



REGULATORY INTERPRETATION 2001-RI-05

Date: May 3, 2001

Subject: Prospective Application of Monitoring Requirements, and Use of Affordable Housing Program (AHP) Funds As “First-In” Money Under the AHP Regulation (12 C.F.R. part 951)

Request Summary:

Several questions have been raised regarding the Federal Home Loan Banks’ (Banks) implementation of the AHP regulation. Specifically, clarification has been requested regarding: (1) whether section 951.16 of the AHP regulation requires the monitoring provisions of sections 951.10 and 951.11 of the regulation to apply retroactively to projects approved prior to the effective date of the regulation; and (2) whether AHP funds may be used as “first-in” money for a project. These questions are discussed further below.

Analysis and Discussion:

1. Prospective Application of Monitoring Requirements

Section 951.16 of the AHP regulation does not require that the monitoring provisions of sections 951.10 and 951.11 of the regulation apply retroactively to projects approved prior to the effective date of the regulation. *See* 12 C.F.R. §§ 951.10, 951.11 and 951.16. In 1997, the Finance Board adopted a revised AHP regulation that went into effect on January 1, 1998. Section 951.16 (formerly section 960.16) of the regulation states that the provisions of the regulation apply to all existing AHP-assisted projects, and that no changes made by the regulation affect the legality of actions taken prior to the effective date of the regulation. *See* 12 C.F.R. § 951.16. Consequently, as explained in the Supplementary Information section of the final rule amending the AHP regulation in 1997, the monitoring requirements established in sections 951.10 and 951.11 of the regulation apply to projects approved on or after January 1, 1998, and to projects approved prior

to January 1, 1998, but only prospectively. *See* 62 Fed. Reg. 41812, 41813 (Aug. 4, 1997). That is, project sponsors and owners, members and Banks must implement the revised monitoring requirements in the regulation for all AHP projects for the period from January 1, 1998 going forward, regardless of when the projects were approved. The revised monitoring requirements do not apply retroactively to any monitoring actions taken or not taken before January 1, 1998. For example, if an entity is required under the AHP regulation to make a specific certification to the Bank that was not required for AHP projects prior to January 1, 1998, the certification must be made for all of the entity's AHP projects for the period from January 1, 1998 going forward, regardless of when the projects were approved. The entity is not required to provide the certification for the period prior to January 1, 1998.

2. Use of AHP Funds as “First-In” Money

The AHP regulation generally allows AHP funds to be used as “first-in” money for a project in the sense that project sponsors or owners may obtain commitments of AHP subsidy from a Bank before obtaining commitments of or receiving funds from other funding sources. Since the inception of the AHP in 1990, AHP funds have acted as “first-in” money, which project sponsors and owners have used to attract and leverage funding commitments from other funding sources.

The AHP regulation allows a project sponsor or owner to obtain AHP subsidy commitments from a Bank before obtaining commitments of or receiving funds from other funding sources, as long as the feasibility of the proposed project has already been established, and the AHP subsidy is likely to be drawn down or used by the project to procure other financing commitments within 12 months of the date of approval of the application for AHP subsidy. *See* 12 C.F.R. § 951.5(b)(2)(iii) and (b)(3). Section 951.5(b)(2)(i)(A) of the AHP regulation requires only that the proposed project's sources of funds include estimates of funds the project sponsor or owner intends to obtain from other funding sources but which have not yet been committed to the project. The amount of AHP subsidy committed by the Bank is based on the estimates of funds to be obtained from other funding sources. Once those other sources of funds are committed, the amount of AHP subsidy actually disbursed to the project may be reduced or increased depending on whether the amounts of funds committed from the other funding sources are higher or lower than the estimates for such funds. If the project needs an increase in the amount of AHP subsidy originally approved, then the project must be modified and rescored in accordance with section 951.7 of the AHP regulation in order to be eligible to receive any additional AHP subsidy.

Section 951.10(c)(1)(ii) and (c)(2)(ii) of the AHP regulation provides that for owner-occupied and rental projects, a Bank must review project documentation after project completion to determine that a project's actual costs were reasonable and customary in accordance with the Bank's project feasibility guidelines, and that the AHP subsidies provided to the project were necessary for the financial feasibility of the project, as currently structured. *See* 12 C.F.R. § 951.10(c)(1)(ii) and (c)(2)(ii). At that time, the project's final statement of sources and uses of

funds will document any changes in the original funding estimates made in the project's application for AHP subsidy. As stated in the Supplementary Information section of the final rule amending the AHP regulation in 1997, "while the [regulation] in no way is intended to prevent AHP subsidies from being used as "first-in" money, the [regulation] provides for safeguards against misuse of such subsidies, consistent with the requirements of other funding sources." See 62 Fed. Reg. 41812, 41825 (Aug. 4, 1997).

Each Bank has the discretion to determine in its policies and feasibility guidelines, as part of its AHP Implementation Plan, whether to require that proposed projects have any other sources of funds committed to the project prior to being able to obtain commitments of AHP subsidies from the Bank. Some Banks have decided not to require commitment of funds from other funding sources before the Bank will commit AHP subsidies to a project, while other Banks have decided to require commitment of up to 70 percent of the total funding from other funding sources before the Bank will commit AHP subsidies to a project.

As discussed in the Supplementary Information section of the final rule amending the AHP regulation in 1997, the AHP regulation does not allow AHP subsidies to be used as "first-in" money in the sense of being used to pay for pre-development expenses, such as site planning and market analysis costs, in order to determine if a proposed project is feasible in the first place. See 62 Fed. Reg. 41812, 41819 (Aug. 4, 1997). Section 951.5(b)(2)(iii) of the regulation requires that projects be feasible in order to receive AHP subsidies. See 12 C.F.R. § 951.5(b)(2)(iii). Proposed projects that have been determined to be feasible may include pre-development expenses that have already been incurred as project costs in their AHP applications, and the AHP subsidy approved for the project may cover such costs.

Interpretation:

1. The AHP regulation does not require that the monitoring provisions of the regulation apply retroactively to projects approved prior to January 1, 1998, the effective date of the regulation. Project sponsors and owners, members and Banks must implement the revised monitoring requirements in the regulation for all AHP projects for the period from January 1, 1998 going forward, regardless of when the projects were approved. The revised monitoring requirements do not apply retroactively to any monitoring actions taken or not taken before January 1, 1998.
2. The AHP regulation allows a project sponsor or owner to use AHP funds as "first-in" money for a project in the sense that the project sponsor or owner may obtain AHP subsidy commitments from a Bank before obtaining commitments of or receiving funds from other funding sources, as long as the feasibility of the proposed project has already been established, and the AHP subsidy is likely to be drawn down by the project or used by the project to procure other financing commitments within 12 months of the date of

approval of the application for AHP subsidy. The AHP regulation does not allow AHP subsidies to be used as “first-in” money in the sense of being used to pay for pre-development expenses in order to determine if a proposed project is feasible in the first place, as projects are required to be feasible in order to receive AHP subsidies. Proposed projects that have been determined to be feasible may include pre-development expenses that have already been incurred as project costs in their AHP applications, and the AHP subsidy approved for the project may cover such costs.

A Regulatory Interpretation applies only to the particular transaction or activity proposed by the requestor, may be relied upon only by the requestor, and is subject to modification or rescission by action of the Board of Directors of the Finance Board. 12 CFR part 907.