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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 1000

[Docket No. FR-5650-P-12]

RIN 2577-AC90

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

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

ACTION: Proposed rule.

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

DATES: Comment Due Date: **[Insert date 60 days after date of publication in the FEDERAL REGISTER].**

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500. Communications must refer to the above docket number and title. There

are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at www.regulations.gov. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the www.regulations.gov website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (fax) comments are not acceptable.

Public Inspection of Public Comments. HUD will make all properly submitted comments and communications available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, you must schedule an appointment in advance to review the public comments by calling the Regulations Division at 202-708-3055 (this is not a toll-

free number). Individuals with speech or hearing impairments may access this number via TTY by calling the toll-free Federal Relay Service at 800-877-8339. Copies of all comments submitted are available for inspection and downloading at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Randall R. Akers, Acting Deputy Assistant Secretary for Native American Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 4126, Washington, DC 20410-5000, telephone, (202) 402-7598 (this is not a toll-free number). Hearing or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

The Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*) (NAHASDA) changed the way that housing assistance is provided to Native Americans. NAHASDA eliminated several separate assistance programs and replaced them with a single block grant program, known as the Indian Housing Block Grant (IHBG) Program. NAHASDA and its implementing regulations, codified at 24 CFR part 1000, recognize tribal self-determination and self-governance while establishing reasonable standards of accountability. Reflective of this, section 106 of NAHASDA provides that HUD shall develop implementing regulations with active tribal participation and using the procedures of the Negotiated Rulemaking Act of 1990 (5 U.S.C. 561-570).

NAHASDA has been amended and reauthorized several times since being signed into law in 1996. Following the enactment of the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 (Public Law 110-411, approved October 14, 2008) (NAHASDA Reauthorization Act) HUD established a negotiated rulemaking committee on January 5, 2010 (75 FR 423), that focused on implementing the NAHASDA Reauthorization Act and prior amendments to NAHASDA. The negotiated rulemaking committee addressed all IHBG program regulations, except those provisions which govern the NAHASDA allocation formula codified in subpart D of 24 CFR part 1000. As a result of that negotiated rulemaking, HUD published a final rule on December 3, 2012 (77 FR 71513), that revised HUD regulations governing the IHBG Program and the Title VI Loan Guarantee program (under Title VI of NAHASDA, 25 U.S.C. 4191, *et seq.*) A separate negotiated rulemaking was subsequently begun to review the allocation formula regulations.

II. The IHBG Formula Negotiated Rulemaking Committee

On July 3, 2012 (77 FR 39452) and September 18, 2012 (77 FR 57544), HUD published notices in the Federal Register announcing HUD's intent to establish a negotiated rulemaking committee for the purposes of reviewing the regulations at 24 CFR part 1000, subpart D, and negotiating recommendations for a possible proposed rule modifying the IHBG formula. On June 12, 2013 (78 FR 35178), HUD published for public comment the names and affiliations of the committee's proposed members. On July 30, 2013 (78 FR 45903), after considering public comment on the proposed membership, HUD published a Federal Register notice announcing the final list of members of the IHBG Formula Negotiated Rulemaking Committee (Committee) and

announcing the date of the first meeting of the Committee. The Committee membership consists of 24 designated representatives of tribal governments (or authorized designees of those tribal governments). The Committee membership reflected a balanced representation of Indian tribes, both geographically and based on size. In addition to the tribal members, there were two HUD representatives on the Committee. Committee meetings took place on August 27-28, 2013, September 17-19, 2013, April 23-24, 2014, June 11-13, 2014, July 29-31, 2014, August, 26-28, 2014, August 11-13, 2015, and January 26-27, 2016. The Committee agreed to operate based on consensus rulemaking and its approved charter and protocols. All of the Committee meetings were announced in the Federal Register and were open to the public.¹

The Committee divided itself into multiple workgroups to analyze specified provisions of the IHBG formula and to draft any new or revised regulatory language it believed was necessary. A workgroup was responsible for analyzing the regulations for the Need component. Another workgroup reviewed the provisions governing the Formula Current Assisted Stock (FCAS) component. The workgroups were not authorized to reach any final or binding decisions but rather, reported to the full Committee. The draft regulatory language developed by the workgroups was then brought before the full Committee for review, amendment, and approval.

At the August 2014 meeting, an additional study group, the Data Study Group, was established to assess alternative data sources to the 2000 United States Decennial Census, which currently serves as the data source for the factors that are used to calculate the Need component of the allocation formula, including American Indian and Alaskan

¹ See, 78 FR 45903 (July 30, 2013); 78 FR 54416 (September 4, 2013); 79 FR 14204 (March 13, 2014); 79 FR 28700 (May 23, 2014); 80 FR 30004 (May 26, 2015); 80 FR 33157 (June 11, 2015); 81 FR 881 (January 8, 2016).

Native (AIAN) households with housing cost burdens, inadequate housing, low- and moderate-income AIAN households, and AIAN population. The Data Study Group was comprised of one Committee member from each of the six HUD-designated ONAP regions, plus one HUD representative. The Data Study Group members identified three technical experts and HUD provided a technical expert to assist with the work. Meetings of the Data Study Group were open to all Committee members and to the public. The Data Study Group met both telephonically and in-person and operated on a consensus basis.

In a Federal Register notice published on September 25, 2014 at 79 FR 57489, the Committee solicited suggestions from the public for potential data sources that would achieve an optimal balance of the following factors: recognition of tribal sovereignty; data relevant to eligible AIAN housing needs; and collected using a methodology that is objective, equitable, transparent, consistent, capable of being applied to all existing formula areas, statistically reliable, and replicable both over time and diverse geographies. The data would need to be collected and submitted by proficient persons or organizations with appropriate capacity and training and to be collected on a recurring basis at reasonable intervals or be capable of reliable statistical aging. Finally, the data source could not impose an undue administrative or financial burden upon tribes, needed to be cost-effective, and be capable of being fully evaluated by the Data Study Group within a one-year timeframe.

After receiving responses to the September 25, 2014 Federal Register notice, the Data Study Group identified 49 different data sources that were reviewed by the technical experts against a pre-determined set of screening criteria. Of the 49 nominated data

sources, the Data Study Group agreed unanimously that 30 did not meet these criteria. The technical experts then prepared detailed characterizations of the remaining 19 data sources. Based on the characterization process and the discussion that followed, the Data Study Group rejected 10 more data sources that did not meet the pre-determined criteria. The Data Study Group moved nine remaining data sources forward for comprehensive evaluation. These included the following four sets of core data and five sets of support data:

Core Data:

- Most Recent Decennial Census data collected by the U.S. Census Bureau
- American Community Survey collected by the U.S. Census Bureau
- National Tribal Survey to be Administered by a Federal Agency
- National Tribal Survey to be Administered by tribes

Support Data:

- Tribal Enrollment Data
- Indian Health Service Population Projections
- U.S. Census Bureau Population Estimates
- Data Reported by IHBG Grant Recipients on Formula Response Form
- Total Development Costs (TDC)

The Data Study Group carefully considered the evaluation results of technical experts, had multiple discussions among its membership, including requests for clarification from the technical experts, and on July 31, 2015, issued its final report containing a recommendation for a data source or sources to be used in calculating the AIAN persons variable of the Need component of the IHBG funding formula, which it presented to the full Committee. Specifically, the Data Study Group recommended that the AIAN population be the greater of the most recently available American Community Survey (ACS), Decennial Census, or Challenge data, and that data no longer be aged. This

proposal did not reach consensus at the full Committee level. The Data Study Group's full report can be found as a supporting document to this proposed rule at www.Regulations.gov.

III. This Proposed Rule

The Committee undertook a comprehensive review of the IHBG Formula. The Committee also reviewed any statutory changes that still needed to be addressed in the regulations. The Committee identified certain areas of the IHBG formula that required clarification, were outdated, or could be improved. With the exception of changes to § 1000.330(b)(ii), this proposed rule reflects the consensus decisions reached by the Committee during the negotiated rulemaking process on the best way to address these issues. The following section of this preamble provides a summary of the consensus recommended changes to the IHBG formula by this proposed rule.

A. Revision of definition of formula area (§ 1000.302)

To conform § 1000.302 to the decision of the United States Court of Appeals for the Tenth Circuit in United Keetoowah Band of Cherokee Indians of Oklahoma v. United States Department of Housing and Urban Development,² HUD is revising the definition of formula area at 24 CFR § 1000.302 by striking the reference to “court jurisdiction” in paragraph (2)(i) of the definition.

B. Continued funding of Section 8 units (§ 1000.306)

The proposed rule would make a technical amendment to § 1000.306 to eliminate paragraph (c), an outdated section that addressed how Section 8 units would be treated under the formula. Currently, § 1000.306(c) provides that, during the five-year review of the FCAS component of the formula, the count of units associated with expired contracts

² 567 F.3d 1235 (10th Cir. 2009).

for tenant-based Section 8 rental assistance would be reduced by the same percentage as the current assisted rental stock has diminished since September 30, 1999. After HUD issued this regulation, section 502(a) of NAHASDA was amended by the Omnibus Indian Advancement Act (Public Law 106-568, approved December 27, 2000) (25 U.S.C. 4181(a)) to provide that housing subject to a contract for tenant-based Section 8 rental assistance prior to September 30, 1997, under the authority of the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.) is to be considered a dwelling unit for purposes of section 302(b)(1) of NAHASDA. As a result, the proposed rule removes paragraph (c) from § 1000.306.

C. Components of IHBG formula (§ 1000.310)

The proposed rule would revise § 1000.310 to reflect that the IHBG formula would consist of four components: FCAS (§ 1000.316), Need (§ 1000.324), 1996 Minimum (§ 1000.340), and Undisbursed IHBG funds factor (§ 1000.342). FCAS, Need, and 1996 Minimum are existing components of the formula. The proposed addition of the Undisbursed IHBG funds factor is discussed below.

D. Conversions of units from Low-Rent FCAS to Mutual Help or from Mutual Help to Low-Rent FCAS (§ 1000.316)

This proposed rule would clarify the type and eligibility of low-income dwelling units developed under the United States Housing Act of 1937 that are converted from Low-Rent to Mutual Help or, from Mutual Help to Low-Rent. The Committee proposed a new paragraph (c) to codify HUD's existing practice and establish the following. Units that were converted before NAHASDA's effective date of October 1, 1997, would count in the formula as the type of unit to which they were converted, and their FCAS

eligibility would be evaluated on the basis of the type of unit to which they were converted. The amount of per unit FCAS funding for units that were converted after October 1, 1997, would be determined according to the unit's type specified in the original Annual Contributions Contract (ACC), i.e. the ACC in effect on September 30, 1997, while their FCAS eligibility would be evaluated on the basis of the type to which they were converted. Furthermore, the rule would require recipients to report conversions on their Formula Response Form. The Committee emphasized that the decision to convert a unit was a local decision for the tribe or TDHE (tribally designated housing entity) to make at its discretion.

E. Mutual Help unit conveyance (§ 1000.318(a))

This proposed rule would clarify in § 1000.318 the FCAS eligibility of Mutual Help and Turnkey III units developed under the United States Housing Act of 1937 that are not conveyed within 25 years from the Date of Full Availability (DOFA plus 25 years). The proposed rule would provide specific milestones for demonstrating FCAS eligibility. Specifically, the proposed rule would provide that a unit may continue to be considered FCAS when conveyance of the unit is prevented by a legal impediment, if the tribe, TDHE, or Indian Housing Authority (IHA) has taken all other steps necessary to effectuate the conveyance and has made and documented reasonable efforts to remove the impediment. Mutual Help and Turnkey III units that are eligible for conveyance under the terms of their Mutual Help and Occupancy Agreement (MHOA) but not conveyed would continue to be considered FCAS if the delay in conveyance is caused by reasons beyond the control of the tribe, TDHE, or IHA. Section 302(b)(1)(D) of NAHASDA (25 U.S.C. § 4152(b)(1)(D)) provides that the term “reasons beyond the

control of a recipient” means, after the recipient makes “reasonable efforts” to resolve all issues necessary for conveyance, the conveyance is still delayed because there remain delays in obtaining or, the absence of title status reports, incorrect or inadequate legal descriptions or other legal documentation necessary for conveyance, clouds on title due to probate or intestacy or other court proceedings, or any other legal impediment. Thus, under this proposed rule, to demonstrate reasonable efforts, the tribe, TDHE or IHA would be required, no later than four months after the unit becomes eligible for conveyance, to create a written plan of action that describes the impediment and the actions it will take to resolve the impediment within 24 months after the date the unit became eligible for conveyance. If the legal impediment remains after that 24-month period, the unit would no longer be considered FCAS unless the tribe, TDHE, or IHA provides evidence from a third party, such as a Federal, State, or tribal court, or State or Federal agency, documenting that the impediment continues to prevent conveyance. Proposed § 1000.318(a)(3) would address Mutual Help and Turnkey III units that, as of the effective date of this regulation, have not been conveyed because timely conveyance was demonstrably beyond the tribe’s control. These units would be considered to have become eligible to convey on the effective date of this regulation, triggering the time periods for creating a written plan of action to resolve the impediment and conveying the units or providing the third party evidence of continued impediment within the 24-month period. Section 1000.318(a)(3)(iv) would apply to units that have not been conveyed due to legal impediments, and would not apply to units that are eligible for conveyance before the effective date of this regulation but have not been conveyed for other reasons.

F. Demolition and rebuilding of FCAS units

At the August 2014 meeting, the Committee approved revising § 1000.318 to add a new paragraph (d) to establish the eligibility criteria for FCAS units that are demolished and rebuilt. Under section 302(b)(1)(C) of NAHASDA, if a unit is demolished and the recipient rebuilds the unit within 1-year of demolition of the unit, the unit may continue to be considered an FCAS unit under the formula. To implement this requirement, the Committee approved a regulatory provision that would permit the unit to continue to be considered FCAS if the recipient certifies in writing, within one-year from the date that the unit becomes damaged or deteriorated, that it has taken tangible action to demolish and rebuild the unit. In addition, the provision would require that reconstruction of the unit be completed within four years of the point at which demolition or replacement became necessary. At the end of the four year period, the unit would no longer be considered FCAS unless the recipient notified HUD that the reconstruction of the unit has been completed. If a recipient fails to rebuild a unit within the four-year time frame, the unit would nonetheless have been considered eligible as FCAS during those four years. This provision was intended to incentivize the reconstruction of properties in a condition of such significant disrepair that they must be demolished and rebuilt in order to preserve critical housing stock and ensure that housing remains available to assist low-income Indian families in the future.

Upon further review, HUD has determined that this provision may exceed the scope of section 302(b)(1)(C) of NAHASDA. The provision would have potentially allowed FCAS units that are rebuilt in a time period that exceeds 1-year from the time of demolition to remain FCAS units under the formula. While this proposed rule does not propose specific regulatory language addressing demolished FCAS units, HUD is seeking

public comment on how to address this issue by regulation, while also remaining within the scope of section 302(b)(1)(C) of NAHASDA.

In this regard, HUD notes that during this negotiated rulemaking, the FCAS workgroup considered defining the term “demolition” in order to help clarify the point in time in which the 1-year period begins to run. For instance, the workgroup discussed whether to define demolition in cases involving natural disasters or fires as occurring at the time of the event. The workgroup also considered whether demolition should be defined as occurring only when a recipient voluntarily demolishes units in order to clear a site for a new replacement unit. HUD is specifically soliciting public comment, therefore, on these and alternative proposals that address section 302(b)(1)(C). Once HUD receives all public comments on this proposed rule, it is HUD’s intent to afford the Committee, based on the public comment received, another opportunity at the final negotiated rulemaking session to consider specific regulatory language addressing this issue to be included in a final rule.

G. Overlapping formula areas (§ 1000.326)

This proposed rule would revise § 1000.326(a) to provide in cases where a State recognized tribe’s formula area overlaps with the formula area of a Federally recognized Indian tribe, that the Federally recognized Indian tribe would receive the allocation for the formula area up to its population cap. The revision also provides that the State recognized tribe would receive the balance of the allocation, if any exists, up to its own population cap.

Section 1000.326 would also be revised to require that HUD follow the notice and comment procedures in the definition of “Formula Area” (§1000.302 (2)(ii)) upon

receiving a request for expansion or redefinition of a tribe's formula area, if approving the request would create an overlap of formula areas with one or more other tribes. This proposed change is intended to ensure that tribes potentially affected by the request be notified and have the opportunity to comment on the request.

H. Minimum total grant allocation of carryover funds (§ 1000.329)

Section 1000.329 is proposed as a new provision of the Need component of the IHBG formula. Section 1000.329 would provide for a minimum block grant allocation in the event that amounts available for allocation include carryover funds. This section would provide that allocations be adjusted to ensure all tribes a minimum block grant allocation of 0.011547 percent of that year's IHBG appropriation. HUD and the Committee estimated, based on current year appropriations, that approximately \$3 million would be required to ensure that tribes receive a minimum allocation of approximately 0.011547 percent of the annual IHBG appropriation (close to \$75,000, given historical appropriated amounts). Therefore, HUD would set aside an amount equal to the lesser of \$3 million of available carryover funds or the entire amount of available carryover funds to increase allocations pursuant to this section. If set-aside carryover funds are insufficient to fund all eligible tribes at 0.011547 percent of that year's appropriations, the minimum total grant would be reduced to an amount which can be fully funded with the available set-aside carryover funds. Set-aside carryover funds that are not required to fund this additional allocation would be carried over to the subsequent year's formula. A tribe would be eligible for a minimum allocation under § 1000.329 if there are eligible households at or below 80 percent of median income in the tribe's formula area. For purposes of this proposed rule, "carryover funds" are defined as

any grant funds voluntarily returned to the formula or not accepted by tribes in a fiscal year. The definition of carryover funds would not include any amounts that are returned to the IHBG formula voluntarily or involuntarily pursuant to § 1000.536, as a result of a HUD action under § 1000.532. The Committee considered and rejected including such amounts in the definition of carryover funds under this section.

I. Volatility control of changes in Need component of formula caused by introduction of new data source (§ 1000.331)

Section 1000.331 would be added to minimize and phase-in funding changes to allocations under the Need component of the formula resulting from the introduction of a new data source under § 1000.330, beginning in fiscal year 2018 (the first year that a new data source could be introduced). Under § 1000.331, if as a direct result of the introduction of a new data source, an Indian tribe's allocation under the Need component of the formula results in an allocation that is less than 90 percent of the amount it received under the Need component in the immediate previous fiscal year, the Indian tribe's Need allocation would be adjusted upward to an amount equal to 90 percent of the previous year's Need allocation. As proposed, this volatility control provision would not impact other adjustments under 24 CFR part 1000, including minimum funding, census challenges, formula area changes, or an increase in the total amount of funds available under the Need component. Section 1000.331 also proposes that in the event that HUD's IHBG appropriation is reduced and results in a decrease in the total amount of funds available under the Need component, an Indian tribe's adjusted allocation under § 1000.331(a) would be reduced by an amount proportionate to the reduced amount available for distribution under the Need component of the formula. Adjustments to the

tribe's Need allocation under §§ 1000.331(b) or (c) would be made after adjustment of the tribe's allocation under § 1000.331(a).

J. Data challenges and appeals of HUD formula determinations (§ 1000.336)

This rule proposes to revise § 1000.336 to provide that an Indian tribe, TDHE, and HUD may challenge data used to determine the proposed undisbursed funds factor, § 1000.342. Specifically, this section would add the undisbursed funds factor to the list of IHBG formula data and HUD formula determinations that Indian tribes and TDHEs may appeal under the formula appeal procedures in §1000.336. As the undisbursed funds factor is part of the formula for determining allocations, its application is not an enforcement action (under 24 CFR part 1000, subpart F).

In addition, §1000.336(d) would be revised to clarify the format and provide the timeframes by which the tribe or TDHE must submit its appeal of the undisbursed funds factor. As proposed, this section would provide that the appeal must be in writing and submitted to HUD no later than 30 days after the tribe's or TDHE's receipt of HUD's application of the undisbursed funds factor.

This proposed rule also revises §§ 1000.336(e) and (f) for clarity. These revisions do not substantively amend these provisions.

K. Undisbursed IHBG funds factor (§ 1000.342)

The Committee proposed adding § 1000.342 to encourage tribes to timely expend their annual grants. Section 1000.342 would add an undisbursed funds factor to the IHBG formula. As proposed, the undisbursed funds factor would apply to Indian tribes whose initial allocation calculation is \$5 million or more. A tribe's initial allocation calculation would include its FCAS, Need, the 1996 Minimum, and repayments or

additions for past over- or under-funding for each Indian tribe (under 24 CFR part 1000, subpart D). Repayments or additions would not include repayments resulting from enforcement actions (24 CFR part 1000, subpart F).

Section § 1000.342(a) proposes that an Indian tribe would be subject to the undisbursed funds factor if it has undisbursed IHBG funds in an amount that is greater than the sum of its prior 3 years initial allocation calculations. Under proposed § 1000.342(c), for purposes of this section, “undisbursed IHBG funds” means the amount of IHBG funds allocated to an Indian tribe in HUD’s line of credit control system (or successor system) on October 1 of the fiscal year for which the allocation is made. To determine the amount of undisbursed IHBG funds of a tribe under an umbrella TDHE (a recipient that has been designated to receive grant amounts by more than one Indian tribe), § 1000.342(c) proposes that the TDHE’s total balance in HUD’s line of credit control system on October 1 of the fiscal year for which the allocation is made would be multiplied by a percentage based on the tribe’s proportional share of the initial allocation calculation of all tribes under the umbrella. Under proposed § 1000.342(b), if subject to the undisbursed funds factor in a given fiscal year, the Indian tribe’s grant allocation would be the greater of the initial allocation calculation minus the amount of undisbursed IHBG funds that exceed the sum of the prior 3 years’ initial allocation calculations, or its 1996 Minimum. Section 1000.342(d) also proposes that amounts subtracted from an initial allocation calculation under this section would be redistributed under the Need component of the formula to Indian tribes not subject to this section.

IV. Eighth Meeting of Negotiated Rulemaking Committee – Data Sources for the Need Variables (§ 1000.330).

The eighth meeting of the Committee, which took place on January 26-27, 2016, was convened at the request of the Committee following HUD's issuance of a proposal on November 19, 2015, to resolve the data source issue. Specifically, HUD proposed the use of the ACS 5-year Estimates as the source of the data for the variables in paragraphs (a) through (f) of § 1000.324 and the most recent Decennial Census as the source for the total AIAN persons variable in § 1000.324(g). In each case, HUD proposed adjusting the data sources in order to address undercounts reported by the U.S. Census Bureau and the unique concerns resulting from conducting the ACS sample in Indian Country.

In an effort to address the concerns of the Committee regarding this proposal, HUD scheduled the eighth meeting to discuss the use of these data sources, vote on adjustments to data sources and approve the final preamble language. HUD's proposal is discussed in more detail later in this preamble.

Section 1000.330 describes the data source used for the Need variables in § 1000.324. Currently, § 1000.330 provides that the data sources 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." Current § 1000.330 also states that "[i]nitially, the data used are the U.S. Decennial Census data." HUD originally codified § 1000.330 in 1998³ and revised the section in 2007.⁴ Currently, HUD uses the 2000 Decennial Census as the data source for the Needs variables.

Beginning in 2010, the U.S. Census Bureau discontinued use of the "long form" that, along with the short-form census questionnaire, went to a sample of households.

³ 63 FR 12334, March 12, 1998.

⁴ 72 FR 20018, April 20, 2007.

The “long form” contained additional questions and provided more detailed socioeconomic information about the population. As part of this change, the more detailed socioeconomic information once collected by the long-form questionnaire is now collected by the ACS. The ACS potentially provides more current data regarding communities and is sent to a sample of the population on a rotating basis throughout the decade.

One impact of the discontinuation of the use of the “long form” is that data for six of the seven variables in § 1000.324 are no longer collected by the Decennial Census. During the course of this negotiated rulemaking the Committee extensively discussed revising § 1000.330 to use more current data sources, including the ACS, that might be used to determine Need under the formula. Because of the complexity of the issue, the Committee agreed by consensus to a procedure to identify and evaluate alternate data sources. Specifically, at the sixth negotiated rulemaking meeting in August 2014, the Committee agreed to provide itself with an additional year to study the issue by delaying implementation of any new data source until fiscal year 2018. At the same time, the Committee agreed to form the Data Study Group that would seek to identify and evaluate potential data sources that could replace the 2000 Decennial Census. The Committee provided that the Data Study Group would report its findings and recommendations by the seventh negotiated rulemaking scheduled for August 2015. The Committee also agreed that absent a consensus decision by the Committee regarding a new data source, HUD would make a final decision on a new data source that would be introduced starting in fiscal year 2018. The data source would be data collected in a uniform manner that can be confirmed and verified for all AIAN household and persons living in an identified

area. Initially, the data used would be the most recent data available from the U.S. Census Bureau.

As discussed in this preamble, the Data Study Group conducted an extensive review of several potential data sources and reported the results of its work and its recommendations at the seventh negotiated rulemaking session. The Committee did not accept the recommendations of the Data Study Group and did not come to a consensus on a new data source. This inability to reach consensus was based in part on a concern expressed by several Committee members that the 2010 Decennial Census undercounted AIAN persons in some tribal areas and that the ACS suffered from similar inaccuracies.

Throughout the negotiated rulemaking process, HUD's Committee representatives made it known that while HUD was open to the results of the Data Study Group and worked toward reaching consensus on the data source, HUD considered the ACS as providing an up-to-date, reliable, comprehensive and accurate data source available for the variables in § 1000.324. In this regard, HUD made clear that the ACS were data "collected in a uniform manner that can be confirmed and verified for all AIAN households and persons living in an identified area." HUD also made it known that the 2010 Decennial Census also met these standards for the count of AIAN persons variable in § 1000.324(g). Accordingly, and consistent with the Committee's consensus decision to establish the Need study group, this rule proposes to use the ACS 5-Year Estimates as the source of the data for the variables in paragraphs (a) through (f) of § 1000.324, and the most recent Decennial Census as the source for the total AIAN person variable in § 1000.324(g). HUD believes that the use of these sources more accurately reflect Indian Country given the substantial changes that have taken place since 2000.

Notwithstanding, HUD recognized that the Data Study Group found evidence to support the concerns of a number of tribes that the 2010 Decennial Census has a significant undercount in some tribal areas and that the ACS suffers from a similar inaccuracy. HUD has further researched these concerns and identified three adjustments that mitigate these problems. These adjustments were the focus of eighth meeting of the Committee, which took place on January 26-27, 2016.

Undercount on reservations. After each Decennial Census, the U.S. Census Bureau conducts a follow-up survey to determine the extent that the Decennial Census under- or over-counted particular subgroups within the U.S. population. To address any undercount in the formula, HUD proposed in § 1000.330(b)(i) to increase the count of AIAN persons (single race; and single and multi-race) for all geographies identified in the most recent Decennial Census as having a statistically significant undercount confirmed by the U.S. Census Bureau. The U.S. Census Bureau determined in its post-Census 2010 enumeration that there was a statistically significant 4.88 percent undercount of AIAN persons living in Reservations and Trust Lands, including restricted fee land acquired under the Treaty of Guadalupe Hidalgo, but not in other tribal areas.⁵ As proposed, this adjusted total would serve as the basis to determine the total AIAN person factor at § 1000.324(g) until the next Decennial Census is released. If a statistically significant undercount occurs in the next Decennial Census, the AIAN person count for § 1000.324(g) would be adjusted based on the amount of that undercount.

⁵ See, https://www.census.gov/coverage_measurement/pdfs/g04.pdf. The U.S. Census Bureau also found a not statistically significant overcount of 3.86 percent for tribal areas off reservation (this including Oklahoma Tribal Statistical Area, Tribal Designated Statistical Area and the Alaska Native Village Statistical Area). HUD is not proposing that these tribal areas be adjusted down for the overcount because the overcount was not statistically significant.

The eighth meeting of the Committee, considered this adjustment, and after consideration, voted on the adjustment. The Committee proposed to modify the language to clarify that the count would be adjusted for a statistically significant undercount specifically for the AIAN population count. After this language was changed, the Committee reached consensus on this adjustment. In addition, the Committee considered a proposal to consider Indian Lands in Remote Alaska the same as Reservation and Trust Lands when it is determined that there has been a statistically significant undercount in Reservation and Trust Lands, unless the U.S. Census has included Remote Alaska in its coverage. This provision was proposed in order to address the fact that the U.S. Census Bureau's Census Coverage Measurement (CCM) Study did not include Indian Lands in Remote Alaska. The term "Remote Alaska" means Type of Enumeration Area as delineated by the U.S. Census Bureau for the 2010 Decennial Census. With the addition of this provision to § 1000.330(b)(i), the Committee reached consensus on this item.

Control total weights within the ACS. A critical component of any sample survey is to accurately weight completed surveys to reflect the full population the sample is drawn from. HUD recognizes that the weighting methodology used by the U.S. Census Bureau for ACS differs from what it used for the long-form data from the 2000 Census. For the 2000 Census long-form, the U.S. Census set the control totals at small geographies – places, tribal areas, Census Tracts, etc. As a result, a sample set of data for subgroup populations – such as a count of Native Americans in a tribal area – were generally very close to the count of those same variables from the short-form of the Decennial Census.

The U.S. Census Bureau adopted a different approach for the ACS, setting population control total weights at the county and place levels that have population estimates. That is, they are set at a higher level geography, mostly county and incorporated places, and not tribal areas. The ACS has adopted this approach because it establishes weights for all variables according to annual population estimates that are only available at these higher level geographies.

This change in methodology for setting control total weights can create a problem for the IHBG formula data for tribes. Without a small geography control total for the weights, the ACS can produce a population count for a subgroup in a small geography that is much different than the Decennial Census count for the same population.

To address this issue, HUD proposed in § 1000.330(b)(ii) to adjust the ACS data for the variables described in paragraphs (a) through (f) of § 1000.324 by the ratio of the adjusted total of AIAN persons based on the aged 2010 Decennial Census to the most recently available ACS count of AIAN persons as adjusted by § 1000.330(b)(i). HUD believes that this adjustment would make the ACS data methodology for small area geographic areas better align with the methodology used in the 2000 Decennial Census and provide a more accurate count of AIAN persons for smaller tribes. Some tribal members of the Committee did not agree.

During the eighth meeting of the Committee, the Committee considered this adjustment, and after consideration, voted on the adjustment. The Committee did not reach consensus on the vote for this adjustment. The majority of tribal Committee members did not support this adjustment. While some members supported this adjustment, the majority of tribal Committee members expressed concern with this

proposal. Some members opposed the use of ACS as the data source for the formula and therefore voted against the adjustment. Other members supported the use of ACS data but believed that reweighting the data as proposed by HUD was not appropriate for other reasons. Specifically, some tribal Committee members believed that the undercount of one variable, AIAN persons, could not be properly assumed to translate to other variables. Notwithstanding, this rule proposes to adjust the ACS data for the variables described in paragraph (a) through (f) of § 1000.324 by the ratio of the adjusted total of AIAN persons based on the aged 2010 Decennial Census to the most recently available ACS count of AIAN persons as adjusted by § 1000.330(b)(i).

Aging of the Data. In addition to the adjustments to the 2010 Decennial Census and ACS data described in this preamble, HUD proposed revising the method of aging the data. Specifically, based on the work of the Data Study Group, HUD in § 1000.330(b)(i) proposed, beginning in fiscal year 2018, to age the data using the U.S. Census Bureau county level Population Estimates for Native Americans. In proposing this change, HUD notes that the Data Study Group determined that the Indian Health Service (IHS) projections based on birth and death rate, which is currently used to age the data, do not take into account migration and may result in both under and over estimates of population growth over time. While not perfect, the U.S. Census Bureau county level Population Estimates take into account migration and provide a more accurate count of AIAN persons. These Population Estimates do not come from the ACS. As a result, § 1000.330(b)(i) would state that the data source used to determine the AIAN person variable in § 1000.324(g) would be updated annually using the U.S. Census Bureau county level Population Estimates for Native Americans.

During the eighth meeting of the Committee, the Committee considered this adjustment, and after consideration, voted on the adjustment. The Committee reached consensus on this adjustment.

Transition Period in Fiscal Years 2016 and 2017. As agreed by the Committee by consensus, this proposed rule would delay implementation of these changes until fiscal year 2018. In this regard, § 1000.330(a) of this rule proposes to maintain the status quo during this period by providing that the data used to determine the Need variables would be the 2000 U.S. Decennial Census and any HUD-accepted Census challenges until fiscal year 2018. This section would also provide that this data would continue to be aged using IHS birth and death records. HUD believes that delaying the use of new data sources will help ensure that tribes do not encounter instability or lack of predictability for their grants when the rule takes effect. For this reason, HUD agreed to this delay.

Challenge Data. This proposed rule continues to maintain the right of Indian tribes to challenge the data described in this section pursuant to § 1000.336. Specifically, this proposed rule would redesignate currently codified § 1000.330(d) as § 1000.330(c) making minor, technical edits to ensure accuracy of the cross-reference.

V. Tribal Comments

After HUD's issuance of a proposal on November 19, 2015, and prior to the eighth meeting of Committee, HUD invited the tribal members of the Committee to submit comments on its proposal and on the preamble section describing its proposal.

The comment period lasted from November 23, 2015, to December 23, 2015. HUD received comments from six Committee members during this time frame.

Several Committee members expressed support for the use of aged 2010 Decennial Census data for the AIAN population count. Those same commenters supported the use of ACS data for the remaining six Need variables.

Other commenters expressed dissatisfaction with the compensation of any undercounts and the use of a weighting adjustment for any undercounts. All of these tribal Committee members opined that HUD improperly made these unanticipated adjustments without consulting the Committee or allowing the Committee sufficient time to review. Some commenters noted that such adjustments are unnecessary since the Study Group found that improvements to the ACS data will be fully implemented upon the release of the 2012-2016 ACS data set. One commenter stated that if the Decennial Census and ACS were used as data sources, a generalized adjustment based on a 4.88 percent undercount would be insufficient in some areas and disproportionately beneficial in others. Another commenter pointed out that the use of the ACS as proposed in the rule will unfairly and significantly harm villages in rural Alaska. According to the commenter, these populations are substantially undercounted, but HUD is not applying a weighting adjustment to rural Alaska because the exact amount of the undercount is unknown.

One commenter expressed support for developing and using a federally- or tribally-administered national tribal survey to collect information concerning enrollment in a recognized tribe, in lieu of the Decennial Census or the ACS.

VI. Other Nonconsensus Items and Issues for Consideration

A. Current Assisted Stock Cost Adjustment Factor

In response to a discussion of the Allowable Expense Level adjustment factor in § 1000.320 during the 2005 IHBG Negotiated Rulemaking Session, HUD commissioned a study to assess the cost of operating 1937 Act housing programs across Indian Country and Alaska. The Indian Housing Operating Cost Study⁶ examined the potential for using, among other sources, data from the U.S. Department of Agriculture's 515 program to determine how to weight the operating costs for different tribes. The USDA 515 data is derived from Section 515 units, which are affordable rental housing units in rural areas for very low-, low-, and moderate-income families; the elderly; and persons with disabilities. Because the data set includes operating expense data for projects in some rural counties that serve low- and very low-income households, it could be used to estimate costs in some tribes' formula area counties.

During the seventh Negotiated Rulemaking Session, the FCAS Working Group considered whether USDA 515 data could be used as an additional cost adjustment factor under § 1000.320. The Committee requested the USDA 515 data and requested that HUD calculate block grant allocations to all tribes under two scenarios: (1) using a local area cost adjustment factor that is the greater of Fair Market Rents (FMR), Allowable Expense Level (AEL), and USDA 515 factors for each tribe, and (2) using a factor that is the greater of the FMR and USDA 515 factors. Ultimately, the Committee considered a proposal to revise § 1000.320 to use a local area cost adjustment factor that is the greater of FMR, AEL, and USDA 515 factors for each tribe. After discussion of the proposal,

⁶ This study investigated the costs of operating 1937 Act housing programs in Indian Country and Alaska and determined the efficacy of the Allowable Expense Level factor in ascertaining these costs. For more information, the study can be found at: http://ihbgrulemaking.firstpic.org/images/Library/ihoc_report_final%20423.pdf

the Committee was unable to reach consensus on how to modify the Current Assisted Stock local cost adjustment in § 1000.320. Several Committee members raised concerns that the USDA 515 rural housing rental program did not provide cost data for some locations and others felt that insufficient data was available to determine how the addition of this factor would affect tribes nationwide.

B. Revise the definition of AIAN

Although the Data Study Group did not reach consensus on the issue, it recommended that the Committee discuss whether or not to exclude South, Central, and Canadian AIAN persons from the data provided by the Decennial Census and the ACS for purposes of the IHBG formula. The study group made this recommendation after some study group members expressed concern that the IHBG is intended to serve only AIAN persons with a tribal affiliation in the United States. Because individuals having their origins in the indigenous peoples of Central America, South America, and Canada may or may not fall within the category of persons eligible to be served through the IHBG program, the study group referred the matter to the full Committee for consideration. The Committee discussed this issue as recommended, considered language drafted by the Drafting Committee, however the full Committee did not take the language up for a formal vote due to the withdrawal of the language.

VII. Question for Commenters

HUD understands that other organizations, including State and local governments or nonprofits, may use certain factors or data from the IHBG formula to inform their own work with Indian tribes. HUD requests public comment on what factors or data are used

by these organizations and how the changes proposed to the IHBG formula would impact the work done by such organizations.

VIII. Tribal Recommendation

Non-HUD members of the Committee recommend HUD establish a joint task force that includes tribal and HUD representatives to develop a methodology to collect operating cost data from IHBG recipients in a consistent and accurate manner that could be used to adjust for local operating costs in the adjustment to the operating subsidy under the current assisted stock portion of the formula (i.e. replace the current factors under section 1000.320(a)). Non-HUD members recommend that resources other than IHBG funds be made available to fund technical experts and task force members and other costs that may be identified.

The Committee notes that for a variety of reasons, the Committee did not accommodate the examination of the Needs variables.

IX. Findings and Certifications

Regulatory Review--Executive Orders 12866 and 13563

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are “outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.” Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent

permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. This proposed rule was determined to be a “significant regulatory action” as defined in section 3(f) of Executive Order 12866. The docket file is available for public inspection in the Regulations Division, Office of General Counsel, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202 402-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service, toll free, at 1-800-877-8339.

Paperwork Reduction Act

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

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

REPORTING AND RECORDKEEPING BURDEN: I

| Section Reference | Number of Respondents | Number of Responses Per Respondent | Estimated Average Time for Requirement (in hours) | Estimated Annual Burden (in hours) |
|--------------------------|------------------------------|---|--|---|
| | | | | |

| | | | | |
|--------------|-----|---|-----|-------|
| § 1000.316 | 226 | 1 | 0.2 | 45.2 |
| § 1000.318 | 212 | 1 | 0.5 | 106 |
| § 1000.336 | 10 | 1 | 4 | 40 |
| Total Burden | | | | 191.2 |

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

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

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

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

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

Interested persons are invited to submit comments regarding the information collection requirements in this rule. Comments must refer to the proposal by name and docket number (FR-5650) and must be sent to:

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

and

Reports Liaison Officer
Office of Public and Indian Housing
Department of Housing and Urban Development, Room
451 7th Street, SW,
Washington, DC 20410

Interested persons may submit comments regarding the information collection requirements electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the <http://www.regulations.gov> web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) generally requires an agency to conduct a regulatory flexibility analysis for any rule that is subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The requirements of this rule apply to Indian tribal governments and their tribal housing authorities. Tribal governments and their tribal housing authorities are not covered by the definition of “small entities” under the RFA. Accordingly, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

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

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute, or preempts state law, unless the relevant requirements of section 6 of the Executive Order are met. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

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

Environmental Review

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Finding of No Significant Impact is available for public inspection

between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the FONSI by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service, toll free, at 1-800-877-8339.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance Number (CFDA) for Indian Housing Block Grants is 14.867, and the CFDA for Title VI Federal Guarantees for Financing Tribal Housing Activities is 14.869.

List of Subjects in 24 CFR Part 1000

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

Accordingly, for the reasons described in the preamble, HUD proposes to amend 24 CFR part 1000 as follows:

PART 1000—NATIVE AMERICAN HOUSING ACTIVITIES

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

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

2. In § 1000.302, revise paragraph (2)(i) of the definition of “Formula area” to read as follows:

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

* * * * *

Formula area. * * *

(2) * * *

(i) For a geographic area not identified in paragraph (1) of this definition, and for expansion or re-definition of a geographic area from the prior year, including those identified in paragraph (1) of this definition, the Indian tribe must submit, on a form agreed to by HUD, information about the geographic area it wishes to include in its Formula Area, including proof that the Indian tribe, where applicable, has agreed to provide housing services pursuant to a Memorandum of Agreement (MOA) with the tribal and public governing entity or entities of the area, or has attempted to establish such an MOA, and is providing substantial housing services and will continue to expend or obligate funds for substantial housing services, as reflected in its Indian Housing Plan and Annual Performance Report for this purpose.

* * * * *

3. Revise § 1000.306 to read as follows:

§ 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) The IHBG formula shall be reviewed not later than May 21, 2012, to determine if a subsidy is needed to operate and maintain NAHASDA units or if any other

changes are needed in respect to funding under the Formula Current Assisted Stock component of the formula.

4. Revise § 1000.310 to read as follows:

§ 1000.310 What are the components of the IHBG formula?

The IHBG formula consists of four components:

- (a) Formula Current Assisted Stock (FCAS) (§ 1000.316);
- (b) Need (§ 1000.324);
- (c) 1996 Minimum (§ 1000.340); and
- (d) Undisbursed IHBG funds factor (§ 1000.342).

5. In § 1000.316 add paragraph (c) to read as follows:

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

* * * * *

(c) *Conversion.* Conversion of FCAS units from homeownership (Mutual Help or Turnkey III) to low-rent or from low-rent to a home ownership program.

(1) If units were converted before October 1, 1997, as evidenced by an amended ACC, then those units will be counted for formula funding and eligibility purposes as the type of unit to which they were converted.

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

(i) *Funding type.* Units that converted after October 1, 1997 will be funded as the type of unit specified on the original ACC in effect on September 30, 1997.

(ii) *Continued FCAS eligibility.* Whether or not it is the first conversion, a unit converted after October 1, 1997, will be considered as the type converted to when

determining continuing FCAS eligibility. A unit that is converted to low-rent will be treated as a low-rent unit for purposes of determining continuing FCAS eligibility. A unit that is converted to homeownership will be treated as a homeownership unit for purposes of determining continuing FCAS eligibility.

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

6. Revise § 1000.318 by adding paragraph (a)(3) to read as follows:

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

(a) * * *

(3) A Mutual Help or Turnkey III unit not conveyed after the unit becomes eligible for conveyance by the terms of the MHOA may continue to be considered Formula Current Assisted Stock only if a legal impediment prevented conveyance; the legal impediment continues to exist; the tribe, TDHE, or IHA has taken all other steps necessary for conveyance and all that remains for conveyance is a resolution of the legal impediment; and the tribe, TDHE, or IHA made the following reasonable efforts to overcome the impediments:

(i) No later than four months after the unit becomes eligible for conveyance, the tribe, TDHE, or IHA creates a written plan of action, which includes a description of specific legal impediments as well as specific, ongoing, and appropriate actions for each applicable unit that have been taken and will be taken to resolve the legal impediments within a 24-month period; and

(ii) The tribe, TDHE, or IHA has carried out or is carrying out the written plan of action; and

(iii) The tribe, TDHE, or IHA has documented undertaking the plan of action.

(iv) No Mutual Help or Turnkey III unit will be considered FCAS 24 months after the date the unit became eligible for conveyance, unless the tribe, TDHE, or IHA provides evidence from a third party, such as a court or state or federal government agency, documenting that a legal impediment continues to prevent conveyance. FCAS units that have not been conveyed due to legal impediments on [effective date of this regulation] shall be treated as having become eligible for conveyance on [effective date of this regulation].

* * * * *

7. In § 1000.326 revise paragraph (a)(3), redesignate paragraph (c) as paragraph (d) and add a new paragraph (c), to read as follows:

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

(a) * * *

(3) In cases where a State recognized tribe’s formula area overlaps with the formula area of a Federally recognized Indian tribe, the Federally recognized Indian tribe receives the allocation for the formula area up to its population cap, and the State recognized tribe receives the balance of the overlapping area (if any) up to its population cap.

* * * * *

(c) Upon receiving a request for expansion or redefinition of a tribe’s formula area, if approving the request would create an overlap, HUD shall follow the notice and

comment procedures set forth in paragraph (2)(ii) of the definition of “Formula area” in § 1000.302.

* * * * *

8. Add § 1000.329 to read as follows:

§ 1000.329 What is the minimum total grant allocated to a tribe if there is carryover funds available?

(a) If in any given year there are carryover funds, then HUD will hold the lesser amount of \$3 million or available carryover funds for additional allocations to tribes with grant allocations of less than 0.011547 percent of that year’s appropriations. All tribes eligible under this section shall receive a grant allocation equal to 0.011547 percent of that year’s appropriations.

(b)(1) If the set-aside carryover funds are insufficient to fund all eligible tribes at 0.011547 percent of that year’s appropriations, the minimum total grant shall be reduced to an amount which can be fully funded with the available set-aside carryover funds.

(2) If less than \$3 million is necessary to fully fund tribes under paragraph (a) of this section, any remaining carryover amounts of the set aside shall be carried forward to the next year’s formula.

(c) Certify in its Indian Housing Plan the presence of any eligible households at or below 80 percent of median income;

(d) For purposes of this section, carryover funds means grant funds voluntarily returned to the formula or not accepted by tribes in a fiscal year.

9. Revise § 1000.330 to read as follows:

§ 1000.330 What are the data sources for the need variables?

(a) The sources of data for the Need variables shall be data that are available and collected in a uniform manner that can be confirmed and verified for all AIAN households and persons living in an identified area. Until fiscal year 2018, the data used are 2000 U.S. Decennial Census data and any HUD-accepted Census challenges. The 2000 U.S. Decennial Census data shall be adjusted annually using IHS projections based upon birth and death rate data provided by the National Center for Health Statistics.

(b)(i) Beginning fiscal year 2018, the data source used to determine the AIAN persons variable described in § 1000.324(g) shall be the most recent U.S. Decennial Census data adjusted for any statistically significant undercount for AIAN population confirmed by the U.S. Census Bureau and updated annually using the U.S. Census Bureau county level Population Estimates for Native Americans. For purposes of this paragraph, Indian Lands in Remote Alaska shall be treated as Reservation and Trust Lands, unless the U.S. Census Bureau includes Remote Alaska in their Census Coverage Measurement or comparable study. The data under this paragraph shall be updated annually using the U.S. Census Bureau county level Population Estimates for Native Americans.

(ii) Beginning fiscal year 2018, the data source used to determine the variables described in paragraphs (a) through (f) of § 1000.324 shall initially be the American Community Survey (ACS) 5-year Estimates adjusted by the ratio of the count of AIAN persons as provided by paragraph (b)(i) of this section to the ACS count of AIAN persons.

(c) Indian tribes may challenge the data described in this section pursuant to § 1000.336.

10. Add § 1000.331 to read as follows:

§ 1000.331 How will the impacts from adoption of a new data source be minimized as the new data source is implemented?

(a) To minimize the impact of funding changes based on the introduction of a new data source under § 1000.330, in fiscal year 2018 and each year thereafter, if, solely as a direct result of the introduction of a new data source, an Indian tribe's allocation under the Need component of the formula is less than 90 percent of the amount it received under the Need component in the immediate previous fiscal year, the Indian tribe's Need allocation shall be adjusted up to an amount equal to 90 percent of the previous year's Need allocation.

(b) Nothing in this section shall impact other adjustments under this part, including minimum funding, census challenges, formula area changes, or an increase in the total amount of funds available under the Need component.

(c) In the event of a decrease in the total amount of funds available under the Need component, an Indian tribe's adjusted allocation under paragraph (a) of this section shall be reduced by an amount proportionate to the reduced amount available for distribution under the Need component of the formula.

(d) Adjustments under paragraph (b) or (c) of this section shall be made to a tribe's Need allocation after adjusting that allocation under paragraph (a) of this section.

11. Revise § 1000.336 as follows:

- a. In paragraph (a)(6) remove "and";
- b. In paragraph (a)(7) remove the period and add in its place "and;"
- c. Add paragraph (a)(8);

d. Revise paragraphs (d), (e), and (f).

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

(a) * * *

(8) The undisbursed funds factor.

* * * * *

(d) An Indian tribe or TDHE that seeks to appeal data or a HUD formula determination, and has data in its possession that are acceptable to HUD, shall submit the challenge or appeal in writing with data and proper documentation to HUD. An Indian tribe or TDHE may appeal the undisbursed funds factor no later than 30 days after the receipt of the formula determination. Data used to challenge data contained in the U.S. Census must meet the requirements described in § 1000.330(a). Further, in order for a census challenge to be considered for the upcoming fiscal year allocation, documentation must be submitted by March 30th.

(e) HUD shall respond to all challenges or appeals no later than 45 days after receipt and either approve or deny the appeal in writing, setting forth the reasons for its decision.

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

(2) If HUD denies a challenge or appeal, the Indian tribe or TDHE may request reconsideration of HUD's denial within 30 calendar days of receipt of HUD's denial. The request shall be in writing and set forth justification for reconsideration.

(3) HUD shall in writing affirm or deny the Indian tribe's or TDHE's request for reconsideration, setting forth HUD's reasons for the decision, within 20 calendar days of receiving the request. HUD's denial of a request for reconsideration shall constitute final agency action.

(4) If HUD approves the Indian tribe or TDHE's appeal, HUD will adjust to the Indian tribe's or TDHE's subsequent fiscal year allocation to include only the disputed fiscal year(s).

(f) In the event HUD questions whether the data contained in the formula accurately represents the Indian tribe's need, HUD shall request the Indian tribe to submit supporting documentation to justify the data and, if applicable, to provide a commitment to serve the population indicated in the geographic area.

12. Add § 1000.342 to subpart D to read as follows:

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

Yes, beginning fiscal year 2018. After calculating the initial allocation calculation for the current fiscal year by calculating FCAS, Need, the 1996 Minimum, and repayments or additions for past over- or under-funding for each Indian tribe, the undisbursed funds factor shall be applied as follows:

(a) The undisbursed funds factor applies if an Indian tribe's initial allocation calculation is \$5 million or more and the Indian tribe has undisbursed IHBG funds in an amount that is greater than the sum of the prior 3 years' initial allocation calculations.

(b) If subject to paragraph (a) of this section, the Indian tribe's grant allocation shall be the greater of the initial allocation calculation minus the amount of undisbursed

IHBG funds that exceed the sum of the prior 3 years' initial allocation calculations, or its 1996 Minimum.

(c) For purposes of this section, "undisbursed IHBG funds" means the amount of IHBG funds allocated to an Indian tribe in HUD's line of credit control system (or successor system) on October 1 of the fiscal year for which the allocation is made. For Indian tribes under an umbrella TDHE (a recipient that has been designated to receive grant amounts by more than one Indian tribe), if the Indian tribe's initial allocation calculation is \$5 million or more, its undisbursed IHBG funds is the amount calculated by multiplying the umbrella TDHE's total balance in HUD's line of credit control system (or successor system) on October 1 of the fiscal year for which the allocation is made by a percentage based on the Indian tribe's proportional share of the initial allocation calculation of all tribes under the umbrella.

(d) Amounts subtracted from an initial allocation calculation under this section shall be redistributed under the Need component among all Indian tribes not subject to paragraph (a) of this section (while also retaining the 1996 Minimum).

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