



REGULATORY INTERPRETATION 1999-RI-14

Date: August 27, 1999

Subject: Questions on the Revised Affordable Housing Program Regulation

Request Summary/Background:

A Federal Home Loan Bank (FHLBank) has a homeownership project where the homeowner is refinancing and paying off the Affordable Housing Program (AHP) grant. The FHLBank proposes to calculate recapture based on a straight pro-rata without any “time value of money”, and asks: (1) whether that method of calculation is correct, and (2) whether there is a *de minimis* amount where the FHLBank would not be required to recapture. The FHLBank also proposes to use a mortgage that will secure a tri-party agreement and use it as a model, with appropriate adjustments, for each state in their district, and asks whether this method of retention is acceptable under the regulation.

Analysis or Discussion:

Section 960.13(d)(iii) of the revised AHP regulation states that in the case of refinancing prior to the end of the retention period, an amount equal to a pro rata share of the direct subsidy, reduced for every year the occupying household has owned the unit, shall be repaid to the FHLBank from any net gain realized upon the refinancing, unless the unit continues to be subject to a deed restriction or other legally enforceable retention agreement or mechanism.

If the unit remains subject to a legally enforceable retention mechanism, no recapture is necessary. However, if recapture is warranted, Finance Board staff considers it reasonable to calculate the recapture amount based on a straight line pro-rata.

Under section 960.12(a)(1) and (b) of the AHP regulation, a FHLBank is required to recapture the amount of any subsidies (plus interest, if appropriate) that, as a result of the actions or omissions of a member, project sponsor or project owner, is not used in compliance with the terms of the application for the subsidy, as approved by the FHLBank and the requirements of this part. The AHP regulation does not provide for a *de minimis* amount exception to the FHLBank’s recapture obligation.

If an FHLBank views a recapture amount as too small to justify recapture efforts, it has at least two additional options. One option would be to request in writing that the Finance Board issue a No-Action Letter for a specific set of circumstances in accordance with 12 C.F.R. part 903. A second alternative would be for the FHLBank to simply reimburse the AHP fund directly for the *de minimis* amount.

Section 960.13(a) of the AHP regulation requires an FHLBank to have in place with each member receiving AHP subsidy an agreement containing the provisions set forth in section 960.13. *See* 12 C.F.R. § 960.13(a). One of these provisions is a requirement that the member ensure that the AHP-funded project is subject to a “deed restriction or other legally enforceable retention agreement or mechanism”, containing the requirements set forth in section 960.13, including: (i) for rental projects, the project’s rental units must remain occupied by and affordable for households with incomes at or below the levels committed to be served in the AHP application for the duration of the retention period; and (ii) the Bank or designee is to be given notice of any sale or refinancing of the project occurring prior to the end of the retention period. The AHP subsidy must be recaptured under certain circumstances, as specified in section 960.13. *See* 12 C.F.R. § 960.13 (c)(4)-(5) and (d)(1)-(2).

Whether a retention agreement/mortgage entered into pursuant to these regulatory requirements is legally enforceable will depend on the local real estate, contract and any other laws applicable to this type of agreement in the state where the agreement is executed. The FHLBank is responsible for taking whatever actions are required under local law to ensure that the contractual affordability, notice and recapture requirements of section 960.13 can be enforced.

Conclusion:

With respect to the questions pertaining to the pro-ration of recapture, a *de minimis* exception to recapture, and acceptable methods of retention, it is the opinion of the staff that if recapture is warranted it is reasonable to calculate the recapture amount based on a straight line pro-ration. In addition, the AHP regulation does not provide for a *de minimis* amount exception to the FHLBank’s recapture obligation. Finally, the FHLBank is responsible for taking whatever actions are required under local law to ensure that the contractual affordability, notice and recapture requirements of section 960.13 can be enforced.

<p>A <u>Regulatory Interpretation</u> 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. 64 Fed. Reg. 30880 (June 9, 1999), <i>to be codified at</i> 12 C.F.R. part 903.</p>
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