

**Indian Housing Block Grant Formula Negotiated Rulemaking
Session 9
September 21, 2016**

The session started with an opening prayer.

Summary of Day 1 and Plan for Day 2

Heidi Frechette, Deputy Assistant Secretary, stated that they have one more public comment left regarding volatility. They are seeing volatility in the formula from year to year, so HUD will start with a presentation and answer any questions they may have. Mr. Santa Anna said they also will deal with the comment on the success of Negotiated Rulemaking.

Review of Public Comments and Approval of Final Rule Language

Volatility Control (§ 1000.331)

Several commenters were concerned that a tribe needs to prove that its Needs grant declined by more than 10 percent solely from the introduction of a new data source. They want to change the language from “solely as a result” to “primarily as a result” of the introduction of a new data source. This led to a more general discussion of volatility control.

Volatility Control: Language and Discussion

Todd Richardson, Associate Deputy Assistant Secretary, Office of Policy Development and Research, made a presentation on volatility control. With volatility control, no tribes lose more than 10 percent as a result of introducing new American Community Survey (ACS) data, so volatility control does what it’s supposed to do in the first year. In year 2 of ACS, they are only continuing to adjust for reductions from year 1. The grants are very stable from year 1 to year 2 for most tribes; however, there are a handful of tribes that lose 15-25 percent or more than 25 percent. Mr. Richardson expects that there could be greater volatility when they bring in Decennial Census 2020 (Census 2020) data.

A Committee member asked if they were drafting a response to a comment on the proposed regulation, or if they were redrafting the regulation. Mr. Richardson stated that they have the option of possibly allowing volatility control to be applied in later years, instead of just being based on first year losers and gainers.

Navajo Housing Authority said that their concern rests on the “solely as a direct result of a new data source” language. They suggested replacing “solely” with “primarily” in § 1000.331 (a). Their concern is that even if the data source itself causes a reduction in a tribe’s grant, if another factor also reduces the grant, it might exclude the application of volatility control. Dr. Peggy Cuciti with FirstPic explained how HUD’s methodology prevents this from happening. It was proposed that the response include this explanation.

A Committee member thinks that it takes a consensus vote to reopen an issue like volatility control. Ms. Fiala, the facilitator, asked HUD to clarify whether discussing revisions to the volatility control provision is a reconsideration. Mr. Santa Anna stated that revisiting volatility control doesn't fall within the provision dealing with reconsideration. Since public comments address volatility, that opens up the opportunity to address volatility in Committee. However, it requires the consensus of the Committee to change the regulatory text. The Committee continued to discuss whether or not they can change the regulation to address year to year volatility, with several Committee members questioning HUD's interpretation. Mr. Santa Anna reiterated that the proposed rule "is chock full of discussion with regard to volatility," and that it gives them leeway to affect how volatility is going to work.

A Committee member asked when HUD applies the undercount relative to volatility control. HUD responded that the undercount adjustment is not applied to any of the ACS Need variables. At this point, the ACS variables are applied as is without any adjustment for the undercount. The undercount doesn't apply to ACS data, only to the population variable, which comes from the Census.

Volatility Control: Comments

1. Comment: Committee should clarify the volatility control provision

HUD proposed the following response:

Ensuring that grantees have stable allocations is a priority for the Committee. The original intent of § 1000.331 was to protect tribes against significant fluctuations with the introduction of the 2010 Decennial Census and ACS data sources.

HUD understands the concern expressed in the comment, however, HUD is able to isolate the impact on Tribes' funding allocations that is due to the introduction of the ACS as a new data source. This ability to isolate the impact, and apply the control on the basis of that impact alone alleviates the concern of the commenters. HUD will continue to apply the same methodology to calculate the impacts of introduction of a new data source to avoid the concerns raised by the commenters with the agreed upon language.

Jad Atallah, HUD attorney, stated that this language says that the original intent of § 1000.331 was to protect tribes against significant fluctuations with the introduction of the 2010 Decennial Census and ACS data sources. However, it is not clear whether Census 2020 is a new data source. Mr. Atallah stated that "we just need some direction from the Committee as to whether your intent with this regulation was to apply volatility control" when we move to the 2020 Decennial Census.

The Committee debated how to handle the two issues: responding to the public comment and addressing whether volatility control applies to both ACS and the Decennial Census. There was a call for the question on the above proposed response to clarify the volatility control provisions. There was dissent, with HUD opposing. Mr. Santa Anna stated that HUD's concern is that they could use this response to clarify whether or not volatility control applies to the 2020 Census. A Committee member proposed a friendly amendment to the language: delete "2010" so that

volatility control applies to all Decennial Censuses. HUD accepted the friendly amendment. Another Committee member proposed including tribal surveys in this language by adding “Federally and/or tribally administered tribal surveys.” Ms. Frechette stated that “HUD isn't supportive of that amendment because it confuses the issue and doesn't address the specific data sources that we'll be using.”

HUD proposed that, in the first paragraph after data sources, add:

When HUD introduces a new data set, HUD will not apply volatility control. When HUD introduces a new data source, HUD will apply volatility control. For example, when a new ACS data set is available from year to year, HUD will not apply volatility control. When new Decennial Census data is available, HUD will apply volatility control (e.g., 2020 Decennial Census).

Ms. Frechette clarified that if the Committee accepts this language, it forecloses any further discussion on year to year volatility with the introduction of new ACS data sets. HUD is still concerned that some tribes will see large reductions in allocation with the introduction of new ACS data sets.

There was a call for the question. The Committee reached consensus on the following language: *Ensuring that grantees have stable allocations is a priority for the Committee. The original intent of § 1000.331 was to protect tribes against significant fluctuations with the introduction of the 2010 Decennial Census and ACS data. When HUD introduce a new data set, HUD will not apply volatility control. When HUD introduces a new data source, HUD will apply volatility control. For example, when a new ACS data set is available from year to year, HUD will not apply volatility control. When new Decennial Census data is available, HUD will apply volatility control (e.g., 2020 Decennial Census).*

HUD understands the concern expressed in the comment, however, HUD is able to isolate the impact on Tribes' funding allocations that is due to the introduction of the ACS as a new data source. This ability to isolate the impact, and apply the control on the basis of that impact alone alleviates the concern of the commenters. HUD will continue to apply the same methodology to calculate the impacts of introduction of a new data source to avoid the concerns raised by the commenters with the agreed upon language.

Comment: The negotiated rulemaking was successful.

HUD proposed the following response:

The Committee appreciates this comment and agrees that this Negotiated Rulemaking was highly productive and successful. The Committee also extends its appreciation to each tribal representative and to HUD leadership and staff for their hard work and dedication to the Negotiated Rulemaking process, and believes that that this final rule reflects the thoughtful and deliberate work of everyone involved in this rulemaking. The Committee believes that the success of the Negotiated Rulemaking rests on the spirit of cooperation and hard work that tribal representatives and HUD leadership and staff brought to the negotiations.

One Committee member said that she would be more comfortable with the word “educational” instead of “successful.” She proposed that they change the first sentence to:

The Committee appreciates this comment and agrees that this Negotiated Rulemaking was educational and productive. There was a call for the question on the proposed response as modified by the friendly amendment above. There was dissent. The Committee discussed the proposed response. A Committee member proposed changing the language in the first sentence to:

...educational, productive and successful.

There was a call for the question on the language with the above changes. There was consensus on the following response:

The Committee appreciates this comment and agrees that this Negotiated Rulemaking was educational, productive and successful. The Committee also extends its appreciation to each tribal representative and to HUD leadership and staff for their hard work and dedication to the Negotiated Rulemaking process, and believes that that this final rule reflects the thoughtful and deliberate work of everyone involved in this rulemaking, The Committee believes that the success of the Negotiated Rulemaking rests on the spirit of cooperation and hard work that tribal representatives and HUD leadership and staff brought to the negotiations.

Additional Question

Ms. Fiala stated that they have one outstanding question: clarification of whether or not the Committee approved deletion of the word “solely” in their discussion of the regulatory language about volatility control. Mr. Santa Anna stated that they had decided not to make any changes to the regulatory text because it wasn’t necessary, since their response to the comment included an explanation of “what the volatility control was all about and how it would be applied.” Based on this discussion, Ms. Fiala said that they can remove the strikeout, and that “the language will remain as it was originally in the proposed rule.”

Two Committee members with a long history of participation in Negotiated Rulemaking expressed their pleasure in being part of Negotiated Rulemaking.

Next Steps

Mr. Santa Anna said that next, HUD will take all of the comments and consensus that was reached here and put it into the final rule. The final rule will include a little background information that is identical to what is included in the proposed rule. There will be bullets of the changes to the proposed rule, and a list of the public comments. “In the spirit of transparency,” HUD will share the final draft with the Committee. They still need to submit the rule to HUD offices, and probably will ask for expedited clearance -- instead of two weeks for comments they will limit it to one week. Assuming there are no non-concurring issues, they will send the rule to the Office of Management and Budget (OMB) for approval. To the extent they can, HUD wants to keep everyone informed about the process. OMB has been very cooperative and supportive of all of HUD’s rules including this rule. After OMB approval, they will get the appropriate signature and get the rule published in the Federal Register. They want to move to publication before the end of the calendar year. There is a statutory rule that delays implementation of the

rule until 30 days after publication. They will revise the appendices in the final rule. The appendices are simply a reflection of what is in the final rule. Mr. Santa Anna said he is very optimistic based on his discussions with HUD leadership and OMB that this will get through.

Public Comments

Craig Moore, Tlingit Haida Regional Housing Authority, said that he is truly impressed at the cooperation and leadership he's seen in this process. They really came together as a family and as a team for the betterment of the tribal nations. Wayne Sims, Administrator of the Southern Plains Office of Native American Programs, thanked everyone for coming to Oklahoma and for doing such important work. He thinks they have been successful.

Closing Remarks

Ms. Castro Ramírez thanked Mr. Sims for hosting Negotiated Rulemaking in Oklahoma City. On behalf of Secretary Castro, she thanked each Committee member for their service, dedication, and “for really engaging in these issues not just from your perspective as leaders in your communities, but thinking more globally about what is in the best interest of Native communities.” She stated that Secretary Castro and this administration, our President, “have been very focused on strengthening our commitment, our investments, our level of coordination in Indian Country and the Alaska Native communities...It is with that sense of purpose and commitment that HUD we as HUD have come to this negotiations table.” Ms. Castro Ramírez stated that she is really pleased that ONAP “will continue to be in good hands with the leadership of Heidi Frechette” and with the very dedicated ONAP staff and the staff throughout HUD.

Ms. Frechette thanked everyone and said it's been an honor to serve with them. She thanked the Co-Chairs and the HUD staff who supported them, and FirstPic, and said “a special thank you to the PDAS Castro Ramírez.” Ms. Frechette also thanked Mr. Sims and the Oklahoma tribes for hosting them. She said “I want to let you know that I look forward to working together,” and that she really looks forward “to getting out into your communities and visiting you, seeing the good work that you're doing on the ground.”

On behalf of Jason Dollarhide and herself, Co-Chair Bryan thanked everyone. Ms. Bryan stated that we've “been a committee that's been able to negotiate and come to agreements. We represent those voices that can't speak for themselves.” She asked that they “keep in our hearts and our thoughts and our prayers the Standing Rock Sioux Tribe in North Dakota.”

Several other Committee members thanked the members of Committee for their work here and for the jobs they do at home. They said it's been an honor and a pleasure to be part of Negotiated Rulemaking, and that they learned a lot.

The Co-Chairs stated that the flags will be retired at 3 pm and asked everyone to attend if they could. The session ended with a closing prayer.