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**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

**24 CFR Part 1000**

**[Docket No. FR-5275-F-13]**

**RIN 2577-AC80**

**Native American Housing Assistance and Self-Determination Reauthorization Act of 2008:  
Amendments to Program Regulations**

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

**ACTION:** Final rule.

**SUMMARY:** This final rule revises the regulations governing the Indian Housing Block Grant (IHBG) program and the Title VI Loan Guarantee program. HUD negotiated this rule with active tribal participation under the procedures of the Negotiated Rulemaking Act of 1990, pursuant to the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008. These regulatory changes implement statutory amendments and reflect the consensus decisions reached by HUD and the tribal representatives.

**DATES:** Effective Date: **[Insert 30 days after date of publication in the FEDERAL REGISTER].**

**FOR FURTHER INFORMATION CONTACT:** Rodger J. Boyd, Deputy Assistant Secretary for Native American Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW, Room 4126, Washington, DC 20410; telephone number 202-401-7914 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Relay Service at 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:**

## I. Executive Summary

### A. Purpose of the Regulatory Action

This final rule implements a number of amendments to the statutory requirements governing HUD's IHBG and Title VI Loan Guarantee programs under the Native American Housing Assistance Act of 1996 (25 U.S.C. 4101 et seq.). Specifically, it focuses on implementing provisions of the Native American Housing Assistance and Self-Determination Reauthorization Act of 2008 (Public Law 110-411, approved October 14, 2008) (NAHASDA Reauthorization Act or 2008 Reauthorization Act). The NAHASDA Reauthorization Act reauthorizes the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 et seq.) (NAHASDA) through September 30, 2013, and makes a number of amendments to the statutory requirements governing HUD's IHBG and Title VI Loan Guarantee programs. Among other changes, the NAHASDA Reauthorization Act amends section 106 of NAHASDA to provide that HUD shall initiate a negotiated rulemaking in order to implement provisions of the 2008 Reauthorization Act that require rulemaking. The rule also implements statutory changes to NAHASDA made by several laws enacted between 1998 and 2005.<sup>1</sup> After establishing the NAHASDA Negotiated Rulemaking Committee (Committee), and with the full and active participation of the Tribal representation on the Committee, HUD and the Committee published a proposed rule on November 18, 2011 (76 FR 71474), which reflected the consensus decision of the Committee. This final rule takes into consideration the public comments on the proposed rule and, as discussed in this preamble, makes some changes to the November 18,

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<sup>1</sup> Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999 (Public Law 105-276, approved October 21, 1998); Omnibus Indian Advancement Act (Public Law 106-568, approved December 27, 2000); Native American Housing Assistance and Self-Determination Reauthorization Act of 2002 (Public Law 107-292, approved November 13, 2002); Homeownership Opportunities for Native Americans Act of 2004, (Public Law 108-393, approved October 30, 2004); Native American Housing Enhancement Act of 2005 (Public Law 109-136, approved December 22, 2005); and Energy Policy Act of 2005 (Public Law 109-58, approved August 8, 2005).

2011, proposed rule. This final rule reflects the consensus decisions reached by HUD and the Committee.

#### B. Summary of Major Provisions of the Regulatory Action

This final rule would amend HUD's regulations by implementing statutory amendments to NAHASDA. The rule amends the regulations under subpart A of 24 CFR part 1000 regarding the guiding principles of NAHASDA, definitions, labor standards, environmental review procedures, procurement, tribal and Indian preference, and program income. The rule also amends subpart B of 24 CFR part 1000, which addresses eligible families, useful life of properties, and criminal conviction records, and subpart C of 24 CFR part 1000, which addresses the tribal program year, Indian Housing Plan (IHP) requirements, administrative and planning expenses, reserve accounts, local cooperation agreements, and exemption from taxation. Changes to subpart D of part 1000 address certain formula information that must be included in the IHP and Annual Performance Report (APR), as well as the date by which HUD must provide data used for the formula and projected allocation to a tribe or Tribally Designated Housing Entity (TDHE). The final rule amends subpart E of 24 CFR part 1000, which addresses financing guarantees, and subpart F of 24 CFR part 1000, which addresses HUD monitoring, APRs, APR review, HUD performance measures, recipient comments on HUD reports, remedial actions in the event of substantial noncompliance, audits, submission of audit reports, and records retention.

#### C. Costs and Benefits

This rule implements the NAHASDA Reauthorization Act, but does not directly address those provisions that affect the NAHASDA allocation formula, subpart D of 24 CFR part 1000. In implementing these provisions of the NAHASDA Reauthorization Act, this rule does not

impose any significant additional costs on Indian tribes, tribal and regional housing authorities, or TDHEs. It provides tribes greater flexibility in administering of their IHBG and Title VI Loan programs and reduces administrative costs by, for example, exempting procurements of goods and services with a value of less than \$5000 from competitive requirements and permitting recipients to use federal supply sources made available by the General Services Administration. Accordingly, HUD has determined that this rule is not an economically significant regulatory action.

## **II. Background**

NAHASDA reorganized and simplified HUD's system of housing assistance to Native Americans by eliminating several separate HUD programs and replacing them with a single block grant program, made directly to tribes, known as the IHBG. Title VI of NAHASDA also authorizes federal guarantees for the financing of certain tribal activities (under the Title VI Loan Guarantee Program). HUD's regulations governing the IHBG and Title VI Loan Guarantee programs are located in 24 CFR part 1000. In accordance with section 106 of NAHASDA, HUD developed the regulations with active tribal participation under the procedures of the Negotiated Rulemaking Act of 1990 (5 U.S.C. 561-570).

Under the IHBG program, HUD makes assistance available to eligible Indian tribes for affordable housing activities. The amount of assistance made available to each Indian tribe is determined using a formula that was developed as part of the NAHASDA negotiated rulemaking process (IHBG Formula). Based on the amount of funding appropriated annually for the IHBG program, HUD calculates the annual grant for each Indian tribe and provides this information to the Indian tribes. An IHP for the Indian tribe is then submitted to HUD. If the IHP is found to be in compliance with statutory and regulatory requirements, the grant is made.

Under the Title VI Loan Guarantee program, HUD guarantees obligations issued by tribes or TDHEs, with tribal approval, to finance eligible affordable housing activities under Section 202 of NAHASDA and housing-related community development activities consistent with the purposes of NAHASDA. No guarantee can be approved if the total outstanding obligations exceed five times the amount of the grant for the issuer, taking into consideration the amount needed to maintain and protect the viability of housing developed or operated pursuant to the U.S. Housing Act of 1937. The program requires issuers to pledge current and future IHBG appropriations to the repayment of the guaranteed obligations. The full faith and credit of the United States is pledged to the payment of all guarantees.

The NAHASDA Reauthorization Act reauthorizes NAHASDA through September 30, 2013, and makes a number of amendments to the statutory requirements governing the IHBG and Title VI Loan Guarantee programs. Among other changes, the NAHASDA Reauthorization Act amends section 106 of NAHASDA to require that HUD establish a negotiated rulemaking committee, in accordance with the procedures of the Negotiated Rulemaking Act of 1990 (5 U.S.C. 561-570) to implement aspects of the 2008 Reauthorization Act that require rulemaking. On January 12, 2009 (74 FR 1227), as required by section 106 of NAHASDA, HUD announced its intention to establish a Negotiated Rulemaking Committee to develop the regulatory changes to the IHBG and Title VI Loan Guarantee programs. On September 23, 2009 (74 FR 48584), after taking nominations for membership on the committee, HUD published membership on the Committee reflecting a balanced representation of Indian tribes.

The NAHASDA Rulemaking Committee convened for one 2-day meeting and five 3-day meetings in Scottsdale, Arizona; Westminster, Colorado; Seattle, Washington; and St. Paul, Minnesota, from March to August 2010. Under the terms of the charter approved by the

Committee, the negotiations were to focus on implementation of NAHASDA, as amended, except that subpart D of 24 CFR part 1000, which governs the NAHASDA allocation formula, was generally to be excluded from the negotiations. (The committee nonetheless agreed by consensus to make minor revisions to regulations in subpart D in order to address issues that primarily involved provisions under subpart C.) With the full and active participation of the Tribes, HUD and the Committee published a proposed rule on November 18, 2011 (76 FR 71474). The November 18, 2011, proposed rule reflected the consensus decisions of HUD and the Tribal representatives. The NAHASDA Rulemaking Committee convened for a 2-day meeting in Washington, DC, on May 1- 2, 2012, to review and consider public comments received on the proposed rule. This final rule takes into consideration the public comments on the proposed rule, and makes some changes, based on the public comments, to the November 18, 2011, proposed rule. It also reflects the consensus decisions reached by HUD and the Committee.

### **III. Changes and Clarifications Made in This Final Rule**

This final rule follows publication of the November 18, 2011, proposed rule and takes into consideration the public comments received on the proposed rule. In response to public comment, a discussion of which is presented in the following section of this preamble, and in further consideration of issues addressed at the proposed rule stage, HUD and the Committee are making the following changes at this final rule stage and clarifying or correcting portions of the preamble to the November 18, 2011, proposed rule:

- HUD and the Committee are revising § 1000.16, which addresses labor standards, to accurately reflect the intent of the Committee during the negotiated rulemaking sessions held in Westminster, Colorado; specifically, that construction and development contracts

are not subject to the prevailing wage provisions referenced in NAHASDA section 104(b)(1) if the contracts are subject to Tribal laws that require payment of not less than prevailing wages, as determined by the Indian tribe. HUD is also clarifying that operations and maintenance contracts and work performed by the TDHE and Tribal employees directly are excluded from Davis-Bacon and HUD wage rates where a Tribal wage provision that requires not less than prevailing wage rates is in existence. In making these changes, HUD also agrees that the preamble of the November 18, 2011, proposed rule incorrectly describes this change as one that did not reach consensus and, accordingly corrects that preamble to reflect otherwise.

- HUD and the Committee are revising § 1000.503(a) to more accurately describe the assessment factors that determine the frequency and level of monitoring recipients. Specifically, HUD and the Committee are revising paragraphs (a)(4), (a)(5) and (a)(6) of § 1000.503 to specifically reference Office of Management and Budget (OMB) Circular A-133. This revision is based on the parties' understanding during the negotiated rulemaking sessions leading to the development of the proposed rule that the delinquent audits included in HUD's risk assessment were delinquent OMB Circular A-133 audits. In addition, to reflect existing practice that considers open Inspector General audit findings as a risk assessment factor, HUD and the Committee are revising § 1000.503(a)(4) to reference open Inspector General audit findings.
- HUD and the Committee are revising § 1000.503(b) to address a perceived grammatical problem and bring greater clarity to the paragraph.
- While not changing HUD regulatory text of § 1000.532(a), HUD and the Committee are clarifying the description of this section in this final rule. Specifically, rather than

covering “significant noncompliance with a major activity of a recipient’s IHP,” as described in the proposed rule, § 1000.532 is clarified to provide that it applies to several categories of “substantial noncompliance” as that term is defined in § 1000.534.

#### **IV. The Public Comments**

The public comment period for the November 18, 2011, proposed rule closed on January 17, 2012, and HUD received 20 public comments, including one duplicate, on the proposed rule. Comments were submitted by federally recognized Indian tribes, tribal and regional housing authorities, TDHEs, associations comprised of tribes, a law office, a nonprofit devoted to issues of race and ethnicity, and a member of the public. On May 1 and 2, 2012, the Committee met in Washington, DC, to review and consider responses to the public comments. This section of the preamble addresses the significant issues raised in the public comments and organizes the comments by subject category, with a brief description of the issue, followed by the Committee’s response. For the convenience of readers, the discussion of the public comments is organized into three sections. The first section discusses the general comments that were received on the proposed rule. The second section discusses the public comments received on specific proposed regulatory changes contained in the proposed rule. The third section discusses the public comments received on nonconsensus issues (i.e., those issues on which the Committee could not reach agreement on proposed regulatory language).

##### **A. General Comments**

**Issue: Tribal and Indian preferences, generally.** One commenter stated that unless there is an explicit statutory mandate to do so, there should be no preferences given on the basis of "Indian" (racial) as opposed to "tribal" (political) status. The commenter cited Morton v. Mancari to support this comment. The commenter stated that the former is a racial classification

and, therefore, triggers strict scrutiny and is presumptively unconstitutional. Adarand Constructors, Inc. v. Pena and Personnel Administrator v. Feeney.

**Response:** The commenter stated that “unless there is an explicit statutory mandate to do so, there should be no preferences given on the basis of ‘Indian’ (racial) as opposed to ‘tribal’ (political) status,” asserting that “the former is a racial classification and, therefore, triggers strict scrutiny and is presumptively unconstitutional.” The commenter references the United States Supreme Court’s decision in Morton v Mancari, 417 U.S. 535 (1974), in support of this comment. The Committee notes that there is a mandate to use Indian preference under NAHASDA, both in providing affordable housing and in hiring and contracting. 25 U.S.C. 4101, 4111, 4131. Further, the Committee notes that Morton, contrary to the commenter’s assertion, expressly found that, “Indian” preference is not a racial categorization, but is rather a political one and that, therefore, the use of Indian preference does not trigger strict scrutiny review under the Constitution’s equal protection clause. 417 U.S. 535, 554—555. As a result, the Committee decided not to revise any provisions providing Indian or tribal preference in this final rule.

**Issue: Lack of timeliness in issuing regulations.** Several commenters expressed their concern that HUD is only now promulgating regulations to implement provisions that were enacted through the NAHASDA. The commenters stated that it is imperative that HUD be timelier in proposing future regulations.

**Response:** HUD recognizes the concern raised by the commenters and is committed to working more timely in proposing future regulations.

#### B. Comments on Specific Proposed Regulatory Changes

**Issue: Initiation of rulemaking; providing for periodic review (§ 1000.9(b)).** Several commenters, citing section 106(b)(2)(D) of NAHASDA, as amended, stated that the proposed rule provides a mechanism for initiating rulemaking when NAHASDA is amended, but does not provide a mechanism for initiating the periodic review of the regulations as required by this section of NAHASDA.

**Response:** The Committee considered the comments and determined that no change is required to § 1000.9(b) as published in the proposed rule.

**Issue: Initiation of rulemaking; clarifying actions that “significantly” amend NAHASDA (§ 1000.9(b)).** Several commenters recommended that HUD clarify the standard used when determining whether an enactment has "significantly" amended NAHASDA. The commenters stated that without such clarification, HUD would retain too much discretion to determine when negotiated rulemaking is called for. The commenters recommended that HUD define "significantly" as "any enactment that has the effect of altering the rights, privileges, duties, or responsibilities of the Secretary, Tribes, or TDHEs, that changes any aspect of the funding allocation mechanism under the statute, or that changes any procedure." Several other commenters agreed and opined that had HUD initiated negotiated rulemaking in 2002, many of the accounting issues facing tribes and TDHEs would not have been necessary.

**Response:** The Committee considered these comments and did not reach consensus on revising § 1000.9(b) as published in the propose rule. Tribal representatives stated that defining “significantly” would provide more clarity and certainty regarding when negotiated rulemaking was required rather than leaving the decision entirely within HUD’s discretion. HUD’s position was that § 1000.9(b) was intended to provide HUD the flexibility to quickly respond to minor changes or technical changes to NAHASDA without first having to establish a negotiated

rulemaking committee, a process that may take considerable time and resources. HUD asserted that defining “significantly” as recommended by the commenters or removing the word “significantly” from § 1000.9(b) would be difficult and likely result in the delayed implementation of amendments to NAHASDA to the detriment of both HUD and the Tribes. As a result, the Committee did not reach consensus to revise § 1000.9(b) in response to these comments.

**Issue: Labor Standards; consensus reached to exclude contracts from section 104(b)(1) of NAHASDA (§ 1000.16(e)).** Several commenters stated that the Committee reached consensus on including language that would exclude construction and development contracts from being required to contain the prevailing wage provision referenced in section 104(b)(1) of NAHASDA. These commenters cited to transcripts of the negotiated rulemaking sessions held in Westminster, Colorado (Neg. Reg. Committee Transcript Vol. II, Page 168 and Issue Number 32 on the NAIHC Legislative Committee Analysis Chart) to support their position. These commenters also stated that the Committee reached agreement specifying that “agreements for assistance, sale or lease” included construction and development contracts. These commenters stated that the final rule should reflect the Committee's action to include regulatory language specifically excluding construction and development contracts from this provision.

These commenters also stated that HUD should clarify that contracts for operations and maintenance of NAHASDA-assisted affordable housing are not subject to the provisions of section 104(b)(1) provided that applicable tribal law requires the payment of prevailing wage rates, and that work performed directly by tribal or TDHE employees on NAHASDA-assisted housing is also excluded from that provision. Another commenter also recommended that proposed § 1000.16(e) be revised to provide a more complete description of those activities not

subject to the prevailing wage requirement. The commenter recommended that proposed § 1000.16(e) be revised to add, “including such construction and development contracts and such contracts for the maintenance and operation of NAHASDA-assisted affordable housing. Work performed directly by tribal or TDHE employees on NAHASDA-assisted housing is also not subject to the prevailing wages provisions in section 104(b)(1) if covered by one or more such laws or regulations adopted by an Indian tribe.”

**Response:** After reviewing this issue, the Committee agreed that consensus was reached and that construction and development contracts, if entered into pursuant to a HUD contract or agreement for assistance, sale, or lease under NAHASDA, are not required to contain the prevailing wage provision referenced in NAHASDA section 104(b)(1) if the contracts are subject to tribal laws that require payment of not less than prevailing wages. Accordingly, the Committee is revising § 1000.16 to accurately reflect this consensus position. In addition, as requested by the commenter, the Committee is also clarifying that operations and maintenance contracts and work performed by the TDHE and Tribal employees directly are excluded from Davis-Bacon and HUD wage rates under section 104(b)(1) where a Tribal wage provision that requires not less than prevailing wage rates is in existence. In making these changes, the Committee also agrees that the preamble of the November 18, 2011, proposed rule incorrectly describes this change as one that did not reach consensus and, accordingly, corrects that preamble to reflect otherwise.

**Issue: Waiver of environmental review procedures; secretarial discretion to approve the waiver (§ 1000.21).** Several commenters stated that the proposed regulation permits the Secretary discretion to grant a waiver from the environmental review requirements in certain circumstances, and sets out the criteria to be used by the Secretary in making his

determination. The commenters recommended that the waiver be mandatory if the Secretary determines that the recipient's waiver request meets each condition provided by § 1000.21.

**Response:** The Committee considered these comments and did not reach consensus to change § 1000.21, regarding waiver of environmental compliance. Tribal representatives stated that adopting the comment would provide a level of certainty regarding HUD's treatment of waiver requests and would be more workable for the tribes. HUD stated that section 105 of NAHASDA provides that the Secretary "may" waive environmental requirements upon a showing of the stated criteria delineated by the statute and reiterated that the intent of this section was to simply codify statutory text. While tribal representatives thought otherwise, HUD also asserted that removing Secretarial discretion to review these waiver requests would diminish HUD's ability to ensure that each criterion was met. HUD also stated that it has routinely granted such waiver requests in the past whenever a recipient has demonstrated that each criterion has been met.

**Issue:** Another commenter stated that HUD changed the preamble discussion of § 1000.21 following Committee consensus by referencing Notice CPD-04-08, regarding the procedures for requesting a waiver of the statutory environmental review requirements, and by adding a footnote that summarizes these procedures. According to the commenter, the inclusion of this language misleadingly implies that there has been sufficient tribal consultation to justify HUD's policies on these issues. The commenter also states that this language attempts to raise the CPD notice almost to the level of a negotiated rule by referencing it in the preamble. The commenter recommended that the wording be removed and full tribal consultation be sought before application of the referenced program notice, or some revised version of that notice.

**Response:** The Committee considered this comment and concluded that no action on this comment is required. Notice CPD-04-08, which has since been replaced by Notice CPD-11-010, restates the authority of the Secretary to waive environmental requirements and describes the existing procedures that HUD follows when reviewing and approving waiver requests. The Notice was referenced only to describe the process, timing, procedures, and forms used by HUD to process a request to waive environmental requirements. As a result, the Committee decided that no action on this comment is required.

**Issue: Utilizing federal supply sources in procurement (§ 1000.26(11)(iv)).** Several commenters stated that they welcomed this provision, which permits recipients to use federal supply sources made available by the General Service Administration (GSA). The commenters reported, however, reluctance on the part of GSA to apply the provision and recommended that the failure be remedied.

**Response:** The Committee notes that the comment offers an observation rather than a recommendation to change the regulatory text. As a result, the Committee agreed that no action on this comment is required. Nevertheless, the Committee agrees with the commenters that use of federal supply sources provided by GSA can be extremely cost effective for tribes, saving thousands of dollars in procurement costs during a period of scarce federal resources. HUD commits to continuing to work with GSA to reduce the difficulties associated with using these sources.

**Issue: Applicability of section 3 of the Housing and Urban Development Act of 1968 (§ 1000.42).** Several commenters stated that section 101(k) of NAHASDA, as amended, designated as Tribal Preference in Employment and Contracting provides that tribal employment and contract preference laws and regulations apply notwithstanding any other provision of law.

The commenters stated that while section 3 of the HUD Act of 1968 requires that low-income residents receive preference in employment and contracts, low-income household members are not always Native American or members of a tribe. The commenters recommended, therefore, that the preamble or the final rule confirm that HUD will not treat the application of tribal preference laws as a violation of section 3, even if they do not contemplate preference for non-Tribal household members.

Another commenter stated that section 3 is an infringement on tribal self-determination and that § 1000.42 of the proposed rule should be eliminated. The commenter stated that application of the section 3 requirement would require that 30 percent of the aggregate number of new hires be section 3 residents and that 10 percent of all contracts be awarded to section 3 businesses. The commenter also stated that tribal education and training programs are federally funded programs for the benefit of Native Americans, and that HUD cannot dictate that this funding be directed to assist non-Indians.

**Response:** The Committee considered the comment and agreed that § 1000.42 does not require change. As more fully discussed in the preamble to the November 18, 2011, proposed rule, § 1000.42 addresses section 3 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701u), which requires certain HUD recipients (e.g., recipients of more than \$200,000 in HUD housing and community development assistance for a covered project) to provide economic opportunities to low- and very low-income residents. Section 1000.42(c) clarifies that recipients meet the section 3 requirements when they comply with employment and contract preference laws adopted by their tribe in accordance with section 101(k) of NAHASDA.

**Issue: Tribal and Indian preferences; potential infringement on Tribal Sovereignty (§§ 1000.48, 1000.50, and 1000.52).** One commenter stated that these sections, which provide

that a recipient is required to apply Tribal preference in employment and contracting, if the Tribe has enacted Tribal preference laws, and that it must apply Indian preference to the extent that Tribal preference laws have not been enacted, may infringe on tribal sovereignty. According to the commenter, each tribe should be able to determine whether or not to implement Indian or tribal preferences and the extent to which it implements such preferences.

**Response:** The final rule has not been revised in response to this comment. As stated in the preamble to the proposed rule, these sections implement section 101(k) of NAHASDA, which provides that the employment and contract preference laws of a tribe that receives the benefit of a grant (or portion of a grant) apply to the administration of the grant (or portion of the grant), notwithstanding any other provision of law. More specifically, these sections clarify that a recipient is required to apply tribal preference in employment and contracting if a tribe has enacted tribal preference laws, and that only to the extent that such tribal preference laws have not been enacted, a recipient must instead apply Indian preference, as required under section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)). In addition, §§ 1000.48(c) and 1000.52(d) clarify that the exemption in NAHASDA section 203(g) for procurements of less than \$5,000 from competitive rules and procedures serves to exempt such procurements from Indian preference requirements under section 7(b) of the Indian Self-Determination and Education Assistance Act.

**Issue: Program Income; Use for Housing or housing related activities (§§ 1000.10(b), 1000.26, and 1000.64).** Several commenters stated that §§ 1000.10(b), 1000.26, and 1000.64 implement changes enacted by the NAHASDA Reauthorization Act of 2002 that provide that income derived from NAHASDA funded activities are not restricted so long as they are used for housing or housing related activities. According to the commenters, this change

should have been self-implementing and, as a result, HUD should authorize tribes and TDHEs to recoup any program income that they were forced to expend since 2002 on affordable housing activities, the statutory standard prior to the 2002 change.

**Response:** The Committee considered these comments and agreed that they raise a valid concern. Notwithstanding, the comments raise issues outside the scope of this rulemaking and can more properly be addressed in a separate rulemaking. As a result, the Committee considered the comments and decided not to revise §§ 1000.10(b), 1000.26, or 1000.64.

**Issue: The rule fails to assist recipients to determine “useful life” (§ 1000.142).** Several commenters stated that § 1000.142 fails to inform recipients regarding how to determine the useful life of a housing unit. As a result, the useful life of a housing unit will be determined on a case-by-case determination by HUD’s approval of the recipient’s Indian Housing Plan. The commenters stated that HUD should provide a clear and realistic way to determine a unit’s useful life rather than relying on a case-by-case determination. Another commenter agreed that § 1000.142 is not clear. The commenter opined that HUD will likely be required to publish guidance regarding the provision and cautioned that unless the guidance is subject to HUD’s tribal consultation policy, such guidance could appear to infringe on tribal self-determination.

**Response:** The Committee considered these comments and concluded not to change § 1000.142. This provision was a consensus provision agreed to by HUD and the Committee. Moreover, § 1000.142 reflects current practice and remains useful in clarifying that recipients implement the useful life requirement by placing binding commitments on the assisted property that are satisfactory to HUD.

**Issue: The requirement that binding commitments are applicable to third parties that are not family members does not make sense (§ 1000.146).** Several commenters stated

that § 1000.146 does not make practical sense. The commenters stated that the binding commitment is between the recipient and the homebuyer and does not pass to family or household members. As a result, the commenters stated that the family or household member cannot pass the restriction to third party buyers. The commenters recommend that HUD revise this provision by deleting the last sentence of the proposed section.

**Response:** As discussed in the preamble to the proposed rule, § 1000.146 incorporates section 205(c) of NAHASDA. More specifically, the sentence that the commenters recommend be deleted reflects the intent of the Committee that any subsequent transfer by the family member or household member to a third party that is not a family member or household member be subject to any remaining useful life under a binding commitment. Accordingly, HUD and the Committee determined that a change to the rule was not necessary.

**Issue: Difficulty receiving criminal conviction information (§ 1000.150).** Several commenters stated that most tribal housing programs and TDHEs remain unable to obtain criminal conviction information on applicants or tenants from law enforcement agencies, including the Bureau of Indian Affairs Police and local non-Indian agencies. The commenters recommended that the authorization to obtain this information be strengthened by regulation or by statutory amendment.

**Response:** The November 18, 2011, rule proposed to amend only the heading of § 1000.150, to conform it to section 208(a) of NAHASDA, which permits the use of criminal conviction records to screen applicants for employment. Consequently, the Committee agrees that no change to § 1000.150 is required. Nevertheless, the Committee agrees that section 208(a) of NAHASDA provides that the National Crime Information Center, police departments, and other law enforcement agencies are required to provide this information upon request. The

Committee also agrees that the preamble to this final rule state that, while § 1000.150 does not explicitly list the “other law enforcement agencies” from which tribes and TDHEs should be able to obtain the criminal conviction records of applicants for employment and adult applicants for housing, the intent of the Committee is that such information be made available from the Bureau of Indian Affairs Police and local non-Indian agencies.

**Issue: Response time not sanctioned (§§ 1000.227 and 1000.246).** Several commenters stated that, unlike § 1000.114, these provisions covering the granting of waivers relating to local cooperation agreement and taxation exemption requirements, as well as waivers relating to a recipient’s IHP submission deadline, do not provide consequences for HUD’s failure to act within the prescribed timeframes. The commenters recommended that these sections be revised to provide that HUD’s failure to issue a decision within the prescribed timeframe shall result in the waiver request being approved.

**Response:** The Committee considered these comments and did not reach consensus to change either §1000.227 or §1000.246. The deadlines for HUD action reflected in §§ 1000.227 and 1000.246 were the subject of much discussion during the negotiated rulemaking sessions leading to the proposed rule. Tribal representatives opined that establishing consequences for HUD’s failure to meet its deadline would expedite the review process and provide certainty for the tribes. HUD asserted that a deadline would eliminate the flexibility it needs to fully review these requests. HUD also asserted the fact that it has delegated decisionmaking authority to the field should expedite HUD decisionmaking, and supports the conclusion that these sections not be revised to result in automatic waivers of program requirements being granted should HUD fail to issue a decision within the prescribed timeframes.

The Committee also reviewed whether to revise § 1000.246(c) to delete the second and third sentences that read, “If the request is denied, IHBG funds may not be spent on the housing units. If IHBG funds have been spent on the housing units prior to the denial, the recipient must reimburse the grant for all IHBG funds expended.” HUD notes that section 101(d) of NAHASDA states that grant amounts may not be used unless the dwelling units are exempt from all real and personal property taxes levied or imposed by the state, tribe, city, county or other political subdivision. Recipients would not, therefore, comply with NAHASDA if they used non-federal assistance to pay any tax imposed on the units. As a result, the Committee did not revise §1000.246.

**Issue: What is the appropriate extent of HUD monitoring (§ 1000.503(a)).** One commenter stated that HUD changed one of the risk assessment factors related to a determination of the frequency of HUD monitoring in § 1000.532 (a)(4) from “delinquent IPA audits” to “delinquent audits.” The commenter stated that the reference to "delinquent audits" should be changed back to the October 2010 version of the provision which provided, “delinquent Independent Public Accountant (IPA) audits.”

**Response:** HUD agrees that the reference to “delinquent IPA audits” was changed to “delinquent audits,” after the language was negotiated and consensus reached. HUD stated that the change was intended to clarify the provision since the term “IPA” is not defined in the rule and may lend itself to confusion. To more accurately describe the assessment factors which determine the frequency and level of monitoring recipients, the Committee agrees to revise paragraphs (a)(4), (a)(5) and (a)(6) of § 1000.503 to reference OMB Circular A-133. The parties understood during the negotiated rulemaking sessions leading to the development of the proposed rule that the delinquent audits included in HUD’s risk assessment were delinquent

OMB Circular A-133 audits. In addition, to reflect existing practice that considers open Inspector General audit findings as a risk assessment factor, the Committee agrees to revise § 1000.503(a)(5) to read, “open OMB Circular A-133 or Inspector General audit findings.”

**Issue: Potential ambiguity in § 1000.503(b).** One commenter stated that there appears to be a grammatical problem with the wording in the introductory language of § 1000.503(b) that could cause ambiguity. The commenter recommended that the provision be clarified by rewriting the section to read as follows: “(b) If monitoring indicates noncompliance, HUD may undertake additional sampling and review to determine the extent of such noncompliance. The level of HUD monitoring of a recipient once that recipient has been selected for HUD monitoring is as follows. . .”

**Response:** The Committee agrees that the recommendation offered by the commenter would clarify § 1000.503(b) and accordingly, revises this section. In addition, the Committee agrees to further clarify the wording in §§ 1000.503(b)(2) and (b)(3) to make the provisions easier to comprehend and apply.

**Issue: HUD altered the meaning of § 1000.503(d) as negotiated by the Committee.** One commenter stated that HUD has changed § 1000.503(d) in a way that alters its meaning as negotiated by the Committee. According to the commenter, the original intent agreed to by the Committee was that HUD would not monitor a recipient that has a self-monitoring agreement, absent the circumstances listed in the regulations. The language incorporated in the proposed rule, however, implies that self-monitoring agreements will include provisions for some form of HUD monitoring, even when the circumstances listed in the proposed rule are not present. The commenter recommended that the final regulation include the wording as originally shown in the October 2010 version of the rule, specifically, that “ONAP will not monitor the recipient within

the effective period of such agreement or arrangements, unless ONAP finds reasonable evidence of fraud, a pattern of noncompliance, or the significant unlawful expenditure of IHBG funds.”

**Response:** Section 1000.503(d) provides that a recipient may request to enter into a self-monitoring agreement with HUD, under which HUD would monitor only the recipient in accordance with the agreement, absent reasonable evidence of fraud, a pattern of noncompliance, or significant unlawful expenditure of IHBG funds. The Committee agrees that as written, § 1000.503(d) represents the intent of the parties, and as a result, does not require change at this final rule stage.

**Issue: Failure of HUD to issue timely report not sanctioned (§ 1000.528).** Several commenters stated that the proposed regulations require tribes to submit comments to the HUD draft report within specific timeframes, and that failure to meet the prescribed time results in consequences for the tribe. The commenters state that there are no consequences for HUD’s failure to issue a report within the regulatory timelines. The commenters recommended that the regulation contain some kind of consequence for HUD, or some kind of enforcement or appeal mechanism if HUD fails to meet its obligations under the timelines.

**Response:** The Committee considered this comment and recognizes that § 1000.528 establishes a timeline for HUD to take action, but does not establish consequences for HUD not taking action within that time period. Tribal representatives stated that establishing consequences for HUD if it fails to meet the timeline would expedite HUD’s review of a tribe’s draft report and provide additional certainty for the tribes. This section was discussed during the committee meeting leading to the development of this section and there was no consensus to adopt the Tribal position. As a result, the Committee did not change the rule to address this comment.

**Issue: Preamble does not accurately describe scope of § 1000.532(a).** One commenter stated that HUD’s preamble describing the scope of § 1000.532(a) inaccurately describes the scope of this section. The commenter stated that the preamble describes this section as covering “significant noncompliance with major activity of a recipient’s IHP” when the proposed section covers any act of substantial noncompliance as defined in § 1000.534, which includes events that are financially significant, whether or not a major activity is involved. The commenter recommended that HUD clarify this language in the final rule.

**Response:** The Committee considered this comment and agrees that it does not recommend changes to the regulatory text of the final rule. As a result, the Committee agrees that § 1000.532(a) does not require change at this final rule stage. The commenter raises a concern regarding the accuracy of the section of the preamble to the proposed rule that describes § 1000.532(a) (76 FR 71479-71480). HUD and the Committee reviewed this section of the preamble and agree it does not clearly describe § 1000.532(a). Specifically, the preamble to the proposed rule states that § 1000.532(a) applies to “significant noncompliance with a major activity of a recipients IHP.” To clarify, the final rule at § 1000.532 applies to several categories of “substantial noncompliance” as that term is defined in § 1000.534.

**Issue: Provision regarding how long the recipient must maintain program records should be clarified (§ 1000.552(b)).** Several commenters stated that only smaller tribes will be controlled by this provision and that most tribes and TDHEs are subject to the Single Audit Act and existing § 1000.552(c). The commenters recommended that HUD combine proposed § 1000.552(b) and existing § 1000.552(c) to make one clearly stated and understandable statement.

**Response:** The Committee considered these comments and agrees not to change § 1000.552(b) to address this comment.

### C. Comments Regarding Nonconsensus Items

**Issue: Procedures to respond to HUD remedial actions are insufficient and do not conform to statute (§§ 1000.528 to 1000.536).** Several commenters stated that sections 401 and 405 of NAHASDA require full due process for recipients before any NAHASDA funds can be reduced or recaptured for any reason. Full due process includes adequate and detailed notice, the right of the recipient to respond, a hearing, and a final determination made by a fair and impartial decisionmaker. Furthermore, the commenters stated that NAHASDA does not provide for the recapture of funds spent on eligible affordable housing activities under any circumstances. The commenters stated that the proposed regulations do not sufficiently or clearly address these requirements. They recommended that the Committee propose new regulations that make these due process requirements clear and state that recapture of NAHASDA funds that have already been spent on eligible affordable housing activities is prohibited under all circumstances.

**Response:** No change has been made to this final rule in response to these comments. As discussed in detail in the preamble to the proposed rule, the Committee could not reach consensus on the recapture of expenditures on affordable housing activities. Because decision-making during the negotiated rulemaking process was based on consensus, the absence of consensus on recapture of funds, even after the full consideration of public comments, precluded the Committee from adopting the changes proposed by the commenters.

**Issue: Remedial actions in the event of substantial noncompliance; HUD should reconsider opposition to three nonconsensus items (§ 1000.532)).**

Several commenters urged HUD to reconsider its opposition to the tribal position on three nonconsensus items. Initially, the commenters urged HUD to include in the final rule the Tribes' proposal to impose a 3-year "statute of limitations" on HUD enforcement actions. The

commenters stated that such a limitation would provide certainty and stability to tribes and TDHEs in their operations. Second, the commenters urged HUD to incorporate the Tribes' proposal to retain the existing language that would prohibit HUD from recapturing funds that have already been distributed to recipients and expended on affordable housing activities, stating that the recapture of funds is unduly punitive to recipients and would have a potentially adverse impact on low-income tenants and homebuyers who depend on the recipients for ongoing services. Finally, the commenters urged HUD to incorporate the Tribes' proposed language to clarify that the Line of Control Credit System (LOCCS) edit is in fact a "limitation on the availability of payments to programs, projects, or activities not affected by a failure to comply as described under section 401(a)(1) of NAHASDA." The commenters stated that the justification that HUD put forward to support its position is not borne out by the facts or the law.

Another commenter stated that procedures to be used for noncompliance are extremely important to recipients, and while it did not object to § 1000.532 as proposed, it is important for HUD and tribes to reach consensus concerning procedures to be used when noncompliance that is not "substantial" is involved.

**Response:** No change has been made to this final rule in response to these comments. HUD and the Committee considered these comments and for the reasons discussed in the preamble to the proposed rule, could not reach consensus on any of these three items. Because decisionmaking during the negotiated rulemaking process was based on consensus, the absence of consensus on these three items, even after the full consideration of public comments, precluded the Committee from adopting the changes proposed by the commenters.

**Issue: LOCCS edit is subject to section 401(a)(1) of NAHASDA and should be reconsidered.** Several commenters recommended that the rule incorporate the Tribes' proposed

language that clarifies that the LOCCS edit is a “limitation on the availability of payments to programs, projects, or activities not affected by a failure to comply,” under section 401(a)(1) of NAHASDA, subject to notice and the opportunity for hearing before terminating, reducing, or limiting the availability of payments. The commenters stated that the justification that HUD put forward during the negotiations to support its position is not borne out by the facts or the law cited by HUD, and that HUD’s efforts in other programs to avoid due process requirements when restricting or limiting access to funds have been struck down by the courts. Another commenter disagreed with HUD’s position regarding the LOCCS edit and stated that HUD will likely be required to publish guidance regarding the provision. The commenter cautioned that unless the guidance is subject to HUD’s tribal consultation policy, such guidance would infringe on tribal self-determination.

**Response:** As discussed in detail in the preamble to the November 18, 2011, proposed rule, HUD and the Tribes disagree as to whether a “LOCCS edit” is a “limitation on the availability of payments to programs, projects, or activities not affected by a failure to comply,” as described under section 401(a)(1) of NAHASDA. Interested parties are directed to review the preamble to the proposed rule for a full discussion of the position of the parties. Because decisionmaking during the negotiated rulemaking process was based on consensus, the absence of consensus, even after the full consideration of public comments, precluded the Committee from adopting the changes proposed by the commenters.

**Issue: Hearing Requirements for Formula Current Assisted Stock (FCAS) overcounts should be reconsidered (§ 1000.532(b)).** Several commenters stated that the tribally proposed language that would make some level of inaccuracy in FCAS reporting by the recipient a substantial noncompliance requiring a hearing should be reconsidered. The

commenters strongly recommend that the Committee propose new regulations that make the statutory due process requirements clear in the case of overcounts where a recipient would lose a substantial amount of their annual funding.

**Response:** As discussed in detail in the preamble to the November 18, 2011, proposed rule, HUD and the Tribes disagree on the meaning of section 401(a)(2) of NAHASDA, which addresses the counting of FCAS units. Interested parties are directed to review the preamble to the proposed rule for a full discussion of the position of the parties. The Tribes also recommended the addition of a new subsection to § 1000.534 that would provide that a FCAS overcount, in itself, does not constitute substantial noncompliance. Because decisionmaking during the negotiated rulemaking process was based on consensus, the absence of consensus on FCAS overcounting, even after the full consideration of public comments, precluded the Committee from adopting the changes proposed by the commenters.

**Issue: Preamble does not accurately describe hearing requirement for FCAS overcounts.** One commenter stated that HUD failed to include a full explanation of the Committee's failure to reach consensus of the FCAS overcount issue in the preamble of the rule. The commenter stated that the October 2010 version of the preamble had the full explanation, including a discussion of whether section 401(a)(2) of NAHASDA, as amended, required a hearing before any grant amount adjustment by HUD. The October 2010 version also addressed the Committee's broader discussions regarding the procedural protections to be applied to both noncompliance and "substantial" noncompliance, and would have ensured that even in cases not involving substantial noncompliance, recipients would have minimum due process protections of notice and an opportunity for some form of hearing. The commenter stated that the failure to include the full discussion of these issues as provided in the October 2010 version downplays the

significance of the importance of the issue to recipients. The commenter concluded by recommending that even if HUD persists in omitting the provisions concerning noncompliance that is not substantial, the October 2010 preamble discussion of this issue should be included in the published version of the rules.

**Response:** As discussed in the response immediately preceding this comment, HUD and the Tribes were unable to reach consensus on this issue. Accordingly, the lack of consensus precluded the Committee from adopting the changes proposed by the commenter.

## **V. 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 final rule was determined not 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 approved by OMB in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) and assigned OMB Control Number 2577-0218. 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.

#### 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.

#### 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 was made at the proposed rule stage 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 amends 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. Revise § 1000.2(a)(6) and (a)(7) to read as follows:

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

(a) \* \* \*

(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 shall 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 shall 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.).

\* \* \* \* \*

3. Add § 1000.9 to read as follows:

**§ 1000.9 How is negotiated rulemaking conducted when promulgating NAHASDA regulations?**

The negotiated rulemaking procedures and requirements set out in section 106(b) of NAHASDA shall be conducted as follows:

(a) Committee membership. In forming a negotiated rulemaking committee, HUD shall appoint as committee members representatives of the Federal Government and representatives of diverse tribes and program recipients.

(b) Initiation of rulemaking. HUD shall initiate a negotiated rulemaking not later than 90 days after the enactment of any act to reauthorize or significantly amend NAHASDA.

(c) Work groups. Negotiated rulemaking committees may form workgroups made up of committee members and other interested parties to meet during committee sessions and between sessions to develop specific rulemaking proposals for committee consideration.

(d) Further review. Negotiated rulemaking committees shall provide recommended rules to HUD. Once rules are proposed by HUD, they shall be published for comment in the Federal Register. Any comments will be further reviewed by the committee and HUD before HUD determines if the rule or rules will be adopted.

4. In § 1000.10(b), revise the definition of “Indian area” and add, in alphabetical order, the definitions for the terms “Housing related activities,” “Housing related community development,” “Outcomes,” and “Tribal program year,” to read as follows:

**§ 1000.10 What definitions apply in these regulations?**

\* \* \* \* \*

(b) \* \* \*

Housing related activities, for purposes of program income, means any facility, community building, infrastructure, business, program, or activity, including any community development or economic development activity, that:

- (1) Is determined by the recipient to be beneficial to the provision of housing in an Indian area; and
- (2) Would meet at least one of the following conditions:
  - (i) Would help an Indian tribe or its tribally designated housing entity to reduce the cost of construction of Indian housing;
  - (ii) Would make housing more affordable, energy efficient, accessible, or practicable in an Indian area;
  - (iii) Would otherwise advance the purposes of NAHASDA.

Housing related community development:

- (1) Means any facility, community building, business, activity, or infrastructure that:
  - (i) Is owned by an Indian tribe or a tribally designated housing entity;
  - (ii) Is necessary to the provision of housing in an Indian area; and

(iii)(A) Would help an Indian tribe or tribally designated housing entity reduce the cost of construction of Indian housing;

(B) Would make housing more affordable, energy efficient, accessible, or practicable in an Indian area; or

(C) Would otherwise advance the purposes of NAHASDA.

(2) Does not include any activity conducted by any Indian tribe under the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.)

\* \* \* \* \*

Indian Area means the area within which an Indian tribe operates affordable housing programs or the area in which a TDHE, as authorized by one or more Indian tribes, operates 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.

\* \* \* \* \*

Outcomes are the intended results or consequences important to program beneficiaries, the IHBG recipient, and the tribe generally from carrying out the housing or housing-related activity as determined by the tribe (and/or its TDHE).

\* \* \* \* \*

Tribal program year means the fiscal year of the IHBG recipient.

\* \* \* \* \*

5. In § 1000.12, revise paragraph (d) to read as follows:

**§ 1000.12 What nondiscrimination requirements are applicable?**

\* \* \* \* \*

(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. The Title VI and Title VIII requirements do not apply to actions under NAHASDA by federally recognized Indian tribes and their TDHEs. State-recognized Indian tribes and their TDHEs may provide preference for tribal members and other Indian families pursuant to NAHASDA sections 201(b) and 101(k) (relating to tribal preference in employment and contracting).

6. In § 1000.16, revise paragraphs (a)(1) and (c), redesignate paragraph (e) as paragraph (f), and add new paragraph (e) to read as follows:

**§ 1000.16 What labor standards are applicable?**

(a) \* \* \*

(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. 3141-44, 3146, and 3147) to be paid to laborers and mechanics 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. 3701).

\* \* \* \* \*

(e) Paragraphs (a) through (d) of this section shall not apply to any contract or agreement for assistance, sale, or lease pursuant to NAHASDA, or to any contract for construction,

development, operations, or maintenance thereunder, if such contract or agreement for assistance, sale, or lease is otherwise covered by one or more laws or regulations adopted by an Indian tribe that requires the payment of not less than prevailing wages, as determined by the Indian tribe. Paragraphs (a) through (d) of this section shall also not apply to work performed directly by tribal or TDHE employees under a contract or agreement for assistance, sale, or lease, that is covered by one or more such laws or regulations adopted by an Indian tribe.

\* \* \* \* \*

7. Add § 1000.21 to read as follows:

**§ 1000.21 Under what circumstances are waivers of the environmental review procedures available to tribes?**

A tribe or recipient may request that the Secretary waive the requirements under section 105 of NAHASDA. The Secretary may grant the waiver if the Secretary determines that a failure on the part of a recipient to comply with provisions of this section:

- (a) Will not frustrate the goals of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) or any other provision of law that furthers the goals of that Act;
- (b) Does not threaten the health or safety of the community involved by posing an immediate or long-term hazard to residents of that community;
- (c) Is a result of inadvertent error, including an incorrect or incomplete certification provided under section 105(c)(1) of NAHASDA; and
- (d) May be corrected through the sole action of the recipient.

8. In § 1000.26, revise paragraphs (a)(5) and (a)(11) to read as follows:

**§ 1000.26 What are the administrative requirements under NAHASDA?**

(a) \* \* \*

(5) Section 85.21, “Payment,” except that HUD shall not require a recipient to expend retained program income before drawing down or expending IHBG funds.

\* \* \* \* \*

(11)(i) General. Section 85.36 of this title, “Procurement,” except paragraph (a), subject to paragraphs (a)(11)(ii) and (a)(11)(iii) of this section.

(ii) Bonding requirements. 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:

(A) 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;

(B) 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

(C) 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.

(iii) De minimis procurement. A recipient shall not be required to comply with § 85.36 of this title with respect to any procurement, using a grant provided under NAHASDA, of goods and services with a value of less than \$5,000.

(iv) Utilizing federal supply sources in procurement. In accordance with Section 101(j) of NAHASDA, recipients may use federal supply sources made available by the General Services Administration pursuant to 40 U.S.C. 501.

\* \* \* \* \*

9. In § 1000.42, add paragraphs (c) and (d) to read as follows:

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

\* \* \* \* \*

(c) Tribal preference. Recipients meet the section 3 requirements when they comply with employment and contract preference laws adopted by their tribe in accordance with section 101(k) of NAHASDA.

(d) Applicability. For purposes of section 3, NAHASDA funding is subject to the requirements applicable to the category of programs entitled “Other Programs” that provide housing and community development assistance (12 U.S.C. 1701u(c)(2), (d)(2)).

10. Revise § 1000.48 to read as follows:

**§ 1000.48 Are Indian or tribal preference requirements applicable to IHBG activities?**

Grants under this part are subject to Indian preference under section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)) or, if applicable under section 101(k) of NAHASDA, tribal preference in employment and contracting.

(a)(1) 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:

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

(ii) 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).

(2) The following definitions apply:

(i) 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.

(ii) 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.

(b) If tribal employment and contract preference laws have not been adopted by the Indian tribe, section 7(b) Indian preference provisions shall apply.

(c) Exception for de minimis procurements. A recipient shall not be required to apply Indian preference requirements under Section 7(b) of the Indian Self-Determination and Education Assistance Act with respect to any procurement, using a grant provided under NAHASDA, of goods and services with a value less than \$5,000.

11. Revise § 1000.50, to read as follows:

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

(a) In accordance with Section 101(k) of NAHASDA, a recipient shall apply the tribal employment and contract preference laws (including regulations and tribal ordinances) adopted by the Indian tribe that receives a benefit from funds granted to the recipient under NAHASDA.

(b) In the absence of tribal employment and contract preference laws, a recipient must, to the greatest extent feasible, give preference and opportunities for training and employment in connection with the administration of grants awarded under this part to Indians in accordance with section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)).

12. Revise § 1000.52 to read as follows:

**§ 1000.52 What tribal or Indian preference requirements apply to IHBG procurement?**

(a) In accordance with Section 101(k) of NAHASDA, a recipient shall apply the tribal employment and contract preference laws (including regulations and tribal ordinances) adopted by the Indian tribe that receives a benefit from funds granted to the recipient under NAHASDA.

(b) In the absence of tribal employment and contract preference laws, a recipient must, to the greatest extent feasible, give preference in the award of contracts for projects funded under this part to Indian organizations and Indian-owned economic enterprises in accordance with Section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)).

(c) The following provisions apply to the application of Indian preference under paragraph (b) of this section:

(1) In applying Indian preference, each recipient shall:

(i) 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 that was previously approved by HUD for a recipient will meet the requirements of this section); or

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

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

(A) 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.

(B) 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.

(2) 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:

(i) Readvertise the contract, using any of the methods described in paragraph (c)(1) of this section; or

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

(iii) 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.

(3) 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 (c)(1) 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.

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

(5) 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:

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

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

(iii) 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.

(6) 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:

(i) 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:

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

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

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

(iii) 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.

(iv) The contractor shall include this section 7(b) clause in every subcontract in connection with the project; shall require subcontractors at each level to include this section 7(b)

clause in every subcontract they execute 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.

(d) A recipient shall not be required to apply Indian preference requirements under Section 7(b) of the Indian Self-Determination and Education Assistance Act with respect to any procurement, using a grant provided under NAHASDA, of goods and services with a value less than \$5,000.

13. In § 1000.58, revise paragraphs (f) and (g) to read as follows:

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

\* \* \* \* \*

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

(g) Investments under this section may be for a period no longer than 5 years.

14. Revise § 1000.60 to read as follows:

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

Yes. In accordance with the standards and remedies contained in §1000.532 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.

15. In § 1000.62, revise the heading and paragraph (b) to read as follows:

**§ 1000.62 What is considered program income?**

\* \* \* \* \*

(b) 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.

\* \* \* \* \*

16. Add § 1000.64 to subpart A to read as follows:

**§ 1000.64 What are the permissible uses of program income?**

Program income may be used for any housing or housing related activity and is not subject to other federal requirements.

17. In § 1000.104, revise paragraphs (b) and (c), and add paragraph (d), to read as follows:

**§ 1000.104 What families are eligible for affordable housing activities?**

\* \* \* \* \*

(b) A non-low-income family may receive housing assistance in accordance with § 1000.110.

(c) A family may receive housing assistance on a reservation or Indian area if the 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.

(d) A recipient may provide housing or housing assistance provided through affordable housing activities assisted with grant amounts under NAHASDA for a law enforcement officer on an Indian reservation or other Indian area, if:

(1) The officer:

(i) Is employed on a full-time basis by the federal government or a state, county, or other unit of local government, or lawfully recognized tribal government; and

(ii) In implementing such full-time employment, is sworn to uphold, and make arrests for, violations of federal, state, county, or tribal law; and

(2) The recipient determines that the presence of the law enforcement officer on the Indian reservation or other Indian area may deter crime.

18. Revise § 1000.106 to read as follows:

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

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

(b) Assistance for essential families under section 201(b)(3) of NAHASDA 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 that the family's housing needs cannot be reasonably met without such assistance.

19. Revise § 1000.108 to read as follows:

**§ 1000.108 How is HUD approval obtained by a recipient for housing for non-low-income 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 families in accordance with section 201(b)(2) of NAHASDA. Assistance to non-low-income 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 families.

20. Revise §1000.110 to read as follows:

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

(a) A family that was low-income at the times described in § 1000.147 but subsequently becomes a non-low-income family due to an increase in income may continue to participate in the program in accordance with the recipient's admission and occupancy policies. The 10 percent limitation in paragraph (c) of this section shall not apply to such families. Such families may be made subject to the additional requirements in paragraph (d) of this section based on those policies. This includes a family member or household member who takes ownership of a homeownership unit under § 1000.146.

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

(c) A recipient may use up to 10 percent of the amount planned for the tribal program year 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 the amount planned for the tribal program year for such assistance or to provide housing for families with income over 100 percent of median income.

(d) Non-low-income families cannot receive the same benefits provided low-income Indian families. The amount of assistance non-low-income 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 family cannot be less than:  $(\text{Income of non-low-income family} / \text{Income of family at 80 percent of median income}) \times (\text{Rental payment of family at 80 percent of median income})$ , but need not exceed the fair market rent or value of the unit.

(2) Other assistance, including down payment assistance, to non-low-income families, cannot exceed:  $(\text{Income of family at 80 percent of median income} / \text{Income of non-low-income family}) \times (\text{Present value of the assistance provided to family at 80 percent of median income})$ .

(e) The requirements set forth in paragraphs (c) and (d) of this section do not apply to non-low-income families that the recipient has determined to be essential under § 1000.106(b).

21. Revise § 1000.114 to read as follows:

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

Whether submitted in the IHP or at any other time, HUD will have 60 calendar days after receiving the proposal to notify the recipient in writing that the proposal to provide assistance to

non-low-income families or for model activities is approved or disapproved. If no decision is made by HUD within 60 calendar days of receiving the proposal, the proposal is deemed to have been approved by HUD.

22. Revise § 1000.116 to read as follows:

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

HUD shall consult with a recipient regarding the recipient's proposal to provide assistance to non-low-income families or a model housing activity. To the extent that 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.

23. In § 1000.118, revise the heading and paragraph (a), to read as follows:

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

(a) Within 30 calendar days of receiving HUD's denial of a proposal to provide assistance to non-low-income 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.

\* \* \* \* \*

24. Add § 1000.141 to read as follows:

**§ 1000.141 What is "useful life" and how is it related to affordability?**

Useful life is the time period during which an assisted property must remain affordable, as defined in section 205(a) of NAHASDA.

25. Revise § 1000.142 to read as follows:

**§ 1000.142 How does a recipient determine 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?**

To the extent required in the IHP, each recipient shall describe its determination of the useful life of the assisted housing units in 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.

26. Add § 1000.143 to read as follows:

**§ 1000.143 How does a recipient implement its useful life requirements?**

A recipient implements its useful life requirements by placing a binding commitment, satisfactory to HUD, on the assisted property.

27. Redesignate § 1000.144 and § 1000.146 as § 1000.145 and § 1000.147, respectively.

28. Add § 1000.144 to read as follows:

**§ 1000.144 What are binding commitments satisfactory to HUD?**

A binding commitment satisfactory to HUD is a written use restriction agreement, developed by the recipient, and placed on an assisted property for the period of its useful life.

29. Add § 1000.146 to read as follows:

**§ 1000.146 Are binding commitments for the remaining useful life of property applicable to a family member or household member who subsequently takes ownership of a homeownership unit?**

No. The transfer of a homeownership unit to a family member or household member is not subject to a binding commitment for the remaining useful life of the property. Any subsequent transfer by the family member or household member to a third party (not a family member or household member) is subject to any remaining useful life under a binding commitment.

30. Revise redesignated § 1000.147, to read as follows:

**§ 1000.147 When does housing qualify as affordable housing under NAHASDA?**

(a) Housing qualifies as affordable housing, provided that the family occupying the unit is low-income at the following times:

- (1) In the case of rental housing, at the time of the family's initial occupancy of such unit;
- (2) In the case of a contract to purchase existing housing, at the time of purchase;
- (3) In the case of a lease-purchase agreement for existing housing or for housing to be constructed, at the time the agreement is signed; and
- (4) In the case of a contract to purchase housing to be constructed, at the time the contract is signed.

(b) Families that are not low-income as described in this section may be eligible under §1000.104 or §1000.110.

31. In § 1000.150, revise the heading to read as follows:

**§ 1000.150 How may Indian tribes and TDHEs receive criminal conviction information on applicants for employment and on adult applicants for housing assistance, or tenants?**

\* \* \* \* \*

32. Revise § 1000.152 to read as follows:

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

(a) With regard to adult tenants and applicants for housing assistance, the recipient shall use the criminal conviction information described in § 1000.150 only for applicant screening, lease enforcement, and eviction actions.

(b) With regard to applicants for employment, the recipient shall use the criminal conviction information described in § 1000.150 for the purposes set out in section 208 of NAHASDA.

(c) The criminal conviction information described in § 1000.150 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.

33. Revise § 1000.201 to read as follows:

**§ 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 a tribal program year an IHP in accordance with § 1000.220 to carry out affordable housing activities.

34. Revise § 1000.214 to read as follows:

**§ 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 75 days before the beginning of a tribal program year. Grant funds cannot be provided until the plan due under this section is determined to be in compliance with section 102 of NAHASDA and funds are available.

35. Revise § 1000.216 to read as follows:

**§ 1000.216 What happens if the recipient does not submit the IHP to the Area ONAP by no later than 75 days before the beginning of the tribal program year?**

If the IHP is not initially sent by at least 75 days before the beginning of the tribal program year, the recipient will not be eligible for IHBG funds for that fiscal year. Any funds not obligated because an IHP was not received before this deadline has passed shall be distributed by formula in the following year.

36. Revise § 1000.220 to read as follows:

**§ 1000.220 What are the requirements for the IHP?**

The IHP requirements are set forth in section 102(b) of NAHASDA. In addition, §§ 1000.56, 1000.108, 1000.120, 1000.134, 1000.142, 1000.238, 1000.302, and 1000.328 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 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.

37. Revise § 1000.224 to read as follows:

**§ 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 exigent circumstances beyond its control, for a period of not more than 90 days. 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), and such waiver shall not be unreasonably withheld.

38. Add § 1000.225 to read as follows:

**§ 1000.225 When may a waiver of the IHP submission deadline be requested?**

A recipient may request a waiver for a period of not more than 90 days beyond the IHP submission due date.

39. Add § 1000.227 to read as follows:

**§ 1000.227 What shall HUD do upon receipt of an IHP submission deadline waiver request?**

The waiver shall be decided upon by HUD within 45 days of receipt of the waiver request. HUD shall notify the recipient in writing within 45 days of receipt of the waiver request whether the request is approved or denied.

40. In § 1000.230, revise paragraph (a)(1) to read as follows:

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

\* \* \* \* \*

(a) \* \* \*

(1) Comply with the requirements of section 102 of NAHASDA, which outlines the IHP submission requirements; however, the recipient may use either the HUD-estimated IHBG amount or the IHBG amount from their most recent compliant IHP;

\* \* \* \* \*

41. In § 1000.236, revise paragraphs (a)(4), (a)(5), and (b), and add paragraph (a)(6), to read as follows:

**§ 1000.236 What are eligible administrative and planning expenses?**

(a) \* \* \*

(4) Preparation of the annual performance report;

(5) Challenge to and collection of data for purposes of challenging the formula; and

(6) Administrative and planning expenses associated with expenditure of non-IHBG funds on affordable housing activities if the source of the non-IHBG funds limits expenditure of its funds on such administrative expenses.

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

42. Revise § 1000.238 to read as follows:

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

Recipients receiving in excess of \$500,000 may use up to 20 percent of their annual expenditures of grant funds or may use up to 20 percent of their annual grant amount, whichever is greater. Recipients receiving \$500,000 or less may use up to 30 percent of their annual expenditures of grant funds or up to 30 percent of their annual grant amount, whichever is greater. When a recipient is receiving grant funds on behalf of one or more grant beneficiaries, the recipient may use up to 30 percent of the annual expenditure of grant funds or up to 30 percent of the annual grant amount, whichever is greater, of each grant beneficiary whose allocation is \$500,000 or less, and up to 20 percent of the annual expenditure of grant funds or up to 20 percent of the annual grant amount, whichever is greater, of each grant beneficiary whose allocation is greater than \$500,000. HUD approval is required if a higher percentage is requested by the recipient. Recipients combining grant funds with other funding may request HUD approval to use a higher percentage based on its total expenditure of funds from all sources for

that year. 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.

43. Add § 1000.239 to read as follows:

**§ 1000.239 May a recipient establish and maintain reserve accounts for administration and planning?**

Yes. In addition to the amounts established for planning and administrative expenses under §§ 1000.236 and 1000.238, a recipient may establish and maintain separate reserve accounts only for the purpose of accumulating amounts for administration and planning relating to affordable housing activities. These amounts may be invested in accordance with § 1000.58(c). Interest earned on reserves is not program income and shall not be included in calculating the maximum amount of reserves. The maximum amount of reserves, whether in one or more accounts, that a recipient may have available at any one time is calculated as follows:

- (a) Determine the 5-year average of administration and planning amounts, not including reserve amounts, expended in a tribal program year.
- (b) Establish  $\frac{1}{4}$  of that amount for the total eligible reserve.

44. Add § 1000.244 to subpart C to read as follows:

**§1000.244 If the recipient has made a good-faith effort to negotiate a cooperation agreement and tax-exempt status but has been unsuccessful through no fault of its own,**

**may the Secretary waive the requirement for a cooperation agreement and a tax exemption?**

Yes. Recipients must submit a written request for waiver to the recipient's Area ONAP. The request must detail a good faith effort by the recipient, identify the housing units involved, and include all pertinent background information about the housing units. The recipient must further demonstrate that it has pursued and exhausted all reasonable channels available to it to reach an agreement to obtain tax-exempt status, and that failure to obtain the required agreement and tax-exempt status has been through no fault of its own. The Area ONAP will forward the request, its recommendation, comments, and any additional relevant documentation to the Deputy Assistant Secretary for Native American Programs for processing to the Assistant Secretary.

45. Add § 1000.246 to subpart C to read as follows:

**§1000.246 How must HUD respond to a request for waiver of the requirement for a cooperation agreement and a tax exemption?**

(a) HUD shall make a determination to such request for a waiver within 30 days of receipt or provide a reason to the requestor for the delay, identify all additional documentation necessary, and provide a timeline within which a determination will be made.

(b) If the waiver is granted, HUD shall notify the recipient of the waiver in writing and inform the recipient of any special condition or deadlines with which it must comply. Such waiver shall remain effective until revoked by the Secretary.

(c) If the waiver is denied, HUD shall notify the recipient of the denial and the reason for the denial in writing. If the request is denied, IHBG funds may not be spent on the housing units.

If IHBG funds have been spent on the housing units prior to the denial, the recipient must reimburse the grant for all IHBG funds expended.

46. In § 1000.302, revise paragraph (2)(i)(B) of the definition of “Formula area” and paragraph (3) of the definition of “Substantial housing services,” to read as follows:

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

\* \* \* \* \*

Formula area. \* \* \*

(2)(i) \* \* \*

(B) 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.

\* \* \* \* \*

Substantial housing services are:

\* \* \*

(3) HUD shall require that the Indian tribe annually provide written verification, in its Indian Housing Plan and Annual Performance Report, that the affordable housing activities it is providing meet the definition of substantial housing services.

\* \* \* \* \*

47. In § 1000.328, revise paragraph (b)(2) to read as follows:

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

\* \* \* \* \*

(b) \* \* \*

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

48. Revise § 1000.332 to read as follows:

**§ 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 the Indian tribe or TDHE notice of the data to be used for the formula and projected allocation amount by June 1.

49. Remove § 1000.408.

50. In § 1000.410, revise paragraphs (c) and (d), and add paragraph (e) to read as follows:

**§ 1000.410 What conditions shall HUD prescribe when providing a guarantee for notes or other obligations issued by an Indian tribe?**

\* \* \* \* \*

(c) The repayment period may exceed 20 years, and the length of the repayment period cannot be the sole basis for HUD disapproval;

(d) Lender and issuer/borrower must certify that they acknowledge and agree to comply with all applicable tribal laws; and

(e) A guarantee made under Title VI of NAHASDA shall guarantee repayment of 95 percent of the unpaid principal and interest due on the notes or other obligations guaranteed.

51. In § 1000.424, revise paragraph (a), remove paragraph (d)(2), and redesignate paragraphs (d)(3) through (d)(6) as paragraphs (d)(2) through (d)(5), respectively, to read as follows:

**§ 1000.424 What are the application requirements for guarantee assistance under title VI of NAHASDA?**

\* \* \* \* \*

(a) An identification of each of the activities to be carried out with the guaranteed funds and a description of how each activity qualifies:

(1) As an affordable housing activity as defined in section 202 of NAHASDA; or

(2) As a housing related community development activity under section 601(a) of NAHASDA.

\* \* \* \* \*

52. In § 1000.428, revise paragraphs (b) and (e) to read as follows:

**§ 1000.428 For what reasons may HUD disapprove an application or approve an application for an amount less than that requested?**

\* \* \* \* \*

(b) The loan or other obligation for which the guarantee is requested exceeds any of the limitations specified in sections 601(c) or section 605(d) of NAHASDA.

\* \* \* \* \*

(e) The activities to be undertaken are not eligible under either:

(1) Section 202 of NAHASDA; or

(2) Section 601(a) of NAHASDA.

\* \* \* \* \*

53. Add § 1000.503 to read as follows:

**§ 1000.503 What is an appropriate extent of HUD monitoring?**

(a) Subject to any conflicting or supplementary requirement of specific legislation, and upon the effective date of this regulation, the frequency of HUD monitoring of a particular recipient will be determined by application of the HUD standard risk assessment factors, provided that when a recipient requests to be monitored, HUD shall conduct such monitoring as soon as practicable. The HUD standard risk assessment factors may be but are not limited to the following:

- (1) Annual grant amount;
- (2) Disbursed amounts – all open grants;
- (3) Months since last on-site monitoring;
- (4) Delinquent Office of Management and Budget (OMB) Circular A-133 audits;
- (5) Open OMB Circular A-133 or Inspector General audit findings;
- (6) Conclusions of OMB Circular A-133 auditor;
- (7) Open monitoring findings;
- (8) Delinquent Annual Performance Reports or Annual Status and Evaluation Reports;
- (9) Status of Corrective Action Plan (CAP) or Performance Agreement (PA);
- (10) Recipient Self-Monitoring;
- (11) Inspection of 1937 Act units;
- (12) Preservation of 1937 Act units; and

(13) Any other additional factors that may be determined by HUD, consistent with HUD's Tribal Consultation Policy, by which HUD will send written notification and provide a comment period. Such additional factors shall be provided by program guidance.

(b) If monitoring indicates noncompliance, HUD may undertake additional sampling and review to determine the extent of such noncompliance. The level of HUD monitoring of a recipient once that recipient has been selected for HUD monitoring is as follows:

(1) Review recipient program compliance for the current program year and the 2 prior program years;

(2) On-site inspection of no more than 10 dwelling units or no more than 10 percent of total dwelling units, whichever is greater;

(3) Review of no more than 10 client files or no more than 10 percent of client files, whichever is greater.

(c) Notwithstanding paragraph (b) of this section, HUD may at any time undertake additional sampling and review of prior program years, subject to the records retention limitations of § 1000.552, if HUD has credible information suggesting noncompliance. HUD will share this information with the recipient as appropriate.

(d) A recipient may request ONAP to enter into Self-Monitoring Mutual Agreements or other self-monitoring arrangements with recipients. ONAP will monitor the recipient only in accordance with such agreement or arrangement, unless ONAP finds reasonable evidence of fraud, a pattern of noncompliance, or the significant unlawful expenditure of IHBG funds.

**54.** Remove § 1000.504.

55. In § 1000.512, revise paragraphs (b) and (c), and add paragraphs (d) and (e), to read as follows:

**§ 1000.512 Are performance reports required?**

\* \* \* \* \*

(b) Brief information on the following:

(1) A comparison of actual accomplishments to the planned activities established for the period;

(2) The reasons for slippage if established planned activities were not met; and

(3) Analysis and explanation of cost overruns or high unit costs;

(c) Any information regarding the recipient's performance in accordance with HUD's performance measures, as set forth in section §1000.524; and

(d) Annual performance data to reflect the accomplishments of the recipient to include, as specified in the IHP:

(1) Permanent and temporary jobs supported with IHBG funds;

(2) Outputs by eligible activity, including:

(i) Units completed or assisted, and

(ii) Families assisted; and

(3) Outcomes by eligible activity.

(e) As applicable, items required under §§ 1000.302 and 1000.544.

56. In § 1000.520, revise the heading, introductory text, and paragraph (c), to read as follows:

**§ 1000.520 What are the purposes of HUD's review of the Annual Performance Report?**

HUD will review each recipient's Annual Performance Report when submitted to determine whether the recipient:

\* \* \* \* \*

(c) Whether the Annual Performance Report of the recipient is accurate.

57. In § 1000.524, remove paragraph (a), redesignate paragraphs (b) through (f) as paragraphs (a) through (e), and revise redesignated paragraph (d) to read as follows:

**§ 1000.524 What are HUD's performance measures for the review?**

\* \* \* \* \*

(d) The recipient has met the IHP-planned activities in the one-year plan.

\* \* \* \* \*

58. Revise § 1000.528 to read as follows:

**§ 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 60 days of the completion of HUD's review. The recipient will have at least 60 days to review and comment on the draft report, as well as provide any additional information relating to the draft report. Upon written notification to HUD, the recipient may exercise the right to take an additional 30 days to complete its review and comment to the draft report. Additional extensions of time for the recipient to complete review and comment may be mutually agreed upon in writing by HUD and the recipient. 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 30 days after receipt of the recipient's comments and additional information.

59. In § 1000.530, revise the heading and paragraph (b), to read as follows:

**§ 1000.530 What corrective and remedial actions will HUD request or recommend to address performance problems prior to taking action under §1000.532?**

\* \* \* \* \*

(b) Failure of a recipient to address performance problems specified in paragraph (a) of this section may result in the imposition of sanctions as prescribed in §1000.532.

60. Revise § 1000.532 to read as follows:

**§ 1000.532 What are the remedial actions that HUD may take in the event of recipient's substantial noncompliance?**

(a) If HUD finds after reasonable notice and opportunity for hearing that a recipient has failed to comply substantially with any provision of NAHASDA or the regulations in this part, HUD shall carry out any of the following actions with respect to the recipient's current or future grants, as appropriate:

- (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 or these regulations;
- (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) Before undertaking any action in accordance with paragraph (a) of this section, HUD will notify the recipient in writing of the action it intends to take and provide the recipient an opportunity for an informal meeting to resolve the deficiency. Before taking any action under paragraph (a) of this section, HUD shall provide the recipient with the opportunity for a hearing no less than 30 days prior to taking the proposed action. The hearing shall be held 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 conducted and HUD has rendered a final decision.

(c) Notwithstanding paragraphs (a) and (b) of this section, if HUD makes a determination that the failure of a recipient to comply substantially with any material provision of NAHASDA or these regulations is resulting, and would continue to result, in a continuing expenditure of funds provided under NAHASDA in a manner that is not authorized by law, HUD may, in accordance with section 401(a)(4) of NAHASDA, take action under paragraph (a)(3) of this section prior to conducting a hearing under paragraph (b) of this section. HUD shall provide notice to the recipient at the time that HUD takes that action and conducts a hearing, in accordance with section 401(a)(4)(B) of NAHASDA, within 60 days of such notice.

(d) Notwithstanding paragraph (a) of this section, if HUD determines that the failure to comply substantially with the provisions of NAHASDA or these regulations is not a pattern or practice of activities constituting willful noncompliance, and is a result of the limited capability or capacity of the recipient, if the recipient requests, HUD shall 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. A recipient's eligibility for technical assistance under this subsection is contingent on the recipient's execution of, and compliance with, a performance agreement pursuant to Section 401(b) of NAHASDA.

(e) In lieu of, or in addition to, any action described in this section, if the Secretary has reason to believe that the recipient has failed to comply substantially with any provisions of NAHASDA or these regulations, HUD may refer the matter to the Attorney General of the United States, with a recommendation that appropriate civil action be instituted.

61. In § 1000.534, revise paragraph (a) to read as follows:

**§ 1000.534 What constitutes substantial noncompliance?**

\* \* \* \* \*

(a) The noncompliance has a material effect on the recipient meeting its planned activities as described in its Indian Housing Plan;

\* \* \* \* \*

62. In § 1000.536, revise the heading to read as follows:

**§ 1000.536 What happens to NAHASDA grant funds adjusted, reduced, withdrawn, or terminated under §1000.532?**

\* \* \* \* \*

63. Remove § 1000.538.

64. Revise § 1000.544 to read as follows:

**§ 1000.544 What audits are required?**

Pursuant to NAHASDA section 405(a), the recipient must comply with the requirements of the Single Audit Act (chapter 75 of title 31, United States Code), including 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 Office of Management and Budget (OMB), as set out in OMB Circular A-133, subpart B, section 200. If applicable, a certification that the recipient has not expended federal funds in excess of the audit threshold that is set by OMB shall be included in the recipient's Annual Performance Report.

65. Revise § 1000.548 to read as follows:

**§ 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 to the appropriate HUD ONAP area office at the same time it is submitted to the Federal Audit Clearinghouse pursuant to OMB Circular A-133.

66. Revise § 1000.552(b) to read as follows:

**§ 1000.552 How long must the recipient maintain program records?**

\* \* \* \* \*

(b) Except as otherwise provided herein, records must be retained for 3 years from the end of the tribal program year during which the funds were expended.

\* \* \* \* \*

Date: November 27, 2012

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Sandra B. Henriquez  
Assistant Secretary for  
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