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Part III

Department of Housing and Urban Development

**24 CFR Part 1000
Self-Insurance Plans Under the Indian
Housing Block Grant Program; Final Rule**

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

24 CFR Part 1000

[Docket No. FR-4897-F-02]

RIN 2577-AC58

**Self-Insurance Plans Under the Indian
Housing Block Grant Program**

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

ACTION: Final rule.

SUMMARY: This final rule establishes standards for recipients under the Indian Housing Block Grant (IHBG) program to purchase insurance through nonprofit insurance entities owned and controlled by Indian tribes and tribally designated housing entities (TDHEs). This rule follows publication of a March 7, 2006, proposed rule, and takes into account the public comments received on the proposed rule. This final rule provides additional clarifications in the preamble and adopts, with one change, the regulations in the March 7, 2006, proposed rule.

DATES: *Effective Date:* June 28, 2007.

FOR FURTHER INFORMATION CONTACT:

Rodger J. Boyd, Deputy Assistant Secretary for Native American Programs, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4126, Washington, DC 20410-5000; telephone (202) 401-7914 (this is not a toll-free number). Hearing- and speech-impaired persons may access this number through TTY by calling the Federal Information Relay Service at (800) 877-8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

The Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) (25 U.S.C. 4101 *et seq.*) provides, pursuant to Congress' constitutional authority over Indian affairs, a comprehensive program of housing assistance to Indian tribes and their tribally designated housing entities. NAHASDA eliminated several separate assistance programs for Indian tribes and replaced them with a single block grant program, known as the Indian Housing Block Grant (IHBG) program. The regulations for the IHBG program are codified at 24 CFR part 1000.

Section 203(c) of NAHASDA requires recipients of IHBG program assistance to "maintain adequate insurance coverage for housing units that are owned and operated or assisted with grant amounts

provided under this Act." (See 25 U.S.C. 4133(c).) Section 102 of NAHASDA requires each Indian Housing Plan (IHP) to include a certification that "the recipient will maintain adequate insurance coverage for housing units that are owned and operated with grant amounts provided under this Act, in compliance with such requirements as may be established by the Secretary."

Current regulatory requirements for housing insurance in the Native American housing program are found at 24 CFR 1000.38, 1000.136, and 1000.138. Section 1000.38 delineates when flood insurance is necessary. Section 1000.136(a) requires the funding recipient under the program to provide casualty insurance against fire, weather, and liability claims for all housing units owned or operated by the recipient. Section 1000.136(b) allows for cases where the recipient does not have to provide insurance. These exceptions apply to non-repayable grants to families for housing under the following conditions: there is no risk of loss or substantial financial exposure to the recipient, or the amount of the assistance is less than \$5,000. Section 1000.136(c) requires the funding recipient to require that contractors and subcontractors have adequate insurance or indemnification coverage to cover their activities. Section 1000.136(d) clarifies that the insurance requirements of that section are in addition to the flood insurance requirements of § 1000.38.

Section 1000.138 defines what is considered "adequate insurance." Insurance must be purchased from an insurance provider or plan of self-insurance "in an amount that will protect the financial stability of the recipient's IHBG program." Insurance may be purchased from nonprofit entities without regard to competitive selection if the entities are owned and controlled by the recipients under the program and have been approved by HUD.

II. The March 7, 2006, Proposed Rule

On March 7, 2006, HUD published a proposed rule (71 FR 11464) to establish specific standards under which IHBG assisted housing units may be insured by nonprofit Indian housing risk pools. Historically, commercial insurers have been unwilling to provide insurance for Indian housing at an affordable rate so HUD encouraged the National American Indian Housing Council (NAIHC) to form a risk pool composed solely of Indian housing authorities to provide the legally required insurance coverage. Current regulations in 24 CFR part 1000 generally address required insurance,

but do not set specific standards under which IHBG-assisted housing units may be insured by nonprofit Indian housing risk pools. The proposed rule was intended to ensure that the statutory requirement of NAHASDA regarding the maintenance of adequate insurance is met in a cost-effective manner by regulating the provision of insurance for IHBG-assisted properties. A detailed description of the proposed rule can be found at 71 FR 11464-11468.

III. This Final Rule

This final rule follows publication of the March 7, 2006, proposed rule and takes into account the six public comments received. After careful consideration of the public comments, HUD is making one change to § 1000.139(g) concerning the scope of preemption of this rule. In the proposed rule, § 1000.139(g) stated, in relevant part, "The [self-insurance] plan shall not be bound by or subject to any state or local law that imposed conflicting or additional requirements * * *" At this final rule stage, HUD is amending § 1000.139(g) to more closely reflect the scope of preemption discussed in the preamble of the proposed rule. In the preamble to the proposed rule, HUD stated that its intention in establishing this regulation governing self-insurance plans is to provide a limited preemption necessary to ensure that insurance services for federally assisted housing on tribal lands are provided as required by federal law. (See 71 FR 11465.)

HUD believes that revising paragraph (g) in § 1000.139 to preempt conflicting state laws that impose widely varying and costly requirements on tribally owned housing entities that provide insurance for IHBG-assisted housing best reflects the limited preemption contemplated by HUD by this rule. The preemptive effect of this rule applies to matters covered in § 1000.139, including, for example, the existence, operation, and organization of the self-insurance plan; however, this rule is not intended to apply to external matters such as, for example, laws governing liability, tort actions, and jurisdictional issues.

As described in further detail in section IV, the issues raised by the commenters primarily requested clarifications in the preamble to the proposed rule and did not seek the changes to the proposed regulatory text. Although the regulatory provisions, with the exception as discussed above, are not revised at this final rule stage, HUD is providing additional explanation in this preamble to the final rule about two matters raised by the commenters.

First, this final rule applies to insurance under section 203(c) of NAHASDA and 24 CFR 1000.136 and 1000.138, which, among other things, require insurance in adequate amounts to indemnify the recipient against loss from liability claims. Second, HUD affirms that the phrase “tribal lands,” which was used in the preamble to the proposed rule, is ambiguous and should refer to insurance for “IHBG-assisted housing,” as utilized in the regulation at § 1000.139(g).

IV. Discussion of Public Comments on the March 7, 2006, Proposed Rule

The public comment period on the proposed rule closed on May 8, 2006. HUD received six public comments. Comments were received from a tribally owned nonprofit Indian housing risk pool, an Indian housing authority, a national Indian housing organization, an Indian tribe, an inter-tribal council, and a state insurance division.

In general, all of the commenters expressed general support for the proposed rule but requested that HUD make changes to the preamble and, in one case, to the rule. The summary of comments that follows presents the major issues and questions raised by the public commenters on the March 7, 2006, proposed rule.

Comment: HUD should explain in the preamble to the final rule that the regulation applies to liability insurance. Two commenters explained that historically, it was nearly impossible for Indian tribes to secure liability insurance at reasonable rates, but there was no similar difficulty with respect to securing property insurance. Three other commenters stated that the proposed rule preamble reference to property insurance but not to liability insurance suggested that the preemption covers only property insurance.

HUD Response. HUD agrees with the commenters that the rule’s applicability to liability insurance should be clear. This rule applies to insurance coverage required by section 203(c) of NAHASDA and 24 CFR 1000.136 and 1000.138. The provisions in § 1000.136 require insurance in adequate amounts to indemnify the recipient against loss from liability claims.

Comment: The preamble to the final rule should clarify the scope of the limited preemption to “Indian areas,” as defined by NAHASDA. These commenters suggested that, for purposes of clarity, the rule should track the statutory language of NAHASDA and refer to “Indian areas” rather than “tribal lands” when describing the scope of the preemption provision.

HUD Response. HUD agrees with the commenters that the phrase “tribal lands” in the preamble to the proposed rule could be ambiguous. Therefore, HUD clarifies that the preemption permitted by this final rule is solely for the provision of insurance for “IHBG-assisted housing,” as described in 24 CFR 1000.139(g).

Comment: HUD should clarify that the scope of the preemption is limited to insurance plans providing the coverage required by NAHASDA. One commenter objected to any preemption of state insurance law, given the statutory grant of jurisdiction provided to the states under the McCarran-Ferguson Act (15 U.S.C. 1012–1015). Further, the commenter was concerned that the scope of the preemption might be misinterpreted broadly, contrary to HUD’s stated intent. The commenter suggested that the rule be revised to require that self-insurance plans provide coverage only for the type of insurance required under § 1000.136.

HUD Response. One of the purposes of the rule is to clarify that limited federal preemption is intended. HUD does not agree that it is necessary to amend the rule because the scope of the preemption is limited to the types of coverage required in section 203(c) of NAHASDA and 24 CFR 1000.136 and 1000.138. HUD does not agree that the McCarran-Ferguson Act is applicable. The Supreme Court ruled that the McCarran-Ferguson Act was intended to limit congressional preemption power only under the interstate commerce power, such that the anti-preemption rule does not apply when Congress acts under another grant of authority (*see American Ins. Assoc. v. Garamendi*, 539 U.S. 396 (2003), which held that McCarran-Ferguson does not temper Congress’ authority to act under its power over foreign affairs). The IHBG program is authorized by NAHASDA, which was promulgated under Congress’ plenary authority over the field of Indian affairs and trust responsibility based on the Indian commerce clause, not the interstate commerce clause (*see sections 2(2)–(5) of NAHASDA*, 25 U.S.C. 4101(2)–(5)).

Comment: In the final rule, HUD should revise the preamble to state that the rule does not establish any indemnification or other third-party rights against a nonprofit insurance entity. One commenter stated that this change is necessary to maintain consistency with 24 CFR 1000.136(a), which requires NAHASDA block grant recipients to provide “insurance in adequate amounts to indemnify the recipient against loss.”

HUD Response. The purpose of this rule is to create the regulatory framework for the Indian housing self-insurance program. Accordingly, § 1000.139(a) specifies the type and amount of insurance that is required under the IHBG program. The commenter is asking HUD to opine not on what type or amount of insurance is required, but on the rights of beneficiaries and nonprofit insurance entities. These types of matters are outside the scope of this rulemaking. Accordingly, HUD has not revised the rule in response to the comment.

V. Federalism Summary Impact Statement

In accordance with Executive Order 13132 (Federalism), and the Department’s own policy on federalism, the Department, by letter dated December 16, 2004, notified the attorneys general of each of the 50 states of its intention to promulgate regulations that would govern the insurance of tribal housing under the IHBG program. Because insurance is regulated by state law, HUD recognized the necessity to consult and solicit the views of state governments on this issue. NAHASDA requires tribes and TDHEs to maintain adequate insurance for housing owned and operated using funds that the government provides under NAHASDA. Indian tribes may meet this statutory requirement through tribally owned and operated insurance entities. There is currently one such self-insurance entity, although, once the rule is promulgated, Indian tribes could establish additional ones.

The Department’s December 16, 2004, letter described the current regulatory environment and stated the reason for promulgating the rule. While NAHASDA requires IHBG program recipients to maintain adequate insurance, HUD investigation, including feedback from IHBG program recipients, has determined that in many areas, adequate insurance for federally assisted Indian housing is either unavailable from private insurance companies or prohibitively expensive. The Department believes that the final rule will effectively address this issue by providing regulations under which IHBG program recipients can establish new self-insurance entities, and under which the sole existing IHBG self-insurance risk pool, AMERIND, can operate. Because state insurance laws could potentially conflict with the regulation intended to be established by this rulemaking and, thereby, defeat the important federal purpose underlying this rulemaking by subjecting tribal housing self-insurance entities to widely

varying and costly requirements, the Department determined it was necessary to preempt state law in the area of housing insurance for IHBG-assisted housing. The preemptive effect of this rule is limited to this one area. HUD requested views and comments from the state attorneys general by January 31, 2005. A number of states responded with requests for further clarifications, which HUD provided. Other states asked for copies of the rule or provided a contact point for further information.

On January 27, 2005, a trade association wrote to HUD on behalf of its members seeking an extension of time until February 15, 2005, for the association and its members to provide any additional comments they might have. HUD agreed to this extension. HUD did not receive further correspondence from the association or its members.

HUD believes that regulatory preemption is appropriate in this case, given the limited nature of the preemption, the fact that the limited preemption is necessary to ensure that insurance services for IHBG-assisted housing are provided as required by federal law, and the limited number of self-insurance entities involved.

VI. Tribal Consultation

HUD's policy is to consult with Indian tribes early in the rulemaking process on matters that have tribal implications. Accordingly, on April 12, 2005, HUD sent letters to all eligible funding recipients under NAHASDA and their TDHEs informing them of the nature of the forthcoming rule and soliciting comments. The deadline for comments under this informal consultation was June 3, 2005. The Department received five responses to the April 12, 2005, consultation letter. HUD considered their comments on the proposed changes in the preparation of the March 7, 2006, proposed rule for publication. In the proposed rule, HUD attempted to address all the issues raised by the tribes. In addition, the proposed rule provided Indian tribes with an additional opportunity to comment on the proposed regulatory changes.

VII. Findings and Certifications

Paperwork Reduction Act

The information collection requirements contained in this final rule have been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) and assigned OMB control number 2577–0218. An agency may not

conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

Environmental Impact

This rule does not direct, provide for assistance or loan or mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1531–1538) 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 does not impose a federal mandate on any state, local, or tribal government, or on the private sector, within the meaning of UMRA.

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 of any rule 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. This rule governs only the provision of insurance for IHBG-assisted housing by entities wholly owned and controlled by IHBG recipients. Because there is only one such entity currently in existence, the number of entities affected is not substantial. Therefore, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities, and an initial regulatory flexibility analysis is not required.

Executive Order 13132, Federalism

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order.

HUD has determined that the policies contained in this rule have federalism implications and are subject to review under the order. Specifically, the rule provides for preemption of state regulation of tribal housing self-insurance entities in their coverage of federally assisted housing. HUD's federalism summary impact statement, as required by section 6(b)(2)(B) of the Executive Order, and which discusses this matter in more detail, is presented in Section V of this preamble.

Regulatory Planning and Review

OMB reviewed this rule under Executive Order 12866 (entitled “Regulatory Planning and Review”). OMB determined that this rule is a “significant regulatory action,” as defined in section 3(f) of the order (although not an economically significant regulatory action under the order). The docket file is available for public inspection in the Regulations Division, Office of General Counsel, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the public comments by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number).

Catalog of Federal Domestic Assistance: The Catalog of Federal Domestic Assistance number is 14.867.

List of Subjects in 24 CFR Part 1000

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

■ Accordingly, for the reasons stated in the preamble, HUD amends 24 CFR part 1000 to read 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).

Subpart B—Affordable Housing Activities

■ 2. Add § 1000.139, to read as follows:

§ 1000.139 What are the standards for insurance entities owned and controlled by recipients?

(a) *General.* A recipient may provide insurance coverage required by section 203(c) of NAHASDA and §§ 1000.136 and 1000.138 through a self-insurance plan, approved by HUD in accordance

with this section, provided by a nonprofit insurance entity that is wholly owned and controlled by IHBG recipients.

(b) *Self-insurance plan.* An Indian housing self-insurance plan must be shown to meet the requirements of paragraph (c) of this section.

(c) *Application.* For a self-insurance plan to be approved by HUD, an application and supporting materials must be submitted containing the information specified in paragraphs (c)(1) through (c)(9) of this section. Any material changes made to these documents after initial approval must be submitted to HUD. Adverse material changes may cause HUD to revoke its approval of a self-insurance entity. The application submitted to HUD must show that:

(1) The plan is organized as an insurance entity, tribal self-insurance plan, tribal risk retention group, or Indian housing self-insurance risk pool;

(2) The plan limits participation to IHBG recipients;

(3) The plan operates on a nonprofit basis;

(4)(i) The plan employs or contracts with a third party to provide competent underwriting and management staff;

(A) The underwriting staff must be composed of insurance professionals with an average of at least five years of experience in large risk commercial underwriting exceeding \$100,000 in annual premiums or at least five years of experience in underwriting risks for public entity plans of self-insurance;

(B) The management staff must have at least one senior manager who has a minimum of five years of insurance experience at the level of vice president of a property or casualty insurance entity; as a senior branch manager of a branch office with annual property or casualty premiums exceeding five million dollars; or as a senior manager of a public entity self-insurance risk pool;

(ii) Satisfaction of this requirement may be demonstrated by evidence such as résumés and employment history of the underwriting staff for the plan and of the key management staff with day-to-day operational oversight of the plan;

(5) The plan maintains internal controls and cost containment measures, as shown by the annual budget;

(6) The plan maintains sound investments consistent with its articles

of incorporation, charter, bylaws, risk pool agreement, or other applicable organizational document or agreement concerning investments;

(7) The plan maintains adequate surplus and reserves, as determined by HUD, for undischarged liabilities of all types, as shown by a current audited financial statement and an actuarial review conducted in accordance with paragraph (e) of this section;

(8) The plan has proper organizational documentation, as shown by copies of the articles of incorporation, charter, bylaws, subscription agreement, business plan, contracts with third-party administrators, and other organizational documents; and

(9) A plan's first successful application for approval under this section must also include an opinion from the plan's legal counsel that the plan is properly chartered, incorporated, or otherwise formed under applicable law.

(d) *HUD consideration of plan.* HUD will consider an application for approval of a self-insurance plan submitted under this section and approve or disapprove that application no later than 90 days from the date of receipt of a complete application. If an application is disapproved, HUD shall notify the applicant of the reasons for disapproval and may offer technical assistance to a recipient to help the recipient correct the deficiencies in the application. The recipient may then resubmit the application under this section.

(e) *Annual reporting.* An approved plan must undergo an audit and actuarial review annually. In addition, an evaluation of the plan's management must be performed by an insurance professional every three years. These audits, actuarial reviews, and management reviews must be submitted to HUD within 90 days after the end of the insuring entity's fiscal year and be prepared in accordance with the following standards:

(1) The annual financial statement must be prepared in accordance with generally accepted accounting principles (GAAP) and audited by an independent auditor in accordance with generally accepted government auditing standards. The independent auditor shall state in writing an opinion on whether the plan's financial statement is presented fairly, in accordance with GAAP;

(2) The actuarial review of the plan shall be done consistently with requirements established by the Association of Governmental Risk Pools and conducted by an independent property or casualty actuary who is a member of a recognized professional actuarial organization, such as the American Academy of Actuaries. The report issued and submitted to HUD must include the actuary's written opinion on any over- or under-reserving and the adequacy of the reserve maintained for open claims and for incurred but unreported claims;

(3) The management review must be prepared by an independent insurance consultant who has received the professional designation of a chartered property/casualty underwriter (CPCU), associate in risk management (ARM), or associate in claims (AIC), and must cover the following:

(i) The efficiency of the management or third-party administrator of the plan;

(ii) Timeliness of the claim payments and reserving practices; and

(iii) The adequacy of reinsurance or excess insurance coverage.

(f) *Revocation of approval.* HUD may revoke its approval of a plan under this section when the plan no longer meets the requirements of this section. The plan's management will be notified in writing of the proposed revocation of its approval and of the manner and time in which to request a hearing to challenge the determination, in accordance with the dispute resolution procedures set forth in this part for model housing activities (§ 1000.118).

(g) *Preemption.* In order that tribally owned Indian housing insurance entities that provide insurance for IHBG-assisted housing will not be subject to conflicting state laws and widely varying and costly requirements, any self-insurance plan under this section that meets the requirements of this section and that has been approved by HUD shall be governed by the regulations of this subpart in its provision of insurance for IHBG-assisted housing.

Dated: May 18, 2007.

Orlando J. Cabrera,

Assistant Secretary for Public and Indian Housing.

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