided in FY 1996 (adjusted to a 100 percent funding level) for each of the following types of programs—Low Rent, Homeownership (Mutual Help and Turnkey III), and Section 8¹. A tribe's total units in each of the above categories is multiplied times the relevant national per unit subsidy amount. That amount is summed and multiplied times a local area cost adjustment factor for management.

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.

The modernization component of FCAS is based on the national per unit modernization funding provided in FY 1996 to Indian Housing Authorities (IHAs). The per unit amount is determined by dividing the

¹ Note that the attachment shows this amount to be \$2,440 for Low Rent, \$528 for Mutual Help, and \$3,625 for Section 8. These numbers may change slightly as the department gets better information.

modernization funds by the total Low Rent, Mutual Help, and Turnkey III units operated by IHAs in 1996. A tribe's total Low Rent, Mutual Help, and Turnkey III units are multiplied times the per unit modernization amount. That amount is then multiplied times a local area cost adjustment factor for construction.

The construction adjustment factor planned to be used is Total Development Cost (TDC) for the area divided by the weighted national average for TDC (weighted on the unadjusted allocation for modernization).

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 Fiscal Year appropriation to determine the total amount to be allocated under the Need component of the IHBG formula. The Need component is then calculated by multiplying a tribe's share of housing need by a local area cost adjustment factor for construction (Total Development Cost).

The Need component of the IHBG formula is calculated using seven factors weighted as shown on the attachment. The way this works is as follows: 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, while 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 living in the Indian tribe's formula area, and so on. The attachment shows the current national totals for each of the need variables. The national total will change as tribes

update information about their formula area and data for individual areas are challenged.

After determining each Indian tribe's allocation under the IHBG formula, their grants are compared to how much they received in FY 1996 for operating subsidy and modernization. If a tribe received more in FY 1996 for operating subsidy and modernization than they do under the IHBG formula, their grant is adjusted up to the FY 1996 level. Indian tribes receiving more under the IHBG formula than in FY 1996 "pay" for the upward adjustment for the other tribes by having their grants adjusted down. The formula for that adjustment is shown below. 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.

Tribal Grant = Formula Current Assisted Stock (FCAS) + NEED

FCAS = FCAS Subsidy + FCAS Modernization

FCAS Subsidy = [{ \$2440 * (Low-rent units) } + { \$528 * (Homeowner Units) } + { \$3625 * (S8 expired "units") }] * FMRAEL/1.15

CAS Modernization = [\$1974 * (Total Low-rent and homeowner units)] * TDC / \$111649

NEED = (Appropriation—National Total FCAS) * Need Share * TDC/\$113462

Need Share =

{ .25 * (AIAN Households overcrowded and or without kitchen or plumbing) / 86831 } +

{ .22 * (AIAN Households paying more than 50% of their income for housing) / 39842 } +

{ .15 * (Housing Shortage²) / 147268 } +
 { .13 * (AIAN Households less than 30% of Median Income) / 87322 } +
 { .07 * (AIAN Households with incomes between 30% and 50% of Median Income) / 58692 } +
 { .07 * (AIAN Households with incomes between 50% and 80% of Median Income) / 68425 } +
 { .11 * (AIAN Persons) / 1059041 }.

ADJUSTED AS FOLLOWS:

30 tribes receive less than their FY 1996 funding for operating subsidy and modernization.

The total amount they are less than the FY 1996 amount is \$5,941,550. 337 tribes receive funding greater than their FY 1996 funding for operating subsidy and modernization.

The total amount they are above the FY 1996 amount is \$234,663,723

The tribes receiving less than the FY 1996 amount are adjusted to the FY 1996 amount. The tribes that received more than the FY 1996 amount (not including new tribes), have their funding amount decreased in proportion to their share of the total funding among tribes with more than the FY 1996 amount. The adjustment formula looks as follows:

Grant for tribes with amount greater than FY 1996 amount =
 (Grant prior to adjustment) — [\$5,941,550 *
 { (amount above FY 1996) /
 \$234,663,723 }]

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² AIAN Households less than 80 percent of median income—CAS units—S8—NAHASDA units.

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ADJUSTMENT FOR FY 1996 OPERATING SUBSIDY AND MODERNIZATION	
TOTAL UNADJUSTED (FCAS + NEED)	(\$4,040,010 + \$1,703,180)
Amount Tribe received in FY 1996 for Operating Subsidy and Modernization	\$5,743,190
Grant above FY 96 (Total unadjusted less FY 1996 Operating Subsidy and Modernization amount)	\$4,550,277
Amount Grant Adjusted down to fund Tribes with Grants less than their FY 1996 operating subsidy and modernization	(\$5,743,190 - \$4,550,277)
	[\$5,941,550 * (\$1,192,913 / \$234,663,723)]
	\$30,204
FINAL GRANT (UNADJUSTED GRANT less Adjustment Factor)	(\$5,743,190 - \$30,204)
	\$5,712,986