

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

24 CFR Part 1000

[Docket No. FR-4897-P-01; HUD-2006-0004]

RIN 2577-AC58

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

AGENCY: Office of Public and Indian Housing, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would establish standards for recipients under the Indian Housing Block Grant Program to purchase insurance through nonprofit insurance entities owned and controlled by Indian tribes and tribally designated housing entities.

DATES: *Comment Due Date:* May 8, 2006.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410-0500. Interested persons also may submit comments electronically through the Federal eRulemaking Portal at: <http://www.regulations.gov>. Commenters should follow the instructions provided on that site to submit comments electronically.

Facsimile (FAX) comments are not acceptable. In all cases, communications must refer to the docket number and title. All comments and communications submitted will be available, without change, for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. 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). Copies are also available for inspection and downloading at <http://www.regulations.gov>.

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; 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

A. Statutory and Regulatory 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 \$5,000.00. 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 section 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.

B. Historical Background

In many areas, commercial insurers have been unwilling to provide property insurance for Indian housing at an affordable rate. Prior to NAHASDA, the annual contributions contract (ACC) required Indian housing assisted under the United States Housing Act of 1937 to have adequate insurance. HUD's practice was to competitively procure a master insurance policy for all public and Indian housing authorities (IHAs). This practice did not prove effective in obtaining adequate housing insurance for public and Indian housing. In 1986, HUD had to reject the only bid submitted for the master policy because it offered no liability insurance, had only limited property coverage, and was exorbitantly expensive.

Because of difficulties of procuring adequate housing insurance, HUD encouraged the National American Indian Housing Council (NAIHC) to form a risk pool composed solely of IHAs to provide the legally-required insurance coverage for HUD-assisted housing on tribal lands. HUD provided federal funds to assist with the creation of this risk pool. AMERIND Risk Management Corporation (AMERIND) was incorporated in 1986 under the laws of the Red Lake Band of Chippewa Indians (Minnesota) as a self-insurance risk pool for IHAs and Indian tribes pursuant to an intergovernmental agreement. HUD approved the self-insurance plan as a means of protecting federally subsidized Indian housing units. AMERIND continues to administer the approved self-insurance plan for properties funded under NAHASDA, pursuant to 24 CFR 1000.138.

Prior to the effective date of NAHASDA, AMERIND operated under HUD's Indian Housing regulations at 24 CFR 950.190, which did not address preemption of state law. After NAHASDA became effective, those Indian Housing regulations were replaced with the current regulations in 24 CFR part 1000. While the regulations in part 1000 generally address required insurance, they do not set specific standards under which IHBG-assisted housing units may be insured by tribally owned insurance entities. This proposed rule is necessary to address a

nationwide lack of available insurance coverage for affordable, IHBG-assisted housing. After receiving feedback from IHBG recipients that standard commercial insurance premiums were either unavailable or prohibitively expensive, the NAIHC conducted a voluntary survey to assess the depth of the problem across the country. The survey showed a clear need for affordable insurance coverage for IHBG-assisted units. The survey also demonstrated that IHBG recipients that obtained insurance through a self-insurance plan realized considerable savings in their premiums. Indeed, for some recipients, such as those in remote geographies, a self-insurance plan was the only coverage available.

This proposed rule is intended to ensure that NAHASDA's statutory requirement of adequate insurance is met in a cost-effective manner by regulating the provision of insurance for IHBG-assisted properties. In the absence of reasonably detailed national guidelines for tribally owned Indian housing insurance entities, HUD fears a repeat of the 1986 situation where there will be no insurance coverage available for affordable Indian housing. The cost of compliance with duplicative or conflicting state or local requirements would cause IHBG recipients to divert scarce IHBG funds for affordable housing and limit the recipients' options, thereby failing to fulfill the intent of Congress "to assist and promote affordable housing activities" (section 201(a) of NAHASDA, 25 U.S.C. 4131(a)(1)). Nonprofit self-insurance pools that are wholly owned and controlled by IHBG recipients further NAHASDA's primary objective "to promote self-sufficiency of Indian tribes" (section 201(a)(2) of NAHASDA, 25 U.S.C. 4131(a)(2)) by permitting tribal recipients to use nonprofit self-insurance plans as an alternative risk financing mechanism to reduce the cost and expense of maintaining adequate insurance coverage for affordable housing assisted by IHBG. Uniform national federal regulation of nonprofit self-insurance plans maximizes the economies of scale for Indian tribes located in different states and fosters efficient pooling of self-insurance risks by removing the possibility of duplicative or conflicting state requirements. Therefore, HUD believes that this rule, which sets guidelines for tribally-owned insurance pools for tribal housing and provides for a limited preemption of state and local law, is necessary.

II. This Proposed Rule

This proposed rule would provide regulations for a self-insurance plan for housing assisted under the IHBG program. This rule governs all property insurance required for Indian Housing Block Grant housing, except for flood insurance required under 24 CFR 1000.38. Section 1000.38 remains unchanged. The regulations provide that the self-insurance plan be operated on a nonprofit basis and owned and controlled by IHBG funding recipients. The rule would provide criteria for management and underwriting staff experience as well as appropriate accounting and financial management. In order to ensure appropriate financial management, the rule would include an annual audit requirement. Also, the rule would provide for HUD approval and the ability of HUD to revoke its approval if an entity no longer meets the standards of this rule. The rule would preempt state and local laws to ensure that a participating Indian housing self-insurance entity has to meet a single set of criteria, thus enabling it to save in compliance costs.

The sole purpose of this rule is to establish regulatory standards for self-insurance entities. This rule does not establish any indemnification or other third-party rights against the federal government, either on behalf of the insurance entity or a party purchasing such insurance. In the Department's determination, HUD is not liable for any financial shortfall or loss resulting from the operation of self-insurance entities operating under the authority of this regulation.

III. Federalism Summary Impact Statement

In accordance with Executive Order 13132 (Federalism), and the Department's own policy on federalism, by letter dated December 16, 2004, the Department 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 property 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 tribally designated housing entities 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 proposed 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 tribally owned Indian housing 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 tribally-owned and operated 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.

The December 16, 2004, letter provided the first step in HUD's consultation process on this rulemaking. HUD welcomes and will consider further comments from the states on this rulemaking. HUD believes that given the limited nature of the preemption, the fact that the limited preemption is necessary to ensure that insurance services for federally assisted housing on tribal lands are provided as required by federal law, and the limited number of self-insurance entities involved, regulatory preemption is appropriate in this case.

IV. 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 tribally designated housing entities 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 has attempted to address all the issues raised by the tribes in this proposed rule. In addition, tribes have the opportunity to comment on this proposed rule, and HUD welcomes such comment.

V. Findings and Certifications

Paperwork Reduction Act

The information collection requirements contained in this rule have

been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

The burden of the information collections in this proposed rule is estimated as follows:

REPORTING AND RECORDKEEPING BURDEN

Section reference	Number of parties	Number of responses per respondent	Estimated average time for requirement (in hours)	Estimated annual burden (in hours)
1000.139	1	1	10	10

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning this collection of information to:

- (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Interested persons are invited to submit comments regarding the information collection requirements in this rule. Under the provisions of 5 CFR part 1320, OMB is required to make a decision concerning this collection of information between 30 and 60 days after today's publication date. Therefore, a comment on the information collection requirements is best assured of having its full effect if OMB receives the comment within 30 days of today's publication. This time frame does not affect the deadline for comments to the agency on the interim rule, however. Comments must refer to the proposal by name and docket number (FR-4897) and must be sent to:

HUD Desk Officer, Office of Management and Budget, New

Executive Office Building, Room 10235, Washington, DC 20503. Fax number: (202) 395-6974 and Sherry Fobear-McCown, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4255, Washington, DC 20410-0500.

Environmental Impact

This proposed 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 proposed 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 proposed 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 proposed rule will not have a significant economic impact on a substantial number of small entities, and an initial regulatory flexibility analysis is not required.

Notwithstanding the determination that this rule would not have a significant economic impact on a substantial number of small entities, HUD specifically invites comments regarding less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

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 proposed 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 III of this preamble.

Regulatory Planning and Review

The Office of Management and Budget (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). Any changes made to this rule as a result of that review are identified in the docket file, which is available for public inspection in the Regulations Division, Office of the 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 described in the preamble, HUD proposes to amend 24 CFR part 1000 as follows:

PART 1000—NATIVE AMERICAN HOUSING ACTIVITIES

1. The authority citation for 24 CFR Part 1000 continues to read as follows:

Authority: 25 U.S.C. 4101 *et seq.*; 42 U.S.C. 3535(d).

Subpart B—Affordable Housing Activities

2. Add a new § 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 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.* Any self-insurance plan under this section that meets the requirements of this section and that has been approved by HUD shall be

governed exclusively by these regulations in its provision of insurance for IHBG-assisted housing. The plan shall not be bound by or subject to any state or local law that imposes conflicting or additional requirements, nor shall the plan avoid the requirements of these regulations on the ground that such avoidance is permissible under state or local law.

Dated: February 7, 2006.

Orlando J. Cabrera,

Assistant Secretary for Public and Indian Housing.

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