**FCAS Work Group**

7/30/14

The work group started by reviewing the table listing FCAS work group issues. Work group members provided updates on items.

The group revised the table at the beginning of the work group meeting (status of some items will be updated as the group addresses them today). See next page.

Jim provided the site where members can get information about unexpended balances:

<https://sites.google.com/site/ihbgddc>.

**Item #4 1000.306c regarding Section 8 units**

The work group looked at language from the drafting committee as follows:

1000.316 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. …

(b) Modernization allocation. …

[new subsection:]

(c) Conversion. Conversion of FCAS units from homeownership (Mutual Help or Turnkey III) to low-rent or vice versa.

(1) If units will be counted for formula funding and eligibility purposes as the type of unit to which they were converted.

(2) If units were converted after October 1, 1997, the following applies:

(a) Funding type. Units that converted after October 1, 1997 will be counted as the type of unit specified on the original ACC.

(b) Continued FCAS eligibility. A unit converted after October 1, 1997, will be considered as the type converted to when determining continuing FCAS eligibility, whether or not it is the first conversion. A unit that is converted to low-rent will be treated as a low-rent unit for purposes of determining continuing FCAS eligibility. A unit that is converted to homeownership will be treated as a homeownership unit for purposes of determining continuing FCAS eligibility.

(3) The Indian Tribe, TDHE, or IHA shall report conversions on the Formula Response Form.

units were converted before October 1, 1997, as evidenced by an amended ACC, then those

A work group member asked if this language can affect needs. HUD responded that this is no different than current practices. It won’t change needs. The work group supported this language by consensus.

**Item #6 Time Limitations on Grantee Expenditures**

Craig Kaufman of Navajo Housing Authority (NHA) explained the issue re: unexpended funds. In the 2015 budget, HUD took a position and asked that housing authorities have a cap of three times its unexpended funds. If a housing authority has accumulated more than three times its annual allocation, the housing authority would not be entitled to receive an allocation until its unexpended funds decreased. The work group distributed proposed Section 302 of NAHASDA Act. This ruling only affects tribes with at least a $5 million grant. On January 1 of each year, the Secretary will notify housing authority whose unexpended funds exceed three times annual allocation, and give the housing authority 30 days to explain why they have this much money in unexpended funds and to demonstrate their capacity to spend the funds in an effective manner. If the Secretary doesn’t think the housing authority’s reason for not spending funds is adequate, or that the housing authority has the capacity to spend the funds, the housing authority does not have appeal rights. Typically a housing authority has the right to appeal a decision. Mr. Kaufman expressed concern about no due process if they are denied allocation because of unexpended funds. He believes that this is a substantial intrusion into self-determination and gives HUD too much authority.

Work group members fall into three sides on this issue: (1) tribes affected by this rule; (2) HUD; (3) tribes not affected by the rule but that have a position on it. Some of the matters around this rule are:

* Excluding small tribes from the rule
* Implementation date when it takes effect
* Due process

| **REVISED JULY 30, 2014** |
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| **Item #** | **FCAS Work Group Issue** | **How Issue was Addressed** | **Status as of 7/30/2014** |
| 1 | Review of Subpart D Regulations and Statutory Changes -- Demolition and Rebuilding of units | The work group developed bullets, the drafting committee wrote draft language and the work group revised the language.  | Draft language ready for full committee review |
| 2 | FCAS Factors -- 2008 Indian Housing Operating Cost Study/Local Area Cost Adjustment Factors | The work group reviewed the Cost Study, and given its length and complexity requested a presentation summarizing the Cost Study. They discussed how AEL, FMR and TDC are used in the formula, and the strengths and weaknesses of each of these local cost adjustment factors. They also considered a new factor, United States Department of Agriculture (USDA) 515 local area cost adjustment factor, which the study recommended adding. The group is waiting for a response to their TA request for the 515 data, and for HUD to do a run that (1) uses the better of FMR, AEL and 515, and (2) uses FMR and 515. HUD has contacted the USDA to start the process to get current data. It will take several months to get the data via inter-agency agreement process, then aggregate the data and do the analysis.  | Still under consideration. Waiting for presentation summarizing the Indian Housing Operating Cost Study; waiting for the simulation using USDA 515 data. |
| 3 | Mutual Help conveyance (units that reached DOFA + 25 but haven’t conveyed) | The group extensively discussed this issue. They discussed the interpretation of “reasonable efforts,” and the range of options for handling units that are not conveyed at DOFA + 25. They looked at categories of reasons that prevent conveyance. They made a TA request for a list of issues that prevent conveyance. Since this area is so challenging, they decided to form a sub-group to address it. | An FCAS sub-group is working on proposed language to present to the work group at the next session. |
| 4a | 1000.306c regarding Section 8 Units | There is a conflict between the statutory language, which says that Section 8 units will continue to be counted, and the regulatory language, which says that Section 8 stock will diminish along with other housing stock. The FCAS work group had an extensive discussion about how to interpret the language about Section 8 units. They decided to recommend removal of regulation 1000.306c because it is inconsistent with the rest of the statute. They will classify this as a technical correction to the regulations. They work group decided that the drafting committee also should develop some preamble language to indicate why they are removing the regulation. | Proposed technical correction to regulation 1000.306c.  |
| 4b | Conversions | The work group segued into a discussion of how to count units that converted after FY 1997. The work group discussed the consequences of changing the way converted units are treated and having the subsidy follow the use of the unit. After extensive discussion, the group was unable to reach consensus on changing how converted units are funded. They decided to regulate the existing practice by adding language to 1000.316c. | Draft language ready for full committee review |
| 5 | Recipients of FCAS money with no or low needs | The work group reviewed the two TA requests that provide data to address this issue. They discussed whether tribes with no needs should receive funding, and also whether tribes that no longer have FCAS should receive funding. The work group submitted a TA request to determine which tribes don’t receive their grants, and how much money goes back to IHBG as a result. After studying the issue, the group determined that 1996 hold harmless language prevents them from coming up with regulatory language that affects recipients that get FCAS money but have no needs. | Studied issue but nothing to present. |
| 6 | Time limitation on grantee expenditures | The group discussed the ramifications of the new appropriations language from 2012 on that put a time limit on funds that are allocated. HUD and tribes want to craft a regulation regarding unexpended balances in order to justify continuing to get at least the same level of IHBG funding. They discussed how to deal with loss of funds because they aren’t expended within the time limit. HUD said that they can’t recapture money from tribes that already have been allocated money. However, they can reduce or suspend future grants for tribes that have not expended their funds in a timely manner. The TA request for LOCCS balances was filled and the group discussed the data. The group also discussed a draft proposal on how to handle this issue. They addressed a number of aspects of the proposal including threshold (what would trigger this rule), and expressed concern about the due process provisions. | Group is in the process of discussing and revising the draft proposal. |
| 7 | Statutory Section 302C as it pertains to FCAS funding – other factors for consideration | Statutory language says that they will “consider” other factors in the funding formula. The work group discussed other factors, particularly administrative capacity. They also discussed whether they should give bonuses to tribes that are facing challenges. They extensively discussed challenges related to geographic distribution, and made a TA request for BIA roads data and IHS water and sewer data that might help them measure geographic dispersion. They also discussed infrastructure and how costs are inflated in rural areas. A major concern about adding another factor was that money would come from Needs. | Still under consideration. Waiting for BIA and IHS data. |
| 8 | HUD processes and practices that could be in conflict with current practice | The work group made a TA request for applicable guidances and notices, and reviewed them all. The only process/practice that is out of step with current regulations is 98-19, which was addressed in item 4b. | Completed.  |
| 9 | NAHASDA assisted units | The work group discussed the definition of NAHASDA assisted units and what would happen if these units were subsidized. They made a TA request for the number of units developed or acquired under NAHASDA. They want this done separately for rental and home ownership units. They also made a TA request for the history of preamble language regarding subsidy for NAHASDA units from previous Negotiated Rulemaking sessions.  | Still under consideration. |
| 10 | Data challenge procedures | The work group reviewed three sections of the regulations. For Section 1000.336, regulation relating to challenging data or HUD determination, HUD provided information showing that since 1998 there have been no challenges to TDC or FMR data. The work group decided that since there have been no challenges, there is no need to change this regulation. However, if they include a new cost factor, they will need to amend the regulation to include it. For Section 1000.315 and 1000.319, the group determined that no changes are needed. | Studied issue and no changes needed. |

**#6 Time Limitation on Grantee Expenditures (continued)**

The FOIA request for LOCCS data was granted. They sent the work group the data that they requested, namely, LOCCS data through January 5, 2014. The data does not show money spent after January 5, 2014. The table shows unexpended funds (available), grant award for the year, and the percentage of the grant award that is available. The data are listed from greatest percentage to lowest percentage. These data do NOT show funds that have been drawn down for investment purposes. These amounts cannot be disclosed. In 2014, only 24 grantees received $5 million or more. Based on these data, the proposed rule applies to two tribes, Navajo and Hopi. .

They did send a list of tribes with approved investment plans. Navajo and Hopi do not have approved investment plans.

The drafting sub-group developed the following bullet points on this issue:

1. Threshold – what would trigger this situation (currently 3 times the tribe’s allocation)
2. Exceptions ($5 million minimum)
3. Due process
4. Minimum (hold harmless)
5. Implementation date (delays might cause tribes to be more favorable toward this rule)
6. Umbrella TDHEs
7. Redistribution
8. Formula repayment

HUD walked us through Code of Federal Regulations, Subpart D – Allocation Formula. First, it proposed to change 1000.310. Then, they proposed a new regulation, 1000.342. See below:

**Code of Federal Regulations**

**Title 24 - Housing and Urban Development**

Subpart D—Allocation Formula

**§1000.310 What are the components of the IHBG formula?**

The IHBG formula consists of four components:

(a) Formula Current Assisted Housing (FCAS) (§ 1000.316);

(b) Need (§ 1000.324);

(c) 1996 Minimum (§ 1000.340); and

(d) Undisbursed IHBG funds (§ 1000.342).

**§1000.342 Are undisbursed IHBG funds a factor in the grant formula?**

Yes. After calculating FCAS, Need, and the 1996 Minimum for all tribes, the undisbursed funds factor shall be applied as follows:

(a) The undisbursed funds factor applies if an Indian tribe’s initial adjusted allocation calculation (after calculating FCAS and Need) is $X million or more and the Indian tribe has undisbursed IHBG funds in an amount that is greater than X times its initial allocation calculation.

(b) If subject to paragraph (a) of this section, the Indian tribe’s allocation shall be the greater of the initial allocation calculation minus the amount of undisbursed IHBG funds that exceed X times the initial allocation, or its 1996 Minimum.

(c) If a recipient that has been designated to receive grant amounts by more than one Indian tribe (an umbrella TDHE) is subject to paragraph (a), only the allocation of an Indian tribe under that umbrella TDHE with an initial allocation calculation of $X million or more shall be impacted, and such impact shall only be proportional to that Indian tribe’s proportion of the total initial allocation calculations of all the Indian tribes under that umbrella TDHE.

(d) For purposes of this section, “undisbursed IHBG funds” for an Indian tribe means the amount of IHBG funds for an Indian tribe in HUD’s line of credit control system on January 1 of the fiscal year for which the allocation is made.

(e) Amounts subtracted from an initial allocation calculation under this section shall be redistributed proportionally under the Need component among all Indian tribes not subject to paragraph (a) of this section except that an Indian tribe whose initial allocation calculation was increased pursuant to § 1000.340(b) shall receive the greater of:

1) its 1996 Minimum; or

2) the sum of FCAS, Need and its proportional redistribution under paragraph (e) of this section.

Someone questioned whether it is more reasonable to look at the beginning of the Federal fiscal year (FY) rather than January 1. Also need to address whether the allocation amount should or should not include any adjustment (e.g., repayment from previous year).

The above would mean that, if redistributed funds bump a tribe up to more than $5 million, it does not become subject to the rule.

A work group member asked about the threshold – the reason behind using $5 million is that it doesn’t prevent small tribes from accumulating money for a number of years to build a project. Some work group members questioned why a tribe with, for example, 9 times its allocation unexpended isn’t included in this rule. Perhaps they should lower the threshold from $5 million to $1 million or $2 million and increase the amount from three to four times a tribe’s allocation. The group discussed what threshold and number of years’ worth of allocations to use. Median grant is $660,000.

It was suggested that they add an implementation date so tribes know when they fall under this rule.

# **Discussion of Due Process**

# The group extensively discussed due process provisions. NHA and other work group members believe that the due process procedures in the bill is not adequate. They want housing authorities to have appeal rights similar to those they have in other areas of the program. They believe that this regulation is an intrusion into self-determination because it puts the entire decision-making process in the Secretary’s hands. HUD stated that the reason this regulation is structured as a ***formula factor*** rather than as an enforcement regulation is because they are introducing an an additional objectively measurable factor. There is no HUD review – it is an objective determination. There therefore is no non-compliance, so it is difficult to apply due process to this rule. HUD stated that NHA wants a full-blown ALJ standard hearing process that would use would standard enforcement action with appeal rights. The middle ground is 1000.336 regulation that allows for formula challenge. They can build in something here because it is the standard for challenging formula factors. HUD is willing to make this compromise.

There is concern that adding due process to 1000.336 it may slow down implementation of the rule.

**Implementation Date/Time**

The group discussed when it is best for this rule to apply, that is, what time of the year. They could set a specific time for the regulation to start, e.g., Federal FY X. The timing could give grantees that might be affected by this action time to get out from under the provisions that might affect them.

**Formula Repayment**

HUD clarified that after the formula is calculated, there may be additional money that affects the dollar amount of the allocation. The work group needs to be specific about which amount is applicable – unadjusted or adjusted amount – when they see if a tribe is above or below the threshold. Mr. Kaufman asked if this addresses whether a tribe is subject to a recapture of funds. HUD said that the tribe’s allocation reflects reductions from recapture of funds (and additions from grant adjustments). They will run this language by FirstPic.

The FCAS work group wants to present all of their work to the full committee in a package so that they can review it all at one time. HUD suggested that they have the full committee approve some discrete issues at this time so that they feel that they are making some progress. Mr. Adams wants to finish all of the FCAS work group’s work tomorrow, and then present their work to the full committee in Scottsdale. He doesn’t want to spend all day tomorrow in full committee.