



OFFICE OF PUBLIC AND INDIAN HOUSING

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-5000

Special Attention of:

All Tribal Government Leaders
and Tribally Designated
Housing Entities (TDHE)

Notice: PIH 2017-16

Issued: August 17, 2017

Expires: This Notice remains effective
until Amended, Superseded or Rescinded

Cross Reference(s): PIH Notice 2017-14
and PIH Notice 2017-15

SUBJECT: Changes to the Indian Housing Block Grant (IHBG) Formula Regulations

PURPOSE: This Notice provides tribes and tribally designated housing entities (TDHE) with an overview of regulatory changes affecting the IHBG formula.

BACKGROUND: On November 22, 2016, HUD published the final rule revising the IHBG allocation formula authorized by section 302 of the Native American Housing Assistance and Self-Determination Act of 1996, as amended (NAHASDA). These regulations, which became effective on December 22, 2016, update the regulations at 24 CFR part 1000. These regulations were developed through the Negotiated Rulemaking process, which included 24 representatives of tribal governments (or authorized designees of those tribal governments), and two HUD representatives. The Negotiated Rulemaking Committee held nine meetings between August 2013 and September 2016, and operated based on a consensus rulemaking process as outlined in its approved charter and protocols.

During the negotiated rulemaking process, the Negotiated Rulemaking Committee undertook a comprehensive review of the existing IHBG formula and any statutory changes that needed to be addressed in the regulations. With active participation of the tribes, HUD and the Negotiated Rulemaking Committee identified components of the IHBG formula that required clarification, were outdated, or could be improved.

On May 31, 2016, a proposed rule (81 FR 34290) was published. The Negotiated Rulemaking Committee convened to consider and to respond to the public comments on the proposed rule. The final rule (81 FR 83674), which reflects the consensus decisions reached by HUD and the Committee, included some changes based on the public comments on the proposed rule.

For additional information on the process and outcomes, please refer to the Final Rule (Native American Housing Assistance and Self-Determination Act; Revisions to the Indian Housing Block Grant Program Formula, 81 Fed. Reg. 83674 (Nov. 22, 2016)) and *PIH Notice 2017-14 "Indian Housing Block Grant Formula Needs Data,"* and *PIH Notice 2017-15 "Indian Housing Block Grant Formula Current Assisted Stock Data."*

The following information highlights the changes:

I. General Changes Affecting the IHBG Formula

1) Components of the IHBG Formula (§1000.310)

For clarity, the list of components of the formula was revised to include pre-existing formula elements (1996 Minimum) and an element added in this final rulemaking (Undisbursed IHBG funds factor). The Undisbursed IHBG funds factor (UDFF) and the 1996 Minimum were added as an additional component to the IHBG formula as shown in bold below:

“The IHBG formula consists of four components: (a) Formula Current Assisted Stock (FCAS) (§1000.316); (b) Need (§1000.324); (c) 1996 Minimum (§1000.340); and (d) Undisbursed IHBG funds factor (§1000.342).”

Further information on UDFF is addressed below.

2) Minimum Total Allocation of Carry-Over Funds (§1000.329)

A provision establishing a new minimum allocation amount was added as follows:

- (a) If in any given year there are carryover funds, then HUD will hold the lesser amount of \$3 million or available carryover funds for additional allocations to tribes with grant allocations of less than 0.011547 percent of that year’s appropriations. All tribes eligible under this section shall receive a grant allocation equal to 0.011547 percent of that year’s appropriations.
- (b)(1) If the set-aside carryover funds are insufficient to fund all eligible tribes at 0.011547 percent of that year’s appropriations, the minimum total grant shall be reduced to an amount which can be fully funded with the available set-aside carryover funds.
- (2) If less than \$3 million is necessary to fully fund tribes under paragraph (a) of this section, any remaining carryover amounts of the set aside shall be carried forward to the next year’s formula.
- (c) To be eligible, an Indian tribe must certify in its Indian Housing Plan the presence of any households at or below 80 percent of median income;
- (d) For purposes of this section, carryover funds means grant funds voluntarily returned to the formula or not accepted by tribes in a fiscal year.”

This provision for a minimum IHBG allocation is triggered only if there are carry-over funds in the given year. Calculating the minimum allocation amount under this provision depends on the given year’s appropriation, the amount of carry-over, and the number of tribes with grant allocations of less than 0.011547 percent of that year’s appropriations. Thus the amount may vary from year to year depending on those factors.

II. Changes Affecting FCAS Data

This section describes the changes affecting Section 8 units and the conversion of FCAS

units from rental to homeownership or vice versa. It also describes the criteria for continuing to include homeownership FCAS (Mutual Help or Turnkey III) as formula data after they are conveyance-eligible, and changes affecting the criteria for when FCAS units that are demolished and rebuilt continue to count as formula data.

1) Section 8 Units (§1000.306)

The provision for reducing FCAS during negotiated rulemaking based on Section 8 units was deleted as follows:

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

This change has no impact on annual formula calculations since it never took effect.

2) Conversion of FCAS Units (§1000.316(c))

The Negotiated Rulemaking Committee added the existing conversion policy to the regulation. The following new section was added to §1000.316:

“§ 1000.316(c) Conversion. Conversion of FCAS units from homeownership (Mutual Help or Turnkey III) to low-rent or from low-rent to a home ownership program.

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

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

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

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

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

As stated in the rule, tribes/TDHES must report all conversions on the Formula Response Form. The IHBG Formula Customer Service Center will be tracking all conversions of units. For additional guidance on the conversion of FCAS units, please refer to the *PIH Notice 2017-15 “IHBG Formula FCAS Data.”*

3) Criteria for Continuing to Count 1937 Act Homeownership Units as FCAS After Pay-Off (§1000.318(b))

In accordance with Section 302(b)(1) of NAHASDA, homeownership units no longer

count as FCAS formula data after they are eligible for conveyance (as when they are purchased because the purchase price is paid-off), unless conveyance was prevented for reasons beyond the control of the tribe/TDHE. Section 302(b)(1)(D) further defines “reasons beyond the control of the recipient” to mean that “after making reasonable efforts” there remains a legal impediment to conveyance. The Negotiated Rulemaking Committee amended §1000.318 to clarify what constitutes “reasonable efforts” by adding a new subsection (b), as follows:

“ (b)(1) A Mutual Help or Turnkey III unit not conveyed after the unit becomes eligible for conveyance by the terms of the MHOA may continue to be considered Formula Current Assisted Stock only if a legal impediment prevented conveyance; the legal impediment continues to exist; the tribe, TDHE, or IHA has taken all other steps necessary for conveyance and all that remains for conveyance is a resolution of the legal impediment; and the tribe, TDHE, or IHA made the following reasonable efforts to overcome the impediments:

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

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

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

(2) No Mutual Help or Turnkey III unit will be considered FCAS 24 months after the date the unit became eligible for conveyance, unless the tribe, TDHE, or IHA provides evidence from a third party, such as a court or state or federal government agency, documenting that a legal impediment continues to prevent conveyance.

FCAS units that have not been conveyed due to legal impediments on December 22, 2016, shall be treated as having become eligible for conveyance on December 22, 2016.”

This addition establishes that when the unit becomes conveyance-eligible (CE) under the terms of the mutual help and occupancy agreement (MHOA), the unit may continue to qualify as FCAS data only if the tribe/TDHE has taken all other steps necessary for conveyance on the CE date, but cannot convey because a legal impediment prevents the conveyance. For such a unit to continue to qualify as FCAS data beyond the CE date, a tribe must:

- Create a plan of action within 4 months after a unit is eligible for conveyance.
- Carry out that plan.
- Maintain documentation that it has carried out the plan.

If those steps are not met, the unit is considered ineligible as FCAS on the date of conveyance eligibility. No unit will be considered eligible after 24 months from conveyance eligibility, unless third party documentation of a legal impediment is submitted. For additional information, please refer to the *PIH Notice 2017-15 “IHBG Formula FCAS Data.”*

4) **Criteria for Continuing to Count 1937 Act Units as FCAS Data if They Are Demolished and Rebuilt (§1000.318(e))**

The following language was added as §1000.318(e):

“A unit that is demolished pursuant to a planned demolition may be considered eligible as a FCAS unit if, after demolition is completed, the unit is rebuilt within one year. Demolition is completed when the site of the demolished unit is ready for rebuilding. If the unit cannot be rebuilt within one year because of relative administrative capacities and other challenges faced by the recipient, including, but not limited to geographic distribution within the Indian area and technical capacity, the Indian tribe, TDHE or IHA may request approval for a one-time, one-year extension. Requests must be submitted in writing and include a justification for the request.”

This new regulatory provision establishes the eligibility criteria for demolished and rebuilt FCAS units and provides a one-time, one-year extension to rebuild demolished FCAS units under certain circumstances. For additional information, please refer to *PIH Notice 2017-15 “IHBG Formula FCAS Data”*.

III. Changes Affecting Needs Data

This section addresses the changes made to the definition of Formula Area, the method of attributing Needs data in cases where a Formula Area of a State-recognized tribe overlaps with that of a Federally recognized tribe, and notification procedures when new or existing Formula Areas overlap.

1) **Definition of Formula Area (§1000.302(2)(i))**

The definition of Formula Area, as stated in §1000.302, was revised to conform to the United States Court of Appeals for the Tenth Circuit’s decision in *United Keetoowah Band of Cherokee Indians of Oklahoma v. United States Department of Housing and Urban Development*.

The following language was removed in paragraph (2)(i) of the definition:

“For a geographic area not identified in paragraph (1) of this definition, and for expansion or re-definition of a geographic area from the prior year, including those identified in paragraph (1) of this definition, the Indian tribe must submit, on a form agreed to by HUD, information about the geographic area it wishes to include in its Formula Area, including proof that the Indian tribe, where applicable, has agreed to provide housing services pursuant to a Memorandum of Agreement (MOA) with the tribal and public governing entity or entities of the area, or has attempted to establish such an MOA ~~and is; and either: (A) Could exercise court jurisdiction; or (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.”

Since this change was the result of a court decision, HUD has been implementing the

revised definition of Formula Area as stated in §1000.302.

2) **Overlapping Formula Areas (§1000.326(a)(3))**

In the past, when a State recognized Indian tribe requested a Formula Area expansion that overlapped with a Federally recognized Indian tribe, the Needs data for the overlapping area was attributed to the Federally recognized Indian tribe. As a result, there were State tribes whose populations in those geographic areas were not figured into included in the State tribe's Needs data. The Negotiated Rulemaking Committee wanted to provide a fair and equitable measure of geographic areas for State recognized Indian tribes, and amended §1000.326(a)(3) as follows:

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

The revisions to §1000.326(a)(3) will be implemented beginning in FY 2017, and will not be applied retroactively to prior decisions.

3) **Overlapping Formula Areas (§1000.326(c))**

In the prior regulation, HUD provided notification to all tribes affected by a Formula Area expansion or removal based on substantial housing services only. The Negotiated Rulemaking Committee decided that other Formula Area requests that would create an overlap needed a formal notification procedure as well, and added the following section to §1000.326:

“(c) Upon receiving a request for expansion or redefinition of a tribe’s formula area, if approving the request would create an overlap, HUD shall follow the notice and comment procedures set forth in paragraph (2)(ii) of the definition of “Formula area” in § 1000.302.”

This new section provides formal notification procedures for all Formula Area requests that would create a new overlap or expand an existing overlap.

4) **What are the Data Sources for the Need Variables? (§1000.330)**

Previously, the data source for factors in the Needs component of the formula was the 2000 U.S. Decennial Census data, which was adjusted annually using the Indian Health Service (IHS) birth and death rates.

The regulation at §1000.330 was revised to provide a new data source. The regulation provide as follows:

“(a) The sources of data for the Need variables shall be data that are available and collected in a uniform manner that can be confirmed and verified for all AIAN households and persons living in an identified area. Until fiscal year 2018, the data

used are 2000 U.S. Decennial Census data and any HUD-accepted Census challenges. The 2000 U.S. Decennial Census data shall be adjusted annually using IHS projections based upon birth and death rate data provided by the National Center for Health Statistics.

(b)(1) Beginning fiscal year 2018, the data source used to determine the AIAN persons variable described in § 1000.324(g) shall be the most recent U.S. Decennial Census data adjusted for any statistically significant undercount for AIAN population confirmed by the U.S. Census Bureau and updated annually using the U.S. Census Bureau county level Population Estimates for Native Americans. For Remote Alaska as defined by the U.S. Census Bureau, Alaska Formula Areas in Remote Alaska shall be treated as Reservation and Trust Lands, unless the U.S. Census Bureau includes Remote Alaska in their Census Coverage Measurement or comparable study. The data under this paragraph shall be updated annually using the U.S. Census Bureau county level Population Estimates for Native Americans.

(2) Beginning fiscal year 2018, the data source used to determine the variables described in paragraphs (a) through (f) of § 1000.324 shall initially be the American Community Survey (ACS) 5-year Estimates.

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

The revision changes the data source of the AIAN persons variable to the Decennial Census, adjusted for the undercount as identified by the Census, and updated annually by the U.S. Census Population Estimates. Beginning in FY 2018, the source of data used to determine the AIAN persons variable will come from the 2010 Decennial Census, until the 2020 Decennial Census is available. The revision also changes the data source of the remaining six Needs variables to the ACS 5-year data. Beginning in FY 2018, the source of data used to determine the remaining six Needs variables will come from the 2009-2013 ACS data, and the ACS 5-year data will be updated every year.

5) Volatility Control of Changes in Need Component of Formula Caused by the Introduction of a New Data Source (§1000.331)

To mitigate fluctuations in the IHBG grant allocation resulting solely from the introduction of the 2010 Decennial Census and the ACS sources, the Negotiated Rulemaking Committee established a limited volatility control in the formula and added the following language:

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

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

(c) In the event of a decrease in the total amount of funds available under the Need component, an Indian tribe’s adjusted allocation under paragraph (a) of this section

shall be reduced by an amount proportionate to the reduced amount available for distribution under the Need component of the formula.

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

HUD will isolate the one-time impact to the IHBG grant allocation that is due to the introduction of the 2010 Decennial Census and the ACS source in FY 2018, and apply the established volatility control as it impacts subsequent FY allocations. A new volatility control schedule will be established for the one-time impact of introducing a new data source, when that occurs.

IV. Change Establishing New Formula Component: Undisbursed Funds Factor (UDFF)

1) Undisbursed IHBG Funds Factor (§1000.342)

The Negotiated Rulemaking Committee established a new formula factor, called the undisbursed funds factor (UDFF), as follows:

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

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

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

(b) If subject to paragraph (a) of this section, the Indian tribe's grant allocation shall be the greater of the initial allocation calculation minus the amount of undisbursed IHBG funds that exceed the sum of the prior 3 years' initial allocation calculations, or its 1996 Minimum.

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

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

The new regulation adds the UDFF to the formula. The UDFF provides allocation

formula calculations specific to tribes with an initial allocation of \$5 million or more, and with undisbursed IHBG funds in an amount greater than the sum of the prior 3 years' initial allocation calculations.

2) Inclusion of UDFE in provision for Data Challenges and Appeals of HUD Formula Determinations (§1000.336)

To include the new UDFE in the formula appeal provisions, the Negotiated Rulemaking Committee revised §1000.336 by adding subparagraph (a)(8) and revising subsections (d), (e), and (f), as follows:

“(a) * * *

(8) The undisbursed funds factor.

* * * * *

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

(e) HUD shall respond to all challenges or appeals not later than 45 days after receipt and either approve or deny the ~~validity of such data or challenge to a HUD formula determination~~ **appeal** in writing, setting forth the reasons for its decision. ~~Pursuant to HUD's action, the following shall apply:~~

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

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

(3) **HUD shall in writing affirm or deny** ~~Within 20 calendar days of receiving the request, HUD shall reconsider~~ the Indian ~~tribe~~ **tribe's** or TDHE's **request for reconsideration,** ~~submission and either affirm or reverse its initial decision in writing,~~ setting forth HUD's reasons for the decision, **within 20 calendar days of receiving the request. HUD's denial of a request for reconsideration shall constitute final agency action.**

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

(4) Pursuant to resolution of the dispute:

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

(ii) ~~If HUD prevails, it shall issue a written decision denying the Indian tribe or~~

~~TDHE's petition for reconsideration, which shall constitute final agency action.~~

(f) In the event HUD questions ~~that~~ **whether** the data contained in the formula ~~does~~ ~~not~~ accurately represents the Indian tribe's need, HUD shall request the Indian tribe to submit supporting documentation to justify the data and, **if applicable**, to provide a commitment to serve the population indicated in the geographic area.”

This regulation adds UDFP as a data item that can be challenged and/or appealed by a tribe/TDHE. Should you have any questions, please contact the IHBG Formula Customer Service Center at:

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Individuals with speech or hearing impairments may access the above telephone number via TTY by calling the toll-free Federal Relay Service at 1-800-877-8339.

/s/

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