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Part VI

**Department of
Housing and Urban
Development**

24 CFR Parts 950, 953, 955, 1000, 1003,
and 1005

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

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

**24 CFR Parts 950, 953, 955, 1000, 1003,
and 1005**

[Docket No. FR-4170-F-16]

RIN 2577-AB74

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

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

ACTION: Final rule.

SUMMARY: On July 2, 1997, HUD published a rule proposing to implement the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA). NAHASDA reorganizes the system of Federal housing assistance to Native Americans by eliminating several separate programs of assistance and replacing them with a single block grant program. In addition to simplifying the process of providing housing assistance, the purpose of NAHASDA is to provide Federal assistance for Indian tribes in a manner that recognizes the right of Indian self-determination and tribal self-governance. This rule makes final the policies and procedures set forth in the July 2, 1997 proposed rule, and takes into consideration the public comments received on the proposed rule. As required by section 106(b)(2) of NAHASDA, HUD developed the proposed and final rules with active tribal participation and using the procedures of the Negotiated Rulemaking Act.

EFFECTIVE DATE: April 13, 1998.

FOR FURTHER INFORMATION CONTACT: Jacqueline Johnson, Deputy Assistant Secretary for Native American Programs, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 4100, Washington, DC 20410; telephone (202) 708-0950 (this is not a toll-free number). Speech or hearing-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. The July 2, 1997 Proposed Rule

On July 2, 1997 (62 FR 35718), HUD published for public comment a rule proposing to implement the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*) (NAHASDA). NAHASDA streamlines the process of providing housing assistance to Native Americans.

Specifically, it eliminates several separate programs of assistance and replaces them with a single block grant program. In addition to simplifying the process of providing housing assistance, the purpose of NAHASDA is to provide Federal assistance for Indian tribes in a manner that recognizes the right of Indian self-determination and tribal self-governance.

The July 2, 1997 rule proposed to implement NAHASDA in a new 24 CFR part 1000. Part 1000 is divided into six subparts (A through F), each describing the regulatory requirements for a different aspect of NAHASDA. The Committee elected to present new part 1000 in a "Question and Answer" format. Additionally, the rule as much as practicable did not repeat statutory language. A reader was therefore required to have the statute available while reading the rule.

The July 2, 1997 rule also proposed to make several conforming amendments to HUD's existing Indian housing regulations. For example, the rule proposed to remove 24 CFR part 950 from the Code of Federal Regulations. Part 950, which sets forth the regulatory requirements for the "old" system of funding, was made obsolete by NAHASDA.

The rule also proposed to redesignate 24 CFR part 953 (Community Development Block Grants for Indian tribes and Alaskan Native Villages) and 24 CFR part 955 (Loan Guarantees for Indian Housing) as 24 CFR parts 1003 and 1005, respectively. These redesignations were designed to consolidate HUD's Indian housing regulations in the "1000 series" of title 24, and assist program participants by presenting uniformity.

Finally, the July 2, 1997 rule proposed amendments to the regulations currently set forth in part 955. These revisions were designed to reflect the amendments made by NAHASDA to section 184 of the Housing and Community Development Act of 1992 (12 U.S.C. 1715z-13a).

The July 2, 1997 proposed rule provided a detailed description of the amendments to title 24 of the CFR.

II. Negotiated Rulemaking.

Section 106(b)(2)(A) of NAHASDA provides that all regulations required under NAHASDA be issued according to the negotiated rulemaking procedure under subchapter II of chapter 5 of title 5, United States Code. The rulemaking procedure referenced is the Negotiated Rulemaking Act of 1990. Accordingly, the Secretary of HUD established the Native American Housing Assistance and Self-Determination Negotiated

Rulemaking Committee (Committee) to negotiate and develop a proposed rule implementing NAHASDA.

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

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

The Committee divided itself into six workgroups. Each workgroup was charged with analyzing specified provisions of the statute and drafting any regulations it believed were necessary for implementing those provisions. The draft regulations developed by the workgroups were then brought before the full Committee for review, amendment, and approval. A seventh workgroup was assigned the task of reviewing the approved regulations for format, style, and consistent use of terminology.

During February, March, and April 1997 the Committee met four times. The meetings were divided between workgroup sessions at which regulatory language was developed and full Committee sessions to discuss draft regulations produced by the workgroups. Tribal leaders were encouraged to attend the meetings and participate in the rulemaking process.

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

After the Negotiated Rulemaking Committee delivered a proposed rule, the Department placed the rule in clearance in accordance with its customary procedures for the finalization of proposed rules. As a result, numerous changes were suggested by offices within HUD which

had not been part of the negotiated rulemaking process. The Department did not send up a "red flag" or adjust its customary process, notwithstanding the fact that the proposed rule was the product of a negotiated rulemaking process. As a result, changes were made to the negotiated rule and were not communicated to the Negotiated Rulemaking Committee for comment prior to publication.

After discussing conflicting views of the propriety of the Department's actions, the Committee determined (with HUD agreement) that the Department's changes would be given consideration in a manner similar to public comments. As with public comments, the Department's changes were accepted by the Committee where they contributed to the clarity or legal accuracy of the rule, or where they more effectively implemented NAHASDA.

The Department regrets any misunderstanding its actions may have caused.

III. Discussion of Public Comments on the July 2, 1997 Proposed Rule

The public comment period on the July 2, 1997 proposed rule expired on August 18, 1997. The rule was of significant interest to Indian country, as demonstrated by the 134 public comments submitted on the regulations. These comments offered detailed and helpful suggestions on the implementation of NAHASDA. The Committee met during August, September, and October 1997 to consider the public comments and develop this final rule. This section of the preamble presents a summary of the significant issues raised by the public commenters on the July 2, 1997 proposed rule, and the Committee's responses to these comments. For the convenience of readers, the discussion of the public comments is organized by subpart and regulatory section.

Subpart A—General

Subpart A contains the legal authority and scope of the regulations. It also sets forth definitions for key terms used in the balance of the regulations. Subpart A also cross-references to other applicable Federal laws and regulations. Additionally, subpart A describes the conflict of interest provisions which are applicable under the new Indian housing block grant program.

Section 1000.1. Section 1000.1 describes the applicability and scope of 24 CFR part 1000. The Committee has made a clarifying amendment to this provision. Specifically, a sentence has been added to explain that to the extent

practicable the regulations do not repeat statutory language.

Section 1000.2. Several commenters believe that the final rule should restate the trust responsibility of the United States to Indian tribes. One of the commenters recommended language regarding trust responsibility for inclusion in the final rule. The Committee has adopted the language suggested by this commenter and added a new undesignated paragraph at the end of § 1000.2.

Section 1000.4. Several commenters believe that this section did not accurately reflect the objectives of NAHASDA. The Committee has addressed this concern by specifically reiterating the language of NAHASDA section 201(a) which sets forth the primary objective of NAHASDA.

Section 1000.6. Several commenters objected to the unilateral change made by HUD to this section. Specifically, the language originally adopted by the Committee provided that the new Indian Housing Block Grant (IHBG) program is a "formula driven" program. HUD revised this to read "formula grant program." The Committee has adopted the suggestion made by these commenters to use the original regulatory language. The Committee believes this language more accurately reflects the nature of the IHBG program.

Section 1000.8. Several commenters believe that this section, which merely cross-referenced to HUD's general regulatory waiver provision at 24 CFR 5.110, was unclear. The Committee has corrected this by revising the section to reiterate the language of § 5.110.

Another commenter recommended that HUD should be required to respond to waiver requests within 30 days of receipt or the waiver should be automatically approved. The authority to grant regulatory waivers rests solely with the Secretary. The default approval procedure suggested by the commenter would contradict this principle. Accordingly, the comment has not been adopted.

Section 1000.10. A number of comments were received which suggested changes to definitions contained in the proposed rule. The Committee reviewed each of the comments and determined as follows:

1. *Adjusted income.* Several comments suggested excluding child support from annual income. The definition of adjusted income is specified in the statute. The statutory definition allows the Indian tribe to include in its Indian Housing Plan (IHP) other amounts they decide to exclude from annual income. Accordingly, no revision was made to the proposed rule.

2. *Annual income.* A number of suggestions were received to remove from the definition of annual income specific items such as per capita payments, lease payments, education stipends, etc. The definition in the proposed rule is modeled on the obsolete 1937 Act definition which was repealed by NAHASDA. In response to these comments, the Committee has revised the definition of "annual income" to provide Indian tribes with greater flexibility in determining what is annual income. The revised definition is modeled on the definition of annual income in the HOME program (24 CFR part 92) and provides three distinct definitions of annual income from which a recipient may choose.

3. *Homebuyer payment.* The Committee has added a new definition of "homebuyer payment." As explained in the preamble to the proposed rule (62 FR 35722), the term "homebuyer payment" is limited to lease-purchase payments, such as those in the Mutual Help Homeownership Opportunity Program. The addition of this new definition will clarify the meaning of the phrase for readers of the regulations.

4. *Indian area.* The proposed rule provided the broadest possible definition of "Indian area" to allow Indian tribes or Tribally Designated Housing Entities (TDHES) to operate. The Committee has chosen not to make substantive revisions to this definition. However, in response to several comments, it has clarified the definition.

5. *Indian tribe.* One commenter suggested that only Federally recognized Indian tribes be recognized in Alaska. The definition of eligible recipients is statutory; therefore, no change was made to the definition.

6. *Median Income.* The Committee has amended the definition of median income. The proposed rule merely cross-referenced to the statutory definition. The amendment clarifies the definition for purposes of eligibility under a recipient's program.

7. *Person with disabilities.* HUD made several changes to language adopted by the Committee at the proposed rule stage designed to clarify that this definition was based on HUD's definition of "physical, or mental impairment" at 24 CFR 8.3. The regulations at 24 CFR part 8 implement section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794). The Committee reviewed the HUD changes and determined they were unnecessary. Accordingly, this final rule reflects the original Committee language.

8. *Total development cost.* Several comments suggested clarifications and

modifications to this definition. Total development cost is a term used only for purposes of the formula. Therefore, the term is being defined under subpart D and is being removed from this section.

Section 1000.12. This section describes the nondiscrimination requirements that are applicable to the Indian Housing Block Grant (IHBG) program. In response to several public comments, the Committee has made several clarifying revisions to § 1000.12. The section now clarifies that the Indian Civil Rights Act applies to Federally recognized Indian tribes exercising powers of self-government. Further, § 1000.12(b) now clearly provides that title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*) apply to Indian tribes that are not covered by the ICRA. However, the title VI and title VIII requirements do not apply to actions by Indian tribes under section 201(b) of NAHASDA.

Section 1000.14. Several commenters objected to the relocation and property disposition requirements set forth in this section. The commenters wrote that these requirements were burdensome and redundant. Several commenters suggested that § 1000.14 simply cross-reference to the Department of Transportation regulations at 49 CFR part 24. The Department of Transportation is the lead agency in the implementation of the Uniform Relocation Act. The Committee has reviewed § 1000.14 and determined that it provides clear and concise guidance to recipients. Accordingly, no changes have been made.

Section 1000.16. A number of comments were received which expressed concern with the application of Davis-Bacon Act requirements to NAHASDA. The payment of Davis-Bacon wage rates to laborers and mechanics in the development of affordable housing under NAHASDA is a statutory requirement under section 104(b) of NAHASDA and cannot be removed by regulation.

Other commenters suggested that the regulations limit the applicability of Davis-Bacon to projects larger than 12 units. This suggestion was not adopted by the Committee for lack of statutory authority.

A number of commenters suggested that the labor standards section was not sufficiently clear. The Committee has replaced the language in the proposed rule, including those provisions modified by HUD without the consent of the Committee, with a more explicit discussion of labor standards including the applicability of Davis-Bacon wage rates, HUD determined wage rates, the

Contract Work Hours and Safety Standards Act, and miscellaneous related laws and issuances.

Section 1000.18. One commenter questioned whether HUD or the recipient will have to conduct an Environmental Assessment (EA) before HUD's compliance determination for an IHP. The commenter recommended that the final rule clarify this issue. Section 1000.18 has been revised to provide that an environmental review does not have to be completed prior to HUD's compliance determination for an IHP.

One commenter noted that 24 CFR parts 50 and 58 do not refer to the Archaeological Resources Protection Act and Native American Graves Protection and Repatriation Act. The commenter believed these statutes should be addressed in the final rule. The Committee has not adopted this suggestion. Parts 50 and 58 list only statutes that apply to Federal projects specifically. The statutes referenced by the commenter have a broader scope.

Section 1000.20. Forty-seven comments were received on this section. These comments deal with HUD's environmental review responsibilities addressing the payment of review costs; the timely completion of reviews; and the eligibility, under NAHASDA, for NEPA training.

This section has been modified by the Committee to provide greater flexibility in addressing environmental review requirements. In addition to requesting HUD to complete reviews or the Indian tribe completing reviews, the Indian tribe can now choose to provide HUD with necessary information for HUD to complete the environmental reviews. Also, a sentence has been added which clearly notifies recipients that environmental reviews must be completed before affordable housing activities affecting the environment can begin.

Additionally, HUD raised an issue in the preamble of the proposed rule concerning the timing of environmental reviews as it relates to approval of the IHP. HUD has reviewed the IHP approval process and has determined that the approval of the IHP does not have an impact on the completion of the environmental reviews.

Section 1000.22. One commenter suggested that the final rule state whether additional funds will be available to the Indian tribes to meet the environmental review requirements. The rule states in § 1000.22 that environmental review costs are eligible costs. Another commenter wrote that Indian tribes should be reimbursed for all related expenses to the extent they assume environmental review

responsibilities. The Committee has not revised § 1000.22 in response to these comments. There will be no additional funds available to Indian tribes for the review.

Section 1000.26. Several commenters objected to the applicability of 24 CFR part 85 to recipients under NAHASDA. These commenters believed that making part 85 applicable violated the self-governance principles of NAHASDA. Part 85 establishes uniform administrative requirements for grants and cooperative agreements to State, local, and Federally recognized tribal governments. The Committee determined that the consensus language of § 1000.26 should not be changed.

Several commenters recommended that the final rule specify which administrative provisions are applicable to NAHASDA. The Committee has adopted this comment. Accordingly, § 1000.26 has been revised to list the administrative requirements which apply to NAHASDA.

Section 1000.28. Several commenters believed the Committee should provide a definition of "self governance tribe." The Committee has added a sentence to this section which provides that for purposes of § 1000.28, a self-governance Indian tribe is an Indian tribe that participates in self governance activities as authorized under Public Law 93-638 (25 U.S.C. 450 *et seq.*).

Other commenters wrote that making the part 85 requirements applicable to self-governance Indian tribes violated the principles of tribal self-determination. The Committee agrees with these comments. Accordingly, the provision has been revised to provide that a self-governance Indian tribe may certify that its administrative requirements and standards meet or exceed the comparable requirements set forth in § 1000.26.

Section 1000.30 through 34. Several commenters objected to the inclusion of specific conflict of interest provisions in the proposed rule. The commenters believe that recipients should make their own determination regarding conflict of interest based on local conditions or the fact that other programs administered by the recipient may have conflict of interest requirements that are not entirely consistent with the proposed requirements. The Committee has not revised § 1000.30 based on these comments. The Committee determined that the final rule should set forth specific conflict of interest provisions to guide recipients.

Other commenters objected to the unilateral changes made by HUD subsequent to Committee approval. The

Committee reviewed the language modifications made by HUD and determined the language is clearer than the original language. Accordingly, the change has been incorporated.

In response to a number of public comments, the Committee has clarified the meaning of the term "family ties" used in this section. Section 1000.30 has been revised to make clear that this term applies to immediate family ties, which are determined by the Indian tribe or TDHE in its operating policies.

The Committee has also removed the reference to 24 CFR part 84, *Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations*, from this section based upon its determination that the common rule requirements of part 85, *Administrative Requirements for Grants and Cooperative Agreements to State, Local and Federally Recognized Indian Tribal Governments*, apply to recipients. The part 85 requirements apply to governmental entities and therefore are more appropriate for recipients of NAHASDA assistance.

Additionally, the Committee has added a new § 1000.30(c) which excludes from the conflict of interest provisions those individuals who would otherwise be eligible for program benefits. Additional language clarifications were also made to sections 1000.32 and 1000.34.

Section 1000.36. Proposed § 1000.36 would have required a recipient to retain records regarding exceptions made to the conflict of interest provisions for a period of at least 5 years. Section 1000.548 of the proposed rule, renumbered as § 1000.552 in the final rule, requires that recipients maintain all other IHBG program records for a period of three years. One commenter suggested that the final rule establish a uniform time period for the retention of program records. The commenter further suggested that the three-year time period set forth in § 1000.548 of the proposed rule, now § 1000.552, be adopted. The Committee agrees and has revised § 1000.36 accordingly.

Section 1000.38. Several commenters objected to HUD's changes to the original Committee language. These commenters believe that the revisions made by HUD establish onerous flood insurance requirements. Other comments expressed concern with the workability of flood insurance requirements and suggested adding exclusions such as for inability to obtain coverage or for costs below \$5000, or exemptions from the requirements due to lack of available land outside marginal floodplain areas. Another

commenter stated that flood insurance requirements should be limited to acquisition and construction projects.

The Committee has decided to retain the revisions made by HUD to § 1000.38. HUD's changes added a citation to the Flood Disaster Protection Act of 1973 (42 U.S.C. 4001-4128) (FDPA). In addition, the changes clarified that flood insurance requirements apply under the FDPA to financial assistance for "acquisition and construction purposes", rather than to all affordable housing activities under NAHASDA. There is no authority to administratively adopt the exemptions suggested. Section 102(c)(2) of the FDPA contains an exclusion from the flood insurance purchase requirement for loans that have an original outstanding balance of \$5000 or less and a repayment term of one year or less.

One commenter suggested that the following language from the FDPA should be added to the end of paragraph 1000.38(b): "Provided, that if the financial assistance provided is in the form of a loan or an insurance or guaranty of a loan, the amount of flood insurance required need not exceed the outstanding principal balance of the loan and need not be required beyond the term of the loan." The Committee has made the recommended change with minor revisions.

Section 1000.40. A number of comments were received questioning the applicability of lead-based paint poisoning prevention requirements to NAHASDA, the complexity and cost of complying with program regulations which applied to housing developed under the 1937 Act, and the limited information provided under the proposed rule as to the lead-based paint poisoning requirements. In order to streamline the lead-based paint poisoning requirements applicable to NAHASDA and to provide guidance to recipients on protection against lead poisoning from applied paint, the Committee has replaced the limited language in the proposed rule with more extensive, grant activity based language utilizing HUD's experience in the HOME program.

Section 1000.42. Several commenters objected to the applicability of HUD's regulations at 24 CFR part 135, *Economic Opportunities for Low- and Very Low-Income Persons*, which implement section 3 of the Housing and Urban Development Act of 1968. The commenters believe that independent Section 3 regulations should be developed for the IHBG program. The Committee has determined that the development of independent Section 3 regulations would be extremely time-

consuming. Further, the part 135 regulations provide an existing set of useful and comprehensive requirements for implementing the Section 3 requirements. Accordingly, the Committee has decided to retain the reference to 24 CFR part 135.

The Committee has made two changes to § 1000.42. First, the lengthy sentence explaining the purpose of section 3 has been removed and has been replaced with a more concise statement of purpose. This sentence merely repeated the language already found in 24 CFR 135.1. Second, a new § 1000.42(b) has been added which clarifies that the section 3 requirements apply only to those Section 3 covered projects or activities for which the amount of assistance exceeds \$200,000.

Sections 1000.44 and 1000.46. Similar public comments were received on these two sections. Section 1000.44 provides that the prohibitions in 24 CFR part 24 on the use of debarred, suspended, or ineligible contractors apply to the IHBG program. Section 1000.46 provides that requirements of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*) and HUD's implementing regulations in 24 CFR part 24 apply to the IHBG program.

Several commenters recommended that Indian tribes be allowed to develop their own debarment and drug-free workplace procedures. The Committee reviewed the requirements set forth in 24 CFR part 24, and determined that they should continue to be referenced in the regulations. The Committee did make one clarifying change to §§ 1000.44 and 1000.46. Specifically, the sections have been revised to clarify that the part 24 requirements apply, in addition to any tribal debarment and drug-free workplace requirements.

Sections 1000.48 through 1000.54. One commenter recommended that the rule be amended to state that an Indian tribe or TDHE may provide preferences in the employment, training, procurement and services to members of the Federally recognized Indian tribes. The reason Indian preference was not addressed in the proposed rule is because it was a non-consensus item as indicated in the preamble to the proposed rule. The Committee has added four sections which address the applicability of Indian preference, requirements for the provision of Indian preference in program administration and procurement, and methods for addressing complaints.

Sections 1000.56, 1000.58, and 1000.60. Numerous comments were received on the issue of the method of NAHASDA payments, identified as a nonconsensus issue in the proposed

rule. After full consideration, HUD and the tribal members of the Committee have agreed to add new §§ 1000.56, 1000.58, and 1000.60, which track the statutory language of section 204(b) of NAHASDA. Section 204(b) authorizes a recipient to invest grant amounts for the purposes of carrying out affordable housing activities in investment securities and other obligations as approved by the Secretary.

The new regulatory provisions provide for a "phase-in" of the recipient's ability to drawdown NAHASDA funds for investment purposes. Specifically, new § 1000.58(f) provides that a recipient may invest its IHBG annual grant in an amount equal to the annual formula grant less any formula grant amounts allocated for the operating subsidy element of the Formula Current Assisted Housing Stock (FCAS) component of the formula multiplied by the following percentages, as appropriate: 50% in Fiscal Years 1998 and 1999; 75% in Fiscal Year 2000; and 100% in Fiscal Year 2001 and thereafter. Investments under these provisions may be for a period no longer than two years.

Section 1000.62. NAHASDA grant amounts will often generate interest funds from investment and program funds from tribal housing activities. The question of whether recipients could keep interest funds was a nonconsensus issue in the proposed rule. Many commenters and tribal committee members strongly supported the right of the recipients to keep all interest income earned on grant amounts. The Committee agrees and has drafted a new § 1000.62 to the final rule.

Tribal representatives and HUD agree that § 1000.62 provides that all program income must be used for affordable housing activities, but Indian tribes argue that program income is not subject to the requirements applicable to NAHASDA grant amounts. HUD disagrees, and interprets § 1000.62 to mean that the use of program income is subject to the same requirements as grant amounts and intends to implement § 1000.62 accordingly. This would have the effect of requiring program income to be subject to other statutory requirements such as environmental review requirements and maximum rent requirements applicable to grant amounts.

The Committee recognizes the importance of the need for developing guidance for accounting for program income grant amounts generated by the combined use of NAHASDA grant amounts and other funds. This guidance will be jointly developed by HUD and tribal representatives appointed by the

Committee co-chairs. Every attempt will be made to develop and issue this guidance as expeditiously as possible.

Subpart B—Affordable Housing Activities

Subpart B contains the regulations necessary for the implementation of title II of NAHASDA. Among the topics addressed by subpart B are eligible affordable housing activities, low-income requirements, lease requirements and tenant selection.

Section 1000.104. Several commenters objected to the language, "absent evidence to the contrary", added at the end of each sentence. This language was stricken. This section was intended to clarify that NAHASDA and these regulations do not affect the eligibility of homebuyers and tenants assisted under the 1937 Act. The regulations were revised to reflect this intent. The original language was unclear regarding whether current families residing in housing units were automatically eligible for all NAHASDA activities or only for continued occupancy. One commenter commented that all Indians residing in Indian Country should be eligible for housing assistance. All Indians are eligible for assistance under specified activities under NAHASDA. However, the regulations are written to reflect the intent of Congress to provide assistance primarily for low income Indian families and to establish eligibility requirements for non low-income Indian families. NAHASDA does not impose requirements on continuing income eligibility after a participant enters a housing program.

Section 1000.106. One comment was received on the different standards applied to non low-income Indian families and non-Indian families. The regulations reflect the statutory requirements in NAHASDA and the Congressional intent to provide housing primarily for low income Indian families, while recognizing an Indian tribe's need to house other persons who are essential to the well-being of Indian families.

Section 1000.108. The Committee agreed with comments to remove the phrase "other housing activities" from this section and § 1000.112 to clarify that these regulations are addressing the assistance to non low-income Indian families and model housing activities.

Section 1000.110. For purposes of clarity, § 1000.118 has been redesignated as § 1000.110 and moved to immediately follow § 1000.108. Former §§ 1000.108 through 116 were renumbered to conform to this change.

NAHASDA requires a family to be low income at the time of purchase of a home. This caused problems for families buying homes pursuant to a lease purchase agreement. To solve the problem, the section was revised by adding a new paragraph (a) to make families who are not low income at the time of purchase of a home, eligible under the non low-income requirements. In addition, this section was revised to allow recipients to provide housing to non low-income Indian families who have been determined by the recipient to be essential to the well-being of the Indian families in the area, without requiring a higher repayment than low income Indian families.

Numerous comments were received that the formula for providing assistance to non low-income Indian families was difficult to understand. The formula was simplified. Comments were received that the amount a non low-income family must pay for the assistance should not be more than the fair market value of the assistance. Comments were received that the regulations gave HUD too much discretion. The regulations were revised to give more discretion to recipients, including the authority to limit payments to Fair Market Value.

Section 1000.112. One commenter believed that these regulations give too much discretion to HUD in evaluating model housing activities. The Committee disagreed with the comment because the regulations provide that HUD will review the proposals with the goal of approving the activities.

Section 1000.114. One commenter asked that the regulations state how notice is to be given. The regulations were changed to clarify that notice by HUD will be given in writing. One commenter commented that HUD should be given 90 days rather than 60 to approve or disapprove a proposal. The Committee believes that sixty days is sufficient time for HUD to approve or disapprove a proposal. This time period is consistent with the time period for approving an IHP.

Section 1000.116. A commenter requested that this section establish a time frame. The time frame is specified in § 1000.114. Other commenters asked whether the time period is affected by the consultation requirement. The time period within which HUD must respond is not affected by the requirement to consult with a recipient regarding its proposal.

Section 1000.118. Commenters asked whether the days specified in this section were calendar or business days and suggested that the number of days be consistent in each step of the appeal

process. The number of days specified in paragraphs (b), (c) and (d) of this section were changed to 20 calendar days. Paragraph (a) of this section was clarified to read "30 calendar days." The appeal process is consistent with other administrative appeal processes.

Section 1000.122. Several commenters stated the answer to the question should be "yes." The final rule clarifies that while NAHASDA does not prohibit the use of grant funds as matching funds, other programs may or may not have restrictions on what may be used as matching funds.

Section 1000.124. Many comments were received that the 30 percent maximum rent or homebuyer payment would impose a hardship in areas where the administrative fee alone exceeds 30 percent of a family's income. The 30 percent requirement is statutory and cannot be changed by the regulations. Many comments were also received on the impact of these regulations on current Mutual Help participants and Section 8 participants. These regulations do not apply to current participants of a lease purchase agreement, including Mutual Help or Homeownership participants under the 1937 Act or Section 8 participants. Their contracts are not affected by NAHASDA. A definition of "homebuyer payment" has been added to the list of defined terms in subpart A, which only refers to payments made under a lease purchase agreement for the purchase of a home. This clarifies that § 1000.124 applies only to rental payments and homebuyer payments made under a lease purchase agreement.

A commenter requested clarification on how adjusted income is determined. Guidance on adjusted income is provided in the definitions section. The section was revised to clarify that these regulations apply only to units assisted with NAHASDA grant amounts. A sentence was also added to address minimum rents.

Section 1000.126. Several commenters objected to the 30 percent limitation on rent or homebuyer payments. The 30 percent requirement is statutory.

Section 1000.132. Many commenters supported this section.

Section 1000.134. One commenter suggested that all HUD requirements for demolition or disposition be provided under this part. This section sets forth all requirements for demolition or disposition. Comments were received asking for more flexibility in disposing of units especially where units were sold to low-income Indian families. This section was revised to reflect this concern. The change allows a recipient

to dispose of a home to a low-income Indian family without maximizing the sale price, so long as the disposition is consistent with a recipient's IHP.

Section 1000.138. Several commenters asked that the regulations exempt from the procurement requirements insurance purchased from Amerind. Language was added to the regulations to provide an exemption for nonprofit insurance entities which are owned and controlled by recipients and which have been approved by HUD.

Section 1000.142. Many comments were received regarding the necessity of HUD determining "useful life" and the criteria used to make such determination. The statute requires HUD to make determinations of what is "useful life." The regulations clarify this while ensuring that the determination will be made in accordance with the local conditions of the Indian area.

Section 1000.146. Many commenters expressed concern about the requirement that homebuyers be income eligible at the time of purchase. This is a statutory requirement. However, § 1000.110 was revised to allow families buying a home under a lease purchase agreement and who are no longer low-income at the time of purchase to be eligible as a non low-income family. This section has been revised to cross reference to § 1000.110.

Section 1000.148. This section of the proposed rule was removed because it was attempting to clarify the statutory language in section 207(a)(3) of NAHASDA concerning what law is applicable regarding the period of time required in giving notice. The answer confused rather than clarified that the law applicable to notice timing requirements is the applicable State, tribal or local law. The issue of applicable law can best be resolved in the recipient's lease.

Section 1000.150. One commenter asked whether HUD would pay the costs of obtaining the criminal conviction information. Another asked if it was a requirement to obtain the criminal conviction information. The costs of obtaining criminal conviction information is an eligible cost of NAHASDA. A recipient is not required to obtain such information. One commenter asked what could be done if such agencies refuse to comply with the request. HUD cannot force other agencies to comply, but the Indian tribe may seek a legal recourse.

Section 1000.154. One commenter suggested that persons other than those specified in NAHASDA section 208(c) be authorized to receive criminal conviction information. The Committee

believes this is inconsistent with NAHASDA.

Section 1000.156. Many comments were received on this section. Many commented on the various elements included in the total development cost. One commenter asked whether donations counted towards total development cost. One commenter objected to any limits. The section was revised to clearly establish a limit on the amount of IHBG funds that can be used on the dwelling construction and equipment of a unit, and to clarify that other costs of development were eligible NAHASDA costs but not subject to the limit.

The costs of making a unit handicapped accessible is a part of the dwelling construction cost. The limit was placed in these regulations in recognition of the few cases of abuse in past Indian housing programs and was developed to prevent abuses in the new IHBG program.

Subpart C—Indian Housing Plan (IHP)

Subpart C sets forth the regulatory requirements concerning the preparation, submission, and review of an Indian tribe's IHP. (Note: The numbers of several sections in this subpart have been amended due to the addition of new sections. For example, § 1000.210 of the proposed rule is numbered as § 1000.218 of this final rule.)

Section 1000.201. One commenter requested that language be added to the beginning of the sentence to indicate "At the beginning of every fiscal year HUD will distribute funds." The language "At the beginning" was not incorporated because the allocation of the formula is subject to appropriations and allocation at the beginning of the Fiscal Year cannot be guaranteed. Also, distribution of the grant is based on submission and approval of an IHP which may not take place at the beginning of the FY.

Another commenter suggested that funds should be allowed to be carried forward from one fiscal year to another. Based on NAHASDA, a recipient has more than one year to expend each annual grant based on goals and objectives in the IHP. As a performance measure, § 1000.524 provides that within 2 years of grant award, 90 percent of the funds must be obligated by the recipient. Another commenter asked what would happen to an Indian tribe's or TDHE's allocation under NAHASDA if an IHP was not submitted by November 3, 1997 deadline. A new provision has been added to address this question.

Section 1000.202. One commenter requested that eligible recipients should include TDHEs which existed and received funding as a Public Housing Agency (PHA) or Indian Housing Authority (IHA) under the 1937 Act. The Committee believes the language in § 1000.202 is clear as to who is an eligible recipient and the specific recipients are more fully defined in § 1000.206. Also, a new section (§ 1000.208) has been added which addresses the commenter's concern regarding an Indian tribe which had two IHAs established prior to September 30, 1996. However, under NAHASDA, PHAs are not default TDHEs unless otherwise recognized as IHAs under these regulations.

Section 1000.204. One commenter asked if the Indian tribe is obligated to notify an existing TDHE for its jurisdiction within a certain time period, if the Indian tribe designates itself as the grant recipient. First, if the Indian tribe designates itself as the recipient, there is no TDHE. Also, there is no requirement in NAHASDA which requires any notification to an existing entity which may own or manage units developed under the 1937 Act. The same commenter asked whether the TDHE is required to submit an IHP for its existing housing stock if the Indian tribe is also submitting an IHP within the same jurisdiction. If an Indian tribe designates itself as a recipient, there is no TDHE and the Indian tribe must provide for existing housing stock in its IHP. One commenter raised several concerns regarding the administration of NAHASDA regarding conflicts of interest, mismanagement, fraud, and abuse. The regulations as a whole were written to address these concerns.

Section 1000.206. Several commenters requested clarification on how TDHEs in Alaska are designated. TDHEs in Alaska are designated in the same manner as any other TDHE. Several commenters also stated that a default TDHE should be able to submit an IHP and obtain funding without obtaining Tribal certification. Section 102(d) of NAHASDA requires Tribal certification for each IHP including a default TDHE. However, the Committee has added § 1000.210 to address the commenters' concern regarding what would happen to 1937 Act units if an Indian tribe did not submit an IHP or if a default TDHE could not obtain tribal certification.

Section 1000.208 of the proposed rule. This section was formerly designated as § 1000.208, but has been redesignated as § 1000.212 due to the addition/redesignation of other regulatory text. One commenter questioned the need for

a detailed five-year plan; another requested that the five-year plan be submitted at the end of the first year of funding; and another requested deleting the requirement for the one-year plan. These requirements are statutory; however, the Committee believes the submission requirements are reasonable. Several commenters have requested an extension of the IHP submission deadline and clarification on what happens if the deadline date is not met. Section 100.214 (formerly designated as § 1000.209) has been amended to address the commenters concerns regarding the IHP submission deadline date. Also, § 1000.216 has been added to clarify what happens if the deadline date is not met.

Section 1000.211 of the proposed rule. This section was formerly designated as § 1000.210, but has been redesignated as § 1000.218 due to the addition/redesignation of other regulatory text. One commenter asked what plan requirements were necessary for a consortium of Indian tribes. The Committee agrees that this comment needs to be addressed and language has been added to § 1000.212 to address this concern. Two commenters stated that the reference in the proposed rule was incorrect. The rule has not been revised, because it reflects the proper statutory reference.

Section 1000.212 of the proposed rule. This section was formerly designated as § 1000.212, but has been redesignated as § 1000.220 due to the addition/redesignation of other regulatory text. A commenter requested that additional language be added to this section to encourage Indian tribes to assess the ability of the existing infrastructure to support additional housing. In response, the Committee believes that the current language that Indian tribes are encouraged to perform comprehensive housing needs assessments is adequate.

Section 1000.214 of the proposed rule. This section was formerly designated as § 1000.214, but has been redesignated as § 1000.222 due to the addition/redesignation of other regulatory text. Two commenters requested that waiver authority be given to a TDHE. The Committee agrees and adopted the comment by adding a new § 1000.224. Comments were received in support of the definition of "small Indian tribe" and also agreeing that "small Indian tribe" should not be defined. No changes have been made to the regulations because the Committee believes that the IHP requirements are reasonable and the deadline date has been extended to allow small Indian tribes additional time to complete the plan.

Section 1000.216 of the proposed rule. This section was formerly designated as § 1000.216, but has been redesignated as § 1000.226 due to the addition/redesignation of other regulatory text. Two commenters requested that the HUD changes made to this section be deleted. One stated that Title II of the Civil Rights Act would create problems for Indian tribes. The Title II referred to in § 1000.12 is the Indian Civil Rights Act. However, because the nondiscrimination requirements, as well as other Federal requirements outlined in these regulations apply whether or not the recipient certifies that it will comply, the language inserted in § 1000.226 is not needed and has been removed.

Section 1000.218 of the proposed rule. This section was formerly designated as § 1000.218, but has been redesignated as § 1000.228 due to the addition/redesignation of other regulatory text. One commenter stated that the word "will" should be changed to "shall" and the word "substantial" should be removed. The word "will" and "shall" have the same meaning in these regulations. Also, the Committee has agreed that NAHASDA gives HUD the authority to develop the IHP format and minor changes may be needed to address comments. Accordingly, no changes have been made to this section.

Section 1000.220 of the proposed rule. This section was formerly designated as § 1000.220, but has been redesignated as § 1000.230 due to the addition/redesignation of other regulatory text. One commenter stated that HUD should be given a limit of 60 days to respond. This requirement is statutory and is outlined in § 1000.230(b). Another commenter stated that a recipient should be required to agree to reasonable time frames for which to provide required certifications. The certifications are a requirement of the IHP submission and are statutory. An IHP cannot be determined to be in compliance without the certifications based on section 102(c)(5) of NAHASDA unless waived under § 1000.226.

A commenter stated that HUD approval should be required only for substantial modifications to the IHP. The Committee agrees with this comment and has added appropriate language to § 1000.232. A commenter stated that the limited HUD review of the IHP should be clearly defined. This limited review is outlined in section 103(c) of NAHASDA and the Committee determined that it was not necessary to repeat these statutory requirements. Another commenter asked when a HUD review would not be

necessary. NAHASDA mandates an IHP review by HUD.

Two commenters addressed the waiver provision in § 1000.230. One requested that the words "requested and approved" be added in paragraph (d). The Committee agrees and has added the language. The second stated that the waiver could not impose conditions which the recipient could not comply with due to conditions beyond the recipient's control. The Committee does not believe this language is necessary since the waiver indicates that HUD has determined the recipient cannot meet certain plan requirements.

Another commenter requested a new section to address partial approval of an IHP. HUD can only make a grant if it is determined that the plan meets the requirements of section 102 of NAHASDA. Therefore, this additional language has not been included in the regulations. However, HUD may approve an IHP pending approval of a model activity or assistance to non low-income Indian families.

Section 1000.222 of the proposed rule. This section was formerly designated as § 1000.222, but has been redesignated as § 1000.232 due to the addition/redesignation of other regulatory text. Several commenters addressed the requirement for modifications of the IHP including the 60-day timeframe for review. The Committee has addressed these comments by providing language in the regulations which limits when HUD's review and determination of compliance is necessary and provides the flexibility requested.

Section 1000.224 of the proposed rule. This section was formerly designated as § 1000.224, but has been redesignated as § 1000.234 due to the addition/redesignation of other regulatory text. One commenter recommended defining applicable judicial review available following final agency action. No change to the regulations is required because an agency's action may be challenged under the Administrative Procedure Act. Another commenter requested that a question be added on the requirements of the form HUD 50058. It is not necessary to address this in final regulations, however, the requirements as of October 1, 1997 will be covered in the transition notice published in the **Federal Register**.

Section 1000.226 of the proposed rule. This section was formerly designated as § 1000.226, but has been redesignated as § 1000.236 due to the addition/redesignation of other regulatory text. Several comments were received on this section. Some commenters requested a percentage should be set for administration and planning; others felt

that the recipient should set the percentage. Several commenters asked that indirect costs be included as an eligible expense. There were also several questions related to reimbursement for reasonable planning costs associated with developing the IHP. NAHASDA states that the Secretary shall, by regulation, authorize each recipient to use a percentage of any grant amounts for administrative and planning expense. Section 1000.238 has been added which establishes a percentage which can be used for these costs and clarifies the eligibility of indirect costs. This percentage can be exceeded with HUD review and approval. The Committee has also made changes to § 1000.236 which are intended to further clarify what are considered administrative and planning costs.

Section 1000.228 of the proposed rule. This section was formerly designated as § 1000.228, but has been redesignated as § 1000.240 due to the addition/redesignation of other regulatory text. There were many comments received on this section. The Committee has clarified when a local cooperation agreement is needed. A statutory amendment would be required to address any of the other comments.

Section 1000.230 of the proposed rule. This section was formerly designated as § 1000.230, but has been redesignated as § 1000.242 due to the addition/redesignation of other regulatory text. There were many comments received on this section. The Committee has clarified when the tax exemption requirement applies. A statutory amendment would be required to address any of the other comments.

Subpart D—Allocation Formula

Subpart D implements title II of NAHASDA. Specifically, it establishes the formula for allocating amounts available for a fiscal year for block grants under NAHASDA.

Section 1000.301. One commenter felt that the following sentence should be added to § 1000.301: "Native Regional Housing Authorities in Alaska shall be the recipients of grants awarded under section 202(1) of NAHASDA for the maintenance and operation of current assisted stock." This cannot be done by regulation; it is a statutory requirement that Indian tribes be funded directly. The Committee agreed to adopt the clarifying changes made by HUD to this section at the proposed rule stage.

Section 1000.302. Several commenters wrote that the references to 24 CFR part 950 should be removed from the definition of "Allowable Expense Level (AEL) factor." As the

commenters noted, the part 950 regulations are made obsolete by this final rule. The Committee agreed and revised the definition to reflect the removal of 24 CFR part 950.

Four commenters felt there was no reference provided for how AEL/FMR, AEL, FMR factor, local area cost adjustment factor for construction, and TDC are computed or what office is responsible for determining these rates or how they can be challenged. Except for AEL and TDC, the Committee felt the definitions are complete as written in the rule. The definition for AEL has been changed in the rule to improve its clarity. AEL was calculated by ONAP and will not be calculated again, there is a method to challenge FMR and the requirements are available from HUD. The definition of TDC has been added to the rule.

Six commenters were concerned with separate definitions of annual income for formula purposes than in the rest of the rule. The definition of annual income is different for purposes of the formula because the formula uses data collected by Census while the annual income for the remainder of the rule relates to income data collected from families by the Indian tribe or TDHE (and is statutory). For clarity, the definition has been changed to "Formula Annual Income" and the census definition is included.

Numerous comments were received on the definition for formula area. Several commenters proposed alternative definitions. Some commenters felt the rule should clearly state that a local cooperation agreement is not required where an Indian tribe or TDHE is providing housing services. Several commenters believed that other service areas designated by an Indian tribe as historical areas of operation or areas of service described in the Indian tribe's ordinance should be included in the definition of formula area. Three commenters felt that Tribal Jurisdictional Statistical Area and Tribal Designated Statistical Area should be defined or removed from the definition.

In response to comments, new language was added which maintains the integrity of the formula by both allowing Indian tribes that provide housing assistance off tribal lands to include a larger geographic area. The regulations still constrain the area and the population counted for an Indian tribe so that it would be fair and equitable for all Indian tribes.

The Committee added a definition of "Formula Response Form" to reflect the changes made elsewhere in the rule. The proposed rule would have required data for the formula to be included in

the IHP. However, because the data is needed before the IHP submission date, the Committee decided to require formula data to be submitted on a separate form.

One commenter felt the definition of "Section 8 unit" should be clarified. Some Section 8 assistance is not tied to a unit; rather, it is tenant-based assistance. The commenter believed this definition lumps all Section 8 under the definition and is confusing. The Committee considered the comment, and believes the definition is clear.

Sections 1000.304 and 1000.306. Several commenters believed that proposed § 1000.304(a) puts the burden on Indian tribes to develop measurable and verifiable data. The commenters felt this should be HUD's responsibility. The Committee believes that proposed § 1000.304 adequately meets the concerns of the commenters. However, the section may have been unclear to commenters so it has been split into two sections (§§ 1000.304 and 1000.306). An additional reference to reviewing the factors in Formula Current Assisted stock is added in reference to comments received on funding for Section 8 noted later.

One commenter recommended that the final rule require the use of more reliable data as soon as possible, and not establish a five year waiting period. The Committee believes the method currently proposed satisfies this concern as efforts to improve data must be begun immediately in order to complete the effort within five years.

Section 1000.308. A commenter believed the formula should be modified by a committee in the same fashion as the formula was developed. Section 1000.306 allows public participation in revision of the formula. While the tribal Committee members encourage HUD to convene a tribal group to negotiate modifications, the rule was not changed to require this.

Section 1000.310. Two commenters stated that the word "formula" added by HUD makes no sense. One commenter felt the proposed §§ 1000.308 and 1000.310 didn't seem to work together. The commenter also believed there is inconsistency among the proposed §§ 1000.308, 1000.324, 1000.326, and 1000.328 which need clarification. The word "formula" is included to maintain consistency in the rule. In response to the confusion over the relationship of Formula Current Assisted Stock to Section 8, they were combined under the single heading of Formula Current Assisted Stock. Furthermore, to provide greater clarity, the order of presentation was changed so that Formula Current Assisted Stock is listed before Need

because this is the manner in which the formula is actually calculated. As a result of this change the sections on FCAS are moved ahead of the sections on Need and are renumbered accordingly.

Section 1000.312. Four comments were received relating to who should receive funding under Current Assisted Stock in cases where the ownership of the Current Assisted Stock remains separate from the Indian tribe. One commenter suggested that a new § 1000.346 be added, responding to the issue of whether IHAs or TDHES are entitled to continued financial assistance for rental public housing projects. NAHASDA requires that the funding for Current Assisted Stock be provided to the Indian tribe where the Current Assisted Stock is located. Because of this statutory requirement, the Committee could not make the changes requested by the commenters, however language in § 1000.327 does address this concern as it relates to the overlapping areas unique to Alaska due to the Alaska Native Settlement Claims Act (ANSCA).

Section 1000.314. Two commenters felt the explanation on how the formula addresses units developed under the 1937 Act and in the development pipeline on October 1, 1997 was unclear. The Committee agreed and has reworded §§ 1000.314 through 1000.320 to improve clarity. The major change was to combine Section 8 into the "formula current assisted stock" component of the formula. As noted earlier under definitions, changes to IHP submission dates required the creation of a Formula Response Form.

Two commenters felt that units developed under NAHASDA should be included in the funding formula. One of the commenters felt that by not providing such a subsidy creates an incentive not to add either rental or homeownership units because the formula will not take into account the maintenance costs of these units. NAHASDA allows for great flexibility in developing housing stock. At this time the Committee is not able to determine the level of need for NAHASDA stock subsidy. This will be re-evaluated within the required 5-year time frame as noted in § 1000.306.

Two commenters stated that the development of housing units for homeownership under a model distinct from the existing Mutual Help program requires a larger initial subsidy investment to reduce the mortgage burden for the homeowner. However, the formula, because it fails to account for this greater expense, fails to count non-mutual help homeownership units,

or include sufficient development funds. This encourages the use of the mutual help model instead of the mortgage model, which discourages the leveraging of private funds for mortgages and goes against NAHASDA. The Committee felt no changes were necessary. Under self-determination Indian tribes have responsibility to develop affordable housing activities within their available resources.

Section 1000.316. One commenter wrote that proposed § 1000.330 is confusing. The commenter questioned how Section 8 contracts that have expired or are due to expire in any subsequent year can be meaningful to a number derived as of September 30, 1997. The Committee agrees that the section is confusing and has incorporated it into § 1000.316 and reworded it for clarity.

One commenter wrote that Section 8 units should be multiplied by the national per unit average for low-rent units and not the Section 8 unit average since they are administered as low income rental units. The Committee disagrees. In developing the base funding for homeownership, Low-Rent, and Section 8 of the Formula Current Assisted Stock, the Committee sought to develop the base funding for each which reflects the actual operating cost of each.

One commenter wrote that Section 8 participants should continue to have flexibility to pay more than 30 percent of income in order to compete for units on the private rental market. Statutorily, recipients are not allowed to charge low-income families receiving subsidy under NAHASDA more than 30 percent of the family's adjusted income for affordable housing.

Four comments received were opposed to funding expired Section 8 contracts under NAHASDA. Opinions were expressed that NAHASDA does not have enough appropriation to fund the Section 8 and that the Section 8 administered by IHAs has a large number of non-Indians. Two commenters specified support for funding Section 8 under the formula.

Once a Section 8 contract administered by an IHA expires it cannot be renewed under the 1937 Act. To maintain this assistance for the households currently served by the Indian tribes, the Committee felt it was important to provide assistance under NAHASDA. Nonetheless, the Committee understands the concerns about the limited assistance available for Indian housing and has made note in this section and § 1000.306 that in five years subsidy for Section 8 should be reconsidered as a component of the formula.

Section 1000.317. Many comments were received from IHAs in Alaska concerning funds to maintain and operate 1937 Act units owned by the IHAs. In response to these comments, a new section has been added which states that formula funds for 1937 Act units owned by Regional Native Housing Authorities in Alaska will be allocated to the regional tribe.

Section 1000.318. One commenter wrote that even if units are conveyed over to a homeowner, the units should still count as Current Assisted Stock if the units are part of the five-year Comp Grant plan because there is a continuing obligation on the part of the Indian tribe's housing program to provide the assistance which has been promised. However, a conveyed unit, because it has become a private home, does not qualify as Current Assisted Stock. However, conveyed units for which Comprehensive Grant funding has been obligated in prior years may be modernized as scheduled.

One commenter stated that block grant amounts should be fixed based on units in management and should only be reduced as units leave management. The grant will not be increased when units are added to management after October 1, 1997. This gives the IHA no incentive to convey units out of management nor does it provide for costs of management of rental units added by the grant. The Committee considered this concern and has added language that requires conveyance of the units as soon as practicable as they are paid off under existing homeownership contracts.

One commenter noted that TDHEs should not be required to repay grant amounts for housing inventories reduced within the FY. The next grant year should be based on inventory at that date. The Committee agrees and has clarified this provision.

Two commenters suggested that the last sentence in the proposed § 1000.336 have the following added: "...by the Tribe or TDHE." The Committee has incorporated this change and also added "or IHA" to take into account situations where the IHA, not designated as the TDHE, continues to own the units.

Section 1000.324. The Committee agreed to adopt the clarifying change made by HUD to this section. One commenter noted that the "without kitchen or plumbing" variable is not an accurate measure of substandard housing because some Indian tribes building housing in remote location or extreme environmental conditions build new homes without kitchen or plumbing. After careful consideration of many issues, including the concern of

the commenter, the Committee felt that it was important to include some indicator of substandard housing. Currently, the only indicator of substandard housing collected in a uniform manner for all Indian tribes related to substandard housing is "without kitchen or plumbing." Accordingly, no change has been made to the rule.

One commenter expressed that "Without kitchen or plumbing" should include heating. While the Committee considered this issue, it was not felt that the available data would adequately address the concern and thus the change to the variable could not be accommodated.

Two commenters noted that because most reservations are poverty areas and the majority of housing consists of HUD built homes and 30 percent is the maximum amount charged, the housing cost burden component appears to mainly reflect urban need. The commenter felt the need components should measure criteria which are proportionally consistent across the country and not include regional or special group needs. Because housing need is different throughout the country, each of the variables in the formula has some regional bias, including the housing cost burden variable referenced in the comment. However, it is the Committee's position that the combination of all of the variables in the formula most fairly allocates funds toward housing need in all regions of the country.

Two commenters felt there should be two need components. One as AIAN households which are overcrowded and the second as AIAN Households without kitchen or plumbing. Separating the two variables was considered. However, they were combined because they are highly correlated; places with overcrowding tend to also have households without complete kitchen or plumbing. The Committee combined the two variables in order to reflect both overcrowding and some components of substandard housing.

One commenter felt the need component should include non-Indians presently living in current assisted stock. IHAs provide housing for both Indians and non-Indians alike. The Committee recognizes that households with a divorced non-Indian with Indian children are not counted by the household variables, nor are other non-Indians that an Indian tribe may choose to serve. However, the needs side of the formula is intended to target toward Native American housing need. After receiving the funds based on Native

American housing need, the Indian tribe may choose who they wish to serve. The current assisted stock component of the formula funds per unit regardless of the race of the resident.

One commenter noted that the formula does not adequately take into consideration the disparity between communities that currently have adequate infrastructure and those that do not. Among tribal communities in the same geographic region, the per-unit cost of infrastructure development typically varies much more than the per-unit cost for the houses alone. Tribal communities located in places that require capital investment infrastructure, such as very deep wells or long pipelines, will be severely disadvantaged under the current formula. The Committee sought out infrastructure data to be used in the formula. However, after discussions with Indian Health Service staff, it was determined that at this time the data were not appropriate for this formula. However, this will be one factor to be considered during the review of the formula over the next five years.

Several commenters recommended that the formula points and methods to weight these components agreed to by the Committee should be added to the regulations. The Committee agreed and has included the weights in the proposed rule.

Section 1000.326. Several comments submitted regarding "overlapping service areas", when more than one Indian tribe defines the same formula area. One commenter indicated that in Alaska there are tribal boundaries and a number of projects that border two or more Indian tribes. Furthermore, Alaska Native Land Claims Corporations overlap many Indian tribes. One commenter feared that without a quick HUD determination regarding overlapping formula area, Indian tribes might be placed in the situation of having to do political "battle" with one another to determine their fair share. The Committee agrees with the comments and have revised § 1000.326 to address overlap disputes between state and Federal Indian tribes as well as § 1000.327 to address the allocation of data for the unique overlapping areas in Alaska.

In addition, one comment was received relating to dual tribal membership and a change was made in the rule to reflect that concern. The other concern related to HUD's timing for dealing with issues related to overlapping areas and a change was made to put in a date specific when overlapping issues will be addressed.

One commenter indicated that the IHS is interested in working with HUD and other agencies on developing better data sources regarding the number and conditions of AIAN homes. Over the next 5 years HUD and the Indian tribes intend to improve the data available on Native American Housing need. IHS participation in this process is greatly appreciated. Furthermore, IHS assistance with current data that might be used for addressing problems related to overlapping service areas will be extremely helpful.

Section 1000.328. Twenty-four of the comments suggested that the needs component of the formula should provide a minimum level of funding, thirteen of the commenters suggesting a base allocation of \$150,000.

After giving this issue serious consideration, the Committee agreed that if an Indian tribe receives less than \$50,000 under the needs side of the formula in the first year it applies for funding, its need component is set to \$50,000 with a downward adjustment for all other Indian tribes to cover this cost. In subsequent years up to the year 2002, an Indian tribe receiving less than \$25,000 under need has their grant adjusted up to \$25,000.

The Committee determined this minimum grant amount was allowable under NAHASDA under "other objectively measurable conditions as the Secretary and Indian tribes may specify."

Section 1000.330. One commenter felt it would be more equitable to allocate a standard across-the board housing allowance for every registered Native American who is a member of a recognized Indian tribe. A housing allowance for every registered Native American is contrary to the intent of the Act. NAHASDA requires that the block grants be targeted to the need of the Indian tribes and the Indian areas of the Indian tribes for assistance for affordable housing activities (Sec. 302(b)).

Two commenters felt that U.S. Census data do not reflect the housing need in Indian country. One commenter recommended the use of tribal waiting lists for housing and that those waiting lists be audited to ensure accuracy. In developing the proposed rule, issues of Census data quality and potential use of waiting list were discussed and carefully considered. Although recognizing the limitations of Census data, it is currently the only data available that is collected in a uniform manner that can be confirmed and verified for all Indian tribes on income and housing need. Section 1000.306 notes that a new set of measurable and

verifiable data on Native American housing need will be developed not later than 5 years from the date of issuance of these regulations. Waiting lists tend to reflect local need rather than national need that is comparative across Indian tribes.

Section 1000.332. Three commenters felt this section (designated in the proposed rule as § 1000.318) should provide the procedural requirements for securing HUD approval, including automatic approval if HUD fails to act within a specified time. The Committee believes the details provided in § 1000.336 are adequate. However, the Committee felt commenters were confused by the order of the questions and answers presented in proposed §§ 1000.316 and 1000.318. Accordingly, the final rule reverses the order of these two sections.

Fourteen comments were received discussing HUD's provision of notice regarding formula data. Several commenters recommended that the data should be provided to Indian tribes/TDHEs immediately for review. Commenters also suggested that HUD be required to provide notice of data and projected allocation not less than 120 days before the end of HUD's fiscal year. Other commenters recommended that HUD should be required to provide notice of data and projected allocation not less than 120 days before the date IHPs are required to be submitted.

The section was changed by adding a specific date (August 1 of each year) by which HUD will provide each Indian tribe with the data and a preliminary allocation based on an estimated appropriation for the next fiscal year. For consistency, all other deadlines in the formula component of the rule were made date specific.

Section 1000.334. Several related comments were made reflecting what information could be used for challenge. One commenter stated that many States, counties, cities, universities and other educational institutions have better data than the U.S. Census. The commenters asked why more systems need to be created if they are in place at the regional or local level. One commenter wrote that if the TDHE is providing accurate, verifiable information to be used in the formula, HUD should not be able to disallow that information. Two commenters wrote that challenge data could be certified by the Indian tribe and the BIA, as the BIA already uses tribal enrollment numbers for some contract funding.

The data used for the formula must be uniformly and consistently collected for all Indian tribes. Local data sources do not necessarily provide this. However,

the Committee revised the rule to allow HUD greater discretion to accept data.

Section 1000.336. Five commenters requested more detail on "a method acceptable to HUD" for challenge. A more detailed explanation of "a method acceptable to HUD" for challenge will be included in the information packet sent out with the data to be used in the formula. Nonetheless, the Committee agreed that the section needed to be clarified in respect to submission of challenge material and the rule was changed accordingly.

Section 1000.338 of the proposed rule. This section was formerly designated as § 1000.338 but has been redesignated as § 1000.325 for purposes of clarity and better organization of the regulatory text. One commenter wrote that this section on adjusting for local area costs is unclear to someone unfamiliar with the existing program. An explanation of this section is included in the appendix which explains how the formula works. In addition, TDC is defined in § 1000.302.

Section 1000.340. Because many small IHAs did not receive modernization funding in FY 1996, two commenters felt the formula should be based on a three to five year average of operating subsidy and modernization received by the IHA. However, the current use of FY 1996 modernization is a statutory requirement that cannot be changed by regulation. Nonetheless, the comments reminded the Committee that an explanation of how this statutory requirement is incorporated into the formula was mistakenly not included in the proposed rule. Accordingly, new § 1000.342 has been added.

Section 1000.342. The proposed rule specifically requested comment on the issue of whether or not there should be an emergency and disaster relief set-aside as part of the block grant allocation.

Seventeen commenters opposed a set-aside. Several commenters wrote that funds should not be taken off the top of the block grant. These commenters believed this would serve to punish everyone for the disasters impacting the few. Other commenters suggested that an Indian tribe should address disaster relief by setting aside its own reserves for such circumstances. One commenter noted that a fund should not be established because insurance requirements protect TDHE property and FEMA is available for natural disasters. Another commenter opposed a set aside due to the lack of accepted definitions for "emergency" and "disaster." One of the comments suggested individual insurance coverage

should be required to be sufficient to cover disaster situations at 100 percent.

Thirty-three commenters were in favor of a disaster and/or emergency set aside. Many of these commenters recommended that the fund not exceed \$10 million. Several commenters suggested that Indian tribes applying for this funding should be required to show that no other relief is available from other sources. One commenter supported the emergency fund, but recommended that Indian tribes should also have the option of establishing an emergency fund with a portion of their grant funds. After considering all of the comments, the Committee determined that a set aside would be difficult to implement and inadvisable. The Committee recommends that recipients consider the establishment of an insurance pool.

Performance Variable. The July 2, 1997 proposed rule solicited comments on the use of a performance variable in the formula allocation. Numerous comments were received.

Many commenters supported the inclusion of a performance variable in the allocation formula. These commenters believed a performance variable was necessary to establish a connection between performance and the amount of funding an Indian tribe receives. Further, the commenters believed that the inclusion of a performance variable would encourage proper fiscal management by Indian tribes. One commenter recommended that the performance objectives be established by the Indian tribes and be tribally driven.

Many commenters were opposed to the performance variable. These commenters believe that a performance variable is unnecessary and would only serve to divide Indian tribes. These commenters believed that the inclusion of a performance variable would lead to the high-performing recipients getting rewarded at the expense of low-performing recipients, which are in most need of assistance. One commenter writing against the proposal believes the inclusion of a performance variable would allow HUD subjectivity in funding decisions.

The Committee believes that performance is an important issue. However, the Committee determined that the inclusion of a performance variable in the formula would be inappropriate. Rather, the Committee has addressed performance measures in subpart F of these regulations, which deals with compliance issues and adjustments to funding.

General comments on the allocation formula. Several commenters submitted

comments that did not refer to a specific section of subpart D, but rather concerned the allocation formula generally.

One commenter suggested the allocation formula be published as part of the final rule. The Committee agrees and the formula is published as part of the appendix to this final rule.

Another commenter suggested splitting allocations by region or size of Indian tribe on a bi-annual or tri-annual basis. This suggestion was considered and not adopted by the Committee for reasons of fairness and equity.

One commenter questioned whether special consideration would be given to the high costs of construction and maintenance in Alaska. The Committee provided for different regional costs to be accounted for in the formula.

Another commenter recommended that \$15 million of the total amount of funds under the Need component be reserved annually for development of off-site sanitation facilities (water, sewer, and solid waste facilities) and allocated to Indian tribes based on a separate methodology. The Committee considered but did not adopt this proposal due to the impracticality of administering such a fund.

Subpart E—Federal Guarantees for Financing of Tribal Housing Activities

Subpart E describes the regulatory requirements necessary for the implementation of title VI of NAHASDA. This subpart establishes the terms and conditions by which HUD will guarantee the obligations issued by an Indian tribe or Tribally Designated Housing Entity for the purposes of financing eligible affordable housing activities. (Note: The numbers of several sections in this subpart have been amended due to the addition of new sections. For example, § 1000.406 of the proposed rule is numbered as § 1000.408 of this final rule.)

Section 1000.402. Several commenters suggested that State recognized Indian tribes should not be eligible for participation in Title VI. Two of these commenters added that if any State recognized Indian tribes were permitted to participate that their funding should come from a separate appropriation. The regulations were not changed because the statute allows for participation by State Indian tribes that meet the definition in section 4(12)(c) of NAHASDA.

Section 1000.404. This section of the final rule contains new language. Section 1000.404 of the proposed rule has been redesignated as § 1000.406 in the final rule. The preamble to the proposed rule sought input on whether

a definition of lender should be added in the final rule. Some commenters agreed that the language should be added while others stated that no regulatory language should be added. It was the decision of the Committee that a lender definition was advisable. It was further agreed to utilize the language found in HUD's regulations for the Section 184 Loan Guarantee Program (currently located in 24 CFR part 955, but redesignated by this final rule as 24 CFR part 1005) to provide consistency in the two loan guarantee programs. Further, it was agreed that the additional language added to the definition of lender in part 1005 was appropriate for Title VI as well (see discussion of changes to part 1005 below). These agreements are implemented in the revised § 1000.404 of the final rule.

Section 1000.406 of the proposed rule. Section 1000.406 of the proposed rule has been redesignated as § 1000.408 in the final rule. One commenter suggested that HUD require only a certification and not volumes of paperwork. The Committee agreed with the comment but made no change to the proposed rule as the language as published was sufficiently broad and did not require excessive paperwork. An additional commenter stated that the financing terms of a non-guaranteed loan should not exceed the financing terms of a guaranteed loan to avoid penalizing financially responsible Indian tribes. The Committee concurred and reworded the rule to conform with statutory language regarding the timely execution of program plans.

Section 1000.408 of the proposed rule. Section 1000.408 of the proposed rule has been redesignated as § 1000.410 in the final rule. Numerous comments were received stating that the term of the Title VI loan should be longer than 20 years. The commenters noted that the proposed rule language provided no flexibility and was counterproductive to establishing creative financing mechanisms. One commenter requesting the longer loan term suggested that each application stand on its own merits. The Committee agreed with this suggestion and amended the language in the final rule. Additionally, the language in paragraph (a) was amended to correct wording which erroneously provided that security pledged with the note or other obligation could have been sold if the note was sold.

Section 1000.412 of the proposed rule. Section 1000.412 of the proposed rule has been redesignated as § 1000.414 in the final rule. While no comments were received, this section was divided into separate paragraphs to clearly show the

reader that NAHASDA contains two, distinctive requirements.

Section 1000.414 of the proposed rule. Section 1000.414 of the proposed rule has been redesignated as § 1000.416 in the final rule. Several commenters requested a change in wording from “may” to “will” which they believed responded to concerns from Indian tribes and was more grammatically correct. The Committee concurred and amended the language as noted.

Section 1000.418 of the proposed rule. Section 1000.418 of the proposed rule has been redesignated as § 1000.420 in the final rule. Two comments requested a change in the proposed rule by adding “should not” instead of the proposed wording of simply “not.” The Committee did not concur with this change as the statute limits the net interest costs to 30 percent and does not provide for the flexibility the commenter is seeking.

Section 1000.422 of the proposed rule. Section 1000.422 of the proposed rule has been redesignated as § 1000.424 in the final rule. Several comments were received requesting the removal of the certification on the drug-free workplace and relocation requirements and the rewording of the certifications in general to be clearer to the reader. The Committee concurred with these recommendations and further streamlined the listing of required certifications. Several commenters requested that “regulation” be changed to “requirements” since the reference is to a statutory requirement, as opposed to a regulatory requirement. The Committee accepted this change.

Section 1000.428 of the proposed rule. Section 1000.428 of the proposed rule has been redesignated as § 1000.430 in the final rule. Several commenters suggested that the word “reasonable” be added to the conditions under which HUD may list conditions in the issuance of a guarantee certificate. The Committee concurred and made this change in paragraph (c) of this section. A comment was received requesting that a 45 day limit be placed on HUD to provide its request for information. The Committee agreed that a review period should be established and retained the 30 day review period.

Section 1000.432 of the proposed rule. Section 1000.432 of the proposed rule has been redesignated as § 1000.434 in the final rule. Two comments requested that the allocation process for title VI applicants be based only on seeking loan guarantee assistance. The Committee did not recommend any changes based on this comment as the Title VI applications will be received by the Department throughout the year and

not at one time. Therefore, it is impossible for the Department to accurately predict the number of loans and the amount of those loans when applying the formula.

Two comments requested that the date when applications could be submitted for the unused funds be changed from the fourth quarter to the third quarter. The Committee agreed with these comments and the language was amended. Additionally, language was added to make clear to the reader that an application previously denied under the regional allocation method would need to be resubmitted at the beginning of the third quarter to be made eligible for unused funds.

Two comments stated that the allocation method should be based on need. The Committee did not adopt this recommendation as there is no statutory basis for such a requirement. The Committee believes that the language in the proposed rule provided a fair distribution of available funds. During the third quarter, an adjustment will be made for regions with higher participation or lower participation in Title VI.

Section 1000.434 of the proposed rule. Section 1000.434 of the proposed rule has been redesignated as § 1000.436 in the final rule. A comment was received which supported the monitoring of Title VI funds by HUD. The Committee agreed with this comment but determined that such monitoring was fully provided for in the proposed rule language. Therefore, no change was necessary. A comment was also received which recommended that this provision be deleted from the rule. The Committee did not concur on this provision as it would contradict the statute.

Subpart F—Recipient Monitoring, Oversight and Accountability

Subpart F implements title IV of NAHASDA. Among other topics, this subpart addresses monitoring of compliance, performance reports, HUD and tribal review, audits, and remedies for noncompliance. (Note: The numbers of several sections in this subpart have been amended due to the addition of new sections. For example, § 1000.528 of the proposed rule is numbered as § 1000.532 of this final rule.)

General comment. One commenter suggested that HUD elevate its capabilities to insure that it can effectively monitor NAHASDA activities. No regulatory changes were proposed.

Section 1000.501. One commenter was in favor of this provision.

Section 1000.502. HUD had added the word “periodically” in describing the

HUD review process which otherwise was cross-referenced to section § 100.520. This prompted several negative comments. Section 1000.520 states that HUD will “at least annually” review each recipient’s performance. Therefore, the word “periodically” has been removed.

HUD also added citations to 24 CFR 8.56 and 24 CFR 146.31. Several commenters objected to this addition. These referenced regulations are not applicable to these reviews and NAHASDA regulations, so they have been deleted.

In paragraph (c) one commenter expressed concern about adding the word “auditing” to HUD’s review practices since HUD is unlikely to conduct financial audits of recipients. Therefore, the word “auditing” has been deleted.

One commenter challenged HUD’s monitoring and suggested further regulating how Indian tribes and HUD should carry out their monitoring responsibilities. NAHASDA mandates that HUD monitor activities and the Committee believes that it is prudent for both HUD and Indian tribes to monitor recipients. The Committee additionally believes that Indian tribes and HUD should generally not be further restricted in their monitoring activities.

Several commenters wanted further detail on monitoring activities. However, the Committee believes the regulations as currently stated are adequate and appropriate.

Section 1000.508. A number of commenters objected to the regulations mandating that recipients take certain specified actions if they identified programmatic concerns. The regulations have been changed to state that some corrective action must be taken, but is not limited to the remedies outlined.

A comment argued that HUD has an obligation to provide technical assistance. This comment was considered but no language was adopted.

Section 1000.510. Similar to some comments regarding § 1000.508, commenters were concerned about the language added by HUD concerning “responsibility” and how this might be interpreted or what consequences it might have. However, the Committee agreed to retain the language.

Section 1000.512. At the suggestion of several commenters, paragraph (c) has been changed to cross-reference to § 1000.524.

Section 1000.514. Contrary to the suggestions of several commenters, the Committee does not believe that it is necessary to address the particulars of audit submissions in this section. Many

comments were received suggesting that Indian tribes need more time to submit performance reports. Therefore, the proposed period of 45 days has been changed to 60 days. Also, based on one comment, "program year" has now been changed to "recipient's program year."

Section 1000.516. As with the change made to § 1000.514, the term "program year" has been changed to read "recipient's program year."

One commenter inquired about staggering IHP deadlines to allow them to fit different fiscal years. The submission period for IHPs has been changed to permit IHP submission anytime prior to July 1 of the Federal Fiscal Year for which funds are appropriated (See § 1000.214). Coordination of plan submission with individual fiscal years has been left to the discretion of the individual recipients.

Section 1000.521. At the suggestion of several commenters, this new question and answer has been added giving HUD 60 days to issue a report on a recipient's performance.

Section 1000.522. Many comments were received regarding the notice for on-site reviews. In response, the regulations have been changed to require a 30-day written notice in most cases. One commenter suggested that in emergency situations where a notice is not required, that the term "emergency" be defined. However, the Committee believes that such a definition would be too cumbersome. One commenter proposed that the recipient and HUD be required to mutually agree on whether an on-site review should be done. The Committee does not agree with this proposal because it might conflict with the rights and duties that HUD has under NAHASDA.

The Committee encourages HUD to be sensitive to the right of Indian tribes to participate in exit reviews. Though no specific action is promulgated, HUD should incorporate such rights in its review procedures.

Section 1000.524. As addressed in the discussion of previous sections, paragraph (d) is changed to read "recipient's program year."

At the suggestion of several commenters, the amount of time that a recipient has to submit an annual performance report has been changed from 45 days to 60 days.

One commenter wanted to expressly address treatment of obligated funds and to define them as expended funds. However, the Committee feels this is not an appropriate definition and that explanatory language is not necessary.

One commenter felt that "substantial" compliance with regulations and

statutes should be required in paragraph (f). The Committee agrees with this commenter and has changed the regulations accordingly.

One commenter suggested that HUD review be done biannually. However, this conflicts with the statutory requirement that HUD review recipients annually.

Section 1000.526. Many commenters objected to HUD adding paragraph (i) to the list of information which it may consider in reviewing a recipient's performance. It was agreed that this section be revised to apply only to "reliable" information relating to performance measurements.

One commenter asked whether paragraph (h) is an inappropriate waiver of attorney-client privilege. The Committee does not interpret this as a waiver because the section merely allows HUD to take into account matters that may be in litigation.

Section 1000.530. This section of the final rule contains new language. Section 1000.530 of the proposed rule has been redesignated as § 1000.538 in the final rule. A number of comments were received which stated that the proposed regulations did not provide a recipient a period of time to cure a performance problem before the Department initiates remedies available to it under either § 1000.528 of the proposed rule, redesignated as § 1000.532 in the final rule, (adjustments to future grants) or § 1000.530 of the proposed rule, redesignated as § 1000.538 in the final rule, (adjustments to current grant based on substantial noncompliance). The final rule adds new language at § 1000.530 which, depending upon the severity of the performance problem, provides a number of corrective and remedial measures which the recipient may take to cure the performance problem. At least one or more of the corrective and remedial actions must be taken by the Department before the Department pursues the remedies available to it under §§ 1000.532 or 1000.538 of the final rule. Such corrective or remedial measures are designed to (1) prevent continuance of the problem, (2) mitigate any adverse effects, and (3) prevent recurrence of the problem. The corrective and remedial actions are phrased as requests and recommendations to recipients.

Section 1000.528 of the proposed rule. Section 1000.528 of the proposed rule has been redesignated as § 1000.532 in the final rule. The July 2, 1997 proposed rule identified the reduction of grant amounts under section 405(c) of NAHASDA without affording notice and an opportunity for a hearing to be a

nonconsensus issue. The tribal position in the proposed rule was that prior to the Department taking action under section 405(c) to adjust, reduce or withdraw future grant awards, the Department must provide notice and an opportunity for a hearing which would be available to the recipient under section 401(a) of NAHASDA (relating to substantial noncompliance issues involving the current year grant). The Department took the position in the proposed rule that section 405(c) permits the Department to adjust, reduce, withdraw, or take other appropriate actions based on the Department's review and audit of the recipient without providing prior notice and an opportunity for hearing.

Section 1000.528 of the proposed rule was drafted by the Department to implement section 405(c). The section, as drafted, did not provide notice and an opportunity for hearing.

Extensive comments were received which unanimously supported the tribal position that the Department afford notice and an opportunity for hearing prior to the Department taking the section 405(c) remedies against the future year grant. The final rule states HUD will (1) provide notice and an informal meeting to resolve program deficiencies prior to taking the section 405(c) remedies and following the future grant adjustment, reduction, withdrawal, or other action, and (2) provide the recipient with a hearing identical to that afforded recipients under section 401(a) of NAHASDA. The funds adjusted, reduced, or withdrawn shall not be reallocated until 15 days after this hearing has been held and a final decision rendered.

Several comments stated that the statutory language in section 405(c) regarding "appropriate adjustments" to future grants is vague and provides little or no guidance to either the Department or recipients. They recommended that some explanation be provided as to the standard that applies when HUD makes a determination to adjust a future grant. Paragraph (c) provides such a standard and mandates that the Department make adjustments in the recipient's future grant appropriate to the deficiency when the recipient has not complied significantly with a major activity of its IHP. If a reduction is made, a recipient may request a hearing identical to that provided for reductions under section 401(a) of NAHASDA.

Other comments were received that were directed at reducing the share of grant funds to recipients who failed to meet their own IHP goals and objectives. The solution to this situation recommended by these commenters was

to provide a performance variable in the funding allocation formula. Also received were comments specific to the issue of whether annual funding would continue for programs with identified management and performance shortfalls and whether, as proposed, the regulations would implement a system that could increase the existing project development pipeline. However, many comments were received that opposed adding performance variables to the formula to reduce funding to non-performing programs.

The response to these varied comments is the insertion of paragraph (c)—a mandatory program sanction which HUD must take. The sanctions only occur if a recipient fails to comply significantly with a major activity of its IHP and the deficiencies that caused the failure were not beyond the control of the recipient.

Since each participant prepares its own IHP and conducts monitoring and oversight activities to assure the IHP will be accomplished, the Committee believes that the actions taken by HUD in the new paragraph (c) are necessary to provide a “means of last resort” when the recipient fails in a way that wastes or mismanages NAHASDA funding. Further, the Committee intends that inclusion of paragraph (c) underscores HUD’s responsibility to assure that funds are allocated to programs that address the goals and objectives set forth in their housing plans, thereby playing an active role in assuring the program’s success.

Section 1000.530 of the proposed rule. Section 1000.530 of the proposed rule has been redesignated as § 1000.538 in the final rule. A number of commenters submitted questions regarding the definition of “substantial noncompliance.” Several comments were received concerning providing a review and allowing an opportunity to cure a case of substantial noncompliance. In whole or in part, these concerns have been addressed in changes and additions made under §§ 1000.530, 1000.532, 1000.534, and 1000.536 of the final rule. One commenter endorsed the language as published.

Section 1000.532 of the proposed rule. Section 1000.532 of the proposed rule has been redesignated as § 1000.540 in the final rule. Numerous comments were received regarding hearing procedures to be followed. The reference to 24 CFR part 26 has been left intact. However, the references to the Rehabilitation Act and the Age Discrimination Act (which were added by HUD) have been removed since these

laws are not applicable in the context of this section.

Section 1000.534 of the proposed rule. Section 1000.534 of the proposed rule has been redesignated as § 1000.542 in the final rule. Commenters in Alaska were concerned about how this section might apply to them and the unique circumstances when an Indian tribe might refuse to both certify a TDHE and submit an IHP covering certain existing units. This issue has been addressed in § 1000.210.

Several commenters were concerned with the structure and language of paragraph (b). The Committee has not revised the language, because the current language reflects the statute.

One commenter expressed concern that this section is inconsistent with the principles of self-determination, although the commenter acknowledges that the section is required by the statute. Because it is mandated by NAHASDA, no change was made to the regulations.

Section 1000.534 of the final rule. This section of the final rule contains new language. Section 1000.534 of the proposed rule has been redesignated as § 1000.542 in the final rule. The proposed rule identified as a nonconsensus issue the question of a definition of the term “substantial noncompliance” contained in section 401 of NAHASDA. The Indian tribes proposed a definition for this term which is the basis for terminating, reducing, or limiting payments under NAHASDA. HUD disagreed with inclusion of the definition, but welcomed public comment on whether the term should be defined and how. There were many public comments on this matter and all urged inclusion of a definition. The final rule adds a definition at § 1000.534 that indicates both the substantiality and noncompliance aspects of the definition.

Section 1000.536 of the proposed rule. This question was added to the proposed rule by HUD and the proposed rule language has been completely removed. One commenter’s challenge to this question made the Committee realize that this provision is not needed. Tribal conditions and performance are evaluated each year by HUD upon the submission of an IHP. At that time, HUD shall make a new determination as to whether the recipient is in substantial compliance. Therefore, HUD is required to follow this process instead of determining that a particular instance of substantial noncompliance has ceased.

Section 1000.536 of the final rule. This section of the final rule contains new language. The language of

§ 1000.536 of the proposed rule has been removed from the final rule. This new question and answer provides that NAHASDA grant funds withheld from a recipient and not returned as a result of the hearing will be distributed by HUD in accordance with the next NAHASDA formula allocation.

Section 1000.538 of the proposed rule. Section 1000.538 of the proposed rule has been redesignated as § 1000.544 in the final rule. Several comments were received on this section. The regulations have been changed to better explain this requirement. (Also, see changes to §§ 1000.546 and 1000.548 of the final rule, which were §§ 1000.542 and 1000.544 of the proposed rule.)

Section 1000.540. The proposed rule language for this entire section has been removed because OMB Circular A-133 establishes new procedures for cognizant agencies and auditing oversight. Section 1000.532 of the proposed rule has been redesignated as § 1000.540 in the final rule.

Section 1000.552 of the proposed rule. Section 1000.552 of the proposed rule has been redesignated as § 1000.556 in the final rule. Several comments were received asking for clarification on this section. Language has been added to explain that there may be other laws or policies which are applicable.

Section 1000.554 of the proposed rule. Section 1000.554 of the proposed rule has been redesignated as § 1000.558 in the final rule. Several comments were received asking for clarification on this section. Language has been added to explain that there may be other laws or policies which are applicable.

Amendments to 24 CFR Part 1005— Section 184 Loan Guarantee Program Regulations

Section 1005.103. A comment was received which recommended a clarifying rewording of the definition for “Holder.” The Committee agreed and revised the wording of the section accordingly.

Section 1005.104. One commenter provided several comments on the eligibility of lenders for the 184 program. While these comments were directed to the requirements of other Federal agencies, the rule was amended to expand the eligibility of lenders.

Section 1005.105. The Committee agreed to reword the provisions of paragraph (b) for further clarity and compliance with NAHASDA.

Many comments were received regarding paragraph (f) of this section. One commenter noted the adverse affect on HMDA data if loan applicants must go through a denial process. A comment discussed the shortage of housing in

rural Alaska and noted that a requirement for a written documentation would present a disadvantage to buyers under this program. Questions were also raised about the type and amount of documentation required. Several commenters requested removal of the "lack of access to private financial markets" language. Several commenters noted that the proposed language would discourage access to private markets which was inconsistent with the objective of NAHASDA. One commenter proposed that this provision be delayed until a later time so that market comparables could be established.

The Committee considered all comments and determined that the language regarding "lack of access" could not be removed as it is contained in NAHASDA. The Committee agrees with the comments that the provision, as drafted, could be detrimental to the program and Indian country and therefore the rule was revised. The new requirement provides for a certification from the borrower that they lack access to private financial markets. Written documentation is no longer required to support this certification.

Section 1005.107. Several commenters believed that NAHASDA intended that the TDHE servicing the Indian tribe be eligible under the liquidation provision. The Committee agreed with this comment and added the language.

III. Findings and Certifications

Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (42 U.S.C. 3501-3530), and assigned OMB control number 2577-0218. *An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.*

Environmental Impact

A Finding of No Significant Impact with respect to the environment was made at the proposed rule stage in accordance with HUD regulations at 24 CFR part 50, implementing section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332). That Finding of No Significant Impact remains applicable to this final rule and is available for public inspection during business hours in the Office of the Rules Docket Clerk, Room 10276, Department of Housing and Urban Development,

451 Seventh Street, SW, Washington, DC 20410-0500.

Executive Order 12612, Federalism

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

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

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

Unfunded Mandates Reform Act

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

Executive Order 12866, Regulatory Planning and Review.

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

Regulatory Flexibility Act

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

List of Subjects

24 CFR Part 950

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

24 CFR Part 953

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

24 CFR Part 955

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

24 CFR Part 1000

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

24 CFR Part 1003

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

24 CFR Part 1005

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

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

PART 950—[REMOVED]

1. Part 950 is removed.

PART 953—[REDESIGNATED]

2. Part 953 is redesignated as part 1003.
- 2a. Part 955 is redesignated as part 1005.
3. Part 1000 is added to read as follows:

PART 1000—NATIVE AMERICAN HOUSING ACTIVITIES

Subpart A—General

Sec.

- 1000.1 What is the applicability and scope of these regulations?
- 1000.2 What are the guiding principles in the implementation of NAHASDA?
- 1000.4 What are the objectives of NAHASDA?
- 1000.6 What is the nature of the IHBG program?
- 1000.8 May provisions of these regulations be waived?
- 1000.10 What definitions apply in these regulations?
- 1000.12 What nondiscrimination requirements are applicable?
- 1000.14 What relocation and real property acquisition policies are applicable?

- 1000.16 What labor standards are applicable?
- 1000.18 What environmental review requirements apply?
- 1000.20 Is an Indian tribe required to assume environmental review responsibilities?
- 1000.22 Are the costs of the environmental review an eligible cost?
- 1000.24 If an Indian tribe assumes environmental review responsibility, how will HUD assist the Indian tribe in performing the environmental review?
- 1000.26 What are the administrative requirements under NAHASDA?
- 1000.28 May a self-governance Indian tribe be exempted from the applicability of § 1000.26?
- 1000.30 What prohibitions regarding conflict of interest are applicable?
- 1000.32 May exceptions be made to the conflict of interest provisions?
- 1000.34 What factors must be considered in making an exception to the conflict of interest provisions?
- 1000.36 How long must a recipient retain records regarding exceptions made to the conflict of interest provisions?
- 1000.38 What flood insurance requirements are applicable?
- 1000.40 Do lead-based paint poisoning prevention requirements apply to affordable housing activities under NAHASDA?
- 1000.42 Are the requirements of section 3 of the Housing and Urban Development Act of 1968 applicable?
- 1000.44 What prohibitions on the use of debarred, suspended or ineligible contractors apply?
- 1000.46 Do drug-free workplace requirements apply?
- 1000.48 Are Indian preference requirements applicable to IHBG activities?
- 1000.50 What Indian preference requirements apply to IHBG administration activities?
- 1000.52 What Indian preference requirements apply to IHBG procurement?
- 1000.54 What procedures apply to complaints arising out of any of the methods of providing for Indian preference?
- 1000.56 How are NAHASDA funds paid by HUD to recipients?
- 1000.58 Are there limitations on the investment of IHBG funds?
- 1000.60 Can HUD prevent improper expenditure of funds already disbursed to a recipient?
- 1000.62 What is considered program income and what restrictions are there on its use?
- Subpart B—Affordable Housing Activities**
- 1000.101 What is affordable housing?
- 1000.102 What are eligible affordable housing activities?
- 1000.104 What families are eligible for affordable housing activities?
- 1000.106 What families receiving assistance under title II of NAHASDA require HUD approval?
- 1000.108 How is HUD approval obtained by a recipient for housing for non low-income Indian families and model activities?
- 1000.110 Under what conditions may non low-income Indian families participate in the program?
- 1000.112 How will HUD determine whether to approve model housing activities?
- 1000.114 How long does HUD have to review and act on a proposal to provide assistance to non low-income Indian families or a model housing activity?
- 1000.116 What should HUD do before declining a proposal to provide assistance to non low-income Indian families or a model housing activity?
- 1000.118 What recourse does a recipient have if HUD disapproves a proposal to provide assistance to non low-income Indian families or a model housing activity?
- 1000.120 May a recipient use Indian preference or tribal preference in selecting families for housing assistance?
- 1000.122 May NAHASDA grant funds be used as matching funds to obtain and leverage funding, including any Federal or state program and still be considered an affordable housing activity?
- 1000.124 What maximum and minimum rent or homebuyer payment can a recipient charge a low-income rental tenant or homebuyer residing in housing units assisted with NAHASDA grant amounts?
- 1000.126 May a recipient charge flat or income-adjusted rents?
- 1000.128 Is income verification required for assistance under NAHASDA?
- 1000.130 May a recipient charge a non low-income family rents or homebuyer payments which are more than 30 percent of the family's adjusted income?
- 1000.132 Are utilities considered a part of rent or homebuyer payments?
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- Subpart A—General**
- § 1000.1 What is the applicability and scope of these regulations?**
- Under the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*) (NAHASDA) the Department of Housing and Urban Development (HUD) provides grants, loan guarantees, and technical assistance to Indian tribes and Alaska Native villages for the development and operation of low-income housing in Indian areas. The policies and procedures described in this part apply to grants to eligible recipients under the Indian Housing Block Grant (IHBG) program for Indian tribes and Alaska Native villages. This part also applies to loan guarantee assistance under title VI of NAHASDA. The regulations in this part supplement the statutory requirements set forth in NAHASDA. This part, as much as

practicable, does not repeat statutory language.

§ 1000.2 What are the guiding principles in the implementation of NAHASDA?

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

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

(i) By using Federal resources to aid families and individuals seeking affordable homes in safe and healthy environments and, in particular, assisting responsible, deserving citizens who cannot provide fully for themselves because of temporary circumstances or factors beyond their control;

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

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

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

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

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

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

(6) The need for affordable homes in safe and healthy environments on Indian reservations, in Indian

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

(7) Federal assistance to meet these responsibilities should be provided in a manner that recognizes the right of Indian self-determination and tribal self-governance by making such assistance available directly to the Indian tribes or tribally designated entities under authorities similar to those accorded Indian tribes in Public Law 93-638 (25 U.S.C. 450 *et seq.*).

(b) Nothing in this section shall be construed as releasing the United States government from any responsibility arising under its trust responsibilities towards Indians or any treaty or treaties with an Indian tribe or nation.

§ 1000.4 What are the objectives of NAHASDA?

The primary objectives of NAHASDA are:

(a) To assist and promote affordable housing activities to develop, maintain and operate affordable housing in safe and healthy environments on Indian reservations and in other Indian areas for occupancy by low-income Indian families;

(b) To ensure better access to private mortgage markets for Indian tribes and their members and to promote self-sufficiency of Indian tribes and their members;

(c) To coordinate activities to provide housing for Indian tribes and their members and to promote self-sufficiency of Indian tribes and their members;

(d) To plan for and integrate infrastructure resources for Indian tribes with housing development for Indian tribes; and

(e) To promote the development of private capital markets in Indian country and to allow such markets to operate and grow, thereby benefiting Indian communities.

§ 1000.6 What is the nature of the IHBG program?

The IHBG program is formula driven whereby eligible recipients of funding receive an equitable share of appropriations made by the Congress, based upon formula components specified under subpart D of this part. IHBG recipients must have the administrative capacity to undertake the affordable housing activities proposed,

including the systems of internal control necessary to administer these activities effectively without fraud, waste, or mismanagement.

§ 1000.8 May provisions of these regulations be waived?

Yes. Upon determination of good cause, the Secretary may, subject to statutory limitations, waive any provision of this part and delegate this authority in accordance with section 106 of the Department of Housing and Urban Development Reform Act of 1989 (42 U.S.C. 3535(q)).

§ 1000.10 What definitions apply in these regulations?

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

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

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

Affordable housing activities are those activities identified in section 202 of NAHASDA.

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

Annual income has one of the following meanings, as determined by the Indian tribe:

(1) "Annual income" as defined for HUD's Section 8 programs in 24 CFR part 5, subpart F (except when determining the income of a homebuyer for an owner-occupied rehabilitation project, the value of the homeowner's principal residence may be excluded from the calculation of Net Family assets); or

(2) Annual income as reported under the Census long-form for the most recent available decennial Census. This definition includes:

(i) Wages, salaries, tips, commissions, etc.;

(ii) Self-employment income;

(iii) Farm self-employment income;

(iv) Interest, dividends, net rental income, or income from estates or trusts;

(v) Social security or railroad retirement;

(vi) Supplemental Security Income, Aid to Families with Dependent Children, or other public assistance or public welfare programs;

(vii) Retirement, survivor, or disability pensions; and

(viii) Any other sources of income received regularly, including Veterans' (VA) payments, unemployment compensation, and alimony; or

(3) Adjusted gross income as defined for purposes of reporting under Internal Revenue Service (IRS) Form 1040 series for individual Federal annual income tax purposes.

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

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

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

Homebuyer payment means the payment of a family purchasing a home pursuant to a lease purchase agreement.

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

IHBG means Indian Housing Block Grant.

Income means annual income as defined in this subpart.

Indian Area means the area within which an Indian tribe operates affordable housing programs or the area in which a TDHE is authorized by one or more Indian tribes to operate affordable housing programs. Whenever the term "jurisdiction" is used in NAHASDA it shall mean "Indian Area" except where specific reference is made to the jurisdiction of a court.

Indian Housing Authority (IHA) means an entity that:

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

(2) Is established:

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

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

Median income for an Indian area is the greater of:

(1) The median income for the counties, previous counties, or their equivalent in which the Indian area is located; or

(2) The median income for the United States.

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

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

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

Person with Disabilities means a person who —

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

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

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

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

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

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

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

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

(6) For purposes of this definition, the term "*physical, mental or emotional impairment*" includes, but is not limited to:

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

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

(iii) The term "*physical, mental, or emotional impairment*" includes, but is

not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, and emotional illness.

§ 1000.12 What nondiscrimination requirements are applicable?

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

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

(c) The Indian Civil Rights Act (Title II of the Civil Rights Act of 1968; 25 U.S.C. 1301–1303), applies to Federally recognized Indian tribes that exercise powers of self-government.

(d) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and title VIII of the Civil Rights Act of 1968 (42 U.S.C. 3601 *et seq.*) apply to Indian tribes that are not covered by the Indian Civil Rights Act. However, the Title VI and Title VIII requirements do not apply to actions by Indian tribes under section 201(b) of NAHASDA.

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

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

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

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

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

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

(2) Request HUD approval of the proposed acquisition price before executing a firm commitment to purchase the property if the proposed acquisition payment exceeds the fair market value. The recipient shall

include with its request a copy of the appraisal(s) and a justification for the proposed acquisition payment. HUD will promptly review the proposal and inform the recipient of its approval or disapproval.

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

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

(1) Reimbursement for all reasonable out-of-pocket expenses incurred in connection with the temporary relocation, including the cost of moving to and from the temporarily occupied housing and any increase in monthly housing costs (e.g., rent/utility costs).

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

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

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

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

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

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

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

(f) *Responsibility of recipient.* (1) The recipient shall certify that it will comply with the URA, the regulations at 49 CFR part 24, and the requirements of this section. The recipient shall ensure such compliance notwithstanding any third

party's contractual obligation to the recipient to comply with the provisions in this section.

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

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

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

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

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

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

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

(B) 30 percent of gross household income.

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

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

increased housing costs and incidental expenses; or

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

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

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

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

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

(i) The person moved into the property after the submission of the IHP to HUD, but, before signing a lease or commencing occupancy, was provided written notice of the project, its possible impact on the person (e.g., the person may be displaced, temporarily relocated or suffer a rent increase) and the fact that the person would not qualify as a "displaced person" or for any assistance provided under this section as a result of the project.

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

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

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

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

§ 1000.16 What labor standards are applicable?

(a) *Davis-Bacon wage rates.* (1) As described in section 104(b) of NAHASDA, contracts and agreements for assistance, sale or lease under NAHASDA must require prevailing wage rates determined by the Secretary of Labor under the Davis-Bacon Act (40 U.S.C. 276a-276a-5) to be paid to

laborers and mechanics employed in the development of affordable housing.

(2) When NAHASDA assistance is only used to assist homebuyers to acquire single family housing, the Davis-Bacon wage rates apply to the construction of the housing if there is a written agreement with the owner or developer of the housing that NAHASDA assistance will be used to assist homebuyers to buy the housing.

(3) Prime contracts not in excess of \$2000 are exempt from Davis-Bacon wage rates.

(b) *HUD-determined wage rates.* Section 104(b) also mandates that contracts and agreements for assistance, sale or lease under NAHASDA require that prevailing wages determined or adopted (subsequent to a determination under applicable state, tribal or local law) by HUD shall be paid to maintenance laborers and mechanics employed in the operation, and to architects, technical engineers, draftsmen and technicians employed in the development, of affordable housing.

(c) *Contract Work Hours and Safety Standards Act.* Contracts in excess of \$100,000 to which Davis-Bacon or HUD-determined wage rates apply are subject by law to the overtime provisions of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327).

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

(e) *Other laws and issuances.* Recipients, contractors, subcontractors, and other participants must comply with regulations issued under the labor standards provisions cited in this section, other applicable Federal laws and regulations pertaining to labor standards, and HUD Handbook 1344.1 (Federal Labor Standards Compliance in Housing and Community Development Programs).

§ 1000.18 What environmental review requirements apply?

The environmental effects of each activity carried out with assistance under this part must be evaluated in accordance with the provisions of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321) and the related authorities listed in HUD's implementing regulations at 24 CFR parts 50 and 58. An environmental review does not have to be completed prior to HUD approval of an IHP.

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

(a) No. It is an option an Indian tribe may choose. If an Indian tribe declines

to assume the environmental review responsibilities, HUD will perform the environmental review in accordance with 24 CFR part 50. The timing of HUD undertaking the environmental review will be subject to the availability of resources. A HUD environmental review must be completed for any NAHASDA assisted activities not excluded from review under 24 CFR 50.19(b) before a recipient may acquire, rehabilitate, convert, lease, repair or construct property, or commit HUD or local funds used in conjunction with such NAHASDA assisted activities with respect to the property.

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

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

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

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

(c) Where an environmental assessment (EA) is appropriate under 24 CFR part 50, instead of an Indian tribe assuming environmental review responsibilities under paragraph (b) of this section or HUD preparing the EA itself under paragraph (a) of this section, an Indian tribe or TDHE may prepare an EA for HUD review. In addition to complying with the requirements of 40 CFR 1506.5(a), HUD shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the EA in accordance with 40 CFR 1506.5(b).

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

Yes, costs of completing the environmental review are eligible.

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

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

§ 1000.26 What are the administrative requirements under NAHASDA?

(a) Except as addressed in § 1000.28, recipients shall comply with the requirements and standards of OMB Circular No. A-87, "Principles for Determining Costs Applicable to Grants and Contracts with State, Local and Federally recognized Indian Tribal Governments," and with the following sections of 24 CFR part 85 "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments." For purposes of this part, "grantee" as defined in 24 CFR part 85 has the same meaning as "recipient."

(1) Section 85.3, "Definitions."
 (2) Section 85.6, "Exceptions."
 (3) Section 85.12, "Special grant or subgrant conditions for 'high risk' grantees."
 (4) Section 85.20, "Standards for financial management systems," except paragraph (a).
 (5) Section 85.21, "Payment."
 (6) Section 85.22, "Allowable costs."
 (7) Section 85.26, "Non-federal audits."

(8) Section 85.32, "Equipment," except in all cases in which the equipment is sold, the proceeds shall be program income.

(9) Section 85.33, "Supplies."
 (10) Section 85.35, "Subawards to debarred and suspended parties."
 (11) Section 85.36, "Procurement," except paragraph (a). There may be circumstances under which the bonding requirements of § 85.36(h) are inconsistent with other responsibilities and obligations of the recipient. In such circumstances, acceptable methods to provide performance and payment assurance may include:

(i) Deposit with the recipient of a cash escrow of not less than 20 percent of the total contract price, subject to reduction during the warranty period, commensurate with potential risk;

(ii) Letter of credit for 25 percent of the total contract price, unconditionally payable upon demand of the recipient, subject to reduction during any warranty period commensurate with potential risk; or

(iii) Letter of credit for 10 percent of the total contract price unconditionally payable upon demand of the recipient subject to reduction during any warranty period commensurate with potential risk, and compliance with the procedures for monitoring of disbursements by the contractor.

(12) Section 85.37, "Subgrants."
 (13) Section 85.40, "Monitoring and reporting program performance," except paragraphs (b) through (d) and paragraph (f).

(14) Section 85.41, "Financial reporting," except paragraphs (a), (b), and (e).

(15) Section 85.44, "Termination for convenience."

(16) Section 85.51 "Later disallowances and adjustments."

(17) Section 85.52, "Collection of amounts due."

(b)(1) With respect to the applicability of cost principles, all items of cost listed in Attachment B of OMB Circular A-87 which require prior Federal agency approval are allowable without the prior approval of HUD to the extent that they comply with the general policies and principles stated in Attachment A of this circular and are otherwise eligible under this part, except for the following:

(i) Depreciation methods for fixed assets shall not be changed without specific approval of HUD or, if charged through a cost allocation plan, the Federal cognizant agency.

(ii) Fines and penalties are unallowable costs to the IHBG program.

(2) In addition, no person providing consultant services in an employer-employee type of relationship shall receive more than a reasonable rate of compensation for personal services paid with IHBG funds. In no event, however, shall such compensation exceed the equivalent of the daily rate paid for Level IV of the Executive Schedule.

§ 1000.28 May a self-governance Indian tribe be exempted from the applicability of § 1000.26?

Yes. A self-governance Indian tribe shall certify that its administrative requirements, standards and systems meet or exceed the comparable requirements of § 1000.26. For purposes of this section, a self-governance Indian tribe is an Indian tribe that participates in tribal self-governance as authorized under Public Law 93-638, as amended (25 U.S.C. 450 *et seq.*).

§ 1000.30 What prohibitions regarding conflict of interest are applicable?

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

(b) *Conflicts prohibited.* No person who participates in the decision-making process or who gains inside information with regard to NAHASDA assisted activities may obtain a personal or financial interest or benefit from such activities, except for the use of NAHASDA funds to pay salaries or other related administrative costs. Such

persons include anyone with an interest in any contract, subcontract or agreement or proceeds thereunder, either for themselves or others with whom they have business or immediate family ties. Immediate family ties are determined by the Indian tribe or TDHE in its operating policies.

(c) The conflict of interest provision does not apply in instances where a person who might otherwise be included under the conflict provision is low-income and is selected for assistance in accordance with the recipient's written policies for eligibility, admission and occupancy of families for housing assistance with IHBG funds, provided that there is no conflict of interest under applicable tribal or state law. The recipient must make a public disclosure of the nature of assistance to be provided and the specific basis for the selection of the person. The recipient shall provide the appropriate Area ONAP with a copy of the disclosure before the assistance is provided to the person.

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

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

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

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

In determining whether or not to make an exception to the conflict of interest provisions, HUD must consider whether undue hardship will result, either to the recipient or to the person affected, when weighed against the public interest served by avoiding the prohibited conflict.

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

A recipient must maintain all such records for a period of at least 3 years after an exception is made.

§ 1000.38 What flood insurance requirements are applicable?

Under the Flood Disaster Protection Act of 1973, as amended (42 U.S.C. 4001-4128), a recipient may not permit the use of Federal financial assistance

for acquisition and construction purposes (including rehabilitation) in an area identified by the Federal Emergency Management Agency (FEMA) as having special flood hazards, unless the following conditions are met:

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

(b) Where the community is participating in the National Flood Insurance Program, flood insurance on the building is obtained in compliance with section 102(a) of the Flood Disaster Protection Act of 1973 (42 U.S.C. 4012(a)); provided, that if the financial assistance is in the form of a loan or an insurance or guaranty of a loan, the amount of flood insurance required need not exceed the outstanding principal balance of the loan and need not be required beyond the term of the loan.

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

Yes, lead-based paint requirements apply to housing activities assisted under NAHASDA. The applicable requirements for NAHASDA are:

(a) *Purpose and applicability.* (1) The purpose of this section is to implement section 302 of the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4822) by establishing procedures to eliminate as far as practicable the hazards of lead-based paint poisoning for rental and homeownership units owned or operated by a recipient. This section is issued under 24 CFR 35.24(b)(4). The requirements of subpart C of 24 CFR part 35 do not apply to the housing covered under this section. Other provisions of part 35 apply, including subpart H, Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property.

(2) The requirements of this section do not apply to housing built after 1977, 0-bedroom units, units that are certified by a qualified inspector to be free of lead-based paint, or units designated exclusively for the elderly or the handicapped unless a child of less than

six years of age resides or is expected to reside in the unit.

(3) Further information on identifying and reducing lead-based paint hazards can be found in the HUD publication, "Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing."

(b) *Definitions.*

Chewable surface. Protruding painted surfaces that are readily accessible to children under six years of age; for example, protruding corners, window sills and frames, doors and frames, and other protruding woodwork. Hard metal surfaces are not considered chewable surfaces.

Component. An element of a residential structure identified by type and location, such as a bedroom wall, an exterior window sill, a baseboard in a living room, a kitchen floor, an interior window sill in a bathroom, a porch floor, stair treads in a common stairwell, or an exterior wall.

Defective paint surface. A surface on which the paint is cracking, scaling, chipping, peeling, or loose.

Elevated blood lead level (EBL).

Excessive absorption of lead. Excessive absorption is a confirmed concentration of lead in whole blood of 20 µg/dl (micrograms of lead per deciliter) or more for a single test or of 15–19 µg/dl in two consecutive tests 3–4 months apart.

HEPA means a high efficiency particle accumulator as used in lead abatement vacuum cleaners.

Lead-based paint. A paint surface, whether or not defective, identified as having a lead content greater than or equal to 1 milligram per centimeter squared (mg/cm²), or 0.5 percent by weight or 5000 parts per million by weight (PPM).

(c) *Requirements for pre-1978 units.*

(1) If a dwelling unit was constructed before 1978, it must be visually inspected for defective paint surfaces. If defective paint surfaces are found, such surfaces must be treated in accordance with this section.

(2) Defective paint surfaces that are found in a report by a qualified lead-based paint inspector not to be lead-based paint, as defined in this section, may be exempted from treatment. For purposes of this section, a qualified lead-based paint inspector is a lead-based paint inspector certified, licensed or regulated by a State or Tribal government, the U.S. Environmental Protection Agency, a local health or housing agency, or an organization recognized by HUD.

(3) Treatment of defective paint surfaces required under this section must be completed within 30 calendar

days of the visual evaluation. When weather conditions prevent treatment of the defective paint conditions on exterior surfaces within the 30 day period, treatment as required by this section may be delayed for a reasonable time.

(4) The requirements in this paragraph apply to:

(i) All painted interior surfaces within the unit (including ceilings but excluding furniture that is not built in or attached to the property);

(ii) The entrance and hallway providing ingress or egress to a unit in a multi-unit building, and other common areas that are readily accessible to children less than six years of age; and

(iii) Exterior surfaces that are readily accessible to children under six years of age (including walls, stairs, decks, porches, railings, windows and doors, and outbuildings such as garages and sheds that are readily accessible to children of less than six years of age).

(d) *Additional requirements for pre-1978 units with children under six with an EBL.* (1) In addition to the requirements of this section, for a dwelling unit constructed before 1978 that is occupied by a family with a child under the age of six years with an identified EBL condition, chewable surfaces must be tested for lead-based paint. Testing is not required if previous testing of chewable surfaces is negative for lead-based paint or if the chewable surfaces have already been treated.

(2) Testing must be conducted by a qualified lead-based paint inspector, as explained in paragraph (c)(2) of this section. Lead content must be tested by using an X-ray fluorescence analyzer (XRF) or by laboratory analysis of paint samples. Where lead-based paint on chewable surfaces is identified, treatment of the paint surface in accordance with this section is required, and treatment shall be completed within 30 days of the paint testing report.

(3) The requirements of paragraph (d) in this section apply to chewable surfaces:

(i) Within the unit;

(ii) The entrance and hallway providing access to a unit in a multi-unit building; and

(iii) Exterior surfaces (including walls, stairs, decks, porches, railings, windows and doors, and outbuildings such as garages and sheds that are accessible to children of less than six years of age).

(e) *Treatment of chewable surfaces without testing.* The recipient may, at its discretion, waive the testing requirement and require the owner to treat all interior and exterior chewable

surfaces in accordance with the methods set out in this section.

(f) *Treatment methods and requirements.* Treatment of defective paint surfaces and chewable surfaces must consist of covering or removal of the paint in accordance with the following requirements:

(1) Surfaces must be covered with durable materials with joints and edges sealed and caulked as needed to prevent the escape of lead contaminated dust. The following are acceptable methods of treatment:

(i) Removal by wet scraping, wet sanding, chemical stripping on or off site;

(ii) Replacing painted components;

(iii) Scraping with infra-red or coil type heat gun with temperatures below 1100 degrees;

(iv) HEPA vacuum sanding;

(v) HEPA vacuum needle gun;

(vi) Contained hydroblasting or high pressure wash with HEPA vacuum; and

(vii) Abrasive sandblasting with HEPA vacuum.

(2) Prohibited methods of removal are: open flame burning or torching; machine sanding or grinding without a HEPA exhaust; uncontained hydroblasting or high pressure wash; and dry scraping except around electrical outlets or except when treating defective paint spots no more than two square feet in any one interior room or space (hallway, pantry, etc.) or totaling no more than 20 square feet on exterior surfaces.

(3) During exterior treatment soil and playground equipment must be protected from contamination.

(4) All treatment procedures must be concluded with a thorough cleaning of all surfaces in the room or area of treatment to remove fine dust particles. Cleanup must be accomplished by wet washing surfaces with a lead solubilizing detergent such as trisodium phosphate or an equivalent solution. Dust clearance testing by a qualified inspector may be done at the discretion of the recipient to ensure that the unit has been cleaned adequately.

(5) Waste and debris must be disposed of in accordance with all applicable Federal, tribal, state and local laws.

(g) *Tenant protection.* The owner must take appropriate action to protect residents and their belongings from hazards associated with treatment procedures. Residents must not enter spaces undergoing treatment until cleanup is completed. Personal belongings that are in work areas must be relocated or otherwise protected from contamination.

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

(a) *General.* Yes. Recipients shall comply with section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u) and HUD's implementing regulations in 24 CFR part 135, to the maximum extent feasible and consistent with, but not in derogation of, compliance with section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)). Section 3 provides job training, employment, and contracting opportunities for low-income individuals.

(b) *Threshold requirement.* The requirements of section 3 apply only to those section 3 covered projects or activities for which the amount of assistance exceeds \$200,000.

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

In addition to any tribal requirements, the prohibitions in 24 CFR part 24 on the use of debarred, suspended or ineligible contractors apply.

§ 1000.46 Do drug-free workplace requirements apply?

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

§ 1000.48 Are Indian preference requirements applicable to IHBG activities?

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

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

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

(b) *Definitions.*

(1) The Indian Self-Determination and Education Assistance Act defines "Indian" to mean a person who is a member of an Indian tribe and defines "Indian tribe" to mean any Indian tribe, band, nation, or other organized group or community including any Alaska Native village or regional or village corporation as defined or established

pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(2) In section 3 of the Indian Financing Act of 1974 "economic enterprise" is defined as any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit, except that Indian ownership must constitute not less than 51 percent of the enterprise. This act defines "Indian organization" to mean the governing body of any Indian tribe or entity established or recognized by such governing body.

§ 1000.50 What Indian preference requirements apply to IHBG administration activities?

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

§ 1000.52 What Indian preference requirements apply to IHBG procurement?

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

(a) Each recipient shall:

(1) Certify to HUD that the policies and procedures adopted by the recipient will provide preference in procurement activities consistent with the requirements of section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)) (An Indian preference policy which was previously approved by HUD for a recipient will meet the requirements of this section); or

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

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

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

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

(b) If the recipient selects a method of providing preference that results in

fewer than two responsible qualified organizations or enterprises submitting a statement of intent, a bid or a proposal to perform the contract at a reasonable cost, then the recipient shall:

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

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

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

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

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

(e) A recipient, at its discretion, may require information of prospective contractors seeking to qualify as Indian organizations or Indian-owned economic enterprises. Recipients may require prospective contractors to provide the following information before submitting a bid or proposal, or at the time of submission:

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

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

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

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

(1) The work to be performed under this contract is on a project subject to section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)) (the Indian Act). Section 7(b) requires that to the greatest extent feasible:

(i) Preferences and opportunities for training and employment shall be given to Indians; and

(ii) Preferences in the award of contracts and subcontracts shall be given to Indian organizations and Indian-owned economic enterprises.

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

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

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

§ 1000.54 What procedures apply to complaints arising out of any of the methods of providing for Indian preference?

The following procedures are applicable to complaints arising out of any of the methods of providing for Indian preference contained in this part, including alternate methods. Tribal policies that meet or exceed the requirements of this section shall apply.

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

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

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

(d) Within 20 calendar days of receipt of a complaint, the recipient shall either meet, or communicate by mail or telephone, with the complainant in an effort to resolve the matter. The recipient shall make a determination on a complaint and notify the complainant, in writing, within 30 calendar days of the submittal of the complaint to the recipient. The decision of the recipient shall constitute final administrative action on the complaint.

§ 1000.56 How are NAHASDA funds paid by HUD to recipients?

(a) Each year funds shall be paid directly to a recipient in a manner that recognizes the right of Indian self-determination and tribal self-governance and the trust responsibility of the Federal government to Indian tribes consistent with NAHASDA.

(b) Payments shall be made as expeditiously as practicable.

§ 1000.58 Are there limitations on the investment of IHBG funds?

(a) A recipient may invest IHBG funds for the purposes of carrying out affordable housing activities in investment securities and other obligations as provided in this section.

(b) The recipient may invest IHBG funds so long as it demonstrates to HUD:

(1) That there are no unresolved significant and material audit findings or exceptions in the most recent annual audit completed under the Single Audit Act or in an independent financial audit prepared in accordance with generally accepted auditing principles; and

(2) That it is a self-governance Indian tribe or that it has the administrative capacity and controls to responsibly manage the investment. For purposes of this section, a self-governance Indian tribe is an Indian tribe that participates in tribal self-governance as authorized under Public Law 93-638, as amended (25 U.S.C. 450 *et seq.*).

(c) Recipients shall invest IHBG funds only in:

(1) Obligations of the United States; obligations issued by Government sponsored agencies; securities that are guaranteed or insured by the United States; mutual (or other) funds registered with the Securities and Exchange Commission and which invest only in obligations of the United States or securities that are guaranteed or insured by the United States; or

(2) Accounts that are insured by an agency or instrumentality of the United States or fully collateralized to ensure protection of the funds, even in the event of bank failure.

(d) IHBG funds shall be held in one or more accounts separate from other funds of the recipient. Each of these accounts shall be subject to an agreement in a form prescribed by HUD sufficient to implement the regulations in this part and permit HUD to exercise its rights under § 1000.60.

(e) Expenditure of funds for affordable housing activities under section 204(a) of NAHASDA shall not be considered investment.

(f) A recipient may invest its IHBG annual grant in an amount equal to the

annual formula grant amount less any formula grant amounts allocated for the operating subsidy element of the Formula Current Assisted Housing Stock (FCAS) component of the formula (see §§ 1000.316(a) and 1000.320) multiplied by the following percentages, as appropriate:

(1) 50% in Fiscal Years 1998 and 1999;

(2) 75% in Fiscal Year 2000; and

(3) 100% in Fiscal Years 2001 and thereafter.

(g) Investments under this section may be for a period no longer than two years.

§ 1000.60 Can HUD prevent improper expenditure of funds already disbursed to a recipient?

Yes. In accordance with the standards and remedies contained in § 1000.538 relating to substantial noncompliance, HUD will use its powers under a depository agreement and take such other actions as may be legally necessary to suspend funds disbursed to the recipient until the substantial noncompliance has been remedied. In taking this action, HUD shall comply with all appropriate procedures, appeals and hearing rights prescribed elsewhere in this part.

§ 1000.62 What is considered program income and what restrictions are there on its use?

(a) Program income is defined as any income that is realized from the disbursement of grant amounts. Program income does not include any amounts generated from the operation of 1937 Act units unless the units are assisted with grant amounts and the income is attributable to such assistance. Program income includes income from fees for services performed from the use of real or rental of real or personal property acquired with grant funds, from the sale of commodities or items developed, acquired, etc. with grant funds, and from payments of principal and interest earned on grant funds prior to disbursement.

(b) Any program income can be retained by a recipient provided it is used for affordable housing activities in accordance with section 202 of NAHASDA. If the amount of income received in a single year by a recipient and all its subrecipients, which would otherwise be considered program income, does not exceed \$25,000, such funds may be retained but will not be considered to be or treated as program income.

(c) If program income is realized from an eligible activity funded with both grant funds as well as other funds (i.e.,

funds that are not grant funds), then the amount of program income realized will be based on a percentage calculation that represents the proportional share of funds provided for the activity generating the program income.

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

Subpart B—Affordable Housing Activities

§ 1000.101 What is affordable housing?

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

§ 1000.102 What are eligible affordable housing activities?

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

§ 1000.104 What families are eligible for affordable housing activities?

The following families are eligible for affordable housing activities:

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

(b) A non-low income Indian family may receive housing assistance in accordance with § 1000.110, except that non low-income Indian families residing in housing assisted under the 1937 Act do not have to meet the requirements of § 1000.110 for continued occupancy.

(c) A non-Indian family may receive housing assistance on a reservation or Indian area if the non-Indian family's housing needs cannot be reasonably met without such assistance and the recipient determines that the presence of that family on the reservation or Indian area is essential to the well-being of Indian families, except that non-Indian families residing in housing assisted under the 1937 Act do not have to meet these requirements for continued occupancy.

§ 1000.106 What families receiving assistance under title II of NAHASDA require HUD approval?

(a) Housing assistance for non low-income Indian families requires HUD approval only as required in §§ 1000.108 and 1000.110.

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

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

Recipients are required to submit proposals to operate model housing activities as defined in section 202(6) of NAHASDA and to provide assistance to non low-income Indian families in accordance with section 201(b)(2) of NAHASDA. Assistance to non low-income Indian families must be in accordance with § 1000.110. Proposals may be submitted in the recipient's IHP or at any time by amendment of the IHP, or by special request to HUD at any time. HUD may approve the remainder of an IHP notwithstanding disapproval of a model activity or assistance to non low-income Indian families.

§ 1000.110 Under what conditions may non low-income Indian families participate in the program?

(a) A family who is purchasing housing under a lease purchase agreement and who was low income at the time the lease was signed is eligible without further conditions.

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

(1) Homeownership activities under section 202(2) of NAHASDA, which may include assistance in conjunction with loan guarantees under the Section 184 program (see 24 CFR part 1005);

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

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

(c) A recipient must determine and document that there is a need for housing for each family which cannot reasonably be met without such assistance.

(d) A recipient may use up to 10 percent of its annual grant amount for families whose income falls within 80 to 100 percent of the median income without HUD approval. HUD approval is required if a recipient plans to use more than 10 percent of its annual grant amount for such assistance or to provide housing for families with income over 100 percent of median income.

(e) Non low-income Indian families cannot receive the same benefits provided low-income Indian families. The amount of assistance non low-income Indian families may receive will be determined as follows:

(1) The rent (including homebuyer payments under a lease purchase agreement) to be paid by a non low-income Indian family cannot be less than: (Income of non low-income

family/Income of family at 80 percent of median income) × (Rental payment of family at 80 percent of median income), but need not exceed the fair market rent or value of the unit.

(2) Other assistance, including down payment assistance, to non low-income Indian families, cannot exceed: (Income of family at 80 percent of median income/Income of non low-income family) × (Present value of the assistance provided to family at 80 percent of median income).

(f) The requirements set forth in paragraph (e) of this section do not apply to non low-income Indian families which the recipient has determined to be essential to the well-being of the Indian families residing in the housing area.

§ 1000.112 How will HUD determine whether to approve model housing activities?

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

§ 1000.114 How long does HUD have to review and act on a proposal to provide assistance to non low-income Indian families or a model housing activity?

Whether submitted in the IHP or at any other time, HUD will have sixty calendar days after receiving the proposal to notify the recipient in writing that the proposal to provide assistance to non low-income Indian families or for model activities is approved or disapproved. If no decision is made by HUD within sixty calendar days of receiving the proposal, the proposal is deemed to have been approved by HUD.

§ 1000.116 What should HUD do before declining a proposal to provide assistance to non low-income Indian families or a model housing activity?

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

§ 1000.118 What recourse does a recipient have if HUD disapproves a proposal to provide assistance to non low-income Indian families or a model housing activity?

(a) Within thirty calendar days of receiving HUD's denial of a proposal to

provide assistance to non low-income Indian families or a model housing activity, the recipient may request reconsideration of the denial in writing. The request shall set forth justification for the reconsideration.

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

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

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

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

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

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

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

§ 1000.124 What maximum and minimum rent or homebuyer payment can a recipient charge a low-income rental tenant or homebuyer residing in housing units assisted with NAHASDA grant amounts?

A recipient can charge a low-income rental tenant or homebuyer rent or homebuyer payments not to exceed 30 percent of the adjusted income of the family. The recipient may also decide to compute its rental and homebuyer payments on any lesser percentage of adjusted income of the family. This requirement applies only to units assisted with NAHASDA grant amounts. NAHASDA does not set minimum rents

or homebuyer payments; however, a recipient may do so.

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

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

§ 1000.128 Is income verification required for assistance under NAHASDA?

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

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

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

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

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

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

§ 1000.134 When may a recipient (or entity funded by a recipient) demolish or dispose of current assisted stock?

(a) A recipient (or entity funded by a recipient) may undertake a planned demolition or disposal of current assisted stock owned by the recipient or an entity funded by the recipient when:

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

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

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

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

(b) No action to demolish or dispose of the property other than performing the analysis cited in paragraph (a) of this section can be taken until HUD has been notified in writing of the recipient's intent to demolish or dispose of the housing units consistent with section 102(c)(4)(H) of NAHASDA. The written notification must set out the analysis used to arrive at the decision to demolish or dispose of the property and may be set out in a recipient's IHP or in a separate submission to HUD.

(c) In any disposition sale of a housing unit, a sale process designed to maximize the sale price will be used. However, where the sale is to a low-income Indian family, the home may be disposed of without maximizing the sale price so long as such price is consistent with a recipient's IHP. The sale proceeds from the disposition of any housing unit are program income under NAHASDA and must be used in accordance with the requirements of NAHASDA and these regulations.

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

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

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

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

(d) These requirements are in addition to applicable flood insurance requirements under § 1000.38.

§ 1000.138 What constitutes adequate insurance?

Insurance is adequate if it is a purchased insurance policy from an insurance provider or a plan of self-insurance in an amount that will protect the financial stability of the recipient's IHBG program. Recipients may purchase the required insurance without regard to

competitive selection procedures from nonprofit insurance entities which are owned and controlled by recipients and which have been approved by HUD.

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

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

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

Each recipient shall describe in its IHP its determination of the useful life of each assisted housing unit in each of its developments in accordance with the local conditions of the Indian area of the recipient. By approving the plan, HUD determines the useful life in accordance with section 205(a)(2) of NAHASDA and for purposes of section 209.

§ 1000.144 Are Mutual Help homes developed under the 1937 Act subject to the useful life provisions of section 205(a)(2)?

No.

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

No. The low-income eligibility requirement applies only at the time of purchase. However, families purchasing housing under a lease purchase agreement who are not low-income at the time of purchase are eligible under § 1000.110.

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

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

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

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

The recipient shall use the criminal conviction information described in § 1000.150 only for applicant screening, lease enforcement and eviction actions. The information may be disclosed only

to any person who has a job related need for the information and who is an authorized officer, employee, or representative of the recipient or the owner of housing assisted under NAHASDA.

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

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

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

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

§ 1000.156 Is there a per unit limit on the amount of IHBG funds that may be used for dwelling construction and dwelling equipment?

(a) Yes. The per unit amount of IHBG funds that may be used for dwelling construction and dwelling equipment cannot exceed the limit established by HUD except as allowed in the definition below. Other costs associated with developing a project, including all undertakings necessary for administration, planning, site acquisition, water and sewer, demolition, and financing may be eligible NAHASDA costs but are not subject to this limit.

(b) Dwelling construction and equipment (DC&E) costs include all construction costs of an individual dwelling within five feet of the foundation. Excluded from the DC&E are any administrative, planning, financing, site acquisition, site development more than five feet from the foundation, and utility development or connection costs. HUD will publish and update on a regular basis DC&E amounts for appropriate geographic areas.

(c) DC&E amounts will be based on a moderately designed house or multi-family structure and will be determined by averaging the current construction costs, as listed in not less than two nationally recognized residential construction cost indices, for publicly bid construction of a good and sound quality. If a recipient determines that

published DC&E amounts are not representative of construction costs in its area, it may request a re-evaluation of DC&E amounts and provide HUD with relevant information for this re-evaluation.

Subpart C—Indian Housing Plan (IHP)

§ 1000.201 How are funds made available under NAHASDA?

Every fiscal year HUD will make grants under the IHBG program to recipients who have submitted to HUD for that fiscal year an IHP in accordance with § 1000.220 to carry out affordable housing activities.

§ 1000.202 Who are eligible recipients?

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

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

(a) By resolution of the Indian tribe;

or

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

§ 1000.206 How is a TDHE designated?

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

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

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

§ 1000.208 What happens if an Indian tribe had two IHAs as of September 30, 1996?

Indian tribes which had established and were operating two IHAs as of September 30, 1996, under the 1937 Act shall be allowed to form and operate two TDHEs under NAHASDA. Nothing in this section shall affect the allocation of funds otherwise due to an Indian tribe under the formula.

§ 1000.210 What happens to existing 1937 Act units in those jurisdictions for which Indian tribes do not or cannot submit an IHP?

NAHASDA does not provide the statutory authority for HUD to grant NAHASDA grant funds to an Indian housing authority, Indian tribe or to a default TDHE which cannot obtain a tribal certification, if the requisite IHP is not submitted by an Indian tribe or is determined to be out of compliance by

HUD. There may be circumstances where this may happen, and in those cases, other methods of tribal, Federal, or private market support may have to be sought to maintain and operate those 1937 Act units.

§ 1000.212 Is submission of an IHP required?

Yes. An Indian tribe or, with the consent of its Indian tribe(s), the TDHE, must submit an IHP to HUD to receive funding under NAHASDA, except as provided in section 101(b)(2) of NAHASDA. If a TDHE has been designated by more than one Indian tribe, the TDHE can submit a separate IHP for each Indian tribe or it may submit a single IHP based on the requirements of § 1000.220 with the approval of the Indian tribes.

§ 1000.214 What is the deadline for submission of an IHP?

IHPs must be initially sent by the recipient to the Area ONAP no later than July 1. Grant funds cannot be provided until the plan is submitted and determined to be in compliance with section 102 of NAHASDA and funds are available.

§ 1000.216 What happens if the recipient does not submit the IHP to the Area ONAP by July 1?

If the IHP is not initially sent by July 1, the recipient will not be eligible for IHBG funds for that fiscal year. Any funds not obligated because an IHP was not received before the deadline has passed shall be distributed by formula in the following year.

§ 1000.218 Who prepares and submits an IHP?

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

§ 1000.220 What are the minimum requirements for the IHP?

The minimum IHP requirements are set forth in sections 102(b) and 102(c) of NAHASDA. In addition, §§ 1000.56, 1000.108, 1000.120, 1000.134, 1000.142, 1000.238, 1000.328, and 1000.504 require or permit additional items to be set forth in the IHP for HUD determinations required by those sections. Recipients are only required to provide IHPs that contain these minimum elements in a form prescribed by HUD. If a TDHE is submitting a single IHP that covers two or more Indian tribes, the IHP must contain a separate certification in accordance with section 102(d) of NAHASDA and IHP Tables for each Indian tribe when

requested by such Indian tribes. However, Indian tribes are encouraged to perform comprehensive housing needs assessments and develop comprehensive IHPs and not limit their planning process to only those housing efforts funded by NAHASDA. An IHP should be locally driven.

§ 1000.222 Are there separate IHP requirements for small Indian tribes and small TDHEs?

No. HUD requirements for IHPs are reasonable.

§ 1000.224 Can any part of the IHP be waived?

Yes. HUD has general authority under section 101(b)(2) of NAHASDA to waive any IHP requirements when an Indian tribe cannot comply with IHP requirements due to circumstances beyond its control. The waiver authority under section 101(b)(2) of NAHASDA provides flexibility to address the needs of every Indian tribe, including small Indian tribes. The waiver may be requested by the Indian tribe or its TDHE (if such authority is delegated by the Indian tribe).

§ 1000.226 Can the certification requirements of section 102(c)(5) of NAHASDA be waived by HUD?

Yes. HUD may waive these certification requirements as provided in section 101(b)(2) of NAHASDA.

§ 1000.228 If HUD changes its IHP format will Indian tribes be involved?

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

§ 1000.230 What is the process for HUD review of IHPs and IHP amendments?

HUD will conduct the IHP review in the following manner:

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

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

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

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

(4) Include the appropriate certifications.

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

section 102 of NAHASDA and the IHP is approved.

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

(1) The reasons for noncompliance;

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

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

(d) If the recipient does not submit a revised IHP by the date indicated in the notice provided under paragraph (c) of this section, the IHP will be determined by HUD to be in non-compliance unless a waiver is requested and approved under section 101(b)(2) of NAHASDA. If the IHP is determined by HUD to be in non-compliance and no waiver is granted, the recipient may appeal this determination following the appeal process in § 1000.234.

(e)(1) If the IHP does not contain the certifications identified in paragraph (a)(4) of this section, the recipient will be notified within 60 days of submission of the IHP that the plan is incomplete. The notification will include a date by which the certification must be submitted.

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

§ 1000.232 Can an Indian tribe or TDHE amend its IHP?

Yes. Section 103(c) of NAHASDA specifically provides that a recipient may submit modifications or revisions of its IHP to HUD. Unless the initial IHP certification provided by an Indian tribe allowed for the submission of IHP amendments without further tribal certifications, a tribal certification must accompany submission of IHP amendments by a TDHE to HUD. HUD's review of an amendment and determination of compliance will be limited to modifications of an IHP which adds new activities or involve a decrease in the amount of funds provided to protect and maintain the viability of housing assisted under the 1937 Act. HUD will consider these modifications to the IHP in accordance

with § 1000.230. HUD will act on amended IHPs within 30 days.

§ 1000.234 Can HUD's determination regarding the non-compliance of an IHP or a modification to an IHP be appealed?

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

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

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

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

§ 1000.236 What are eligible administrative and planning expenses?

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

- (1) Costs of overall program and/or administrative management;
- (2) Coordination monitoring and evaluation;
- (3) Preparation of the IHP including data collection and transition costs;
- (4) Preparation of the annual performance report; and
- (5) Challenge to and collection of data for purposes of challenging the formula.

(b) Staff and overhead costs directly related to carrying out affordable housing activities can be determined to be eligible costs of the affordable housing activity or considered administration or planning at the discretion of the recipient.

§ 1000.238 What percentage of the IHBG funds can be used for administrative and planning expenses?

The recipient can use up to 20 percent of its annual grant amount for administration and planning. The recipient shall identify the percentage of grant funds which will be used in the IHP. HUD approval is required if a higher percentage is requested by the

recipient. When HUD approval is required, HUD must take into consideration any cost of preparing the IHP, challenges to and collection of data, the recipient's grant amount, approved cost allocation plans, and any other relevant information with special consideration given to the circumstances of recipients receiving minimal funding.

§ 1000.240 When is a local cooperation agreement required for affordable housing activities?

The requirement for a local cooperation agreement applies only to rental and lease-purchase homeownership units assisted with IHBG funds which are owned by the Indian tribe or TDHE.

§ 1000.242 When does the requirement for exemption from taxation apply to affordable housing activities?

The requirement for exemption from taxation applies only to rental and lease-purchase homeownership units assisted with IHBG funds which are owned by the Indian tribe or TDHE.

Subpart D—Allocation Formula

§ 1000.301 What is the purpose of the IHBG formula?

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

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

Allowable Expense Level (AEL) factor. In rental projects, AEL is the per-unit per-month dollar amount of expenses which was used to compute the amount of operating subsidy used prior to October 1, 1997 for the Low Rent units developed under the 1937 Act. The "AEL factor" is the relative difference between a local area AEL and the national weighted average for AEL.

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

Fair Market Rent (FMR) factors are gross rent estimates; they include shelter rent plus the cost of all utilities, except telephones. HUD estimates FMRs on an annual basis for 354 metropolitan FMR areas and 2,355 non-metropolitan county FMR areas. The "FMR factor" is the relative difference between a local area FMR and the national weighted average for FMR.

Formula Annual Income. For purposes of the IHBG formula, annual income is a household's total income as

currently defined by the U.S. Census Bureau.

Formula area. (1) Formula area is the geographic area over which an Indian tribe could exercise court jurisdiction or is providing substantial housing services and, where applicable, the Indian tribe or TDHE has agreed to provide housing services pursuant to a Memorandum of Agreement with the governing entity or entities (including Indian tribes) of the area, including but not limited to:

- (i) A reservation;
- (ii) Trust land;
- (iii) Alaska Native Village Statistical Area;
- (iv) Alaska Native Claims Settlement Act Corporation Service Area;
- (v) Department of the Interior Near-Reservation Service Area;
- (vi) Former Indian Reservation Areas in Oklahoma as defined by the Census as Tribal Jurisdictional Statistical Area;
- (vii) Congressionally Mandated Service Area; and
- (viii) State legislatively defined Tribal Areas as defined by the Census as Tribal Designated Statistical Areas.

(2) For additional areas beyond those identified in the above list of eight, the Indian tribe must submit on the Formula Response Form the area that it wishes to include in its Formula Area and what previous and planned investment it has made in the area. HUD will review this submission and determine whether or not to include this area. HUD will make its judgment using as its guide whether this addition is fair and equitable for all Indian tribes in the formula.

(3) In some cases the population data for an Indian tribe within its formula area is greater than its tribal enrollment. In general, for those cases to maintain fairness for all Indian tribes, the 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.

(4) 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 the Indian tribe is providing housing assistance (on July 30 of the year before funding is sought) divided by the number of members 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, 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.

Formula Median Income. For purposes of the formula median income is determined in accordance with section 567 of the Housing and Community Development Act of 1987 (42 U.S.C. 1437a note).

Formula Response Form is the form recipients use to report changes to their Formula Current Assisted stock, formula area, and other formula related information before each year's formula allocation.

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

Mutual Help Occupancy Agreement (MHOA) means a lease with option to purchase contract between an IHA and a homebuyer under the 1937 Act.

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

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

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

Total Development Cost (TDC) is the sum of all costs for a project including all undertakings necessary for administration, planning, site acquisition, demolition, construction or equipment and financing (including payment of carrying charges) and for otherwise carrying out the development of the project, excluding off site water and sewer. Total Development Cost amounts will be based on a moderately designed house and will be determined by averaging the current construction costs as listed in not less than two nationally recognized residential construction cost indices.

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

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

§ 1000.304 May the IHBG formula be modified?

Yes, as long as any modification does not conflict with the requirements of NAHASDA.

§ 1000.306 How can the IHBG formula be modified?

(a) The IHBG formula can be modified upon development of a set of measurable and verifiable data directly related to Indian and Alaska Native housing need. Any data set developed shall be compiled with the consultation and involvement of Indian tribes and examined and/or implemented not later than 5 years from the date of issuance of these regulations and periodically thereafter.

(b) Furthermore, the IHBG formula shall be reviewed within five years 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.

(c) During the five year review of housing stock for formula purposes, the Section 8 units shall be reduced by the same percentage as the current assisted rental stock has diminished since September 30, 1999.

§ 1000.308 Who can make modifications to the IHBG formula?

HUD can make modifications in accordance with § 1000.304 and § 1000.306 provided that any changes proposed by HUD are published and made available for public comment in accordance with applicable law before their implementation.

§ 1000.310 What are the components of the IHBG formula?

The IHBG formula consists of two components:

- (a) Formula Current Assisted Housing Stock (FCAS); and
- (b) Need.

§ 1000.312 What is current assisted stock?

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

§ 1000.314 What is formula current assisted stock?

Formula current assisted stock is current assisted stock as described in § 1000.312 plus 1937 Act units in the development pipeline when they become owned or operated by the recipient and are under management as indicated in the Formula Response

Form. Formula current assisted stock also includes Section 8 units when their current contract expires and the Indian tribe continues to manage the assistance in a manner similar to the Section 8 program, as reported on the Formula Response Form.

§ 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.** The operating subsidy consists of three variables which are:

- (1) The number of low-rent FCAS units multiplied by the FY 1996 national per unit subsidy (adjusted to full funding level) multiplied by an adjustment factor for inflation;
- (2) The number of Section 8 units whose contract has expired but had been under contract on September 30, 1997, multiplied by the FY 1996 national per unit subsidy adjusted for inflation; and
- (3) The number of Mutual Help and Turnkey III FCAS units multiplied by the FY 1996 national per unit subsidy (adjusted to full funding level) multiplied by an adjustment factor for inflation.

(b) **Modernization allocation.** Modernization allocation consists of the number of Low Rent, Mutual Help, and Turnkey III FCAS units multiplied by the national per unit amount of allocation for FY 1996 modernization multiplied by an adjustment factor for inflation.

(c) **Modernization allocation.** Modernization allocation consists of the number of Low Rent, Mutual Help, and Turnkey III FCAS units multiplied by the national per unit amount of allocation for FY 1996 modernization multiplied by an adjustment factor for inflation.

§ 1000.317 Who is the recipient for funds for current assisted stock which is owned by state-created Regional Native Housing Authorities in Alaska?

If housing units developed under the 1937 Act are owned by a state-created Regional Native Housing Authority in Alaska, and are not located on an Indian reservation, then the recipient for funds allocated for the current assisted stock portion of NAHASDA funds for the units is the regional Indian tribe.

§ 1000.318 When do units under Formula Current Assisted Stock cease to be counted or expire from the inventory used for the formula?

(a) Mutual Help and Turnkey III units shall no longer be considered Formula Current Assisted Stock when the Indian tribe, TDHE, or IHA no longer has the legal right to own, operate, or maintain the unit, whether such right is lost by conveyance, demolition, or otherwise, provided that:

- (1) Conveyance of each Mutual Help or Turnkey III unit occurs as soon as

practicable after a unit becomes eligible for conveyance by the terms of the MHOA; and

(2) The Indian tribe, TDHE, or IHA actively enforce strict compliance by the homebuyer with the terms and conditions of the MHOA, including the requirements for full and timely payment.

(b) Rental units shall continue to be included for formula purposes as long as they continue to be operated as low income rental units by the Indian tribe, TDHE, or IHA.

(c) Expired contract Section 8 units shall continue as rental units and be included in the formula as long as they are operated as low income rental units as included in the Indian tribe's or TDHE's Formula Response Form.

§ 1000.320 How is Formula Current Assisted Stock adjusted for local area costs?

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

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

§ 1000.322 Are IHA financed units included in the determination of Formula Current Assisted Stock?

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

§ 1000.324 How is the need component developed?

After determining the FCAS allocation, remaining funds are allocated by need component. The need component consists of seven criteria. They are:

(a) American Indian and Alaskan Native (AIAN) Households with housing cost burden greater than 50 percent of formula annual income weighted at 22 percent;

(b) AIAN Households which are overcrowded or without kitchen or plumbing weighted at 25 percent;

(c) Housing Shortage which is the number of AIAN households with an annual income less than or equal to 80 percent of formula median income reduced by the combination of current assisted stock and units developed under NAHASDA weighted at 15 percent;

(d) AIAN households with annual income less than or equal to 30 percent of formula median income weighted at 13 percent;

(e) AIAN households with annual income between 30 percent and 50 percent of formula median income weighted at 7 percent;

(f) AIAN households with annual income between 50 percent and 80 percent of formula median income weighted at 7 percent;

(g) AIAN persons weighted at 11 percent.

§ 1000.325 How is the need component adjusted for local area costs?

The need component is adjusted by the TDC.

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

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

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

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

(3) In cases where a State recognized Indian tribe's formula area overlaps with a Federally recognized Indian tribe, the Federally recognized Indian tribe receives the allocation for the overlapping area.

(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, Indian Health Service User Data, and Bureau of Indian Affairs data.

(c) If the Indian tribes involved cannot agree on what data source to use, HUD will make the decision on what data will be used to divide the funds between the Indian tribes by August 1.

§ 1000.327 What is the order of preference for allocating the IHBG formula needs data for Indian tribes in Alaska not located on reservations due to the unique circumstances in Alaska?

(a) Data in areas without reservations. The data on population and housing within an Alaska Native Village is credited to the Alaska Native Village. Accordingly, the village corporation for the Alaska Native Village has no needs data and no formula allocation. The data on population and housing outside the Alaska Native Village is credited to the regional Indian tribe, and if there is no regional Indian tribe, the data will be credited to the regional corporation.

(b) Deadline for notification on whether an IHP will be submitted. By September 15 of each year, each Indian

tribe in Alaska not located on a reservation, including each Alaska Native village, regional Indian tribe, and regional corporation, or its TDHE must notify HUD in writing whether it or its TDHE intends to submit an IHP. If an Alaska Native village notifies HUD that it does not intend either to submit an IHP or to designate a TDHE to do so, or if HUD receives no response from the Alaska Native village or its TDHE, the formula data which would have been credited to the Alaska Native village will be credited to the regional Indian tribe, or if there is no regional Indian tribe, to the regional corporation.

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

In the first year of NAHASDA participation, an Indian tribe whose allocation is less than \$50,000 under the need component of the formula shall have its need component of the grant adjusted to \$50,000. An Indian tribe's IHP shall contain a certification of the need for the \$50,000 funding. In subsequent years, but not to extend beyond Federal Fiscal Year 2002, an Indian tribe whose allocation is less than \$25,000 under the need component of the formula shall have its need component of the grant adjusted to \$25,000. The need for § 1000.328 will be reviewed in accordance with § 1000.306.

§ 1000.330 What are data sources for the need variables?

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

§ 1000.332 Will data used by HUD to determine an Indian tribe's or TDHE's formula allocation be provided to the Indian tribe or TDHE before the allocation?

Yes. HUD shall provide notice to the Indian tribe or TDHE of the data to be used for the formula and projected allocation amount by August 1.

§ 1000.334 May Indian tribes, TDHEs, or HUD challenge the data from the U.S. Decennial Census or provide an alternative source of data?

Yes. Provided that the data are gathered, evaluated, and presented in a manner acceptable to HUD and that the standards for acceptability are consistently applied throughout the Country.

§ 1000.336 How may an Indian tribe, TDHE, or HUD challenge data?

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

(b) An Indian tribe or TDHE that has data in its possession that it contends are more accurate than data contained in the U.S. Decennial Census, and the data were collected in a manner acceptable to HUD, may submit the data and proper documentation to HUD. Beginning with the Fiscal Year 1999 allocation, in order for the challenge to be considered for the upcoming Fiscal Year allocation, documentation must be submitted by June 15. HUD shall respond to such data submittal not later than 45 days after receipt of the data and either approve or challenge the validity of such data. Pursuant to HUD's action, the following shall apply:

(1) In the event HUD challenges the validity of the submitted data, the Indian tribe or TDHE and HUD shall attempt in good faith to resolve any discrepancies so that such data may be included in formula allocation. Should the Indian tribe or TDHE and HUD be unable to resolve any discrepancy by the date of formula allocation, the dispute shall be carried forward to the next funding year and resolved in accordance with the dispute resolution procedures set forth in this part for model housing activities (§ 1000.118).

(2) Pursuant to resolution of the dispute:

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

(ii) If HUD prevails, no further action shall be required.

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

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

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.

Subpart E—Federal Guarantees for Financing of Tribal Housing Activities**§ 1000.401 What terms are used throughout this subpart?**

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

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

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

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

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

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

§ 1000.404 What lenders are eligible for participation?

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

(a) Any mortgagee approved by HUD for participation in the single family mortgage insurance program under title II of the National Housing Act;

(b) Any lender whose housing loans under chapter 37 of title 38, United States Code, are automatically guaranteed pursuant to section 1802(d) of such title;

(c) Any lender approved by the Department of Agriculture to make guaranteed loans for single family housing under the Housing Act of 1949;

(d) Any other lender that is supervised, approved, regulated, or insured by any agency of the United States; and

(e) Any other lender approved by the Secretary.

§ 1000.406 What constitutes tribal approval to issue notes or other obligations under title VI of NAHASDA?

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

§ 1000.408 How does an Indian tribe or TDHE show that it has made efforts to obtain financing without a guarantee and cannot complete such financing in a timely manner?

The Indian tribe or TDHE shall submit a certification that states that the Indian tribe has attempted to obtain financing and cannot complete such financing consistent with the timely execution of the program plans without such guarantee. Written documentation shall be maintained by the Indian tribe or TDHE to support the certification.

§ 1000.410 What conditions shall HUD prescribe when providing a guarantee for notes or other obligations issued by an Indian tribe?

HUD shall provide that:

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

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

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

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

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

(c) The repayment period may exceed twenty years and the length of the repayment period cannot be the sole basis for HUD disapproval; and

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

§ 1000.412 Can an issuer obtain a guarantee for more than one note or other obligation at a time?

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

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

longer owed on existing notes or other obligations; and

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

§ 1000.414 How is an issuer's financial capacity demonstrated?

An issuer must demonstrate its financial capacity to:

(a) Meet its obligations; and

(b) Protect and maintain the viability of housing developed or operated pursuant to the 1937 Act.

§ 1000.416 What is a repayment contract in a form acceptable to HUD?

(a) The Secretary's signature on a contract shall signify HUD's acceptance of the form, terms and conditions of the contract.

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

§ 1000.418 Can grant funds be used to pay costs incurred when issuing notes or other obligations?

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

§ 1000.420 May grants made by HUD under section 603 of NAHASDA be used to pay net interest costs incurred when issuing notes or other obligations?

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

§ 1000.422 What are the procedures for applying for loan guarantees under title VI of NAHASDA?

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

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

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

(d) The borrower and lender execute documents.

(e) The lender formally applies for the guarantee.

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

§ 1000.424 What are the application requirements for guarantee assistance under title VI of NAHASDA?

The application for a guarantee must include the following:

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

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

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

(d) Certifications by the borrower that:

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

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

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

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

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

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

- (5) The borrower has complied with section 602(a) of NAHASDA.

- (6) The borrower will comply with the requirements described in subpart A of this part and other applicable laws.

§ 1000.426 How does HUD review a guarantee application?

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

(a) HUD will review the application for compliance with title VI of NAHASDA and these implementing regulations.

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

§ 1000.428 For what reasons may HUD disapprove an application or approve an application for an amount less than that requested?

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

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

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

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

- (3) The borrower's inability to furnish adequate security pursuant to section 602(a) of NAHASDA; and

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

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

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

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

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

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

§ 1000.430 When will HUD issue notice to the applicant if the application is approved at the requested or reduced amount?

(a) HUD shall make every effort to approve a guarantee within 30 days of receipt of a completed application including executed documents and, if unable to do so, will notify the applicant within the 30 day timeframe of the need for additional time and/or if additional information is required.

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

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

§ 1000.432 Can an amendment to an approved guarantee be made?

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

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

§ 1000.434 How will HUD allocate the availability of loan guarantee assistance?

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

(b) These allocated amounts shall remain exclusively available for loan guarantee assistance for Indian tribes or TDHEs in the area of operation of that office until committed by HUD for loan guarantees or until the end of the second quarter of the fiscal year. At the beginning of the third quarter of the fiscal year, any residual loan guarantee commitment amount shall be made available to guarantee loans for Indian tribes or TDHEs regardless of their location. Applications for residual loan guarantee money must be submitted on or after April 1.

(c) In approving applications for loan guarantee assistance, HUD shall seek to maximize the availability of such assistance to all interested Indian tribes

or TDHEs. HUD may limit the proportional share approved to any one Indian tribe or TDHE to its proportional share of the block grant allocation based upon the annual plan submitted by the Indian tribe or TDHE indicating intent to participate in the loan guarantee allocation process.

§ 1000.436 How will HUD monitor the use of funds guaranteed under this subpart?

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

Subpart F—Recipient Monitoring, Oversight and Accountability**§ 1000.501 Who is involved in monitoring activities under NAHASDA?**

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

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

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

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

(c) HUD is responsible for reviewing the recipient as set forth in § 1000.520.

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

and training. In the absence of funds, HUD shall make best efforts to provide technical assistance and training.

§ 1000.504 What are the recipient performance objectives?

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

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

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

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

If the recipient's monitoring activities identify areas of concerns, the recipient will take corrective actions which may include but are not limited to one or more of the following actions:

(a) Depending upon the nature of the concern, the recipient may obtain additional training or technical assistance from HUD, other Indian tribes or TDHEs, or other entities.

(b) The recipient may develop and/or revise policies, or ensure that existing policies are better enforced.

(c) The recipient may take appropriate administrative action to remedy the situation.

(d) The recipient may refer the concern to an auditor or to HUD for additional corrective action.

§ 1000.510 What happens if tribal monitoring identifies compliance concerns?

The Indian tribe shall have the responsibility to ensure that appropriate corrective action is taken.

§ 1000.512 Are performance reports required?

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

(a) The information required by sections 403(b) and 404(b) of NAHASDA;

(b) Brief information on the following:

(1) A comparison of actual accomplishments to the objectives established for the period;

(2) The reasons for slippage if established objectives were not met; and

(3) Analysis and explanation of cost overruns or high unit costs; and

(c) Any information regarding the recipient's performance in accordance with HUD's performance measures, as set forth in section § 1000.524.

§ 1000.514 When must the annual performance report be submitted?

The annual performance report must be submitted within 60 days of the end of the recipient's program year. If a justified request is submitted by the recipient, the Area ONAP may extend the due date for submission of the performance report.

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

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

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

The recipient must make its report publicly available to tribal members, non-Indians served under NAHASDA, and other citizens in the Indian area, in sufficient time to permit comment before submission of the report to HUD. The recipient determines the manner and times for making the report available.

The recipient shall include a summary of any comments received by the grant beneficiary or recipient from tribal members, non-Indians served under NAHASDA, and other citizens in the Indian area.

§ 1000.520 What are the purposes of HUD review?

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

(a) Has carried out its eligible activities in a timely manner, has carried out its eligible activities and certifications in accordance with the requirements and the primary objective of NAHASDA and with other applicable laws and has a continuing capacity to carry out those activities in a timely manner;

(b) Has complied with the IHP of the grant beneficiary; and

(c) Whether the performance reports of the recipient are accurate.

§ 1000.521 After the receipt of the recipient's performance report, how long does HUD have to make recommendations under section 404(c) of NAHASDA?

60 days.

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

HUD shall generally provide a 30 day written notice of an impending on-site review to the Indian tribe and TDHE. Prior written notice will not be required in emergency situations. All notices shall state the general nature of the review.

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

HUD has the authority to develop performance measures which the recipient must meet as a condition for compliance under NAHASDA. The performance measures are:

(a) Within 2 years of grant award under NAHASDA, no less than 90 percent of the grant must be obligated.

(b) The recipient has complied with the required certifications in its IHP and all policies and the IHP have been made available to the public.

(c) Fiscal audits have been conducted on a timely basis and in accordance with the requirements of the Single Audit Act, as applicable. Any deficiencies identified in audit reports have been addressed within the prescribed time period.

(d) Accurate annual performance reports were submitted to HUD within 60 days after the completion of the recipient's program year.

(e) The recipient has met the IHP goals and objectives in the 1-year plan and demonstrated progress on the 5-year plan goals and objectives.

(f) The recipient has substantially complied with the requirements of 24 CFR part 1000 and all other applicable Federal statutes and regulations.

§ 1000.526 What information will HUD use for its review?

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

(a) The approved IHP and any amendments thereto;

(b) Reports prepared by the recipient;

(c) Records maintained by the recipient;

(d) Results of HUD's monitoring of the recipient's performance, including on-site evaluation of the quality of the work performed;

(e) Audit reports;

(f) Records of drawdown(s) of grant funds;

(g) Records of comments and complaints by citizens and organizations within the Indian area;

(h) Litigation; and

(i) Any other reliable relevant information which relates to the performance measures under § 1000.524.

§ 1000.528 What are the procedures for the recipient to comment on the result of HUD's review when HUD issues a report under section 405(b) of NAHASDA?

HUD will issue a draft report to the recipient and Indian tribe within thirty (30) days of the completion of HUD's review. The recipient will have at least thirty (30) days to review and comment on the draft report as well as provide any additional information relating to the draft report. HUD shall consider the comments and any additional information provided by the recipient. HUD may also revise the draft report based on the comments and any additional information provided by the recipient. HUD shall make the recipient's comments and a final report readily available to the recipient, grant beneficiary, and the public not later than thirty (30) days after receipt of the recipient's comments and additional information.

§ 1000.530 What corrective and remedial actions will HUD request or recommend to address performance problems prior to taking action under §§ 1000.532 or 1000.538?

(a) The following actions are designed, first, to prevent the continuance of the performance problem(s); second, to mitigate any adverse effects or consequences of the performance problem(s); and third, to prevent a recurrence of the same or similar performance problem. The following actions, at least one of which must be taken prior to a sanction under paragraph (b), may be taken by HUD singly or in combination, as appropriate for the circumstances:

(1) Issue a letter of warning advising the recipient of the performance problem(s), describing the corrective actions that HUD believes should be taken, establishing a completion date for corrective actions, and notifying the recipient that more serious actions may be taken if the performance problem(s) is not corrected or is repeated;

(2) Request the recipient to submit progress schedules for completing activities or complying with the requirements of this part;

(3) Recommend that the recipient suspend, discontinue, or not incur costs for the affected activity;

(4) Recommend that the recipient redirect funds from affected activities to other eligible activities;

(5) Recommend that the recipient reimburse the recipient's program account in the amount improperly expended; and

(6) Recommend that the recipient obtain appropriate technical assistance using existing grant funds or other

available resources to overcome the performance problem(s).

(b) Failure of a recipient to address performance problems specified in paragraph (a) above may result in the imposition of sanctions as prescribed in § 1000.532 (providing for adjustment, reduction, or withdrawal of future grant funds, or other appropriate actions), or § 1000.538 (providing for termination, reduction, or limited availability of payments, or replacement of the TDHE).

§ 1000.532 What are the adjustments HUD makes to a recipient's future year's grant amount under section 405 of NAHASDA?

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

(b) Before undertaking any action in accordance with paragraphs (a) and (c) of this section, HUD will notify the recipient in writing of the actions it intends to take and provide the recipient an opportunity for an informal meeting to resolve the deficiency. In the event the deficiency is not resolved, HUD may take any of the actions available under paragraphs (a) and (c) of this section. However, the recipient may request, within 30 days of notice of the action, a hearing in accordance with § 1000.540. The amount in question shall not be reallocated under the provisions of § 1000.536, until 15 days after the hearing has been held and HUD has rendered a final decision.

(c) Absent circumstances beyond the recipient's control, when a recipient is not complying significantly with a major activity of its IHP, HUD shall make appropriate adjustment, reduction, or withdrawal of some or all of the recipient's subsequent year grant in accordance with this section.

§ 1000.534 What constitutes substantial noncompliance?

HUD will review the circumstances of each noncompliance with NAHASDA and the regulations on a case-by-case basis to determine if the noncompliance is substantial. This review is a two step process. First, there must be a noncompliance with NAHASDA or

these regulations. Second, the noncompliance must be substantial. A noncompliance is substantial if:

(a) The noncompliance has a material effect on the recipient meeting its major goals and objectives as described in its Indian Housing Plan;

(b) The noncompliance represents a material pattern or practice of activities constituting willful noncompliance with a particular provision of NAHASDA or the regulations, even if a single instance of noncompliance would not be substantial;

(c) The noncompliance involves the obligation or expenditure of a material amount of the NAHASDA funds budgeted by the recipient for a material activity; or

(d) The noncompliance places the housing program at substantial risk of fraud, waste or abuse.

§ 1000.536 What happens to NAHASDA grant funds adjusted, reduced, withdrawn, or terminated under § 1000.532 or § 1000.538?

Such NAHASDA grant funds shall be distributed by HUD in accordance with the next NAHASDA formula allocation.

§ 1000.538 What remedies are available for substantial noncompliance?

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

(1) Terminate payments under NAHASDA to the recipient;

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

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

(4) In the case of noncompliance described in § 1000.542, provide a replacement TDHE for the recipient.

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

(c) If HUD determines that the failure to comply substantially with the provisions of NAHASDA is not a pattern or practice of activities constituting willful noncompliance, and is a result of the limited capability or capacity of the recipient, HUD may provide technical

assistance for the recipient (directly or indirectly) that is designed to increase the capability or capacity of the recipient to administer assistance under NAHASDA in compliance with the requirements under NAHASDA.

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

§ 1000.540 What hearing procedures will be used under NAHASDA?

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

§ 1000.542 When may HUD require replacement of a recipient?

(a) In accordance with section 402 of NAHASDA, as a condition of HUD making a grant on behalf of an Indian tribe, the Indian tribe shall agree that, notwithstanding any other provisions of law, HUD may, only in the circumstances discussed below, require that a replacement TDHE serve as the recipient for the Indian tribe.

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

§ 1000.544 What audits are required?

The recipient must comply with the requirements of the Single Audit Act and OMB Circular A-133 which require annual audits of recipients that expend Federal funds equal to or in excess of an amount specified by the U.S. Office of Management and Budget, which is currently set at \$300,000.

§ 1000.546 Are audit costs eligible program or administrative expenses?

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

§ 1000.548 Must a copy of the recipient's audit pursuant to the Single Audit Act relating to NAHASDA activities be submitted to HUD?

Yes. A copy of the latest recipient audit under the Single Audit Act relating to NAHASDA activities must be submitted with the Annual Performance Report.

§ 1000.550 If the TDHE is the recipient, does it have to submit a copy of its audit to the Indian tribe?

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

§ 1000.552 How long must the recipient maintain program records?

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

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

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

§ 1000.554 Which agencies have right of access to the recipient's records relating to activities carried out under NAHASDA?

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

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

§ 1000.556 Does the Freedom of Information Act (FOIA) apply to recipient records?

FOIA does not apply to recipient records. However, there may be other applicable State and tribal access laws or recipient policies which may apply.

§ 1000.558 Does the Federal Privacy Act apply to recipient records?

The Federal Privacy Act does not apply to recipient records. However,

there may be other applicable State and tribal access laws or recipient policies which may apply.

PART 1005—LOAN GUARANTEES FOR INDIAN HOUSING

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

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

5. Newly designated § 1005.101 is revised to read as follows:

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

Under the provisions of section 184 of the Housing and Community Development Act of 1992, as amended by the Native American Housing Assistance and Self-Determination Act of 1996 (12 U.S.C. 1515z-13a), the Department of Housing and Urban Development (the Department or HUD) has the authority to guarantee loans for the construction, acquisition, or rehabilitation of 1- to 4-family homes that are standard housing located on trust land or land located in an Indian or Alaska Native area, and for which an Indian Housing Plan has been submitted and approved under 24 CFR part 1000. This part provides requirements that are in addition to those in section 184.

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

§ 1005.103 What definitions are applicable to this program?

* * * * *

Holder means the holder of the guarantee certificate and in this program is variously referred to as the lender holder, the holder of the certificate, the holder of the guarantee, and the mortgagee.

* * * * *

Mortgagee means the same as "Holder."

* * * * *

7. A new § 1005.104 is added to read as follows:

§ 1005.104 What lenders are eligible for participation?

Eligible lenders are those approved under and meeting the qualifications established in this subpart, except that loans otherwise insured or guaranteed by an agency of the United States, or made by an organization of Indians from amounts borrowed from the United States, shall not be eligible for guarantee under this part. The following lenders

are deemed to be eligible under this part:

(a) Any mortgagee approved by HUD for participation in the single family mortgage insurance program under title II of the National Housing Act;

(b) Any lender whose housing loans under chapter 37 of title 38, United States Code are automatically guaranteed pursuant to section 1802(d) of such title;

(c) Any lender approved by the Department of Agriculture to make guaranteed loans for single family housing under the Housing Act of 1949;

(d) Any other lender that is supervised, approved, regulated, or insured by any agency of the United States; or

(e) Any other lender approved by the Secretary.

8. Newly designated § 1005.105 is amended by:

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

§ 1005.105 What are eligible loans?

* * * * *

(b) *Eligible borrowers.* A loan guarantee under section 184 may be made to:

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

* * * * *

(d) * * *

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

* * * * *

(f) *Lack of access to private financial markets.* In order to be eligible for a loan guarantee if the property is not on trust or restricted lands, the borrower must certify that the borrower lacks access to private financial markets. Borrower certification is the only certification required by HUD.

9. Newly designated § 1005.107 is amended by:

- a. Revising the section heading;
- b. Revising paragraph (a) introductory text;
- c. Revising paragraph (a)(2);
- d. Revising paragraph (b) introductory text;
- e. Redesignating paragraphs (b)(3) and (b)(4) as paragraphs (b)(4) and (b)(5), respectively; and

f. Adding a new paragraph (b)(3), to read as follows:

§ 1005.107 What is eligible collateral?

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

* * * * *

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

* * * * *

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

* * * * *

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

* * * * *

§ 1005.109 [Amended].

10. Newly designated § 1005.109 is amended by revising the section heading to read “§ 1005.109 *What is a guarantee fee?*”

§ 1005.111 [Amended].

11. Newly designated § 1005.111 is amended by revising the section heading to read “§ 1005.111 *What safety and quality standards apply?*”

12. Newly designated § 1005.112 is added to read as follows:

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

The lender/borrower will certify that they acknowledge and agree to comply with all applicable tribal laws. An Indian tribe with jurisdiction over the dwelling unit does not have to be notified of individual section 184 loans unless required by applicable tribal law.

13. Section 1005.113 is added to read as follows:

§ 1005.113 How does HUD enforce lender compliance with applicable tribal laws?

Failure of the lender to comply with applicable tribal law is considered to be a practice detrimental to the interest of the borrower and may be subject to enforcement action(s) under section 184(g) of the statute.

Appendix A TO PART 1000—Indian Housing Block Grant Formula Mechanics

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

1. The Indian Housing Block Grant (IHBG) formula is calculated by initially determining the amount a tribe receives for Formula Current Assisted Stock (FCAS) (See §§ 1000.310 and 1000.312. FCAS funding is comprised of two components, operating subsidy (§ 1000.316(a)) and modernization (§ 1000.316(b)). The operating subsidy component is calculated based on the national per unit subsidy provided in FY 1996 (adjusted to a 100 percent funding level) for each of the following types of programs—Low Rent, Homeownership (Mutual Help and Turnkey III), and Section 8. A tribe's total units in each of the above categories is multiplied times the relevant national per unit subsidy amount. That amount is summed and multiplied times a local area cost adjustment factor for management.

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

3. The modernization component of FCAS is based on the national per unit modernization funding provided in FY 1996 to Indian Housing Authorities (IHAs). The per unit amount is determined by dividing the modernization funds by the total Low Rent, Mutual Help, and Turnkey III units operated by IHAs in 1996. A tribe's total Low Rent, Mutual Help, and Turnkey III units are multiplied times the per unit modernization amount. That amount is then multiplied times a local area cost adjustment factor for construction (e.g. the Total Development Cost) (See § 1000.320).

4. The construction adjustment factor is Total Development Cost (TDC) for the area divided by the weighted national average for TDC (weighted on the unadjusted allocation for modernization) (See § 1000.320).

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

6. The Need component of the IHBG formula is calculated using seven factors weighted as set forth in § 1000.324 as follows: 22 percent of the allocated funds will be allocated by a tribe's share of the total Native American households paying more than 50 percent of their income for housing living in the Indian tribe's formula area, 25 percent of the funds allocated under Need will be allocated by a tribe's share of the total

Native American households overcrowded and or without kitchen or plumbing living in their formula area, and so on. The current national totals for each of the need variables will be distributed annually by HUD with the Formula Response Form (See § 1000.332).

The national totals will change as tribes update information about their formula area and data for individual areas are challenged (See §§ 1000.334 and 1000.336). The Need component is then calculated by multiplying a tribe's share of housing need by a local area cost adjustment factor for construction (the Total Development Cost) (See § 1000.338).

7. No tribe in its first year of funding will receive less than \$50,000 under the Need component of the formula. In subsequent allocations to a tribe, it will receive no less than \$25,000 under the Need component of the formula. This increase in funding for the tribes receiving the minimum Need allocation is funded by a reallocation from all tribes receiving more than \$50,000 under their Need component. This is necessary in order to keep the total allocation within the appropriation level. Such minimum Need allocations will only continue through FY 2002 (See § 1000.328).

8. A tribe's total grant is calculated by summing the FCAS and Need allocations. This preliminary grant is compared to how much a tribe received in FY 1996 for operating subsidy and modernization. If a tribe received more in FY 1996 for operating subsidy and modernization than they do under the IHBG formula, their grant is adjusted up to the FY 1996 level (See § 1000.340). Indian tribes receiving more under the IHBG formula than in FY 1996 “pay” for the upward adjustment for the other tribes by having their grants adjusted downward. Because many more Indian tribes have grant amounts above the FY 1996 level than those with grants below the FY 1996 level, each tribe contributes very little relative to their total grant to fund the adjustment.

Appendix B to Part 1000—IHBG Block Grant Formula Mechanisms

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

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

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

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

3. OPSUB consists of three main parts: Number of Low-Rent units; Number of Section 8 units; and Number of Mutual Help and Turnkey III units. Each of these main parts are adjusted by the FY 1996 national per unit subsidy, an inflation factor, and local area costs as reflected by the greater of the AEL factor or FMR factor. The AEL factor

as defined in § 1000.302 as the difference between a local area Allowable Expense Level (AEL) and the national weighted average for AEL. The FMR factor is also defined in § 1000.302 as the difference between a local area Fair Market Rent (FMR) and the national weighted average for FMR. So, expanding OPSUB gives:

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

Where:

LR = number of Low-Rent units.

LRSUB = FY 1996 national per unit average subsidy for Low-Rent units = \$2,440.

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

HOSUB = FY 1996 national per unit average subsidy for Homeownership units = \$528.

S8 = number of Section 8 units.

S8SUB = FY 1996 national per unit average subsidy for Section 8 units = \$3,625.

INF = inflation adjustment determined by the Consumer Price Index for housing.

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

AEL FACTOR = AEL/NAEAL.

AEL = local Allowable Expense Level.

NAEAL = national weighted average for AEL.

FMR FACTOR = FMR/NAFMR.

FMR = local Fair Market Rent.

NAFMR = national weighted average for FMR.

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

For estimating FY 1998 allocations:

NAAEL = 240,224.

NAFMR = 459,437.

NAAELFMR = 1.144.

4. MOD considers only the number of Low-Rent, and Mutual Help and Turnkey III units. Each of these are adjusted by the FY 1996 national per unit subsidy for modernization, an inflation factor and the local Total Development Costs relative to the weighted national average for TDC. So, expanding MOD gives us:

$$\text{MOD} = [\text{LR} + (\text{MH} + \text{TK})] * \text{SUB} * \text{INF} * \text{TDC} / \text{NATDC}$$

Where:

LR = number of Low-Rent units.

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

SUB = FY 1996 national per unit average subsidy for modernization.

INF = inflation adjustment determined by the Consumer Price Index for housing.

TDC = Local Total Development Costs defined in § 1000.302.

NATDC = weighted national average for TDC.

For estimating FY 1998 allocations:

SUB = \$1,974.

NATDC = \$103,828.

5. Now that calculation for FCAS is complete, we can determine how many funds

will be available to allocate over the NEED component of the formula by calculating: NEED FUNDS = APPROPRIATION—NATCAS.

Where:

APPROPRIATION = dollars provided by Congress for distribution by the IHBG formula.

NATCAS = summation of CAS allocations for all tribes.

For estimating FY 1998 allocations:

APPROPRIATION = \$590 million.

NATCAS = \$236,147,110.

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

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

Where:

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

NPER = national total of PER.

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

NHHLE30 = national total of HHLE30.

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

NHH30T50 = national total of HH30T50.

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

NHH50T80 = national total of HH50T80.

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

NOCRPR = national total of OCRPR.

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

NSCBTOT = national total SCBTOT.

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

NHOUSHOR = national total of HOUSHOR.

TDC = Local Total Development Costs defined in § 1000.302.

NATDC = weighted national average for TDC.

For estimating FY 1998 allocations:

NPER = 953,254.

NHHLE30 = 78,496.

NHH30T50 = 52,514.

NHH50T80 = 59,793.

NOCRPR = 80,581.

NSCBTOT = 34,080.

NHOUSHOR = 23,840.

NEEDFUNDS = \$353,852,890.

NATDC = \$104,956.

7. The second iteration in computing Need allocation consists of adjusting the Need allocation computed above to take into account the \$50,000 baseline funding for the first year only and then \$25,000 per year for each year thereafter through FY 2002. So, if

in the first Need computation you have less than the minimum Needs funding level, your Need allocation will go up. But, if you have more than the minimum Needs funding level, your Need allocation will go down to adjust for the other Need allocations going up. We can represent this by:

If NEED1 is less than MINFUNDING, then NEED = MINFUNDING.

If NEED1 is greater than or equal to MINFUNDING, then NEED = NEED1—{UNDERMINS * [(NEED1—MINFUNDING) / OVERMINS]}.

Where:

MINFUNDING = minimum needs funding level.

UNDERMINS = for all tribes with NEED1 less than MINFUNDING, sum of the differences between MINFUNDING and NEED1.

OVERMINS = for all tribes with NEED1 greater than or equal to

MINFUNDING, sum of the difference between NEED1 and MINFUNDING.

For estimating FY 1998 allocations:

MINFUNDING = \$50,000.

UNDERMINS = \$4,919,224.

OVERMINS = \$335,022,114.

8. Now we have computed values for FCAS and NEED. This final step in computing the grant allocation is to adjust the sum of FCAS and NEED to reflect the statutory requirement that a tribe's minimum grant will not be less than that tribe's FY 1996 Operating Subsidy and Modernization funding. So, before adjusting for the minimum grant compute:

unadjGRANT = FCAS + NEED

where both FCAS and NEED are calculated above.

9. Now, apply test to determine if the GRANT (unadjusted for FY 1996) levels is greater than or equal to FY 1996 Operating Subsidy and Modernization funding.

Let TEST = unadjGRANT—OPMOD96 .

If TEST is less than 0, then GRANT = OPMOD96.

If TEST is greater than or equal to 0, then GRANT = unadjGRANT—[UNDER1996 * (TEST / OVER1996)].

Where:

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

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

OVER1996 = for all tribes with TEST greater than or equal to 0, sum of TEST.

For estimating FY 1998 allocations:

UNDER1996 = \$5,378,558.

OVER1996 = \$326,095,837.

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

Dated: March 6, 1998.

Kevin Emanuel Marchman,

Assistant Secretary for Public and Indian Housing.

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