



U.S. Department of Housing and Urban Development

Office of Public and Indian Housing

Special Attention of:
Administrators, Offices of Native
American Programs; Tribal Government
Leaders; Tribally Designated Housing
Entities

NOTICE PIH 2003-2 (TDHEs)

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Expires: Indefinite

Cross References: 24 CFR Part 1000
24 CFR part 1005

Subject: Implementation of Statutory Changes to the Native American Housing
Assistance and Self-Determination Act of 1996 (NAHASDA)

Summary: In calendar year 2000, three laws were enacted which amended NAHASDA: the Fiscal Year (FY) 2001 HUD Appropriations Act, Public Law 106-377, approved October 27, 2000; the *Omnibus Indian Advancement Act*, Public Law 106-568, Title X – Native American Homeownership approved December 27, 2000; and the *American Homeownership and Economic Opportunity Act of 2000*, Public Law 106-569, Title V – Native American Homeownership approved December 27, 2000. With minor exception, the two laws approved on December 27, 2000 contain identical provisions. However, because the two laws enacted on December 27, 2000, cannot both amend NAHASDA, HUD considers the first – the *Omnibus Indian Advancement Act*, Public Law 106-568 – to contain the operative amendments.

The Department has identified those provisions that may be implemented through administrative Notice and identified those provisions that the Department has determined require rulemaking to implement. Rulemaking is required whenever the Department determines it is necessary to develop policy governing the implementation of a statutory provision.

Consultation with Tribal Governments: In accordance with Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, and the Department's *Tribal Government-to-Government Consultation Policy* (published in the Federal Register on September 28, 2001), the Department provided tribal leaders with an outline of the statutory amendments and HUD's proposed method for implementing the amendments. Approximately 800 copies of the proposed language were mailed to Indian tribal governments and tribally designated housing entities (TDHE) to solicit feedback in accordance with the Department's *Tribal Government-to-Government Consultation Policy*. February 11, 2002 was established as the date for receipt of feedback. Written

and electronic feedback was provided by one tribal government, six TDHEs, one attorney on behalf of six TDHEs, and two housing associations.

Several responders objected to the Department's Consultation Policy, which provides for consultation methods other than negotiated rulemaking. The Department consulted extensively during the development of its Consultation Policy and acknowledges that tribal housing officials do not universally embrace the Consultation Policy. The Department believes the method of consultation employed for this topic provided an appropriate opportunity for tribal government officials to have input into the determinations made by the Department regarding implementation of statutory revisions to NAHASDA.

It is important to note that this Notice does not amend program regulations but simply advises how the Department is proceeding with implementing the statutory amendments. Some responders questioned the need for the Department to administratively implement statutory amendments, asserting that the amendments were effective with the law. To avoid confusion, it is important for the Department to inform the public on the steps to be taken to implement the changes to NAHASDA. For certain provisions, the Department believes that rulemaking is necessary to implement the statutory amendments. For other provisions, the changes can be implemented administratively with conforming rule changes to be made at a later date. Upon completion of the consultation process, the Department believes that many of the determinations presented in the proposed language continue to be appropriate. However, we have reconsidered our position on two amendments based on tribal comment. The Department is now taking the position that both the amendment to sec. 101(c) regarding the waiver on Local Cooperation Agreements and the amendment to sec. 104(b) related to Labor Standards can be implemented administratively. This Notice is implementing the Local Cooperation Agreement provision and a conforming rule will be published in the future. A separate Notice will be issued related to the Labor Standards provision.

The following discusses the implementation of the statutory amendments to NAHASDA:

Amendments to NAHASDA:

1. Sec. 1003(a)(1) of P.L. 106-568 amended sec. 101(b)(2) of NAHASDA. Sec. 101(b)(2) allows the Secretary to waive applicability of requirements of the Indian Housing Plan in whole or in part if the Secretary finds the Indian tribe has not complied or cannot comply due to circumstances beyond the tribe's control. This amendment limits the waiver period to not more than 90 days and requires the circumstances for the waiver to be "exigent." Sec. 101(b)(2) now reads:

“(2) WAIVER.-- The Secretary may waive the applicability of the requirements under paragraph (1), in whole or in part, for a period of not more than 90 days, if the Secretary determines that an Indian tribe has not complied with, or is unable to comply with, those requirements due to exigent circumstances beyond the control of the Indian tribe.”

This Notice is implementing the above provision and a conforming rule will be published in the future.

2. Sec. 1003(a)(2) of P.L. 106-568 amended sec. 101(c) of NAHASDA by providing the Secretary with the authority to waive the requirements of this subsection if the recipient has made a good faith effort and agrees to pay user fees or make payments in lieu of taxes. Sec. 101(c) now reads:

“(c) LOCAL COOPERATION AGREEMENT. – Notwithstanding any other provision of this Act, grant amounts provided under this Act on behalf of an Indian tribe may not be used for rental or lease-purchase homeownership units that are owned by the recipient for the tribe unless the governing body of the locality within which the property subject to the development activities to be assisted with the grant amounts is or will be situated has entered into an agreement with the recipient for the tribe providing for local cooperation required by the Secretary pursuant to this Act. The Secretary may waive the requirements of this subsection and subsection (d) if the recipient has made a good faith effort to fulfill the requirements of this subsection and subsection (d) and agrees to make payments in lieu of taxes to the appropriate taxing authority in an amount consistent with the requirements of subsection (d)(2) until such time as the matter of making such payments has been resolved in accordance with subsection (d).”

This Notice is implementing the above provision and a conforming rule will be published in the future.

3. Sec. 1003(b) of P.L. 106-568 amended sec. 102(c) of NAHASDA by adding a new component to the Indian Housing Plan regarding non low-income families. The following language was added to sec. 102(c) of the 1-Year Plan:

“(6) CERTAIN FAMILIES – With respect to assistance provided under section 201(b)(2) by a recipient to Indian families that are not low-income families, evidence that there is a need for housing for each such family during that period that cannot reasonably be met without such assistance.”

This Notice is implementing the above provision and a conforming rule will be published in the future.

4. Sec. 1003(c) of P.L. 106-568 amended sec. 102 of NAHASDA by removing paragraph (f) that outlined the plan requirements for small tribes; provided a waiver provision for small tribes; and provided the Secretary with the ability to define small tribes. Sec. 102(f) has been removed and subsection 102(g) has been redesignated as (f).

Indian Housing Block Grant regulations do not establish separate requirements for small tribes. Therefore, this Notice can implement the provision eliminating the requirements for small tribes. No conforming rule will be required.

5. Sec. 1003(d) of P.L. 106-568 amended sec. 105 of NAHASDA to allow the Secretary to waive, under limited circumstances, procedural errors made by a recipient in complying with environmental review requirements under the Act. Sec. 105(d) was added to read:

“(d) ENVIRONMENTAL COMPLIANCE. -- The Secretary may waive the requirements under this section if the Secretary determines that a failure on the part of a recipient to comply with provisions of this section—

- (1) will not frustrate the goals of the National Environmental Policy Act of 1969 (42 U.S.C. 4331 et seq.) or any other provision of law that furthers the goals of that Act;
- (2) does not threaten the health or safety of the community involved by posing an immediate or long-term hazard to residents of that community;
- (3) is a result of inadvertent error, including an incorrect or incomplete certification provided under subsection (c)(1); and
- (4) may be corrected through the sole action of the recipient.”

This language cannot be fully implemented without rulemaking because it applies to the “recipient” (which is defined in section 4(18) of NAHASDA to mean the tribe or the TDHE that is authorized to receive the grant on behalf of the tribe) whereas section 105(a)(1) authorizes the Indian tribe to assume environmental review responsibility. Rulemaking is required to implement the provision where the TDHE receives the grant since the TDHE cannot be the responsible entity under sec. 105. The Department is implementing this provision to the extent possible now without a rule so that waivers may be granted in those situations where a tribe directly administers a grant.

6. Sec. 210 of P.L. 106-377 amended sec. 201(b) of NAHASDA to enable recipients to provide housing or housing assistance to law enforcement officers. A similar change is in P.L. 106-568. Because the language in these two amendments differs and the FY 2001 Appropriations Act was enacted first, it was determined that the language in the HUD Appropriations Act is operative. Sec. 201 of NAHASDA was amended by redesignating paragraphs (4) and (5) as paragraphs (5) and (6) respectively and inserting after paragraph (3) the following new paragraph so that sec. 201(b)(4) reads as follows:

“(4) LAW ENFORCEMENT OFFICERS.-- Notwithstanding paragraph (1), a recipient may provide housing or housing assistance provided through affordable housing activities assisted with grant amounts under this Act to a law enforcement officer on the reservation or other Indian

area, who is employed full-time by a Federal, State, county, or tribal government, and in implementing such full-time employment is sworn to uphold, and make arrests for violations of Federal, State, county, or tribal law, if the recipient determines that the presence of the law enforcement officer on the Indian reservation or other Indian area may deter crime.”

This Notice is implementing the above provision and a conforming rule will be published in the future.

7. Sec. 1003(f)(1) of P.L. 106-568 amended sec. 209 of NAHASDA to remove the requirement that HUD take specific remedies if assisted housing is not maintained as affordable under the Act. Sec. 209 now reads:

“Sec. 209. NONCOMPLIANCE WITH AFFORDABLE HOUSING REQUIREMENT-- If a recipient uses grant amounts to provide affordable housing under this title, and at any time during the useful life of the housing the recipient does not comply with the requirement under section 205(a)(2), the Secretary shall take appropriate action under section 401(a).”

There is no corresponding provision in program regulations. This Notice is implementing the above provision and a conforming rule will not be required.

8. Sec. 1003(f)(2) of P.L. 106-568 amended sec. 405 of NAHASDA by modifying several provisions of the section. Sec. 405 now reads:

“Sec. 405. REVIEW AND AUDIT BY SECRETARY.

- (a) REQUIREMENTS UNDER CHAPTER 75 OF TITLE 31, UNITED STATES CODE.-- An entity designated by an Indian tribe as a housing entity shall be treated, for purposes of chapter 75 of title 31, United States Code, as a non-Federal entity that is subject to the audit requirements that apply to non-Federal entities under that chapter.
- (b) ADDITIONAL REVIEWS AND AUDITS.—
 - (1) IN GENERAL.-- In addition to any audit or review under subsection (a), to the extent the Secretary determines such action to be appropriate, the Secretary may conduct an audit or review of a recipient in order to—
 - (A) determine whether the recipient—
 - (i) has carried out—
 - (I) eligible activities in a timely manner; and
 - (II) eligible activities and certification in accordance with this Act and other applicable law;
 - (ii) has a continuing capacity to carry out eligible activities in a timely manner; and
 - (iii) is in compliance with the Indian housing plan of the recipient; and

- (B) verify the accuracy of information contained in any performance report submitted by the recipient under section 404.
- (2) ON-SITE VISITS.-- To the extent practicable, the reviews and audits conducted under this subsection shall include on-site visits by the appropriate official of the Department of Housing and Urban Development.
- (c) REVIEW OF REPORTS.—
 - (1) IN GENERAL.-- The Secretary shall provide each recipient that is the subject of a report made by the Secretary under this section notice that the recipient may review and comment on the report during a period of not less than 30 days after the date on which notice is issued under this paragraph.
 - (2) PUBLIC AVAILABILITY.-- After taking into consideration any comments of the recipient under paragraph (1), the Secretary—
 - (A) may revise the report; and
 - (B) not later than 30 days after the date on which those comments are received, shall make the comments and the report (with any revisions made under subparagraph (A)) readily available to the public.
- (d) EFFECT OF REVIEWS.-- Subject to section 401(a), after reviewing the reports and audits relating to a recipient that are submitted to the Secretary under this section, the Secretary may adjust the amount of a grant made to a recipient under this Act in accordance with the findings of the Secretary with respect to those reports and audits.”

Sec. 405(a) specifies that tribally designated housing entities are subject to the Single Audit Act requirements. Because the Single Audit Act applies by its own terms to tribally designated housing entities, this requirement is already set forth in the program regulations at §1000.544. The Department proposes no additional action.

Sec. 405(b)(1) no longer requires annual reviews and audits to be conducted by HUD. Instead, this paragraph now permits reviews and audits to the extent the Secretary determines such action to be appropriate.

Sec. 405(d) modified the statute by removing the words “reduce, or withdraw grant amounts, or take other action as appropriate”. Additionally, the revised statute no longer contains the following language: “except that grant amounts already expended on affordable housing activities may not be recaptured or deducted from future assistance provided on behalf of an Indian tribe.”

Rulemaking (changes to Subpart F of the regulations) is required to fully implement the statutory changes. Tribes will be consulted on the regulatory changes. Pending full implementation of the statutory changes through rulemaking, HUD will: determine the frequency of reviews in accordance with section 405(b), offer recipients notice and opportunity for a hearing before taking actions under section

405 (currently implemented in §1000.532), and limit the actions to those now permitted by section 405.

9. Sec. 1003(g) of P.L. 106-568 amended sec. 302(d)(1) of NAHASDA to revise the formula beginning in 2001 for tribes with less than 250 units developed under the United States Housing Act of 1937. Sec. 302(d)(1) was amended and now reads:

“(1) FULL FUNDING.—

(A) IN GENERAL.--Except with respect to an Indian tribe described in subparagraph (B), the formula shall provide that, if, in any fiscal year, the total amount made available for assistance under this Act is equal to or greater than the total amount made available for fiscal year 1996 for assistance for the operation and modernization of public housing developed or operated pursuant to a contract between the Secretary and an Indian housing authority pursuant to the United States Housing Act of 1937, the amount provided for such fiscal year for each Indian tribe for which such operating or modernization assistance was provided for fiscal year 1996 shall not be less than the total amount of such operating and modernization assistance provided for fiscal year 1996 for such tribe.

(B) CERTAIN INDIAN TRIBES.--With respect to fiscal year 2001 and each fiscal year thereafter, for any Indian tribe with an Indian housing authority that owns or operates fewer than 250 public housing units, the formula shall provide that if the amount provided for a fiscal year in which the total amount made available for assistance under this Act is equal to or greater than the amount made available for fiscal year 1996 for assistance for the operation and modernization of the public housing referred to in subparagraph (A), then the amount provided to that Indian tribe as modernization assistance shall be equal to the average annual amount of funds provided to the Indian tribe (other than funds provided as emergency assistance) under the assistance program under section 14 of the United States Housing Act of 1937 (42 U.S.C. 1437l) for the period beginning with fiscal year 1992 and ending with fiscal year 1997.”

The Department believes that a regulatory change is needed to implement this provision. The regulatory change will be made through the negotiated rulemaking process on formula issues. The Department is currently in the process of selecting members for the negotiated rulemaking committee which will meet in Denver in early 2003.

10. Sec. 1003(h) of P.L. 106-568 amended sec. 401(a) of NAHASDA to expressly permit HUD to take certain actions before conducting a hearing, subject to procedural requirements: Section 401(a) now reads:

“Sec. 401. REMEDIES FOR NONCOMPLIANCE.

- (a) ACTIONS BY SECRETARY AFFECTING GRANT AMOUNTS.--
- (1) IN GENERAL.-- Except as provided in subsection (b), if the Secretary finds after reasonable notice and opportunity for hearing that a recipient of assistance under this Act has failed to comply substantially with any provision of this Act, the Secretary shall –
- (A) terminate payments under this Act to the recipient;
 - (B) reduce payments under this Act to the recipient by an amount equal to the amount of such payments that were not expended in accordance with this Act;
 - (C) limit the availability of payments under this Act to programs, projects, or activities not affected by such failure to comply; or
 - (D) in the case of noncompliance described in section 402(b), provide a replacement tribally designated housing entity for the recipient, under section 402.
- (2) CONTINUANCE OF ACTIONS.-- If the Secretary takes an action under subparagraph (A), (B), or (C) of paragraph (1) the Secretary shall continue such action until the Secretary determines that the failure to comply has ceased.
- (3) EXCEPTION FOR CERTAIN ACTIONS.—
- (A) IN GENERAL.-- Notwithstanding any other provision of this subsection, if the Secretary makes a determination that the failure of a recipient of assistance under this Act to comply substantially with any material provision (as that term is defined by the Secretary) of this Act is resulting, and would continue to result, in a continuing expenditure of Federal funds in a manner that is not authorized by law, the Secretary may take an action described in paragraph (1)(C) before conducting a hearing.
 - (B) PROCEDURAL REQUIREMENT-- If the Secretary takes an action described in subparagraph (A), the Secretary shall—
 - (i) provide notice to the recipient at the time that the Secretary takes that action; and
 - (ii) conduct a hearing not later than 60 days after the date on which the Secretary provides notice under clause (i).
 - (C) DETERMINATION.-- Upon completion of a hearing under this paragraph, the Secretary shall make a determination regarding whether to continue taking the action that is the subject of the hearing, or take another action under this subsection.”

Rulemaking (changes to Subpart F of the regulations) is required to implement the statutory changes. Tribes will be consulted on the regulatory changes.

11. Sec. 1003(i) of P.L. 106-568 amended sec. 401(b) of NAHASDA to require a performance agreement should HUD determine that a failure to comply with the requirements of the Act is due to technical incapacity of the recipient not caused by a pattern or practice of activities constituting a willful noncompliance. Sec. 401(b) now reads:

- (b) “NONCOMPLIANCE BECAUSE OF TECHNICAL INCAPACITY.—
- (1) IN GENERAL- If the Secretary makes a finding under subsection (a), but determines that the failure to comply substantially with the provisions of this Act –
 - (A) is not a pattern or practice of activities constituting willful noncompliance, and
 - (B) is a result of the limited capability or capacity of the recipient, the Secretary may provide technical assistance for the recipient (directly or indirectly) that is designed to increase the capability and capacity of the recipient to administer assistance provided under this Act in compliance with the requirements under this Act, if the recipient enters into a performance agreement with the Secretary that specifies the compliance objectives that the recipient will be required to achieve by the termination date of the performance agreement.
 - (2) PERFORMANCE AGREEMENT- The period of a performance agreement described in paragraph (1) shall be for 1 year.
 - (3) REVIEW- Upon the termination of a performance agreement entered into under paragraph (1), the Secretary shall review the performance of the recipient that is a party to the agreement.
 - (4) EFFECT OF REVIEW- If, on the basis of a review under paragraph (3), the Secretary determines that the recipient—
 - (A) has made a good faith effort to meet the compliance objectives specified in the agreement, the Secretary may enter into an additional performance agreement for the period specified in paragraph (2); and
 - (B) has failed to make a good faith effort to meet applicable compliance objectives, the Secretary shall determine the recipient to have failed to comply substantially with this Act, and the recipient shall be subject to an action under subsection (a).”

There is no relevant provision in the existing program regulations. This Notice implements the statutory amendment. The Department will determine whether to include an implementing regulation for section 401(b) when doing rulemaking to revise Subpart F of the regulations to implement the other revisions to section 401 and to section 405.

12. Sec. 1003(k) of P.L. 106-568 outlines the Technical and Conforming Amendments. The first amends the table of contents of NAHASDA; the second repeals sec. 206 of NAHASDA—the Certification of Compliance with Subsidy Layering Requirements;

and the third is titled “Terminations” and relates to the formula and tenant-based housing.

This Notice is implementing provisions one and two above. Sec. 1(b) of NAHASDA was amended in the table of contents by striking the item relating to section 206 and by striking the item relating to section 209 and inserting the following:

“Sec. 209. Noncompliance with affordable housing requirement.”

Sec. 502(a) of NAHASDA is amended by adding language at the end of 502(a). This section now reads as follows:

“(a) TERMINATION OF ASSISTANCE.--After September 30, 1997, financial assistance may not be provided under the United States Housing Act of 1937 or pursuant to any commitment entered into under such Act, for Indian housing developed or operated pursuant to a contract between the Secretary and an Indian housing authority, unless such assistance is provided from amounts made available for fiscal year 1997 and pursuant to a commitment entered into before September 30, 1997. Any housing that is the subject of a contract for tenant-based assistance between the Secretary and an Indian housing authority that is terminated under this section shall, for the following fiscal year and each fiscal year thereafter, be considered to be a dwelling unit under section 302(b)(1).”

The Department believes that a regulatory change is needed to implement this provision. The regulatory change will be made through negotiated rulemaking on formula issues. The Department is currently in the process of selecting members for the negotiated rulemaking committee.

13. Sec. 227 of P.L. 106-377 amended sections 184(a) and 184(b)(2) of the Housing and Community Development Act of 1992, as amended by Title VII of NAHASDA, as follows:

Sec. 184(a) was amended by striking “or as a result of a lack of access to private financial markets”.

The existing sec. 184 regulation at 24 CFR 1005.15 (f) imposes a burden upon a Section 184 borrower, if the property is not on Trust or restricted land, that they “...must certify that the borrower lacks access to private financial markets.” The statutory amendment eliminates the need for this certification from tribal members interested in participating in the 184 loan program in the fee simple land areas primarily in Alaska and Oklahoma or on fee simple lands where an Indian housing authority or Indian tribe is authorized to provide housing.

Sec 184(b)(2) was amended by inserting “refinance,” after acquire. It now reads:

“Eligible Housing. The loan shall be used to construct, acquire, refinance, or rehabilitate 1-to-4 family dwellings that are standard housing and are located on trust land or land located in an Indian or Alaska Native area.”

The current regulation at 24 CFR 1005 does not allow refinance of an existing mortgage in Indian Country. The amendment allows eligible tribal members to use the 184 Loan Guarantee Program to refinance existing higher rate home loans and/or access existing equity in their home.

This Notice is implementing the above provisions and a conforming rule will be published in the future.

_____/s/_____
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