



# Federal Register

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**Friday,**  
**February 25, 2005**

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## **Part III**

### **Department of Housing and Urban Development**

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**24 CFR Part 1000**

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

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT****24 CFR Part 1000**

[Docket No. FR-4938-P-01; HUD-2005-0003]

RIN 2577-AC57

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

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

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule would make several revisions to the Indian Housing Block Grant (IHBG) Program allocation formula authorized under section 302 of the Native American Housing Assistance and Self-Determination Act of 1996. Through the IHBG Program, HUD provides Federal housing assistance for Indian tribes in a manner that recognizes the right of Indian self-determination and tribal self-government. HUD negotiated the proposed rule with active tribal participation and using the procedures of the Negotiated Rulemaking Act of 1990. The proposed regulatory changes reflect the consensus decisions reached by HUD and the tribal representatives on ways to improve and clarify the current regulations governing the IHBG Program formula.

**DATES:** Comment Due Date: April 26, 2005.

**ADDRESSES:** Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500. Electronic comments may be submitted through either:

- The Federal eRulemaking Portal: at [www.regulations.gov](http://www.regulations.gov); or
- The HUD electronic Web site at: [www.epa.gov/fedocket](http://www.epa.gov/fedocket). Follow the link entitled "View Open HUD Dockets." Commenters should follow the instructions provided on that site to submit comments electronically.

Facsimile (fax) comments are not acceptable. In all cases, communications must refer to the docket number and title. All comments and communications submitted will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Copies are also available for inspection and

downloading at [www.epa.gov/fedocket](http://www.epa.gov/fedocket).

**FOR FURTHER INFORMATION CONTACT:**

Roger J. Boyd, Deputy Assistant Secretary for Native American Programs, Room 4126, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-5000, telephone, (202) 401-7914 (this is not a toll-free number). Hearing or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:****I. Background**

The Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*) (NAHASDA) changed the way that housing assistance is provided to Native Americans. NAHASDA eliminated several separate assistance programs and replaced them with a single block grant program, known as the Indian Housing Block Grant (IHBG) Program. NAHASDA and its implementing regulations recognize tribal self-determination and self-governance while establishing reasonable standards of accountability.

The regulations governing the IHBG Program are located in part 1000 of HUD's regulations in title 24 of the Code of Federal Regulations. The part 1000 regulations were established as part of a March 12, 1998 final rule implementing NAHASDA. In accordance with section 106 of NAHASDA, HUD developed the March 12, 1998, final rule with active tribal participation and using the procedures of the Negotiated Rulemaking Act of 1990 (5 U.S.C. 561-570). The basic concept of negotiated rulemaking is to have the agency that is considering drafting a rule bring together representatives of the agency and affected interests for face-to-face negotiations. HUD has issued a limited number of changes to the March 12, 1998, final rule since publication of the final rule.

Under the IHBG Program, HUD makes assistance available to eligible Indian tribes for affordable housing activities. The amount of assistance made available to each Indian tribe is determined using a formula that was developed as part of the NAHASDA negotiated rulemaking process (IHBG Formula). A regulatory description of the IHBG Formula is located in subpart D of 24 CFR part 1000 (§§ 1000.301-1000.340). Under section 302 of NAHASDA, the allocation formula must be based on factors that reflect the need

of Indian tribes for affordable housing activities. In implementing the need-based IHBG Formula, the negotiated rulemaking committee concluded that tribal need would most appropriately be measured by two components: Need and Formula Current Assisted Stock (FCAS). Generally, the amount of annual funding for an Indian tribe is the sum of the Need component (subject to a minimum funding amount authorized by § 1000.328) and the FCAS component. Based on the amount of funding appropriated annually for the IHBG Program, HUD calculates the annual grant for each Indian tribe and provides this information to the Indian tribes. An Indian Housing Plan (IHP) for the Indian tribe is then submitted to HUD. If the IHP is found to be in compliance with statutory and regulatory requirements, the grant is made.

**II. The IHBG Formula Negotiated Rulemaking Committee**

Section 1000.306 of the IHBG Program regulations provides that the IHBG Formula shall be reviewed within five years after issuance. On July 16, 2001 (66 FR 37098) and July 5, 2002 (67 FR 44787), HUD published notices in the **Federal Register** announcing HUD's intent to establish a negotiated rulemaking committee for the purposes of reviewing the regulations at 24 CFR part 1000, subpart D, and negotiating recommendations for a possible proposed rule modifying the IHBG Formula. These notices also solicited public comments on the proposed membership of the Committee, and explained how persons could be nominated for membership. On January 22, 2003 (68 FR 3112), HUD published an additional **Federal Register** notice, announcing the list of proposed members for the negotiated rulemaking committee and requesting additional public comment on the proposed membership.

On April 8, 2003 (68 FR 17000), HUD published a notice in the **Federal Register** announcing the establishment of its IHBG Formula Negotiated Rulemaking Committee (Committee) and announcing the final list of Committee members. The Committee membership consisted of 24 elected officers of tribal governments (or authorized designees of those tribal governments). The Committee membership reflected a balanced representation of Indian tribes, both geographically and based on size. In addition to the tribal members, there were two HUD representatives on the Committee.

The first meeting of the Committee took place in April 2003 and continued to meet thereafter on approximately a monthly basis. The Committee met a total of seven times, with the final meeting being held in January 2004. The Committee agreed to operate based on consensus rulemaking and its approved charter and protocols. HUD committed to using, to the maximum extent feasible consistent with its legal obligations, all consensus decisions as the basis for the proposed rule. When an issue was raised for consensus, only those members objecting to the proposed change were asked to raise their hands. Silence indicated that the Committee member did not wish to object to the proposal. The Committee's premise was that existing regulations were sufficient if not amended by consensus of the full Committee.

The Committee divided itself into two workgroups to analyze specified provisions of the IHBG Formula and to draft any new or revised regulatory language it believed was necessary. The workgroups were not authorized to reach any final or binding decisions but, rather, reported to the full Committee. One workgroup was responsible for analyzing the regulations for the Need component, while the other group reviewed the provisions regarding the FCAS component. The draft regulatory language developed by the workgroups was then brought before the full Committee for review, amendment, and approval. Also, some issues discussed by the workgroups, but not agreed upon, were also raised by the Committee members for consideration by the full Committee. In some cases, ideas were brought forward for Committee consideration without accompanying draft language and consensus was reached with the understanding that a drafting workgroup would subsequently craft the language to effect the desired change. The meetings were divided between workgroup sessions, at which regulatory language and proposals were developed. Full Committee sessions were held to discuss the draft regulations produced by the workgroups. It was the Committee's policy to provide for public participation in the rulemaking process. All of the Committee sessions were announced in the **Federal Register** and were open to the public, and interested members of the public actively participated in the workgroup sessions.

Subsequent to the conclusion of the Committee meetings, two additional workgroups were established. One workgroup was assigned the task of reviewing the approved regulatory language for content, format, style, and

consistent use of terminology. The second workgroup was charged with developing the preamble to this proposed rule. The membership of both workgroups consisted of HUD and tribal representatives.

### **III. This Proposed Rule**

The Committee undertook a comprehensive review of the IHBG Formula, and thoroughly analyzed all aspects of both the Need and FCAS components. The Committee identified certain areas of the IHBG Formula that required clarification, were outdated, or were not operating as intended by the original negotiated rulemaking committee. This proposed rule reflects the consensus decisions reached by the Committee during the negotiated rulemaking process on the best way to address these issues. The following section of this preamble provides a summary of the recommended changes to the IHBG Formula by this proposed rule. HUD welcomes public comment on the proposed regulatory changes. The Committee will consider all comments in the development of the final rule.

#### *A. Definition of Formula Area*

This proposed rule would revise the definition of the term "Formula Area" located in § 1000.302. Section 1000.302 contains the definitions that apply to the IHBG Formula. Several of the proposed changes are editorial and non-substantive, and are designed to clarify the current definition. Other proposed revisions are more substantive and expand upon current regulatory language. Specifically, the proposed rule would define the term "Formula Area" to mean:

1. Reservations for federally recognized Indian tribes, as defined by the U.S. Census;
2. Trust lands;
3. Department of the Interior Near-Reservation Service Area;
4. Former Indian Reservation Areas in Oklahoma Indian Areas, as defined by the U.S. Census as Oklahoma Tribal Statistical Areas (OTSAs);
5. Congressionally Mandated Service Areas;
6. State Tribal Areas as defined by the U.S. Census as State Designated American Indian Statistical Areas (SDAISAs);
7. Tribal Designated Statistical Areas (TDSAs);
8. California Tribal Jurisdictional Areas established or reestablished by federal court judgment; and
9. Alaska formula areas (which are further defined by the proposed rule, as described in section II.B. of this preamble below).

The proposed rule would contain a "grandfather" provision that ensures Indian tribes will continue to be assigned their current Formula Area despite the proposed changes to the definition. The "grandfather" provision would apply to Indian tribes assigned a Formula Area that is not included within the geographies listed above. Specifically, the proposed rule provides that such a federally recognized Indian tribe will continue to be assigned the Formula Area geography it was assigned in Fiscal Year 2003, provided that the Indian tribe continues to provide an appropriate level of housing services within the Formula Area. HUD will monitor the level of housing assistance provided by the Indian tribe using the new proposed definition of the term "substantial housing services" as a guideline but not a requirement (see section III.E. of this preamble for more information regarding the definition of "substantial housing services").

To reflect special circumstances within OTSAs, the rule would authorize a challenge by such tribes to the "grandfathering" of current Formula Areas. This language was added to reflect possible challenges regarding Formula Areas in Oklahoma. The grandfather provision, however, would not apply in Alaska.

#### *B. Definition of Alaska Formula Area*

Given the unique circumstances of Indian tribes in Alaska, the proposed rule would establish a separate provision clarifying how the Formula Area for these tribes will be determined. The proposed rule provides that Alaska needs data shall be credited, as currently described in § 1000.327 of the IHBG Program regulations, to the Alaska Native Village (ANV), the regional Indian tribe, or to the regional corporation established pursuant to the Alaska Native Claims Settlement Act (33 U.S.C. 1601 *et seq.*) (ANCSA).

The Formula Area of the ANV shall be the geographic area of the village or that area delineated by the TDSA established for the ANV for purposes of the 1990 U.S. Census or the Alaska Native Village Statistical Area (ANVSA) established for the ANV. To the extent the area encompassed by such designation may substantially exceed the actual geographic area of the village, such designation is subject to challenge pursuant to revised § 1000.336 (see section III.L. of this preamble below). If the ANVSA or the TDSA is determined pursuant to such challenge to substantially exceed the actual area of the village, then the geographic formula area of the ANV for purposes of § 1000.327 shall be such U.S. Census

designation as most closely approximates the actual geographic area of the village. The Formula Area of the regional corporation shall be the area established for the corporation by the ANCSA.

An Indian tribe may seek to expand its Alaska Formula Area within its ANCSA region pursuant to the proposed new procedures described in section III.D. of this preamble. Formula Area added in this way shall be treated as overlapping pursuant to § 1000.326 of the IHBG Program regulations, unless the Indian tribe's members in the expanded area is less than 50 percent of the American Indian/Alaska Native (AIAN) population. In cases where the Indian tribe is not treated as overlapping, the tribe shall be credited with population and housing data only for its own tribal members resident within the new or added area. All other population and housing data for the area shall remain with the Indian tribe or tribes previously credited with such data.

#### *C. Population Cap in Determining Formula Area*

The proposed rule would retain the existing "cap" on the population data that will be attributed to an Indian tribe within its Formula Area. The Committee determined that the cap was necessary to maintain fairness for all Indian tribes. In general, population data may not exceed twice an Indian tribe's enrolled population. However, the proposed rule continues to provide that an Indian tribe may exceed this cap under certain specified circumstances, and makes the following clarification to these requirements.

The clarification concerns state-recognized Indian tribes. The proposed rule provides that, for state-recognized tribes, the population data and formula allocation shall be limited to tribal enrollment figures as determined under enrollment criteria in effect in 1996. This provision is derived from the definition of state-recognized tribes in section 4(12)(C)(ii) of title I of NAHASDA, which states that the allocation for a state-recognized Indian tribe shall be determined based on tribal membership eligibility criteria in existence on the date of enactment of NAHASDA (October 26, 1996). The clarification is intended to ensure that state-recognized Indian tribes will not be credited for any new members who do not meet the enrollment criteria that was in place in 1996. However, it does not prohibit a state-recognized Indian tribe from being credited with new members who meet the enrollment criteria in place in 1996 and it does not

freeze or grandfather a state-recognized Indian tribe's population data or formula allocation at 1996 levels.

#### *D. Expansion and Re-Definition of Formula Areas*

The proposed rule would establish new procedures governing the expansion or re-definition of an Indian tribe's Formula Area. The proposed requirements are designed to ensure that an Indian tribe seeking to include additional geography within its approved Formula Area has the authority to provide housing services within the new geography, and will serve the housing needs of Native Americans within the expanded Formula Area.

The Indian tribe must submit proof that it either: (1) Could exercise court jurisdiction within the new geography; or (2) is providing substantial housing services and will continue to expend or obligate funds for substantial housing services within the new geographic area. Further, where applicable, the Indian tribe must submit proof that it has agreed to provide housing services pursuant to a Memorandum of Agreement (MOA) with the tribal and public governing entity or entities of the area, or has attempted to establish such an MOA in good faith. The geographic area into which the Indian tribe may expand shall be the smallest U.S. Census unit or units that encompass the physical location of the substantial housing services that have been provided by the Indian tribe.

HUD will make a preliminary decision upon receipt of the tribal request for recognition of an expanded or re-defined Formula Area. HUD shall notify all potentially affected Indian tribes of the basis for its preliminary determination by certified mail and provide the Indian tribes with the opportunity to comment for a period of not less than 90 days. After consideration of the comments, HUD shall announce its final determination through **Federal Register** notice.

#### *E. Definition of "Substantial Housing Services"*

As noted above in this preamble, this proposed rule would establish a new definition of the term "substantial housing services" that would be used in determining whether an Indian tribe may expand or re-define its Formula Area (see section II.D. of this preamble). The new definition would clarify these provisions of the IHBG Formula and help to ensure consistent administration of these program requirements.

In the case of the expansion or redefinition of the Formula Area, the

term "substantial housing services" would mean affordable housing activities funded from any source provided to AIAN households with incomes 80 percent of the median income as defined in NAHASDA (25 U.S.C. 4103(14)) or lower, equivalent to 100 percent or more of the increase in the IHBG formula allocation that the Indian tribe would receive as a result of adding the proposed geography to its Formula Area. Alternatively, the term "substantial housing services" would mean affordable housing activities funded with IHBG funds provided to AIAN households with incomes 80 percent of the median income as defined in NAHASDA (25 U.S.C. 4103(14)) or lower, equivalent to 51 percent or more of the Indian tribe's current total IHBG grant, and either: (1) 51 percent or more of the Indian tribe's official enrollment resides within the geographic area; or (2) the Indian tribe's official enrollment constitutes 51 percent or more of the total AIAN persons within the geography.

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

#### *F. Use of U.S. Census Data for Determining Tribal Membership in Overlapping Formula Areas*

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

#### *G. Required Use of Formula Response Form for Reporting Changes to FCAS*

The proposed rule would add a new § 1000.315 clarifying that the Formula Response Form is the only mechanism a recipient may use to report changes to the FCAS. This is the existing practice under the IHBG Program, and

codification of this policy will clarify that a recipient must use the Formula Response Form to report any changes to information related to the IHBG Formula.

Further, the proposed rule would add a new § 1000.319 that specifies what happens if a recipient misreports or fails to correct FCAS information on the Formula Response Form. Proposed § 1000.319 provides that if a recipient receives an overpayment of funds because it failed to report changes on the Formula Response Form in a timely manner, the recipient is required to repay the funds within five fiscal years. HUD shall subsequently distribute the funds to all Indian tribes in accordance with the next IHBG Formula allocation.

New § 1000.319 would also cover the issue of back funding for FCAS units that a recipient failed to report on the Formula Response Form in a timely manner. The proposed rule specifies that if a recipient subsequently seeks credit for those unreported units, the recipient will not be provided back funding for such units. HUD shall have three years from the date a Formula Response Form is sent out to take action against any recipient that fails to correct or make appropriate changes on that Formula Response Form.

The language of proposed new §§ 1000.315 and 1000.319 was adopted by the Committee based on HUD's agreement to provide back funding for any undercount of units that occurred and was reported or challenged prior to October 30, 2003. It was further agreed by the Committee that such back funding would be provided only after publication of a final rule adopting the policies contained in proposed §§ 1000.315 and 1000.319.

#### *H. Calculating Operating Subsidy Component of FCAS*

The proposed rule would make a minor, non-substantive modification to § 1000.316(a)(1) for purposes of clarity. The current language of the regulation provides that the first of the three variables comprising the operating subsidy component of FCAS is "the number of low-rent FCAS units multiplied by the FY 1996 national per-unit subsidy (adjusted to full funding level) multiplied by an adjustment factor for inflation." The proposed rule would simplify this provision by establishing a separate definition of the term "national per unit subsidy" in § 1000.302, which contains the definitions applicable to the IHBG Program. Under the new definition, the term "national per unit subsidy" would be defined to mean the Fiscal Year 1996 national per unit subsidy (adjusted to

full funding level) multiplied by an adjustment factor for inflation. Accordingly, § 1000.316(a)(1) would then be streamlined to provide that the operating subsidy component of FCAS is "the number of low-rent FCAS units multiplied by the national per-unit subsidy."

#### *I. Calculating the FCAS Modernization Allocation for Indian Tribes That Owned or Operated Less Than 250 Public Housing Units Under the United States Housing Act of 1937*

This proposed rule would implement a statutory amendment to NAHASDA made by the Omnibus Indian Advancement Act (Pub. L. 106-568, approved December 27, 2000) (Omnibus Act). Section 1003(g) of the Omnibus Act added a new subsection 302(d)(1)(B) to NAHASDA regarding operating and modernization funding for Indian tribes with Indian Housing Authorities (IHAs) that owned or operated fewer than 250 units developed under the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*) (1937 Act). Specifically, section 302(d)(1)(B) provides that in any fiscal year in which the total amount made available under the IHBG Program is equal to or greater than the amount made available in Fiscal Year 1996 for the operation and modernization of housing units developed under the 1937 Act, the modernization allocation provided to Indian tribes with IHAs that owned or operated fewer than 250 units shall equal the average annual funding provided to the Indian tribe under section 14 of the 1937 Act (other than funds provided for emergency assistance) for Fiscal Years 1992 through 1997. Section 14 of the 1937 Act, which has been repealed, formerly contained the requirements for public housing modernization.

The proposed rule would implement this statutory provision by revising § 1000.316(b), which concerns calculation of the modernization allocation of the FCAS component of the IHBG Formula. The substance of existing paragraph (b) would be redesignated as paragraph (b)(1), and would concern the calculation of the FCAS modernization allocation for Indian tribes with IHAs that owned or operated 250 or more public housing units on October 1, 1997. The modernization allocation for these Indian tribes will continue to equal the number of Low Rent, Mutual Help, and Turnkey III FCAS units multiplied by the national per unit amount of allocation for Fiscal Year 1996 modernization multiplied by an adjustment factor for inflation.

A new § 1000.316(b)(2) would be added to address section 302(d)(1)(B) of NAHASDA. New paragraph (b)(2) would provide that the FCAS modernization allocation for Indian tribes with an IHA that owned or operated fewer than 250 public housing units on October 1, 1997, shall equal the average amount of funds received under the assistance program authorized by section 14 of the 1937 Act (not including funds provided as emergency assistance) for Fiscal Years 1992 through 1997.

This proposed rule would also make a conforming change to § 1000.340, which concerns the funding of an Indian tribe that is allocated less funding under the IHBG Formula than it received in Fiscal Year 1996 for operating subsidy and modernization. Specifically, the proposed rule would designate the existing substance of § 1000.340 as paragraph (b) and add a new paragraph (a) that addresses the effect of the amendment to section 302(d) of NAHASDA.

New § 1000.340(a) provides that if an Indian tribe is allocated less funding under the modernization allocation of the IHBG Formula than the number of Low Rent, Mutual Help, and Turnkey III FCAS units multiplied by the national per unit amount of allocation for Fiscal Year 1996 modernization multiplied by an adjustment factor for inflation, its modernization allocation will be increased to that amount. The remaining grants would be adjusted to keep the allocation within available appropriations. The Committee determined that the change was required to ensure that all Indian tribes are treated equitably, and to maintain fairness in the allocation of IHBG funds.

#### *J. Small Programs/Minimum Funding*

The proposed rule would significantly revise the minimum funding provisions of § 1000.328. First, the proposed rule would remove the current provisions regarding the minimum IHBG Formula Need allocation for an Indian tribe in its first year of participation in the IHBG Program. Currently, the regulation provides for a minimum allocation of \$50,000 for an Indian tribe in its first program year. The proposed change to § 1000.328 would treat all Indian tribes equally in setting a minimum amount of funding, regardless of their length of participation in the IHBG Program.

The proposed rule would also revise the minimum formula allocation an Indian tribe will receive under the Need component of the IHBG Formula after its first year of participation in the program. The regulation currently in effect provides that the minimum

amount an Indian tribe will receive under the Need component after its first year of participation in the program is \$25,000. The proposed rule would replace this dollar amount with a percentage of the available fiscal year appropriations (after set asides).

Specifically, under the proposed rule, the minimum allocation in any fiscal year to an Indian tribe under the Need component shall equal 0.007826% of the available appropriations for that fiscal year after set asides. The Committee chose this percentage because, if the provision were effective for Fiscal Year 2004, the minimum funding amount under the proposed rule would equal approximately \$50,000. The Committee wished to set a percentage that reflected a minimum of approximately \$50,000 based on current IHBG appropriations.

The use of a percentage rather than a fixed dollar amount will help to ensure that Indian tribes receiving minimum funding will benefit proportionally with other Indian tribes from any increases in Congressional appropriations over the coming years. Conversely, the use of a percentage will also ensure that any reductions in appropriations are shared on a proportional basis among all Indian tribes.

The proposed rule would also establish new eligibility requirements for minimum funding. The Indian tribe must receive less than \$200,000 under the FCAS component for the fiscal year, and must demonstrate the presence of any households at or below 80 percent of median income. These eligibility requirements are designed to ensure that the minimum funding provisions benefit Indian tribes that would otherwise be unable to provide even minimal housing services, and that have a demonstrable need for such services.

#### *K. Adjustment of Need Variables Using Census Birth and Death Data*

The proposed rule would revise § 1000.330, which describes the data sources used for the Need component, to codify existing procedures regarding the annual adjustment of these data to reflect birth and death rates. Specifically, new § 1000.330(b) would specify that the data for the Need variables shall be adjusted annually beginning the year after the need data is collected, using Indian Health Service projections based upon birth and death rate data as provided by the National Center for Health Statistics.

#### *L. Data Challenges and Appeal of HUD Formula Determinations*

The proposed rule would clarify and elaborate upon existing § 1000.336,

which describes the procedures that an Indian tribe, tribally designated housing entities (TDHE), and HUD may use to challenge data. As revised by this proposed rule, § 1000.336 would continue to authorize data challenges, but also provide for appeal of certain HUD formula determinations. Specifically, Indian tribes and TDHEs would be authorized to appeal formula determinations regarding, among others: (1) U.S. Census data; (2) tribal enrollment; (3) Formula Area; (4) FCAS; (5) Total Development Cost (TDC); (6) Fair Market Rents (FMRs); and (7) Indian Health Service projections based upon birth and death rate data provided by the National Center for Health Statistics. An Indian tribe, however, would not be permitted to challenge data or HUD formula determinations regarding Allowable Expense Level (AEL) and the inflation factor used to adjust AEL. As currently authorized for data challenges, the proposed rule would provide that the appeal of HUD formula determinations is an allowable cost for IHBG funds.

The proposed rule would also clarify that data used to challenge U.S. Census data must meet the requirements described in § 1000.330(a). Specifically, the data must be collected in a uniform manner that can be confirmed and verified for all AIAN households and persons living in an identified area. Further, the proposed rule would revise the date by which the data challenge must be submitted to HUD in order for a U.S. Census challenge to be considered for the upcoming fiscal year allocation. The current regulation establishes a June 15 deadline date. This proposed rule would require that the documentation be submitted by no later than March 15. The Committee decided to shorten the deadline after consideration of the time and resources required by HUD staff to process challenge requests in a timely manner and without delay to the calculation of formula allocations for all Indian tribes.

The proposed rule would continue to provide that HUD shall respond to all challenges or appeals not later than 45 days after receipt and either approve or deny the validity of such data or challenge to a formula determination. The proposed rule would clarify that HUD shall provide the Indian tribe with the reasons for its determination in writing. The proposed rule would continue to provide that in the event HUD challenges the validity of the submitted data, the Indian tribe or TDHE and HUD shall attempt in good faith to resolve any discrepancies so that such data may be included in the formula allocation. The proposed rule

would also clarify the steps that HUD and Indian tribes must follow should they be unable to reach resolution on these issues. Specifically, should the Indian tribe or TDHE and HUD be unable to resolve any discrepancy within 30 calendar days of receipt of HUD's denial, the Indian tribe or TDHE may request reconsideration of HUD's denial in writing. The request shall set forth justification for reconsideration. Within 20 calendar days of receiving the request, HUD shall reconsider the Indian tribe or TDHE's submission and either affirm or reverse its initial decision in writing, setting forth HUD's reasons for the decision.

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

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.

#### *M. Review of IHBG Formula Within Five Years*

Section 1000.306 provides that the IHBG Formula shall be reviewed within five years after promulgation to determine whether changes are required. The Committee has agreed to interpret this provision to mean that the IHBG Formula regulations will again be reviewed within five years following the effective date of the final rule implementing this proposed rule. For purposes of clarity, and consistent with this consensus decision, the proposed rule would revise § 1000.306 to state that the IHBG Formula regulations will be reviewed within five years following the effective date of the final rule.

#### **IV. Nonconsensus Items; Other Issues for Consideration**

In addition to the proposed regulatory changes described above, the Committee considered other issues that, although not resulting in proposed revisions to the IHBG Formula, it wishes to bring to the attention of the public. The Committee considered a variety of proposals for suggested changes during the course of the negotiations for which consensus was not achieved.

In some cases, the Committee considered possible changes for which

no draft regulatory language was developed and, therefore, consensus could not be reached. These proposals included: (1) The revised weighting of the Need component to better reflect the need of low-income families; (2) the inclusion of separate variables under the Need component to reflect overcrowding and lack of plumbing (which are currently reflected by a single formula variable under the Need component); (3) retaining the Current Assisted Stock portion of the IHBG Formula without change; (4) revising the determination of Total Development Cost; and (5) reviewing the eligibility of state-recognized Indian tribes to receive funding under NAHASDA.

The Committee also considered six draft rule changes upon which consensus could not be reached. The following discussion summarizes these proposals.

#### *A. Definition of Formula Median Income*

The Committee considered removing the definition of "formula median income" used in calculating the Need component of the IHBG Formula and, in its place, using the definition of "median income" provided under section 4 of NAHASDA. Under the NAHASDA definition, median income equals the greater of the median income for the Indian area as determined by the Secretary of HUD, or the median income for the United States. The IHBG Formula regulations use the term "formula median income," which is determined in accordance with section 567 of the Housing and Community Development Act of 1987 (42 U.S.C. 1437a note). Section 567 provides that median income is the higher of the median income of the county in which the area is located or the median income of the entire nonmetropolitan area of the state.

The Committee members advocating this change took the position that the formula allocation should be based in part on the statutory definition of median income contained in NAHASDA. These Committee members expressed concern that the regulatory definition unfairly results in some Indian tribes not receiving IHBG funding for low-income Indian families who must be served by the Indian tribe. Other Committee members, however, noted that the revision would result in a shift in funding and authorize the use of a national income standard not reflective of local conditions.

There was one objection to the proposed removal of formula median income. Later, at the conclusion of negotiations of all issues, but prior to

adjournment of the Committee session, the member disagreeing with the change offered to withdraw the objection if the Committee wished to revisit the item. There were 10 objections to revisiting the proposal and, therefore, consensus was not reached on this change.

#### *B. Elimination of Section 8 Inflation Adjustment Factor in Calculating FCAS*

Under § 1000.316, the FCAS component considers the number of Section 8 units operated by the Indian tribe as of September 30, 1997, multiplied by the FY1996 national per unit subsidy adjusted for inflation. The Committee considered various proposals to remove the inflation adjustment factor for Section 8 units. One proposal would have simply removed the inflation factor. A compromise proposal offered by the same Committee member would also have removed the inflation factor, but provided that the number of Section 8 units would be adjusted by the FY2003 national per unit subsidy. The Committee members advocating this change stated that the adjustment factor results in the diversion of scarce IHBG funds and encourages the retention of Section 8 units at the expense of other affordable housing activities. Other Committee members stated that the Section 8 units were a valuable housing resource in their communities, and that the inflation factor was necessary to ensure that families could continue to afford residing in these units.

There were seven objections to the proposed removal of the Section 8 inflation factor in the calculation of FCAS and, therefore, consensus was not reached.

#### *C. Definition of Substantial Noncompliance*

Section 1000.534 of the IHBG Program regulations describes those tribal actions that constitute substantial noncompliance with IHBG Program requirements. As explained in § 1000.538, HUD may take certain actions against an Indian tribe that has failed to comply substantially with the IHBG Program requirements, but only after reasonable notice and opportunity for a hearing conducted in accordance with 24 CFR part 24. The Committee considered expanding the actions deemed to constitute substantial noncompliance and, therefore, entitle the Indian tribe to a formal hearing prior to any reduction or adjustment of its IHBG grant. Specifically, the Committee considered proposed language providing that an Indian tribe is entitled to a formal hearing if HUD takes any action or makes any determination that

would reduce, withdraw, or adjust an Indian tribe's grant by an amount of at least \$50,000 or 20 percent of the Indian tribe's grant for the fiscal year.

The Committee members advocating this change stated that HUD determinations that might result in a reduction of the Indian tribe's grant in an amount exceeding the proposed thresholds should, in the interest of fairness, be considered "substantial" and entitle the Indian tribe with the opportunity to a hearing. A Committee member noted that the current procedures are fair and work effectively to safeguard the interests of Indian tribes and the federal government for all Indian tribes. This member also expressed concerns that the proposed regulatory change would result in a large increase in hearing requests, thereby creating undue administrative burden and delaying formula calculations.

There were two objections to the proposed expansion of substantial noncompliance and therefore consensus was not reached on this proposal.

#### *D. Replacement of Allowable Expense Level (AEL)*

The IHBG Formula currently uses an adjustment factor known as the Allowable Expense Level (AEL), which serves as a substitute measurement of geographic and other differences in the monthly per-unit operating costs incurred by an Indian tribe to operate Current Assisted Stock. The individual AEL determinations for each Indian tribe vary, sometimes greatly, across the country. Pursuant to § 1000.320, either the relative difference between local area AEL and the national weighted average for AEL, or the fair market rent factor, is used to allocate operating subsidies among Indian tribes under the CAS component of the IHBG Formula. The use of the AEL and the existing AEL levels are a carry-over from the Performance Funding System under which HUD, prior to enactment of NAHASDA, provided operating subsidy to IAHAs. The fair market rent factors have a challenge or appeal process, but there is no such right or procedure for the AELs.

Some members of the Committee expressed dissatisfaction with the AEL, stating that it is not reflective of the true costs of operating affordable housing units and that individual AEL levels were often inaccurately calculated. Some other Committee members felt that generally use of the AEL is an acceptable method for allocating IHBG operating funds among the Indian tribes but that individual AEL determinations should be subject to challenge by

individual Indian tribes. The Committee considered a consensus proposal to retain the AEL but also permit individual tribal challenges to AEL determinations. However, other Committee members noted that the revision would result in a shift in funding. There were seven objections to the proposal, resulting in nonconsensus. Accordingly, this rule does not propose any changes to the AEL.

During Committee deliberations, several members, including HUD, expressed a desire to replace the AEL with a more current, accurate, asset-based measure of the costs to operate well-run housing in tribal areas. It was acknowledged, moreover, that at this time the data and methodologies necessary to implement such a system have not been developed. HUD has begun to undertake a comprehensive study of well-run tribal housing. HUD will consult with, and seek the active participation of, Indian tribes, TDHEs, and other Native American and Alaska Native organizations in the development and implementation of the cost study. HUD advised the Committee that it will make its best efforts to develop an acceptable replacement for the AEL no later than the next five-year review of the IHBG Formula under § 1000.306, consistent with any applicable negotiated rulemaking requirements.

#### E. Alternative Data Sources

Section 1000.330 provides that the data sources for the Need component shall be available data that is collected in a uniform manner that can be confirmed and verified for all AIAN households. Section 1000.330 further provides that initially the data used will be U.S. Census data.

Several Committee members expressed concerns about the use of U.S. Census Data, stating that it does not accurately reflect the population of tribal areas. These members proposed a regulatory change that would have permitted an Indian tribe to elect the use of other data sources in calculation of its Need component. These data sources would have included a tribal census, Indian Health Service data, and tribal enrollment data. Other Committee members, while acknowledging imperfections in the census data, stated that the U.S. Census is the only data source that satisfies the criteria contained in § 1000.330, which requires that the data be verifiable for all Indian tribes and collected in a uniform manner. These members were also concerned that opening formula calculations to a variety of data sources, rather than a single source agreed upon

by all Indian tribes, would jeopardize the speed, accuracy, and fairness of IHBG Formula determinations.

There were nine objections to the use of alternative data sources other than the U.S. Census and, therefore, consensus was not reached on the proposal.

#### F. Use of Multi-Race U.S. Census Data

In calculating the Need component, pursuant to § 1000.330, HUD uses U.S. Census population data. When § 1000.330 was adopted by the original negotiated rulemaking committee, the U.S. Census population data at that time reflected only those persons who identified solely as AIAN. However, the 2000 U.S. Census reported for the first time both those persons who identify themselves solely as AIAN and those who also identify with another race. HUD's current calculation of the Need component incorporates all persons who identify as AIAN, without regard to whether they also identify as another race. Proponents of using this data stated that the use of single-race data reflects the best available information and would exclude some persons who identified as multi-race and are eligible to be served under NAHASDA. These members stressed the importance of allowing tribal members, as determined by individual tribal membership criteria, to be counted and served. Other Committee members, however, expressed objections to the use of this multi-race data, stating that the purpose of NAHASDA to assist Native Americans would be better served by limiting the population data to those persons designating themselves as being solely AIAN. These Committee members expressed concern that HUD, not the individual Indian tribes, had determined whether to use multi-race data in the calculation of the Need component. The Committee considered a compromise proposal that would have provided for the calculation of the Need component based on the average of the number of individuals designating themselves solely as AIAN and the number of persons also designating themselves as belonging to other racial categories. There were ten objections to the proposal and consensus was not reached to amend HUD's current practice to use multi-race AIAN data for formula purposes.

#### G. Calculation of the Need Component Housing Shortage Variable

Section 1000.324(c) provides that in calculating the Need component housing shortage variable, HUD shall consider, among other factors, the

number of "units developed under NAHASDA." There is currently no regulatory provision defining which units are considered to have been developed under NAHASDA.

Accordingly, HUD has not taken these "NAHASDA units" into account when calculating the housing shortage variable.

The Committee attempted unsuccessfully to develop a definition of NAHASDA units. The Committee then considered a proposal to remove the reference to these units from § 1000.324(c). The members advocating the proposal indicated that the change was necessary for purposes of clarity. Other Committee members, however, noted that a definition could be established at a later date, and that Indian tribes should be afforded the opportunity to develop, and receive funding for, NAHASDA units. There were five objections to the proposed removal of the reference to NAHASDA units and, therefore, consensus was not reached on this issue.

### V. Findings and Certifications

#### Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866 (entitled "Regulatory Planning and Review"). OMB determined that this rule is a "significant regulatory action" as defined in section 3(f) of the Order (although not an economically significant action, as provided under section 3(f)(1) of the Order). Any changes made to the rule subsequent to its submission to OMB are identified in the docket file, which is available for public inspection in the Regulations Division, Room 10276, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500.

#### Paperwork Reduction Act

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

The burden of the information collections in this proposed rule is estimated as follows:

*Reporting and Recordkeeping Burden:*

Section reference	Number of parties	Number of responses per respondent	Estimated average time for requirement (in hours)	Estimated annual burden (in hours)
§ 1000.315 .....	579	1	.60	347
§ 1000.336 .....	15	1	170	2,550
<b>Total burden .....</b>				<b>2,897</b>

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning this 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.

Interested persons are invited to submit comments regarding the information collection requirements in this rule. Under the provisions of 5 CFR part 1320, OMB is required to make a decision concerning this collection of information between 30 and 60 days after today's publication date. Therefore, a comment on the information collection requirements is best assured of having its full effect if OMB receives the comment within 30 days of today's publication. This time frame does not affect the deadline for comments to the agency on the interim rule, however. Comments must refer to the proposal by name and docket number (FR-4676) and must be sent to:

Mark Menchik, HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, Fax number: (202) 395-6947, E-mail:

*Mark\_D.\_Menchik@omb.eop.gov*; and Sherry Fobear-McKown, Reports Liaison Officer, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4116, Washington, DC 20410-5000.

#### *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, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Finding of No Significant Impact is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-0500.

#### *Regulatory Flexibility Act*

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

Notwithstanding HUD's determination that this rule will not have a significant economic impact on a substantial number of small entities, HUD specifically invites comments regarding less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

#### *Unfunded Mandates Reform Act*

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

#### *Catalog of Federal Domestic Assistance*

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

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

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

Accordingly, for reasons discussed above, HUD proposes to amend 24 CFR part 1000 as follows:

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

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

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

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

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

\* \* \* \* \*

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

- (i) Reservations for federally recognized Indian tribes, as defined by the U.S. Census;
- (ii) Trust lands;
- (iii) Department of the Interior Near-Reservation Service Area;
- (iv) Former Indian Reservation Areas in Oklahoma Indian Areas, as defined by the U.S. Census as Oklahoma Tribal Statistical Areas (OTSAs);
- (v) Congressionally Mandated Service Areas;

(vi) State Tribal Areas as defined by the U.S. Census as State Designated American Indian Statistical Areas (SDAISAs);

(vii) Tribal Designated Statistical Areas (TDSAs);

(viii) California Tribal Jurisdictional Areas established or reestablished by Federal court judgment; and

(ix) Alaska formula areas described in paragraph (4) of this definition.

(2)(i) For a geographic area not identified in paragraph (1) of this definition, and for expansion or redefinition of a geographic area from the prior year, including those identified in paragraph (1) of this definition, the Indian tribe must submit, on a form agreed to by HUD, information about the geographic area it wishes to include in its Formula Area, including proof that the Indian tribe, where applicable, has agreed to provide housing services pursuant to a Memorandum of Agreement (MOA) with the tribal and public governing entity or entities of the area, or has attempted to establish such an MOA; and either:

(A) Could exercise court jurisdiction, or

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

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

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

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

(3) Subject to a challenge by an Indian tribe with a Formula Area described under paragraph (1)(iv) of this definition, any federally recognized Indian tribe assigned Formula Area geography in Fiscal Year 2003 not identified in paragraphs (1) and (2) of

this definition, shall continue to be assigned such Formula Area in subsequent fiscal years, provided that the Indian tribe continues to provide an appropriate level of housing services within the Formula Area as monitored by HUD using the definition of substantial housing services contained in this section as a guideline but not a requirement.

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

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

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

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

(5) In some cases the population data for an Indian tribe within its Formula Area is greater than its tribal enrollment. In general, to maintain fairness for all Indian tribes, the tribe's population data will not be allowed to exceed twice an Indian tribe's enrolled population.

However, an Indian tribe subject to this cap may receive an allocation based on more than twice its total enrollment if it can show that it is providing housing assistance to substantially more non-member Indians and Alaska Natives who are members of another federally recognized Indian tribe than it is to members. For state-recognized Indian tribes, the population data and formula allocation shall be limited to their tribal enrollment figures as determined under enrollment criteria in effect in 1996.

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

\* \* \* \* \*

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

\* \* \* \* \*

*Substantial housing services* are:

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

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

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

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

(3) HUD shall require that the Indian tribe annually provide written

verification, on a form approved by HUD, that the affordable housing activities it is providing meet the definition of substantial housing services.

\* \* \* \* \*

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

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

\* \* \* \* \*

(b) The IHBG Formula shall be reviewed not later than [date that is five years from the effective date of final rule] to determine if subsidy is needed to operate and maintain NAHASDA units or any other changes are needed in respect to funding under the Formula Current Assisted Stock component of the formula.

\* \* \* \* \*

4. Add § 1000.315 to read as follows:

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

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

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

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

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

\* \* \* \* \*

(a) \* \* \*

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

\* \* \* \* \*

(b) *Modernization allocation.* (1) For Indian tribes with an Indian Housing Authority that owned or operated 250 or more public housing units on October 1, 1997, the modernization allocation equals the number of Low Rent, Mutual Help, and Turnkey III FCAS units multiplied by the national per unit amount of allocation for FY1996 modernization multiplied by an adjustment factor for inflation.

(2) For Indian tribes with an Indian Housing Authority that owned or operated fewer than 250 public housing

units on October 1, 1997, the modernization allocation equals the average amount of funds received under the assistance program authorized by section 14 of the 1937 Act (not including funds provided as emergency assistance) for fiscal years 1992 through 1997.

6. Add § 1000.319 to read as follows:

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

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

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

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

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

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

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

\* \* \* \* \*

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

\* \* \* \* \*

8. Revise § 1000.328 to read as follows:

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

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

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

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

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

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

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

\* \* \* \* \*

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

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

10. Revise § 1000.336 to read as follows:

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

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

- (1) U.S. Census data;
- (2) Tribal enrollment;
- (3) Formula area
- (4) Formula Current Assisted Stock (FCAS);

(5) Total Development Cost (TDC);

(6) Fair Market Rents (FMRs); and

(7) Indian Health Service projections based upon birth and death rate data provided by the National Center for Health Statistics.

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

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

(d) An Indian tribe or TDHE that seeks to appeal data or a HUD formula

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

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

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

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

(3) Within 20 calendar days of receiving the request, HUD shall

reconsider the Indian tribe or TDHE's submission and either affirm or reverse its initial decision in writing, setting forth HUD's reasons for the decision.

(4) Pursuant to resolution of the dispute:

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

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

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

11. Revise § 1000.340 to read as follows:

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

(a) If an Indian tribe is allocated less funding under the modernization

allocation of the formula pursuant to § 1000.316(b)(2) than the calculation of the number of Low Rent, Mutual Help, and Turnkey III FCAS units multiplied by the national per unit amount of allocation for Fiscal Year 1996 modernization multiplied by an adjustment factor for inflation, the Indian tribe's modernization allocation is calculated under § 1000.316(b)(1). The remaining grants are adjusted to keep the allocation within available appropriations.

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

Dated: January 28, 2005.

**Michael Liu,**

*Assistant Secretary for Public and Indian Housing.*

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