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## MEMORANDUM

September 22, 2016

TO: Tribal Housing Clients

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP

RE: *2013-16 HUD Formula Negotiated Rulemaking Committee Update*

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This memo reports on the recent developments regarding the 2013-16 Indian Housing Block Grant Allocation Formula Negotiated Rulemaking Committee. The purpose of the negotiated rulemaking is to review subpart D of 24 CFR part 1000, which establishes the IHBG allocation formula. This is the third rulemaking to address the IHBG allocation formula provisions, which by their own terms require a negotiated rulemaking every five years.

### A. Pre-Meeting Conference Call

HUD held a brief call on September 15, 2016, in advance of the final meeting of the Rulemaking Committee. Heidi J. Frechette, Deputy Assistant Secretary, Office of Native American Programs, welcomed participants to the call. The purpose of the call was to discuss ongoing technical questions related to the data and the volatility control. Todd Richardson, from HUD's Policy Development and Research Office, provided the Committee members a set of data runs to highlight how the use of American Community Survey ("ACS") data and the volatility control affects the undercount issue.

In its proposed rule, HUD will apply the 2010 Decennial Census data to measure the AIAN population variable, and will apply the 4.88% adjuster to tribes in reservation areas and in Remote Alaska to address the undercount in the Census data. HUD will use ACS data to measure the other six needs variables. HUD will not apply an adjuster to the data for those variables, as HUD received significant comments in opposition to inclusion of the adjuster and therefore removed it, since it was included as a nonconsensus item in the first instance.

In response to Committee member requests, HUD will include new runs with ACS data adjusted prior to the Oklahoma City meetings. HUD also agreed to provide a narrative with detailed assumptions prior to the meetings.

The application of the ACS data to the other six needs variables has increased the year-to-year volatility, because the ACS data is based on rolling sampling, generating a new five-year rolling average. Mr. Richardson explained that there are now 33 additional tribes receiving the minimum grant level, for a total of 124 minimum grant tribes. There are 249 tribes receiving funds between the minimum grant level and the \$500,000 level. The new volatility issue will most significantly affect the minimum grant tribes and those tribes at the middle funding levels. Mr. Richardson said that the increased volatility issue would continue to be discussed at the Oklahoma City meetings.

## **B. Ninth and Final Meeting of 2013-16 IHBG Negotiated Rulemaking Committee**

The ninth meeting of the 2013-16 Indian Housing Block Grant Allocation Formula Negotiated Rulemaking Committee took place in Oklahoma City, on September 20 - 21, 2016. This meeting was the final meeting of this round of negotiated rulemaking, in order to consider and respond to the public comments on the proposed rule, which was published in June 2016.

The meeting was opened with comments from the HUD Principal Deputy Assistant Secretary for the Office of Public and Indian Housing, Lourdes Castro Ramirez. She also gave an update on the HUD Tribal Intergovernmental Advisory Committee. HUD will be publishing information shortly about how to apply to become a member of that Committee. Also, next week, HUD will be hosting a Native Youth Leadership summit in Washington, DC. Over 100 Native youth have been invited for a four day session to meet with Administration and Congressional leaders, and to learn more about HUD and housing programs. She introduced the new Deputy Assistant Secretary for ONAP, Heidi Frechette. Ms. Frechette also made a few welcoming remarks. The Negotiated Rulemaking Committee then approved the agenda for the meeting and the minutes from the prior meeting before moving into the substantive items.

Aaron Santa Anna from the HUD Office of General Counsel gave the procedural overview for the two day meeting. This rulemaking process held its first meeting in July 2013, and has held eight prior meetings. The goal is still to get the final rule published and in effect by the end of this calendar year. To that end, the Committee needs to spend these two days going through the public comments and giving them consideration. Doing so is an obligation of HUD as a federal agency. HUD has prepared a summary of public comments, and proposes to go through them issue-by-issue, rather than comment-by-comment, since many of the comments address the same issues.

HUD received 22 separate public comments, although some of them were duplicative. Several of the comments provided constructive suggestions for addressing the “demolished units” issue that was the basis of one of the changes to the proposed rule that came out of the HUD internal clearance process. Many of the comments focused on the various aspects of the Needs variables: the definition of “Indian lands” in Remote Alaska; the adjusters for inaccurate census data; and the volatility control. HUD would like to get through all of the 22 comments during the two day meeting. Each comment

will be summarized and a response provided in the final rule. Mr. Santa Anna drafted a proposed response to each of the comments, which will be presented to the Committee for consideration.

*1. Need for a federally conducted National Tribal Survey*

One commenter recommended that tribes continue to find common ground on changes to the IHBG funding formula and push for the self-determined goal of building tribally driven data sources. This commenter also stated that it is the duty of HUD and the Federal government to assist tribes in seeking data sources that most appropriately reflect and represent the conditions and characteristics of their tribal communities and that this includes providing tribes the training and technical assistance to develop their own tribal data sources for housing and community development purposes. Another commenter recommended that HUD should consider developing or using a federally conducted National Tribal Survey to collect demographic and enrollment information for NAHASDA-eligible tribes. According to the commenter, a National Tribal Survey, jointly designed by HUD and tribes, would collect demographic data directly related to the IHBG formula. The commenter wrote that the survey could be administered by the Census Bureau under contract from HUD, much the same way the American Housing Survey is now done for special data related to public housing information. The commenter concluded that there would be many advantages to such a survey, including a focus on information essential for IHBG fund allocation, providing flexibility in survey design to accommodate future changes to the IHBG formula, and using said survey to inform a more accurate allocation of funds in other Indian programs like education and health care.

Mr. Santa Anna's proposed response was to state that the Committee supports the recommendation that the tribes find common ground by developing a tribally driven data source, but that the Committee also emphasizes that the data study group (established by the Committee) considered a National Tribal Survey and identified significant concerns and was not able to reach consensus on such a proposal. The proposed response also identified a number of the concerns with such a proposal, such as the time and cost of implementing it, the challenges it would face, and that it would seem duplicative of other data collection activities. The proposed response also noted that HUD lacked the resources to carry out such a survey. The response ended with a statement that HUD will continue to work with the American Indian and Alaska Native Data Improvement Workgroup, the National Advisory Committee, and other Tribal consultation efforts helping to design the 2020 Decennial Census to improve data collection in tribal communities.

One of the Committee members asked why the proposed response contained only negative statements about the National Tribal Survey. Another committee member said she opposed the first sentence of the proposed response – that the Committee supports the recommendation that the tribes find common ground by developing a tribally driven data source – because the Committee never took any such action to make such a

recommendation. She proposed it be deleted. Another committee member noted that there were some positive statements about a National Tribal Survey in the Data Source Study Group report, and proposed that some of those positive statements be included as well. The Committee tabled the issue to give HUD time to address this question and incorporate some of those positive statements.

HUD came back with a revised proposed response. That response included some positive comments about a National Tribal Survey. The Committee members who were supportive of a National Tribal Survey proposed their own revisions to the response, which included reference to the Data Study Group's report and the fact that the Committee could not reach consensus on any alternative to the ACS data source. The Committee reached consensus on the alternative proposed language as a response to the comments.

*2. Impact on other organizations that use the IHBG factors or data*

One commenter responded to HUD's request for public comment regarding how the proposed changes to the IHBG formula would potentially impact nonprofits, state and local governments, and other organizations that are not IHBG recipients. The commenter stated that the effect of IHBG formula on outside stakeholders should have no bearing on the implementation of changes to the IHBG formula. The commenter also stated that the purpose of the IHBG formula is to allocate Federal Indian Housing resources to eligible recipients to address the housing needs of Alaska Native and American Indian families and that impact on other entities is not within the scope of factors that HUD may consider in the course of negotiating the IHBG formula.

Mr. Santa Anna shared the HUD proposed response, which states that the Committee is aware that some other organizations rely on the data, but that the effect on other stakeholders should have no bearing on how this Committee makes its determination on this rule. The Committee approved the response by consensus.

*3. Minimum total grant allocation of carryover funds is inconsistent with NAHASDA*

One commenter expressed opposition to the Minimum Total Grant Allocation of Carryover Funds (24 CFR 1000.329) stating that it is an arbitrary allocation rather than a need-based allocation, as required by NAHASDA. The commenter stated that adjusting the formula simply because carryover funds are added is a departure from the need-based model and will mean funding is withheld from tribes with more demonstrable needs. The commenter suggested that if carryover funds cannot be added to the total allocation, then the carryover funds should be used for drug clean-up grants.

HUD's proposed response was that the Committee disagrees that 1000.329 is inconsistent with NAHASDA, and that HUD has the authority to make this allocation. It is simply a recalibration of the minimum funding amount if there are carry-over funds, which follows the same authority that supports 1000.328 (which establishes the minimum

funding allocation). Further, the proposed response notes that HUD does not have the statutory authority to award funds specifically to fund drug control elimination efforts, but that grantees may choose to spend their IHBG funds to remediate units as doing so is an eligible activity under the IHBG program. The Committee approved the response by consensus.

4. *Minimum total grant allocation of carryover funds should be clarified*

One commenter recommended that § 1000.329(c) be clarified to read, “To be eligible, a tribe must certify in its Indian Housing Plan the presence of any eligible households at or below 80 percent of median income.” (The new, clarifying language is underlined.) The basis of the commenter’s concern is that the language should be identical to the parallel provision in 1000.328(b)(2), which also addresses the minimum funding issue, and includes the prefatory language.

HUD’s proposed response is to agree with the commenter and include the proposed clarifying language in 1000.329(c), so that the two provisions dealing with the same issue are the same, which will avoid any potential ambiguity. The Committee approved the proposed change and response by consensus.

5. *“Indian lands” in Remote Alaska for purposes of adjustment*

Several commenters stated that the term “Indian Lands” in § 1000.330(b)(i) needs to be clarified as it pertains to Alaska Native villages in Remote Alaska. One commenter stated that the term was not meant to mean “Indian Country”, but was meant to refer to the lands within the formula area of the villages (Alaska Native Village Statistical Areas). The commenter recommended that the Committee not change this section if this is the understanding of how this term would be interpreted. The commenter requested, however, that the term be clarified as including those lands comprising the formula areas of the Alaska Native Villages if there is confusion regarding this interpretation.

Another commenter stated that aggravating the ambiguity is the absence of any definition of the term “Indian Lands” in NAHASDA or the NAHASDA regulations, and the various uses of the term by other Federal agencies (e.g., the Department of Energy under the Alaska Native Claims Settlement Act, 25 U.S.C. §3501). This commenter stated that there are no reservation or trust lands in Remote Alaska other than the Metlakatla Reservation, and concluded that confining the term to reservations and trust lands in this unique context would render the provision meaningless. The commenters asserted that the committee adopted the term “Indian Lands” in the committee briefings to also include Alaskan Native Village areas in Remote Alaska and proposed a documented definition or a technical amendment specifically stating that Alaskan Native Villages or Indian Lands in Remote Alaska shall be treated as reservation and trust lands.

The proposed response is to remove the term “Indian Lands” and replace it with “For Remote Alaska as defined by the U.S. Census Bureau, Alaska Formula Areas shall be...” This proposal would replace the ambiguous term “Indian Lands” with reference to a defined term in the IHBG rule (Alaska Formula Areas). The Committee approved this change by consensus.

6. *Require HUD to issue a report on the data source and update the data source if necessary*

A commenter recommended that the volatility control provision, in §1000.331, be retained if HUD proceeds with using the American Community Survey (ACS), as adjusted, to determine the variables described in § 1000.324. The commenter also recommended that the rule require HUD to renegotiate this provision if it determines that the use of ACS data or U.S. Census Bureau county level population estimates for Native Americans results in inaccurate figures. Specifically, the commenter recommended the addition of the following provision:

§1000.330(d) After fiscal year 2018, but before fiscal year 2023, HUD shall prepare a report on the use of the data sources in this Section, including whether the data sources provide reliable information on the funding variables described in §1000.324, and provide tribes an opportunity to comment on the report. If the report determines that the data sources used in this section result in unreliable data, HUD shall propose a more reliable data source.

HUD’s proposed response is to indicate that the Committee considered the comment and agreed not to add the language proposed, because the Committee notes that the recommended language is ambiguous. Additionally, the Data Study Group extensively evaluated all data sources used in the formula during negotiated rulemaking. The resulting report outlining the Data Study Group’s process and final recommendations to the Committee was published with the proposed rule. The Committee approved this comment by consensus.

7. *Counting and averaging of the U.S. Decennial Census data*

One group of commenters recommended the U.S. Decennial Census data be adjusted for both over- and undercounts for accuracy. The commenter also requested clarification on who determines what is “significant” since it is not defined in the regulations. Another group of commenters recommended that HUD must determine what the actual undercounts are on a reservation-by-reservation basis instead of utilizing an average undercount for its adjustment.

HUD’s proposed response is that the Committee considered these comments and agreed that the regulation should make adjustment for any statistically significant under- or overcount as determined by the U.S. Census Bureau. In the case of an overcount, however, the adjustment would not be presumed to apply to formula areas not explicitly

incorporated in the Census Bureau determination, e.g., areas in Remote Alaska. Statistical significance is the level of confidence that a relationship between two or more variables is caused by something other than random chance. The U.S. Census Bureau determines whether overcounts or undercounts are statistically significant. Finally, HUD does not have the administrative capability to determine actual undercounts on a reservation-by-reservation basis.

One Committee member took issue with the last sentence, since it is not HUD that determines under- or overcounts, but rather the U.S. Census. The Committee agreed to add language that it is the Census that does that statistical analysis. Another Committee member stated that the Committee did not agree to do anything about overcounts, but only undercounts, and that the proposed response suggests that it did. This Committee member wanted to make sure that the rule would not trigger some kind of recalculation of the formula if the Census determines that there is an overcount. This Committee member then proposed some additional language clarifying that the language should not be read to allow for downward adjustments based on overcounts, and that there was no evidence of any statistically significant overcounts from the Census.

Several Committee members asked why the adjustments for undercounts can't be done tribe-by-tribe, rather than a blanket adjustment for all tribes who fall within a certain category. The concern is that since the data regarding undercounts is generalized, some tribes may be getting an adjustment that does not match the inaccuracy in the data specific to that tribe (i.e., some tribes will get the benefit of an upward adjustment even though they may not have had an undercount). Todd Richardson explained that the data regarding undercounts is generalized and cannot be applied tribe-by-tribe. There is currently no means for the Census or HUD to refine the existing data to do a tribe-by-tribe analysis. The Committee negotiated further and came up with the following response:

The Committee considered these comments and agreed that the regulation should not make adjustment for any statistically significant overcount. The Committee, during its eighth session, considered how to address undercounts and overcounts reported by the U.S. Census Bureau. The Committee, by consensus, determined that adjustments to data should be made for statistically significant undercounts. The Committee did not reach consensus on any adjustments to data based upon overcounts. The Census reports reviewed during the convenings<sup>1</sup> of the Committee did not indicate any statistically significant overcounts. The U.S. Census Bureau determines whether overcounts or undercounts are statistically significant. Currently there is no way to determine actual overcounts or undercounts on a reservation-by-reservation basis.

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<sup>1</sup> “Convenings” is the word actually used by the Committee.

## 8. *Demolition of FCAS units*

There were three commenters on the demolition issue. This became an issue because the Committee had originally reached consensus on a four year time period for rebuilding, but the HUD OIG stated that this was inconsistent with the NAHASDA statute. HUD asked for commenters to suggest alternative approaches.

One commenter stated that section 302(b)(1)(C) of NAHASDA triggers a one-year time period at the time of demolition, regardless of how demolition occurs. The commenter stated that section 302(b)(1)(C) does not require completion of the unit within the one-year period, but requires that the construction process begin within one year of the demolition. Based on this interpretation of the statute, the commenter recommended that the Committee adopt language that requires rebuilding to begin within one year of demolition, and be completed within two years (or three years for certain larger rebuilding projects).

Another commenter recommended that the Committee define the terms “demolish” and “rebuilds” using a standard dictionary definition and consistent with Congressional intent. With regard to the term “demolish”, the commenter stated that standard dictionary definitions convey a sense of completeness, and define this term as requiring a deliberate, human, caused process. In defining “rebuilds”, the commenter notes that the statute uses the present active tense, to provide more flexibility.

A third commenter supported the preamble definition of demolition, "as occurring only when a recipient voluntarily demolishes units in order to clear a site for a new replacement unit." The commenter also recommended that the Committee define "demolition" in a way as to provide maximum flexibility to tribes. The commenter recommended, therefore, a definition for demolition that takes these concerns into account and allows tribes and TDHEs maximum flexibility in rehabilitation and reconstruction of FCAS units that are destroyed or demolished due to events beyond the control of the tribe/TDHE.

HUD took these comments into consideration and proposed the following language:

A unit that is demolished pursuant to a planned demolition may be considered eligible as an 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 geographic location, 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.

HUD’s attorneys explained that this approach gives flexibility because of its broadly defined concept of “demolition,” after which there is the statutory one-year period. As



far as justification for the one-year extension, HUD's attorneys stated that Section 302 of NAHASDA allows for consideration of other factors in the IHBG formula, including "geographic" distribution. This is language that HUD's attorneys discussed with OIG, and believe that OIG will approve.

One Committee member asked to add the language "administrative capacity" to the additional one year exception, because that is in Section 302 as well. Lourdes Castro Ramirez stated that HUD is willing to add that language and to try and negotiate that language with OIG, but that they do not want this issue to hold up approval of the rule. Therefore, they will make the argument to OIG but would go back to their original proposal if OIG does not agree. Another Committee member asked that we simply add the language from Section 302 of the statute in its entirety, and see if OIG is agreeable to that approach, with the fallback being the language that they have agreed to.

One commenter asked whether the factor of a legal impediment to rebuilding can be built in here. The HUD attorneys said no, because it is not tied to a factor in the statute. This issue involved a lot of internal debate at HUD, and this is the best that the HUD attorneys think that they can get through internal review with no changes. HUD was asked about the limitation of a "planned demolition." HUD staff appeared to have different positions. One of the attorneys stated that this language only covers voluntary, intentional demolition. If the demolition of the unit is from natural causes (fire, flood, etc.), this language would not directly apply – HUD has a different process and timeline for units destroyed from natural causes. But if there is disaster (fire, flooding) that damages a building(s), and you decide to plan a demolition, this provision will apply once you carry out that planned demolition. The HUD attorneys emphasized, however, that units that are damaged by natural disasters cannot be left vacant indefinitely. At some point, you will have to plan a demolition and a rebuild, or the unit will be taken off FCAS because it is not a dwelling unit, which is what FCAS funding is allowed for.

The Committee reached consensus on the HUD proposal, as amended by the proposal to include all the language from Section 302, with the understanding that if HUD cannot sell this concept to the OIG, HUD would revert to the original proposal.

The Committee then went back to each of the three individual comments and agreed upon responses to each of those comments. The responses pointed out the concerns with each of the comments, and pointed to the language that was agreed upon, as discussed above.

#### *9. Control weights within the ACS not a valid measure of other variables*

Several commenters expressed concern with the adjustment of § 1000.330(b)(ii) (which was HUD's nonconsensus approach, applying the reservation and trust area adjusters to the ACS data for the non-AIAN persons Need variables), stating that it is not reasonable to assume that an undercount of one variable, AIAN persons, should be applied to the other variables and require an adjustment of those variables. HUD in fact

decided to remove the adjusters as applied to the Need variables other than AIAN persons, based on these comments and its own internal analysis. Since HUD's original decision was a nonconsensus decision, HUD's decision to change is not subject to consensus either.

HUD's proposed response is that the proposed adjustment is to reduce some of the likely error, but that after careful consideration HUD determined that it does not do enough to address volatility associated with small areas to warrant its introduction as a nonconsensus adjustment. One Committee member stated that because this is HUD's nonconsensus decision, there was no need for the Committee to vote on the language, and withheld consensus on this language. There was a proposal to add language that would clarify that the decision was a nonconsensus decision by HUD, which was adopted by the Committee.

*10. The ACS data is unreliable*

One commenter stated that they did not support § 1000.330(b)(ii), because the ACS is neither reflective nor representative of the commenter's tribal community. The commenter also stated that the flaws in the ACS data cannot be fixed by a weighting that uses the ACS count of American Indian and Native persons. Another commenter questioned the accuracy of ACS data given the sampling, response and inclusion rates, as well as its failure to capture tribal enrollment information. The commenter concluded that reliance on these data would harm poorer tribes with the worst housing, and thus disproportionately affect the funding accessible to them via the Need component of the IHBG funding formula.

HUD's proposed response involved stating that the Committee did a thorough review of ACS as a data source, and that although consensus was not achieved on the use of a data source, HUD has determined that ACS is the most current and accurate data available for measuring Need. The proposed response went on to detail HUD's reasoning as to why they reached this conclusion, while also noting some issues with ACS. The proposed response also noted that the minimum grant amounts and adjusters will help mitigate the shortcomings of ACS. Finally, the proposed response states that HUD is committed to work with the Census Bureau to improve the accuracy of the counts. Some Committee members proposed taking out HUD's detailed discussion of the pros of the ACS as a data source. The Committee reached consensus on a revised version of HUD's proposed response.

*11. Opposition to implementing a nonconsensus adjustment to the ACS data (§ 1000.330(b)(ii))*

The commenters expressed disappointment with HUD in proposing to implement the reweighting proposal that is part of § 1000.330(b)(ii) despite broad opposition from tribal Committee members. The commenters urged HUD to respect the perspective of the majority of the Committee tribal members and not implement the reweighting

proposal. Another commenter stated that HUD should not unilaterally move forward with its own proposals if no consensus is found, but rather should rely on the existing language of the regulations since that approach was the result of a prior consensus between HUD and the tribes.

Several commenters stated that they do not support the implementation of any nonconsensus items, and referred to the adoption of the ACS. Several of these commenters also concluded that implementing a nonconsensus item severely dilutes the significance of this process, is not a sign of negotiating in good faith, and is inconsistent with what constitutes government-to-government consultation. One of the commenters also stated that the summary section of the proposed rule was inaccurate by stating that the proposed regulatory changes reflect the consensus decision of the Committee since the adoption of the data source itself was not made by consensus, and recommended that HUD revise the sentence to reflect that the proposal included regulatory changes that did not achieve consensus.

HUD's proposed response states that HUD disagrees with the suggestion that moving forward with a nonconsensus item indicates a lack of good faith or a lack of consultation, and that nevertheless HUD has agreed to remove the ACS data adjustment. The Committee reached consensus on this proposed response.

#### *12. Committee should clarify volatility control provision*

This provision was the most difficult to resolve, because certain problems were identified with the language in the volatility control provision as applied with the ACS data source. There was a substantial discussion with Todd Richardson of the HUD PDR division regarding the formula issues. First, here are the summaries of the comments received.

Several commenters stated that a strict construction of § 1000.331(a) would defeat the intent of the Committee in agreeing to the provision. According to these commenters, the intent of § 1000.331(a) was to limit the impact of adopting a new data source (ACS) on those tribes that will be significantly and adversely affected by that conversion. The commenters wrote that as written, however, the relief would only be available if the tribe can show that the greater than 10 percent Needs grant decline occurred, "solely as a direct result of the introduction" of the ACS. The commenters stated that the record of the Committee proceedings indicates that was not the Committee's intent. One commenter presented several examples, including one which provided that if a tribe that suffered a 65 percent reduction and can trace only 64.9 percent of its reduction to adoption of the ACS, it would be disqualified from receiving any volatility control assistance, because its decline would not have been "solely as a direct result of the introduction" of ACS.

The commenters recommended that § 1000.331(a) be revised by substituting "primarily as a result" for "solely as a direct result." These same commenters also recommended that the intent of § 1000.331(a) be clarified by adding a definition for

“primarily as a result” to read, “As used in this section, “primarily as a result” means that the introduction of a new data source, in-and-of-itself, would result in greater than a 10 percent decline in the tribe’s Need component allocation, irrespective of any declines attributable to causes other than introduction of that data source.”

After the introduction of these comments, Todd Richardson made a presentation addressing these comments as well as an additional concern that arose when HUD carried out the data runs. He first went over the proposed volatility control language. The concept was that if as a result of introduction of a new data source, a grantee’s IHBG allocation would be more than 10% lower than the previous fiscal year, that grantee’s allocation will be adjusted so that the allocation is no more than 10% lower. The language is limited only to the Needs portion of the allocation, and excludes minimum grant amounts, census challenges, or FCAS. He then showed how the volatility control worked as a result of the introduction of ACS as a new data source in year one, but then in year two, with the use of the new ACS data (since ACS data changes every year as a rolling five year sample), there are several tribes that take a loss of over 10%. The volatility control will not apply to these tribes, because the change from the prior fiscal year is not as a result of the introduction of a new data “source,” but just new data from the source that had been introduced in the prior year. Smaller tribes are the tribes that tend to see the larger losses from the new data in the ACS in year two. In any given year, there will be similar volatility, and it will mostly hit smaller tribes. There are some other anomalies: there are 29 tribes that make contributions to the volatility control due to gains in year one, despite the fact that their year two grant has fallen below their base year funding due to the introduction of new data from ACS in year two; over 10 years, “gainer” tribes give up less than 50% of their year one gain in contributions to the volatility control system.

Based on Mr. Richardson’s comments, HUD wanted to know if there was any interest in revising the agreed-upon language to address these unforeseen anomalies.

One of the commenters who raised the initial concern in the comments proposed a change to the language that would replace “solely as a direct result” with “primarily as a result” and defining that term. Mr. Richardson and Peggy Cuciti addressed this comment by stating that the methodology used to calculate this impact of the new data source does not allow this concern, because it excludes beforehand the changes based on other factors. HUD proposed that the word “solely” be removed. The Committee discussed this change and agreed with the change, so long as there is a detailed response explaining how HUD is able to address the “directly as a result” language. HUD and tribal attorneys worked on the proposed response, which reads as follows:

Ensuring that grantees have stable allocations is a priority for the Committee. The original intent of 1000.331 was to protect tribes against significant fluctuations with the introduction of the 2010 Decennial Census and ACS data. When HUD introduces a new data set, HUD will not apply volatility control. When HUD introduces a new data source, HUD will apply volatility control. For example,

when a new ACS data set is available from year-to-year, HUD will not apply volatility control. When new Decennial Census data is available, HUD will apply volatility control (e.g., 2020 Decennial Census).

HUD understands the concern expressed in the comment, however, HUD is able to isolate the impact on the Tribes' funding allocations that is due to the introduction of the ACS as a new data source. This ability to isolate the impact, and apply the control on the basis of that impact alone alleviates the concerns of the commenters. HUD will continue to apply the same methodology to calculate the impacts of introduction of a new data source to avoid the concerns raised by the commenters with the agreed upon language.

Another Committee member pointed out that the year-to-year volatility of the ACS data, as explained by HUD, shows that this is a flawed data source. But the Committee was unwilling to reopen the language of the rule to make any changes to the language. HUD tried to raise the question of whether there should be any change to the volatility control to take into account the year-to-year volatility of the use of ACS. There was no agreement to do so.

HUD also raised the question of whether the introduction of the data from the 2020 Decennial Census comes in as a new data source (which requires application of the volatility control) or is simply a new data set (which does not require application of the volatility control). HUD's attorneys stated that they are seeking clarification on this point for when the 2020 Decennial Census comes online. There was some discussion on this point. After such discussion, the Committee clarified its understanding that the introduction of a new data source will apply to the introduction of ACS, and to the introduction of the 2020 Decennial Census data when that comes online.

### *13. Rulemaking was successful*

The final discussion concerned a comment that thanked everyone involved in the negotiated rulemaking process, and noting that it was difficult, but successful. HUD proposed language stating that the Committee appreciates the comment, extends its appreciation to all involved, and that the success of negotiated rulemaking rests on the spirit of cooperation and hard work. One of the Committee members objected, saying that the rulemaking was not "successful," because the Committee saw that the ACS data was not a good fit, but that the rule uses it anyway. She proposed inserting the word "educational" rather than "successful." There was no consensus on this proposed change, because other Committee members wanted to keep the word successful in, and added that as well as the addition of "educational." The Committee agreed to that change.

## **C. Next Steps in Rulemaking Process**

Aaron Santa Anna described the next steps. HUD will take the changes and responses, and include them in the final rule. There will be a section that lists out

changes from the proposed rule. There will also be a section laying out the public comments and the responses. That final draft will be shared with the Committee members once it is done and launched into departmental clearance. He thinks that HUD will ask for expedited clearance internally, and they expect it will move through smoothly, since the HUD attorneys have been consulting with OIG. The next step would be for the final rule to go through clearance at OMB. OMB has been supportive and cooperative with HUD's goal of getting this rule approved so that HUD can have this rule published before the end of the calendar year. It will go into effect 30 days after publication. The publication of the final rule will also involve a revision to the appendices attached to the rule, which are the mathematical formulae for application of the formula pursuant to the rule.

#### **D. Public Comment**

At the end of the deliberations there was time for public comment. One commenter from Tlingit-Haida Regional Housing Authority briefly spoke about how impressed he was with the Committee and the progress it made, and wished that Congress could see how the Committee worked and try to act in the same spirit. Several of the regional ONAP administrators were asked to provide public comments. The regional administrator from Oklahoma welcomed everyone to Oklahoma City and thanked everyone for their hard work.

Finally, Committee members made closing remarks thanking everyone for their participation and their honor in being able to participate.

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