

July 2019

## **Federal Home Loan Bank Affordable Housing Program**

### **12 C.F.R. Part 1291**

#### **Questions and Answers on the November 28, 2018 Final Rule--Part I**

This document sets forth answers prepared by Federal Housing Finance Agency (FHFA) staff in response to questions raised about amendments to the Affordable Housing Program (AHP) regulation by the final rule issued on November 28, 2018.<sup>1</sup> The questions and answers constitute informal staff explanations or clarifications of certain provisions of the final rule for the Federal Home Loan Banks (Banks), Bank members, and AHP participants. The final rule became effective on December 28, 2018, with a compliance date of January 1, 2021, except for section 1291.15(a)(7) on owner-occupied units, which has a compliance date of January 1, 2020, with one variance.<sup>2</sup> Section 1291.2 of the final rule provides that, starting December 28, 2018, a Bank may elect to comply with any provision of the final rule before its applicable compliance date.

#### **Owner-Occupied Retention Agreements**

##### Applicability of Owner-Occupied Retention Agreements

**Q1:** Do the regulatory amendments to the requirements for homeownership retention agreements in section 1291.15(a)(7) apply under the Banks' General Funds and Targeted Funds, as well as under their Homeownership Set-Aside Programs?

**A1:** Yes, they apply to all three programs.

**Q2:** Does the final rule continue to require retention agreements where the AHP subsidy is used for construction of owner-occupied units?

**A2:** Yes. Section 1291.15(a)(7) inadvertently omitted the reference in the AHP regulation to construction, which FHFA plans to correct in a future technical corrections rule or other rule.

##### Notice Provision in Owner-Occupied Retention Agreements

**Q3:** Section 1291.15(a)(7)(i) requires that a Bank be given notice of any sale, transfer, assignment of title or deed, or refinancing of the AHP-assisted unit during the AHP five-year retention period. Prior to the final rule, the regulation required that this notice be provided to either the Bank or its designee. What actions are the Banks expected to take when they receive these notices?

**A3:** As stated in the final rule preamble, the notice requirement facilitates program operations by making a Bank aware of events that might trigger an obligation to obtain repayment of AHP subsidy. Upon receiving notice, a Bank would implement its internal procedures for determining whether any repayment of AHP subsidy is required and, if applicable, seeking repayment. In addition, the notice could facilitate repayment of AHP subsidy to a Bank in cases of a merger or where a member fails and is subject to receivership actions by other federal agencies.

Removal of Requirement for Retention Agreements for Households Receiving AHP Subsidy Solely for Rehabilitation of Owner-Occupied Units

**Q4:** Section 1291.15(a)(7) provides that, starting on January 1, 2020, a Bank may not require AHP retention agreements where the AHP subsidy is used solely for rehabilitation of an owner-occupied unit. Can a Bank decide to no longer require retention agreements for these units before the January 1, 2020 compliance date?

**A4:** Yes. A Bank may, at its discretion, stop implementing or enforcing retention agreements for AHP subsidy awards to an owner-occupied unit where the AHP subsidy is used solely for rehabilitation. As indicated in the December 26, 2018 email to the Banks from the FHFA Deputy Director, Division of Bank Regulation, FHFA has requested that if a Bank decides to implement this change before January 1, 2020, it notify FHFA within 30 days after adopting the decision.

**Q5:** On or after January 1, 2020, will a Bank have the discretion to continue requiring retention agreements for owner-occupied units where the AHP subsidy is used solely for rehabilitation?

**A5:** No. The regulation prohibits the adoption of any eligibility requirement for its General Fund, any Targeted Funds, and any Homeownership Set-Aside Programs where the subsidy is used solely for rehabilitation.<sup>3</sup>

**Q6:** If a Bank decides to implement only this change before January 1, 2020, is it required to simultaneously implement any other changes made in section 1291.15(a)(7) of the final rule?

**A6:** No.

**Q7:** How should a Bank treat a retention agreement on an owner-occupied unit that received AHP subsidy solely for rehabilitation, where the agreement was executed prior to the January 1, 2020 compliance date for owner-occupied retention agreements in section 1291.15(c), but an event that would trigger repayment of the AHP subsidy occurs on or after January 1, 2020?

**A7:** The retention agreement may not be enforced on or after January 1, 2020. Under section 1291.15(a)(7), a Bank may not require a retention agreement for owner-occupied units that receive AHP subsidy solely for rehabilitation on or after January 1, 2020. Section 1291.15(c) incorporates the entire AHP regulation into all agreements between a Bank and any member, project sponsor, or project owner receiving AHP subsidies under the General Fund and any Targeted Funds, and between a Bank and any member or unit owner under any Homeownership Set-Aside Programs. Accordingly, enforcement of a retention agreement of this type would be inconsistent with the final rule. A Bank is not required to amend or release the retention agreement because the agreement is amended by operation of law.

**Q8:** How should a Bank treat a retention agreement on an owner-occupied unit that received AHP subsidy solely for rehabilitation, where the Bank elects under section 1291.2 to comply with the owner-occupied retention agreement provisions of section 1291.15(a)(7) before the January 1, 2020 compliance date and the retention agreement was executed prior to the earlier

compliance date, if an event that would trigger repayment of the AHP subsidy occurs on or after the earlier compliance date?

**A8:** The retention agreement may not be enforced on or after the earlier compliance date. Under section 1291.15(a)(7), a Bank may not require a retention agreement for owner-occupied units that receive AHP subsidy solely for rehabilitation on or after January 1, 2020, or, under section 1291.2, such earlier date as determined in the Bank’s discretion. Section 1291.15(c) incorporates the entire AHP regulation into all agreements between a Bank and any member, project sponsor, or project owner receiving AHP subsidies under the General Fund and any Targeted Funds, and between a Bank and any member or unit owner under any Homeownership Set-Aside Programs. Therefore, and as similarly explained above in A7, enforcement of a retention agreement of this type would be inconsistent with the final rule. A Bank is not required to amend or release the retention agreement because the agreement is amended by operation of law.

#### Calculation of AHP Subsidy Repayment Based on Net Proceeds and Household’s Investment

**Q9:** Section 1291.15(a)(7)(v)(B) requires subtraction of the AHP-assisted “household’s investment” from any net proceeds in calculating the amount of AHP subsidy required to be repaid to the Bank. What documentation is needed by a household to confirm the “household’s investment” for purposes of this calculation?

**A9:** Section 1291.1 of the final rule defines the “household’s investment” as the expenditures specified in that section that are paid by the household and documented in the Closing Disclosure or other settlement statement, if applicable, or elsewhere. An “other settlement statement” could include, for example, a HUD-1, which was commonly used prior to the change by the Consumer Financial Protection Bureau to the Closing Disclosure. A Bank may accept other documentation besides settlement statements if the Bank determines that they are reasonable evidence of the household’s expenditures. For example, a household may provide copies of cancelled checks as evidence of the down payment paid by a household in connection with the purchase of the unit. A household may produce documentation (e.g., cancelled checks, receipts, and invoices) of expenditures associated with capital improvements (e.g., installation of a new roof or a new heating/ventilation/air conditioning system) related to the unit. A household may also produce documentation from its mortgage lender (e.g., detailed payoff statements) as evidence of any mortgage principal paid since purchase of the unit.

A Bank’s procedures should provide for the Bank or its designee to notify AHP-assisted households at the time they purchase units that they should maintain documentation of their household investments in case the unit is sold or refinanced during the five-year retention period. The procedures should also provide that the households be given a reasonable amount of time, as specified by the Bank in the procedures, to provide the documentation to the Bank or its designee in the event of a sale or refinancing. If any portion of the household’s total investment cannot be adequately documented within the amount of time specified in the Bank’s procedures, that portion would not be subtracted from the net proceeds in calculating the amount of AHP subsidy required to be repaid by the household to the Bank.

## **Scoring Criteria for the General Fund**

**Q1:** How is the phrase “such as” in section 1291.6 defined?

**A1:** The phrase “such as,” which the final rule generally did not alter, is consistent with the common usage of the phrase. In other words, it precedes an illustrative, but not exhaustive, list of examples that meet the criteria in the paragraph. A Bank may choose to adopt one or more of the examples as part of its scoring system, and may adopt additional examples not specified in the regulation, provided they meet the criteria in the paragraph and are similar in nature to the specific examples provided in the regulation.

**Q2:** Section 1291.26 of the final rule states that FHFA may provide guidance on other housing needs that would qualify under the underserved communities and populations and creating economic opportunity scoring categories.<sup>4</sup> When will FHFA issue this guidance?

**A2:** FHFA may, in the future, find it beneficial to expand the housing needs eligible under these scoring categories through the issuance of guidance, but has no prescribed timeframe to do so.

## **Monitoring of Low-Income Housing Tax Credit (LIHTC) Projects**

**Q1:** What are the final rule’s new monitoring requirements for AHP projects that receive LIHTCs?

**A1:** The final rule removes the requirement for Banks to review back-up household income and rent documentation for LIHTC projects at initial monitoring.<sup>5</sup> The final rule continues to require the Banks to review certifications from LIHTC project sponsors that the residents’ incomes and rents comply with the income-targeting and rent commitments in the approved AHP application. The final rule also codifies a requirement, consistent with Bank practice, that the Banks review LIHTC projects’ rent rolls, which include each household’s income and rent.

For long-term monitoring of LIHTC projects, as discussed in the final rule preamble and consistent with long-standing regulatory provisions, the Banks are not required to review any household income and rent documentation from LIHTC project sponsors. The final rule language in section 1291.50(c) inadvertently omitted this exception, which FHFA plans to correct in a future technical corrections rule or other rule.

The final rule added a requirement that the Banks include in their AHP monitoring agreements with members, and that members include in their agreements with project owners, that project owners provide prompt written notice to the Bank if an AHP-assisted LIHTC project is in material and unresolved noncompliance with LIHTC household income targeting or rent requirements at any time during the AHP 15-year retention period.<sup>6</sup> Banks must review any LIHTC noncompliance notices received from project owners so that they are aware of the noncompliance and can take actions regarding the project as required by the AHP regulation.<sup>7</sup>

**Q2:** For AHP projects receiving LIHTCs, are project sponsors required to complete the enhanced annual certification form during long-term monitoring?

**A2:** No.

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<sup>1</sup> 83 Fed. Reg. 61186 (Nov. 28, 2018).

<sup>2</sup> The Banks are required to comply with section 1291.15(a)(7)(ii)(B) on the date set forth in FHFA guidance on proxies referenced therein.

<sup>3</sup> 12 C.F.R. § 1291.20(a)(2), (b)(2)(ii); § 1291.42.

<sup>4</sup> 12 C.F.R. § 1291.26(e)(6), (f)(3).

<sup>5</sup> 12 C.F.R. § 1291.50(a)(3)(i).

<sup>6</sup> 12 C.F.R. § 1291.15(a)(5)(ii).

<sup>7</sup> 12 C.F.R. § 1291.50(c)(1)(ii).