

## FEDERAL HOUSING FINANCE AGENCY

### 12 CFR Parts 1290 and 1291

RIN 2590-AA83

### Affordable Housing Program Amendments

**AGENCY:** Federal Housing Finance Agency.

**ACTION:** Proposed rule.

**SUMMARY:** The Federal Housing Finance Agency (FHFA) is issuing notice and providing an opportunity for the public to comment on proposed amendments to its regulation on the Federal Home Loan Banks' (Banks) Affordable Housing Program (AHP or Program). The proposed amendments would provide the Banks additional authority to allocate their AHP funds; authorize the Banks to establish special competitive funds that target specific affordable housing needs in their districts; provide the Banks authority to design and implement their own project selection scoring criteria, subject to meeting certain FHFA-prescribed outcome requirements; remove the requirement for retention agreements for owner-occupied units; further align the project monitoring requirements with those of other federal government funding programs; clarify the provisions on remediating AHP noncompliance; clarify certain operational requirements; and streamline and reorganize the regulation.

**DATES:** Written comments must be received on or before May 14, 2018.

**ADDRESSES:** You may submit your comments on the proposed rule, identified by regulatory information number (RIN) 2590-AA83, by any one of the following methods:

- *Agency Website:* [www.fhfa.gov/open-for-comment-or-input](http://www.fhfa.gov/open-for-comment-or-input).
- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by email to FHFA at [RegComments@fhfa.gov](mailto:RegComments@fhfa.gov) to ensure timely receipt by FHFA. Include the following information in the subject line of your submission: Comments/RIN 2590-AA83.

- *Hand Delivered/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590-AA83, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW, Washington, DC 20219. Deliver the package at the Seventh Street entrance Guard Desk,

First Floor, on business days between 9 a.m. and 5 p.m.

- *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590-AA83, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW, Washington, DC 20219. Please note that all mail sent to FHFA via U.S. Mail is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks. For any time-sensitive correspondence, please plan accordingly.

**FOR FURTHER INFORMATION CONTACT:** Ted Wartell, Manager, Office of Housing and Community Investment, 202-649-3157, [ted.wartell@fhfa.gov](mailto:ted.wartell@fhfa.gov); Marcea Barringer, Senior Policy Analyst, Office of Housing and Community Investment, 202-649-3275, [marcea.barringer@fhfa.gov](mailto:marcea.barringer@fhfa.gov); Marshall Adam Pecsek, Senior Counsel, Office of General Counsel, 202-649-3380, [marshall.pecsek@fhfa.gov](mailto:marshall.pecsek@fhfa.gov); or Sharon Like, Managing Associate General Counsel, Office of General Counsel, 202-649-3057, [sharon.like@fhfa.gov](mailto:sharon.like@fhfa.gov). These are not toll-free numbers. The mailing address is: Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877-8339.

#### SUPPLEMENTARY INFORMATION:

##### I. Comments

FHFA invites comments on all aspects of the proposed rule and will take all comments into consideration before issuing a final rule. A list of FHFA's requests for comments on specific issues appears in Section V. Please identify the specific request for comment to which you are responding by its request number. Copies of all comments will be posted without change, and will include any personal information you provide such as your name, address, email address, and telephone number, on the FHFA website at <http://www.fhfa.gov>. In addition, copies of all comments received will be available for examination by the public through the electronic rulemaking docket for this proposed rule also located on the FHFA website.

##### II. Background

###### A. Overview of Current Program

The Federal Home Loan Bank Act (Bank Act) requires each Bank to establish an affordable housing program, the purpose of which is to enable Bank members to provide subsidies for long-term, low- and moderate-income,

owner-occupied and affordable rental housing.<sup>1</sup> The Banks may provide AHP subsidies to finance: Homeownership by families with incomes at or below 80 percent of area median income (AMI); and the purchase, construction, or rehabilitation of rental housing, at least 20 percent of the units of which will be occupied by and affordable for very low-income households.<sup>2</sup> "Affordable for very low-income households" is defined to mean that rents charged to tenants for units made available for occupancy by low-income families shall not exceed 30 percent of the adjusted income of a family whose income equals 50 percent of AMI, with adjustment for family size.<sup>3</sup> FHFA's regulation implementing the Bank Act's AHP requirements is set forth at 12 CFR part 1291.

The AHP has played an important role in facilitating the Banks' support of their members' efforts to meet the affordable housing needs of their communities. Between 1990 and 2016, the Banks awarded approximately \$5.4 billion in AHP subsidies to assist the financing of over 827,000 housing units through two programs—the Competitive Application Program and the Homeownership Set-Aside Program. From 1990 to 2016, the Banks awarded approximately \$4.4 billion under the Competitive Application Program, assisting over 660,000 units, 71 percent of which were for very low-income households. From 1995 to 2016, the Banks awarded almost \$1 billion under the Homeownership Set-Aside Program, assisting the financing of approximately 167,000 owner-occupied units.<sup>4</sup> AHP subsidies have proven effective in funding projects that present underwriting challenges, such as projects for the homeless and special needs populations, including persons with disabilities and the elderly. One strength of the AHP is its capacity to leverage additional public and private resources for affordable housing. For example, the AHP has been used effectively by project sponsors with a number of different federal and state funding sources, including Low-Income Housing Tax Credits (LIHTC or tax credits), an important funding source for rental housing for very low-income households.

###### B. AHP Regulatory History

FHFA and one of its predecessor agencies, the Federal Housing Finance Board (Finance Board), have engaged in

<sup>1</sup> 12 U.S.C. 1430(j)(1).

<sup>2</sup> 12 U.S.C. 1430(j)(2).

<sup>3</sup> 12 U.S.C. 1430(j)(13)(D).

<sup>4</sup> The Competitive Application Program began in 1990, and the Homeownership Set-Aside Program began in 1995.

numerous rulemakings over the years to revise, clarify, and streamline the AHP requirements as the program has evolved and housing markets have changed. In the early years of the Program, the Finance Board designed the AHP regulation to address affordable housing needs from a national policy perspective. The regulation contained scoring criteria (referred to as “regulatory priorities”) that represented specific housing needs existing in all of the Bank districts that the Finance Board viewed as national policy priorities. The Banks would review and forward the AHP applications to the Finance Board’s Board of Directors, who would approve eligible applications in accordance with the regulation’s competitive scoring system. Subsequent AHP rulemakings progressively devolved specific approval and governance authorities to the Banks in order to enhance the ability of the Banks to address specific affordable housing needs in their respective districts. Highlighted among these regulatory amendments are the following:

- 1995—The rule authorized the Banks to establish Homeownership Set-Aside Programs to provide grants for households purchasing or rehabilitating homes. The Finance Board increased the maximum permissible annual funding allocation for these optional programs several times after 1995.

- 1997—The rule transferred approval authority over the AHP applications from the Finance Board to the Banks. The rule also substantially modified the scoring system, including establishing five regulatory priorities selected by the Finance Board, and allowing the Banks greater input in selecting scoring criteria and scoring points allocations based on their district housing needs. This included authority to select “Bank First District Priority” scoring criteria (from a list of specific housing needs identified in the regulation) and a “Bank Second District Priority” scoring criterion (a specific district housing need identified by the Bank), which together accounted for a maximum of 50 scoring points out of 100. The regulation also established specific initial and long-term project monitoring requirements.

- 2006—The rule provided the Banks with more discretion to establish project monitoring and other requirements and authorized the use of AHP subsidies with revolving loan funds and loan pools.

- 2009—The rule expanded the Banks’ authority to target specific affordable housing needs in their districts by allowing the Banks to identify and include multiple district

housing needs under their Bank Second District Priority scoring criterion.

The AHP regulation currently authorizes the Banks to establish and administer two programs: A mandatory Competitive Application Program; and an optional Homeownership Set-Aside Program. Each Bank generally is required to allocate annually at least 65 percent of its required annual AHP contribution to its Competitive Application Program.<sup>5</sup> Under the Competitive Application Program, Bank members apply to the Banks for AHP subsidies on behalf of project sponsors, which are typically nonprofit affordable housing developers, but may include for-profit organizations. The regulation requires the Banks to develop and implement a Competitive Application Program scoring system subject to requirements in the regulation, which serves as a tool for evaluating and selecting the project applications that will receive a limited supply of AHP subsidies. During the 28 years that the Programs have operated, the demand for the AHP subsidies has always exceeded the amount available. In 2016, the Banks approved, on average, 43 percent of applications received. In total, the Banks awarded \$283.4 million in AHP subsidies under their Competitive Application Programs in 2016 to help finance the purchase, construction, or rehabilitation of 25,530 rental and owner-occupied housing units.

The regulation also provides that each Bank may allocate annually up to the greater of \$4.5 million or 35 percent of its required annual AHP contribution to fund its Homeownership Set-Aside Program. Under this program, members apply to the Banks for AHP subsidies, which are provided to low- or moderate-income homebuyers or homeowners for the purchase or rehabilitation of homes. In 2016, the Banks provided members a combined total of \$85.5 million through their Homeownership Set-Aside Programs, which assisted 13,555 low- or moderate-income homebuyers or homeowners.

### C. Bank and Stakeholder Input

In accordance with FHFA’s five-year regulatory review plan, FHFA published a Notice of Regulatory Review in the **Federal Register** in 2013 requesting comment on FHFA’s existing regulations for purposes of improving their effectiveness and reducing their burden.<sup>6</sup> In response, the Banks jointly

<sup>5</sup> Where a Bank allocates the alternative maximum amount of \$4.5 million to its Homeownership Set-Aside Program, the Bank may allocate less than 65 percent of its total AHP funds to its Competitive Application Program.

<sup>6</sup> See 78 FR 23507 (April 19, 2013).

submitted a letter to FHFA commenting on the AHP and other FHFA regulations.<sup>7</sup> Addressing the AHP regulation, the letter argued that prescriptive, outdated, or ambiguous provisions of the regulation created inefficiencies and uncertain risk exposures, and recommended that FHFA review the regulation and consider clarifications and enhancements to further empower the Banks in the management of their Programs.

In response to the Banks’ recommendations, FHFA undertook a comprehensive review of the AHP regulation, including AHP issues on which FHFA had provided regulatory guidance. To further inform the review, FHFA held a number of discussions separately or jointly with the Banks’ Community Investment Officers (CIOs), the Bank Presidents’ Housing Committee, leadership of the Banks’ Affordable Housing Advisory Councils, and other AHP stakeholders including Bank member institutions and representatives of several national and regional nonprofit housing organizations. The Banks and stakeholders uniformly expressed support for the AHP, viewing the program’s affordable housing mission favorably and acknowledging its longstanding reputation as a well-managed program and the critical role it plays in affordable housing initiatives throughout the country.

At the same time, the CIOs and stakeholders offered a number of specific recommendations to improve the operation of the AHP. The recommendations were directed largely at (1) expanding the Banks’ authority to allocate their AHP funds; (2) providing the Banks authority to devise their own project selection methods, including the use of non-competitive processes; (3) clarifying the requirements for determining a project’s need for AHP subsidy; (4) aligning the project monitoring requirements with those of other major funding sources; (5) clarifying the Banks’ authorities to resolve project noncompliance; (6) clarifying certain operational requirements; and (7) codifying FHFA regulatory guidance in the regulation. Although a majority of the CIOs and stakeholders expressed the view that the existing regulatory requirements for scoring AHP applications limit a Bank’s ability to effectively target specific housing needs within its district, others stated that the project scoring system

<sup>7</sup> See Comment Letter from 12 Banks to FHFA, dated June 18, 2013.

provides the Banks sufficient scoring flexibility and does not need revision.

After reviewing all of the specific recommendations, FHFA determined that a number of the recommended changes are already permissible under the current regulation and, therefore, do not require regulatory amendments. A number of other recommendations are clearly impermissible under the Bank Act and, therefore, cannot be authorized in the AHP regulation without statutory amendments. The remaining recommendations generally require revisions to the AHP regulation. FHFA analyzed these recommendations to determine whether they were appropriate from a policy standpoint and consistent with the statutory requirements. FHFA also considered the impact that adopting these recommendations would have on populations in greatest need of affordable housing assistance, the AHP's reputation as a well-managed program, and FHFA's ability to supervise, examine, and monitor the Banks' Programs. Based on FHFA's analyses of the recommendations and its review of the Programs, FHFA is proposing to amend the AHP regulation as further discussed below.

The proposed rule would authorize the Banks to develop and implement an "outcome-based approach" for administering their competitive application programs (the proposed General Fund and any Targeted Funds established by a Bank discussed below). This approach would differ significantly from the existing project selection scoring process, which requires Banks to allocate a majority of the points for scoring applications to several pre-determined housing needs priorities. Instead, the proposed rule would require each Bank to design and implement its own system to address specific housing needs in its district. However, the scoring system would need to result in the Bank awarding a majority of its AHP funds to certain regulatory priorities established by FHFA as well as the housing priorities specified in the Bank Act. The Banks would be required to support their reasons for choosing specific housing needs with empirical data in their Targeted Community Lending Plans.

FHFA is also proposing to provide the Banks additional flexibility to allocate their total annual AHP funds. The Banks would be authorized to allocate a portion of their total annual AHP funds to a maximum of three competitive Targeted Funds that enhance the Banks' ability to target specific affordable housing needs within their districts that are unmet, have proven difficult to

address through the existing Competitive Application Program, or align with objectives identified in the strategic plans adopted by each Bank's board of directors. The amount each Bank could allocate to its Targeted Funds would be limited to a maximum of 40 percent of the Bank's total annual AHP funds. The Banks would be required to establish and support the need for the Targeted Funds in their Targeted Community Lending Plans.

In addition, the proposed rule would increase the percentage of total annual AHP funds that the Banks could allocate to their noncompetitive Homeownership Set-Aside Programs. The current regulation authorizes each Bank to allocate annually up to the greater of 35 percent of its total annual AHP funds or \$4.5 million to fund its Homeownership Set-Aside Programs. The proposed rule would increase the maximum allocation percentage to 40 percent, while retaining the alternate \$4.5 million threshold. To account for high-cost areas and high rehabilitation costs, as well as housing price appreciation since the last time the set-aside percentage threshold was increased, the maximum set-aside grant that a Bank could provide to a household would increase from \$15,000 to \$22,000 and would be subject to annual increases according to FHFA's Housing Price Index.

FHFA is also proposing to further align the AHP project monitoring requirements with those of other government funding programs. The proposed rule would remove certain back-up documentation requirements for the initial monitoring of AHP projects that have received LIHTC funding. It would also remove certain back-up documentation requirements for initial and long-term monitoring of AHP projects that have received funding under other federal government programs, which would be specified in FHFA guidance.

FHFA is also proposing to clarify the responsibilities of the various parties in the event of AHP noncompliance.

### III. Analysis of the Proposed Rule Reorganization of Regulatory Text

To provide greater clarity for users of the AHP regulation and to take into account the proposed new provisions, the proposed rule would reorganize the current regulation. Existing and new regulatory sections would be grouped under new Subpart headings according to similar subject matter, which would result in renumbering of most sections of the current regulation. In addition, the numbering of the sections would not

be consecutive from Subpart to Subpart in order to reserve room within Subparts for the addition of new sections in the future, as necessary. Specific organizational changes are discussed below under the applicable regulatory amendments.

#### Subpart A—General

##### Proposed § 1291.1 Definitions

Proposed § 1291.1 would retain most of the definitions currently in § 1291.1. The proposed rule would revise some of the definitions and add definitions, which are discussed below in the context of the related regulatory amendments.

In addition, the proposed rule would make the following technical changes:

- A definition of "AHP" would be added, which means the Affordable Housing Program required to be established by the Banks pursuant to 12 U.S.C. 1430(j) and this part.
- The definition of "Homeownership Set-Aside Program" would include a reference that establishment of such a program is in the Bank's discretion and is a noncompetitive program.
- The definition of "net earnings of a Bank" would be revised by removing the requirement to deduct the Bank's annual contribution to the Resolution Funding Corporation, as the Banks are no longer required to make annual contributions to the Resolution Funding Corporation.<sup>8</sup>
- In the definition of "rental project," the term "manufactured housing" would be changed to "manufactured housing communities," which more accurately describes this type of housing in the context of rental projects.
- References to the "competitive application program" would be changed to the General Fund and any Targeted Funds established by the Bank. References to the "homeownership set-aside programs" would be capitalized and would highlight that they are discretionary and noncompetitive.

#### Subpart B—Program Administration and Governance

##### Proposed § 1291.10 Required Annual AHP Contribution

Consistent with current § 1291.2(a), proposed § 1291.10(a) would contain the Bank Act requirement that each Bank contribute annually to its AHP 10 percent of its net income for the preceding year, subject to a minimum annual combined contribution by all of the Banks of \$100 million.<sup>9</sup>

<sup>8</sup> 12 U.S.C. 1441b.

<sup>9</sup> See 12 U.S.C. 1430(j)(5)(C).

### Proposed § 1291.11 Temporary Suspension of AHP Contributions

Existing § 1291.11 on the temporary suspension of AHP contributions would not be changed.

### Proposed § 1291.12 Allocation of Required Annual AHP Contribution

Proposed § 1291.12 would revise existing § 1291.2(b) governing the required and permissible allocations of the Banks' required annual AHP contributions. Section 1291.2(b)(1) currently requires each Bank to allocate annually to its Competitive Application Program that portion of its required annual AHP contribution that is not set aside by the Bank to fund Homeownership Set-Aside Programs. Section 1291.2(b)(2) provides that each Bank may allocate annually, in the aggregate, up to the greater of \$4.5 million or 35 percent of its annual required AHP contribution to Homeownership Set-Aside Programs. Therefore, a Bank generally is required to allocate at least 65 percent of its required annual AHP contribution to its Competitive Application Program depending on the amount of AHP funds it allocates, if any, to Homeownership Set-Aside Programs.<sup>10</sup>

The proposed rule would revise the required and permissible annual maximum AHP funding allocations as follows:

(1) General Fund—A Bank must allocate annually at least 50 percent of its required annual AHP contribution to a General Fund (a mandatory competitive application program but with significant changes from the current Competitive Application Program, as further discussed below);

(2) Homeownership Set-Aside Programs—A Bank may allocate annually, in the aggregate, up to the greater of \$4.5 million or 40 percent of its required annual AHP contribution to Homeownership Set-Aside Programs (the same optional Homeownership Set-Aside Programs as in the current regulation but with proposed changes discussed below);

(3) Targeted Funds—A Bank may allocate annually, in the aggregate, up to 40 percent of its required annual AHP contribution to a maximum of three Targeted Funds (a new type of optional competitive application program discussed below).

If a Bank chooses not to establish Homeownership Set-Aside Programs or

Targeted Funds in a given year, it would allocate 100 percent of its required annual AHP contribution to its General Fund. If a Bank chooses to allocate the maximum 40 percent to Homeownership Set-Aside Programs, it could allocate up to 10 percent for Targeted Funds (after allocating the required 50 percent for the General Fund). If a Bank chooses to allocate the maximum 40 percent to Targeted Funds, it could allocate up to 10 percent for Homeownership Set-Aside Programs (after allocating the required 50 percent for the General Fund).

The proposed rule would provide that a Bank's board of directors may not delegate to a committee of the board, Bank officers, or other Bank employees the responsibility for adopting the policies for its General Fund and any Targeted Funds and Homeownership Set-Aside Programs established by the Bank. The purpose of this provision is to encourage increased engagement in the AHP and increased integration of the Banks' low-income housing and community development activities and issues, as well as Advisory Council input, into the overall strategic planning of the Bank. FHFA anticipates the board committee's work to remain largely the same as it is currently, but also for the full board to have more engagement with the board committee's recommendations. The full board could still delegate limited responsibilities to the board committee for non-strategic types of AHP issues that a board committee is well suited to address within the parameters of its delegation of authority, such as project modification requests for AHP subsidy increases.

The reasons for the proposed AHP funding allocations are discussed below.

*Allocation to General Fund.* The proposed rule would reduce the minimum percentage of a Bank's required annual AHP contribution that must be allocated annually to the General Fund to 50 percent. All projects would be eligible to apply for AHP subsidies under the General Fund, as under the current Competitive Application Program. FHFA believes that the Banks should be required to continue administering a competitive application program that attracts numerous applications that address a broad array of affordable housing needs. The proposed 50 percent threshold would still ensure that at least half of the AHP funds are made available to address a broad spectrum of affordable housing needs within the Bank district, while enabling a Bank to simultaneously target additional specific affordable housing needs in its

district through allocation of up to an additional 40 percent of the total AHP funds to Targeted Funds or Homeownership Set-Aside Programs. FHFA considered whether to allow the Banks complete discretion regarding the allocation of their AHP funds but rejected this approach for the reasons in the discussion of proposed § 1291.25.

### Allocation to Homeownership Set-Aside Programs

*Maximum permissible AHP funding allocation.* FHFA is proposing to increase the maximum percentage allocation amount for the Homeownership Set-Aside Program from 35 to 40 percent, and to retain the alternative maximum allocation amount at \$4.5 million.

The Homeowner Set-Aside Programs have helped expand homeownership opportunities for very low-, and low- or moderate-income households since 1995. From 1995 through 2016, the programs provided approximately \$953 million in grants, supporting approximately 167,000 households. In 2016, the 11 Banks, in the aggregate, allocated approximately 27 percent of their total annual required AHP contributions to Homeownership Set-Aside Programs. A number of Banks consistently allocate the maximum permissible amount of 35 percent or \$4.5 million. For example, in 2016, four Banks allocated 35 percent, and one Bank allocated \$4.5 million. In 2015, six Banks allocated the maximum permissible amount. FHFA considered whether to eliminate or raise the maximum permissible allocation amounts because the demand for set-aside funds has far exceeded the amount the Banks are currently authorized to allocate to these programs.

Authorizing the Banks to allocate more funds to Homeownership Set-Aside Programs would enable the Banks and their members to meet more of the demand for set-aside funds and to provide more assistance to low- or moderate-income homebuyers and homeowners, including first-time homebuyers, than occurs under the Competitive Application Program. The current regulation allows Banks to establish more than one Homeownership Set-Aside Program. A number of Banks establish multiple Homeownership Set-Aside Programs each year to address the homeownership needs of different populations, such as military veterans or disaster victims. The proposed changes to the regulation would enable the Banks to serve even more low- or moderate-income homebuyers and homeowners.

<sup>10</sup> As noted earlier, where a Bank allocates the alternate maximum amount of \$4.5 million to its Homeownership Set-Aside Programs, the Bank may allocate less than 65 percent of its total AHP funds to its Competitive Application Program.

The Homeownership Set-Aside Programs not only assist low- or moderate-income households by providing grants for home purchase or rehabilitation, but assist Bank members by providing them a way to access a wider customer base and originate new mortgages for low- or moderate-income households. Member participation in the program can result in new potential household customers and increased goodwill for Bank members. Members' participation in the AHP, including the Homeownership Set-Aside Program, also enables them to receive favorable consideration under the federal Community Reinvestment Act. Increasing the maximum permissible percentage allocation could result in more opportunities for members to fulfill those obligations.

In addition, the lack of a competitive scoring process and minimal monitoring requirements at subsidy disbursement make the Homeownership Set-Aside Programs easy to administer and cost-effective. Further, no long-term monitoring is required because the AHP-assisted households currently are only subject to five-year retention agreements governing the sale or refinancing of the home, although determining and managing the repayments of AHP subsidies by households who sell or refinance their homes during the five-year period entails some administrative responsibilities on the Banks and members. As discussed below, FHFA is proposing to remove the requirement for retention agreements on owner-occupied units.

Increasing the maximum percentage amount for the Homeownership Set-Aside Program would enable the Banks to allocate less funds to their Competitive Application Programs, resulting potentially in less funding of rental projects, which are funded under those programs. However, in light of the significant demand for set-aside funds, which exceeds the current maximum percentage amount, FHFA believes that increasing this amount would be a reasonable approach to address the demand. As noted above, one of the main goals of the proposed rule is to enhance the Banks' ability to target specific housing needs in their districts through the AHP. Each Bank would weigh the specific homeownership and rental housing needs in its district and determine what the appropriate relative funding allocations should be for those needs under its AHP.

FHFA is not proposing to remove the maximum permissible allocation limits for the Homeownership Set-Aside Program because this could result in the

Banks allocating all of their annual AHP funds to the Homeownership Set-Aside Program, which would be contrary to the statutory intent that both homeownership and rental projects be funded. The proposed rule would continue to require that the Banks allocate the majority of their total annual AHP funds (at least 60 percent under the proposed rule) to competitive application programs—the proposed General Fund and any Targeted Funds, which are likely to be targeted to more types of housing needs including rental housing. This may ensure that a significant percentage of AHP funds continue to support rental projects.<sup>11</sup> FHFA believes that it is extremely important that a substantial portion of AHP funds continue to assist in the development of rental housing for lower income households given the need for more affordable rental housing throughout the nation.

FHFA is proposing to retain the existing alternative maximum allocation amount of \$4.5 million because it has enabled smaller Banks, as well as some larger Banks with lower earnings, to provide more funds than would be permissible under the maximum percentage limit to their Homeownership Set-Aside Programs to address district housing needs. For these Banks, \$4.5 million may be greater than 35 or 40 percent. FHFA analyzed the impact that a proposed increase from 35 to 40 percent would have on each Bank, using each Bank's annual total AHP funding allocations for 2016 and 2017, to determine whether revisions to the \$4.5 million limit would be necessary in conjunction with the percentage increase. FHFA found that the proposed increase from 35 to 40 percent would not have altered the Banks' need for, or use of, the \$4.5 million maximum during those two years. Accordingly, FHFA is not proposing an increase in the \$4.5 million maximum.

*One-third first-time homebuyer allocation requirement.* The current regulation also requires that at least one-third of a Bank's aggregate annual funding allocation to its Homeownership Set-Aside Programs be to assist first-time homebuyers. The proposed rule would make a technical

<sup>11</sup> A Bank would be required to allocate at least 50 percent of its total annual AHP funds to its General Fund, and may allocate up to 40 percent of its total annual AHP funds to Homeownership Set-Aside Programs. If the Bank allocates the maximum 40 percent to the latter programs, then it has 10 percent remaining for allocation to its General Fund and any Targeted Funds. That amounts to 60 percent if only a General Fund is established, or 60 percent total for both the General Fund and any Targeted Funds established.

revision to clarify that the one-third allocation requirement applies to the amount of set-aside funds "allocated" by the Bank for first-time homebuyers, not the amount of set-aside funds actually used by them, because the Bank cannot control whether sufficient numbers of first-time homebuyers ultimately request set-aside funds in a given year. If an insufficient number of first-time homebuyers request set-aside subsidies, a Bank would not be considered in violation of the allocation requirement as long as it allocated the required amount.

In addition, the proposed rule would make a substantive revision to the one-third allocation requirement to allow the Banks to include owner-occupied rehabilitation as a permissible use within the one-third allocation. FHFA considered whether to eliminate the one-third first-time homebuyer allocation requirement, which would enable Banks, in their discretion, to provide additional set-aside funds to households for owner-occupied rehabilitation. While the Banks currently may establish specific Homeownership Set-Aside Programs for owner-occupied rehabilitation using some or all of the remaining two-thirds set-aside funding allocation, eliminating the one-third first-time homebuyer allocation would enable allocation of even more set-aside funds for owner-occupied rehabilitation. A substantial need for owner-occupied rehabilitation funds exists in many Bank districts, and demand is likely to increase as the country's population ages.<sup>12</sup> Expanding the scope of the one-third allocation requirement to include owner-occupied rehabilitation could facilitate additional funding for home repairs and accessibility modifications for households including the elderly, persons with disabilities, and military veterans.

While FHFA recognizes the substantial need for more funds for owner-occupied rehabilitation for low- or moderate-income households, it is also important that all Banks continue to support the entry of first-time homebuyers into the homeownership market. The national homeownership rate has fallen from its peak of 69.2 percent at the end of 2004 to 63.9 percent as of September 30, 2017.<sup>13</sup> The

<sup>12</sup> *Housing America's Older Adults*, Harvard Joint Center for Housing Studies, September 2, 2014. [http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs-housing\\_americas\\_older\\_adults\\_2014-ch4.pdf](http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs-housing_americas_older_adults_2014-ch4.pdf).

<sup>13</sup> *Quarterly Residential Vacancies and Homeownership*, Third Quarter 2017, October 31, 2017, U.S. Census Bureau. <https://www.census.gov/housing/hvs/files/currenthvspress.pdf>.

significant need for funding for first-time homebuyers is demonstrated by the fact that the Banks consistently have exceeded the one-third allocation requirement for first-time homebuyers since 1995, the year Homeownership Set-Aside Programs were first authorized by regulation. The 11 Banks have provided more than 80 percent of their set-aside funds each year to first-time homebuyers. In 2016, approximately 90 percent of the households receiving set-aside funds were first-time homebuyers.

Accordingly, rather than eliminating the one-third first-time homebuyer allocation requirement, the proposed rule would expand the scope of the requirement to include households for owner-occupied rehabilitation. While the proposed change could allow a Bank to allocate its entire one-third allocation to households for owner-occupied rehabilitation, FHFA believes this is highly unlikely in light of the Banks' record of allocating most of their set-aside funds to first-time homebuyers. Notably, in 2016, the Banks allocated only 10 percent of their total set-aside funds for owner-occupied rehabilitation. The proposed change could encourage Banks to increase their set-aside funding allocations for owner-occupied rehabilitation, while continuing their support for first-time homebuyers.

The proposed rule would also provide that a Bank's board of directors may not delegate to a committee of the board the responsibility for adopting its Homeownership Set-Aside Program policies, for the reasons discussed earlier.

*Allocation to Targeted Funds.* Proposed § 1291.12(c)(1) would provide the Banks with a new authority to allocate annually, in the aggregate, up to 40 percent of a Bank's required annual AHP contribution to a maximum of three Targeted Funds established by the Bank. Targeted Funds would be administered through a competitive application scoring process developed by each Bank, pursuant to the requirements in proposed § 1291.25. The purpose of the Targeted Funds is to enable a Bank to target specific affordable housing needs within its district that are either unmet, have proven difficult to address through the existing Competitive Application Program, or align with objectives identified in the Bank's strategic plan. Proposed § 1291.12(c)(2) would require the Banks to transfer any uncommitted Targeted Fund amounts to the General Fund for awards to alternates in the General Fund in the same calendar year.

Permitting the Banks to establish Targeted Funds would help address

challenges the Banks experience when trying to target specific affordable housing needs within their districts, especially in a single AHP funding period. Banks report that the existing regulatory scoring requirements can affect their efforts to fully address affordable housing needs within their districts. For example, Banks have indicated that they would like greater ability to target the affordable housing needs of specific geographic areas or populations, or to act in response to a disaster. The use of Targeted Funds focused on a specific geographic area or population or in response to a disaster could serve this purpose.

FHFA's regulations require each Bank's board of directors to adopt a strategic business plan that describes how its business activities will achieve its mission. The regulations require that each plan describe how the Bank will maximize activities that further the Bank's housing finance and community lending mission.<sup>14</sup> The Banks would be able to use Targeted Funds to improve their ability to address their strategic objectives related to affordable housing.

The current regulation already provides the Banks a degree of flexibility to address multiple housing priorities within a given AHP funding period. The Banks can allocate up to 50 points out of a total of 100 under the Bank First and Second District Priorities to emphasize multiple housing needs in their districts. However, some Banks have indicated that they find it difficult to allocate points, test, adjust, and balance the different scoring criteria in a manner that enables them to award subsidies to multiple housing priorities in the same funding period. Establishing a Targeted Fund with a dedicated funding allocation, for example, to a particular housing need, would guarantee that projects serving that housing need receive awards pursuant to the competitive process under that Fund, while other projects would receive awards under the competitive General Fund, thereby serving multiple housing needs in the same funding period.

FHFA believes that the use of Targeted Funds would be appropriate provided they are operated pursuant to a competitive scoring process to ensure a transparent and objective process for awarding funds. FHFA also believes that limitations should be imposed on the size of the Targeted Funds to ensure that funds continue to be available to address a broad spectrum of affordable housing needs within each district under the General Fund. Accordingly,

the proposed rule would authorize each Bank to allocate annually up to 40 percent of its total annual AHP funds to Targeted Funds subject to a phase-in period.

FHFA is mindful that the use of Targeted Funds could introduce new risks to the Banks given the targeted nature of each Fund. Proposed § 1291.20(c)(1) would require the Banks adopt and implement controls for ensuring that each Targeted Fund is designed to receive sufficient numbers of applicants for the amount of AHP funds allocated to the Targeted Fund to facilitate a genuinely competitive scoring process so that specific project sponsors or members are not specially advantaged. To further address the potential new risks, proposed § 1291.20(b) would authorize each Bank to establish initially only one Targeted Fund, but would enable the Bank to increase the number of its Targeted Funds to a maximum of three pursuant to a phase-in period. In addition, as provided in proposed § 1291.13(a) and (b), a Bank would not be allowed to establish or administer a Targeted Fund unless at least 12 months have passed since the publication of the Targeted Community Lending Plan and the Bank identifies in the Plan the affordable housing needs to be addressed by that Targeted Fund. This advance notice would help ensure that the Targeted Fund is designed in an open and objective manner to generate sufficient interest for holding a competitive scoring funding round. The advance notice also may serve to encourage potential sponsors to consider developing projects that address the affordable housing needs set by the Targeted Fund and submit applications to the Fund.

Although FHFA is not proposing that the Banks' Targeted Community Lending Plans be subject to approval by FHFA, FHFA may request that the Banks submit an advance copy to FHFA before releasing it to the public. This would provide FHFA an opportunity to review the Plans and provide comments as needed, particularly in the initial years of the Funds. Proposed § 1290.6(c) would also require that the Targeted Community Lending Plans be published on the Banks' public websites, consistent with current practice at most Banks.

The Banks would identify in their Targeted Community Lending Plans the specific affordable housing needs, supported by empirical data, that the Targeted Funds will address. The Banks' AHP Implementation Plans would describe how the Targeted Funds will address these housing needs

<sup>14</sup> 12 CFR 1239.31.

through the specific funding allocations and scoring criteria.

FHFA specifically requests comments on the benefits and risks of allowing the Banks to establish Targeted Funds. FHFA also requests comments on whether the proposed allocation of 40 percent of total annual AHP funds to Targeted Funds is an appropriate percentage, or whether the percentage should be higher or lower.

*Acceleration of funding.* Current § 1291.2(b)(3) containing the discretionary authority for a Bank to accelerate future required annual AHP contributions to its current year's Program would move unchanged to proposed § 1291.12(d) except for certain clarifying technical edits.

Proposed § 1291.13 Targeted Community Lending Plan; AHP Implementation Plan

*Targeted Community Lending Plan.* The Banks' boards of directors currently are required to adopt Targeted Community Lending Plans as part of their community support programs under FHFA's Community Support regulation. These Plans are focused largely on targeted economic development needs in the Banks' districts. As discussed, the proposed rule would amend § 1290.6(a)(5) of the Community Support regulation<sup>15</sup> to require the Banks to include in their Plans market research on affordable housing needs in their districts, and their identification and assessment of those affordable housing needs that are significant. The Banks would be required to specify, from among those identified needs, the affordable housing needs they will address through their funding allocations and scoring criteria under their General Funds and any Bank Targeted Funds and Homeownership Set-Aside Programs, as further discussed under the AHP Implementation Plans below. The identified needs to be addressed through the Banks' General Funds and Homeownership Set-Aside Programs must be included in their Targeted Community Lending Plans at least six months before the beginning of the Plan year.

In addition, the proposed rule would amend the Community Support regulation to provide that a Bank's board of directors may not delegate to a committee of the board, Bank officers, or other Bank employees the responsibility to adopt or amend the Targeted Community Lending Plan as previously discussed.

The proposed rule would also make technical changes to the language in § 1290.6(a)(5) to clarify the Plan requirements.

The proposed changes discussed above would ensure that the Targeted Community Lending Plans are results-oriented and useful to FHFA in assessing the Banks' progress towards addressing the housing challenges of low- or moderate-income households in their districts. The proposed changes would increase the emphasis on accountability and results in the Targeted Community Lending Plans.

FHFA specifically requests comments on the benefits of the proposed expansion of the contents of the Targeted Community Lending Plans and their linkage to the AHP Implementation Plans. In addition, FHFA requests comments on whether the proposed expansion of the contents of the Targeted Community Lending Plans will impede the Banks' ability to respond to disasters through the AHP.

AHP Implementation Plan

*Requirements for each Fund.* The current provision containing the requirements for the Banks' AHP Implementation Plans would move from § 1291.3 to proposed § 1291.13(b). Currently, each Bank must include in its AHP Implementation Plan its requirements for its Competitive Application Program, including its scoring methodology, and any Homeownership Set-Aside Programs. The proposed rule would require a Bank to include those requirements in its AHP Implementation Plan for its General Fund and any Targeted Funds established by the Bank. For a Targeted Fund, a Bank would also be required to include in its AHP Implementation Plan controls that ensure the Targeted Fund is designed to receive sufficient numbers of applicants for the amount of AHP funds allocated to the Fund to facilitate a genuinely competitive scoring process, as required in § 1291.20(c)(1).

*Linkage to Targeted Community Lending Plan.* The proposed rule would require that a Bank include in its AHP Implementation Plan the specific funding allocation amounts for its General Fund and any Bank Targeted Funds and Homeownership Set-Aside Program, including how the one-third allocation for the Homeownership Set-Aside Program will be apportioned with respect to first-time homebuyers and households for owner-occupied rehabilitation. The Banks' scoring criteria for each Fund must flow logically from the analyses and identified housing needs in the Banks'

Targeted Community Lending Plans, which should lead ultimately to AHP awards meeting those housing needs.

*Applications to multiple Funds.* The proposed rule would require a Bank to include in its AHP Implementation Plan the Bank's policy on how it will decide under which Fund to approve a project that applies to more than one Fund and is competitive under all of them, pursuant to § 1291.24(d).

*Optional Bank district eligibility requirements.* Consistent with the existing requirement in § 1291.5(c)(15), the proposed rule would also provide in the AHP Implementation Plan section of the regulation (proposed § 1291.13(b)(7)) that a Bank must include in its AHP Implementation Plan any optional Bank district eligibility requirements adopted by the Bank pursuant to proposed § 1291.24(c).

*Re-use of repaid AHP direct subsidy.* The requirement in current § 1291.3(a)(7) for a Bank to include in its AHP Implementation Plan its requirements for re-use of repaid AHP direct subsidy, if adopted by the Bank pursuant to current § 1291.8(f)(2), would be removed. Repayment of subsidy under § 1291.8(f)(2) depends upon an AHP-assisted household selling its home during the AHP five-year retention period, as required under the AHP owner-occupied retention agreement. As elaborated below under the Agreements section, FHFA is proposing to remove the owner-occupied retention agreement requirement. Therefore, there would be no repayment of subsidy by the household and § 1291.8(f)(2) would become moot.

*Retention agreements.* As noted above, because FHFA is proposing to remove the owner-occupied retention agreement requirement, the Banks' requirements for such retention agreements would no longer be required to be included in the AHP Implementation Plan. The Banks' retention agreement requirements for rental projects would continue to be included in the AHP Implementation Plan.

*No delegation.* Current § 1291.3(a) prohibits a Bank's board of directors from delegating to Bank officers or other Bank employees the responsibility to adopt, and make any amendments to, the AHP Implementation Plan. The proposed rule would also provide that the Bank's board of directors may not delegate these responsibilities to a committee of the board.

Proposed § 1291.14 Advisory Councils

The current provisions addressing the membership and duties of the Banks'

<sup>15</sup> See 12 CFR 1290.6(a)(5).

Advisory Councils would move from § 1291.4 to proposed § 1291.14, with several clarifications.

*Representatives from for-profit organizations.* The Bank Act requires that each Bank appoint an Advisory Council of persons drawn from “community and not-for-profit organizations” actively involved in providing or promoting low- and moderate-income housing in its district.<sup>16</sup> Consistent with long-standing agency guidance, the proposed rule would clarify that “community organizations” may include for-profit organizations.

*Recommendations on Bank Targeted Community Lending Plans.* FHFA’s Community Support regulation requires the Banks to consult with their Advisory Councils and other groups in developing and implementing their Targeted Community Lending Plans. See 12 CFR 1290.6(a)(5)(iii). Proposed § 1291.14(d)(1)(ii)(A) would include the parallel requirement for the Advisory Councils to provide recommendations to the Banks on their Targeted Community Lending Plans, and any amendments thereto.

*No delegation.* The proposed rule would clarify that a Bank’s board of directors may delegate to a committee of the board, but not to Bank officers or other Bank employees, the responsibility to appoint persons as members of the Advisory Council. However, for the reasons discussed above, the proposed rule would provide that a Bank’s board of directors may not delegate to a committee of the board, Bank officers, or other Bank employees the responsibility to meet with the Advisory Council at the quarterly meetings required by the Bank Act.<sup>17</sup>

#### Proposed § 1291.15 Agreements

Current § 1291.9 governing the AHP contractual agreements that must be in place between the Banks and members, and between the members and project sponsors or project owners, would move to proposed § 1291.15. The proposed rule would make a number of changes and clarifications to the provisions in this section, as discussed below.

*Notice to Bank of LIHTC project noncompliance.* Current § 1291.9(a)(5)(ii) requires that members’ AHP agreements with project sponsors state that such parties shall meet the AHP project monitoring requirements. The AHP monitoring requirements do not require the Banks to conduct monitoring of AHP projects that received LIHTCs during the AHP 15-

year retention period. Nor are LIHTC project sponsors required to send reports to the Banks of LIHTC noncompliance. Noncompliance with LIHTC income-targeting and rent requirements is the same as or substantially equivalent to noncompliance with AHP income-targeting and rent requirements. Although LIHTC project noncompliance is rare, instances of noncompliance with LIHTC income-targeting or rent requirements can occur during the AHP retention period, which would mean that the projects’ incomes or rents likely are also in noncompliance with similar AHP requirements. However, the noncompliance would not come to the attention of a Bank during the AHP retention period because it is not monitoring the projects.

To address the possibility of such noncompliance by LIHTC projects, proposed § 1291.15(a)(5)(ii) would require the members’ AHP agreements with LIHTC project sponsors to include a provision requiring the sponsors to agree to provide prompt written notice to the Bank if the project is in noncompliance with the LIHTC income-targeting or rent requirements at any time during the AHP 15-year retention period. A corresponding requirement that the Bank review such LIHTC project noncompliance notices received from project sponsors during the AHP retention period would be included in proposed § 1291.50(c)(1)(ii).

FHFA specifically requests comments on the practicality of this requirement, and whether it should also be required of project sponsors in the event of noncompliance by projects with the income-targeting or rent requirements of the government housing programs discussed under Monitoring below.

*Owner-occupied retention agreements.* The proposed rule would eliminate the requirement in current § 1291.9(a)(7) for a retention agreement under which AHP-assisted households must repay AHP subsidy to the Bank if they sell or refinance their homes under certain circumstances during the AHP five-year retention period. The proposed rule would also make conforming changes to remove references to the owner-occupied retention agreements elsewhere in the regulation.

The owner-occupied retention agreement provides, specifically, that in the event of a sale or refinancing of the home by the AHP-assisted household during the five-year retention period, an amount equal to a pro rata share of the AHP subsidy that financed the purchase or rehabilitation of the unit, reduced for every year the household owned the unit, shall be repaid by the household

to the Bank from any net gain realized upon the sale or refinancing, unless:

(A) The unit was assisted with a permanent mortgage loan funded by an AHP subsidized advance;

(B) the unit is sold to a very low-, or low- or moderate-income household; or

(C) following a refinancing, the unit continues to be subject to a deed restriction or other legally enforceable retention agreement or mechanism described in this paragraph.

The purpose of the retention agreement is to discourage “flipping” of the home by requiring households to repay AHP subsidy if they sell the home during the AHP retention period, unless one of the exceptions applies. The AHP provides subsidies which enable very low- and low- or moderate-income households to purchase or rehabilitate their homes and reap the benefits of wealth creation from homeownership. The AHP subsidy is not intended to be used by investors or landlords to purchase or rehabilitate and quickly sell homes to take advantage of rapidly appreciating housing prices in a neighborhood. The AHP retention agreement requirement is consistent with the retention agreement requirements of other government housing programs, such as HUD’s HOME Investment Partnerships Program (HOME), for households receiving subsidy for purchasing or rehabilitating owner-occupied units.

FHFA recognizes the moral hazard risk that may be associated with using subsidy intended to provide housing to low- or moderate-income households to flip properties. However, homes purchased by AHP-assisted households, by virtue of their low prices, are not typically located in neighborhoods with rapidly appreciating housing prices that would encourage flipping, especially given the low amount of AHP subsidy provided to the households—averaging \$6,311 per household in 2016—although exceptions may exist. Most AHP-assisted households do not sell their homes during the five-year retention period and, if they do, they usually sell to another low- or moderate-income household or have no net gain, so the retention agreement does not apply in most situations, making its value questionable. Moreover, the underlying policy of the AHP has always been that the purpose of the AHP subsidy is to enable low- or moderate-income households to receive the benefits of homeownership including appreciation in the value of their homes and, thus, to minimize any AHP subsidy repayments. Repayments of AHP subsidy may be a financial burden on the households.

<sup>16</sup> See 12 U.S.C. 1430(j)(11).

<sup>17</sup> 12 U.S.C. 1430(j)(11).



The Banks have also cited the administrative burdens on themselves and their members of having to obtain and track repayments of generally very small amounts of subsidy, obtaining the documentation to calculate whether there is a “net gain” on the sale, and determining whether the subsequent purchaser is a low- or moderate-income household. In particular, the Banks have noted the complications of trying to determine the net gain where a household used the AHP subsidy to rehabilitate its home without an accompanying purchase.

These considerations appear to outweigh the potential for deterring rare instances of flipping. Accordingly, FHFA is proposing to eliminate the retention agreement requirement for owner-occupied units. FHFA specifically requests comments on whether a retention agreement of some duration is necessary or desirable to ensure that AHP funds are being used for the statutorily-intended purposes and whether there are viable ways to deter potential flipping and address moral hazard risks other than through retention agreements (*e.g.*, a prohibition against flipping in the AHP subsidy documentation). FHFA also requests comments on whether the proposed increase in the maximum permissible grant to households from \$15,000 to \$22,000 under the Homeownership Set-Aside Program, discussed below, should impact this decision.

If, based on the comments received and other relevant factors, FHFA decides to retain an owner-occupied retention agreement requirement in the final rule, FHFA is raising a number of issues below for consideration.

**Notice to the Bank.** FHFA requests comments on whether a retention agreement, if retained in the final rule, should require that notice of a sale or refinancing be provided to both the Bank and its designee (typically the member), rather than to one or the other. This would facilitate Program operations by giving the Bank simultaneous notice. Also, it could facilitate repayment of AHP subsidy to the Bank in cases where a member subsequently fails and is subject to receivership actions by other federal agencies. Some Banks already require notice to the Bank.

**AHP subsidy repayment calculation.** FHFA requests comments on what subsidy repayment method should be required, if a retention agreement requirement is retained in the final rule. The current regulation requires the household to repay a pro rata portion of the subsidy from any net gain (unless an exception applies), but does not define

“net gain.” A majority of the Banks calculate the net gain as the sales price minus the original purchase price, purchaser and seller paid costs, and capital improvement costs, and then apply the pro rata repayment requirement. Other Banks calculate the subsidy repayment amount using net proceeds identified on the Closing Statement, deducting the outstanding senior mortgage debt from the sales price, but adding the full amount of the AHP subsidy originally provided to the household. The calculation does not credit the household with its investments (principal payments, down payment, and substantive capital improvements), meaning there are always net proceeds (*i.e.*, the amount of the AHP subsidy).

FHFA reviewed the subsidy repayment requirements of other government housing programs and, in particular, HUD’s HOME Investment Partnership Program (HOME). One approach under this program calculates net proceeds as the sales price minus outstanding superior debt and seller paid costs, with the household recovering its entire investment first from the net proceeds, the Bank then recovering the subsidy on a pro rata basis, and any remaining net proceeds returned to the household. FHFA requests comments on the merits and disadvantages of this approach and the net gain approach discussed above from the standpoint of the AHP-assisted households and the Banks, and whether there are other subsidy repayment approaches FHFA should consider if a retention agreement requirement is retained in the final rule.

**Proxies for determining that a subsequent purchaser is low- or moderate-income.** FHFA also requests comments on what approaches should be specified in the retention agreement, if retained in the final rule, that would provide a reasonable basis to assume that the subsequent purchaser of an AHP-assisted unit is likely to be low- or moderate-income, including proxies that could serve this purpose. The subsequent purchaser of an AHP-assisted unit is not receiving any AHP subsidy and, therefore, has no reason or obligation to provide income documentation to the Bank or member indicating whether it is low- or moderate-income. This has made it difficult for the Banks and their members to determine subsequent purchaser incomes in order to apply the subsidy repayment exception.

FHFA requests comments on what proxies would be reasonable for assuming a subsequent purchaser’s income, including the following:

Certification from the subsequent purchaser or a third party that the subsequent purchaser’s income is at or below the low- or moderate-income limit; evidence that the subsequent purchaser is receiving direct homebuyer assistance from another government program with household income targeting requirements substantially equivalent to those of the AHP; purchase price of the AHP-assisted unit is less than the median home price in the area; the AHP-assisted unit is located in a census tract or block group where at least 51 percent of the households are low- or moderate-income; or Federal Housing Administration (FHA) or other underwriting standards indicate that the income required to purchase the AHP-assisted unit at the purchase price is low- or moderate-income.

**AHP subsidy repayment exception for \$1,000 amount.** FHFA also requests comments on whether there should be an exception to subsidy repayment in the retention agreement, if retained in the final rule, where the amount of AHP subsidy subject to repayment, after calculating the net proceeds or net gain, is \$1,000 or less.

As discussed above, maintaining a subsidy repayment requirement in the retention agreement could help deter potential, but rare, flipping during the retention period. Setting a *de minimis* threshold of \$1,000 may promote the goal of deterring flipping, while at the same time not financially burdening low- or moderate-income borrowers who may opt to sell their homes during their retention periods. It would also reduce the administrative obligations of the Banks and members associated with calculating and collecting pro rata shares of the AHP subsidies.

**Termination of AHP subsidy repayment obligation.** FHFA also requests comments on whether, if a retention agreement requirement is retained in the final rule, the rule should clarify that the obligation to repay AHP subsidy to a Bank shall terminate not only after any event of foreclosure, but also after transfer by deed in lieu of foreclosure, assignment of an FHA mortgage to HUD, or death of the owner(s) of the unit, which would be consistent with agency guidance.

**Retention agreements for rental projects.** The AHP 15-year retention agreement requirement for rental projects in current § 1291.9(a)(8) would be retained in proposed § 1291.15(a)(7), with several proposed changes discussed below. Current § 1291.9(a)(8) provides that if a rental project is sold or refinanced during the 15-year retention period, the full amount of the

AHP subsidy must be repaid to the Bank, unless the project continues to be subject to a retention agreement incorporating the income-eligibility and affordability restrictions committed to in the AHP application for the duration of the retention period, or the households are relocated under certain circumstances specified in the regulation. The requirement to repay the full amount of AHP subsidy, instead of a pro rata amount, is intended to discourage rental projects from being sold before the end of the retention period and converted to projects with market rate rents that low- or moderate-income households can no longer afford.

*Notice to the Bank.* As with owner-occupied agreements discussed above, FHFA requests comments on whether the retention agreement for rental projects should require that notice of a sale or refinancing of the rental project during the AHP 15-year retention period be provided to both the Bank and its designee, rather than to one or the other. This would facilitate Program operations by giving the Bank simultaneous notice, and could facilitate repayment of AHP subsidy to the Bank in cases where a member subsequently fails and is subject to receivership actions by other federal agencies.

*Transfer or assignment.* Proposed 1291.15(a)(7) would clarify that the retention agreement would apply not only to a sale of the rental project, but also to a transfer or assignment of title or deed, during the retention period, as these forms of conveyance are the functional equivalent of sales.

*Project sponsor qualifications.* Current § 1291.5(c)(10) provides that a project sponsor must be qualified and able to perform its responsibilities as committed to in the AHP application. Proposed § 1291.21(b) on eligible applicants would clarify that a project sponsor includes all affiliates and team members such as the general contractor.

In addition, the proposed rule would add a requirement in the Agreements section at proposed § 1291.15(b)(2) that the Bank's AHP subsidy application or other related form include project sponsor qualifications criteria that evaluate the ability of the project sponsor (including all affiliates and team members such as the general contractor) to perform the responsibilities committed to in the AHP application. The project sponsor qualifications section of the form would be required to include a requirement for the project sponsor to provide certifications or respond to specific questions about whether the project

sponsor (and affiliates and team members such as the general contractor) have engaged in misconduct as defined and imputed in FHFA's Suspended Counterparty Program regulation,<sup>18</sup> or as defined by the Bank. The Bank's AHP subsidy disbursement or other related form would also be required to include a requirement for similar certifications or questions for the project sponsor to complete prior to each disbursement of AHP subsidy.

The purpose of these requirements is to enable a Bank to identify any misconduct by the project sponsor so that the Bank can determine whether it should accept the AHP application or approve requests from the sponsor for disbursement of AHP subsidy. The proposed rule would provide that the project sponsor's affiliates and team members such as the general contractor must also meet the project sponsor qualification requirements in order for the project sponsor to be eligible for AHP subsidy.

The Suspended Counterparty Program regulation defines "covered misconduct" generally to mean a conviction or administrative sanction imposed by a federal agency involving fraud, embezzlement, theft, conversion, forgery, bribery, perjury, making false statements or claims, tax evasion, obstruction of justice, or any similar offense, in connection with a mortgage, mortgage business, mortgage securities, or other lending product. For AHP project sponsor qualifications purposes, a Bank may choose to define "covered misconduct" more broadly to also include, for example, convictions or administrative sanctions imposed by a state agency, pending investigations, noncompliance by the project sponsor (and affiliates and team members such as the general contractor) with other funders' requirements, pending claims, pending litigation, settlements of criminal or administrative charges, or criminal activity involving financial transactions more generally.

*Application to existing AHP projects and units.* Current § 1291.9(c) on the application of AHP regulatory amendments to existing AHP projects would move to proposed § 1291.15(c). Under this section, the provisions of the AHP regulation, as they may be amended from time to time, are deemed incorporated into all agreements between Banks, members, project sponsors, and project owners receiving AHP subsidies. However, no amendment to the regulation affects the legality of actions taken prior to the effective date of the amendment. Thus,

if the owner-occupied retention agreements are eliminated in the final rule, households that currently have such agreements would no longer be subject to them upon the effective date of the final rule. Where households repaid AHP subsidy prior to the effective date of the final rule, they would not be entitled to a refund of their payments because the final rule would not have retroactive effect.

#### Proposed § 1291.16 Conflicts of Interest

Current § 1291.10 addressing conflicts of interest by Bank directors, Bank employees and Advisory Council members would move unchanged to proposed § 1291.16.

#### Subpart C—General Fund and Targeted Funds

##### Proposed § 1291.20 Establishment of Programs

*General Fund.* Proposed § 1291.20 would replace existing § 1291.5(a) by requiring that instead of establishing a Competitive Application Program, each Bank would be required to establish a General Fund pursuant to the requirements of this part.

*Targeted Funds.* Proposed § 1291.20(b) would provide that a Bank may establish, in its discretion, a maximum of three Targeted Funds pursuant to the requirements of this part.

To address the risks of Targeted Funds, given their targeted nature, the proposed rule would include phase-in requirements for the Funds. Specifically, unless otherwise directed by FHFA, a Bank would be permitted to establish:

- (1) One Targeted Fund;
- (2) Two Targeted Funds to be administered concurrently, provided that the Bank administered at least one Targeted Fund in any preceding year; or
- (3) Three Targeted Funds to be administered concurrently, provided that the Bank administered at least two Targeted Funds in any preceding year.

In addition, as discussed under the funding allocation provisions in proposed § 1291.12(c)(1) above, the allocations to Targeted Funds would be subject to phase-in requirements.

*Eligibility requirements.* As discussed earlier, proposed § 1291.20(c)(1) would require the Bank to adopt and implement controls, as specified in its AHP Implementation Plan, for ensuring that each Targeted Fund is designed to receive sufficient numbers of applicants for the amount of AHP funds allocated to the Targeted Fund to facilitate a genuinely competitive scoring process.

<sup>18</sup> 12 CFR part 1227.

In addition, as under the current regulation, a Bank would not be authorized to adopt additional eligibility requirements for the General Fund and any Targeted Funds established by the Bank except as specifically authorized in the regulation.

#### Proposed § 1291.21 Eligible Applicants

*Member applicants.* The eligibility requirement for member applicants in existing § 1291.5(b)(2) would move unchanged to proposed § 1291.21(a), with the exception that the reference to the Competitive Application Program would be replaced with references to the General Fund and any Targeted Funds established by the Bank.

*Project sponsor qualifications.* The eligibility requirements in existing § 1291.5(c)(10) for project sponsors applying for AHP funds in conjunction with members would move to proposed § 1291.21(b), with the addition of the proposed documentation requirements discussed in the Agreements section above under proposed § 1291.15(b)(2). The purpose of these requirements is to enable a Bank to identify any misconduct by the project sponsor so that the Bank can determine whether it should accept the AHP application or approve requests from the sponsor for disbursement of AHP subsidy. The proposed rule would provide that the project sponsor's affiliates and team members such as the general contractor must also meet the project sponsor qualification requirements for the project sponsor to be eligible for AHP subsidy.

#### Proposed § 1291.22 Funding Periods; Application Process

The funding period and application process requirements in existing § 1291.5(b)(1), (b)(3), and (b)(4) would move unchanged to proposed § 1291.22.

#### Proposed § 1291.23 Eligible Projects

*Eligibility requirements.* Proposed § 1291.23 would be a new section setting forth the eligibility requirements for AHP projects, but comprising a number of existing provisions related to what constitutes an eligible project in current § 1291.5(c). This section would include the eligibility requirements for owner-occupied and rental housing projects, project feasibility, timing of AHP subsidy use, retention agreements for rental projects, and compliance with fair housing laws. The existing eligibility requirement for a five-year retention agreement for owner-occupied projects in § 1291.5(c)(9)(i) would be removed, as discussed earlier.

*Tenant income qualification in rental projects.* FHFA considered altering the requirement in current § 1291.5(c)(1)(ii) for tenant income qualification in rental projects that are occupied at the time of the application for AHP subsidy. Under the current provision, for rental projects that are not occupied at the time of application and are approved for AHP subsidy, the households must have incomes meeting the income targeting commitments in the approved AHP application upon initial occupancy of the rental units. For projects involving the purchase or rehabilitation of rental housing that are occupied at the time of AHP application, the households must have incomes meeting the income targeting commitments in the approved AHP application at the time of the AHP application. The purpose of qualifying current occupants' incomes at the time of AHP application is to discourage displacement of occupants whose incomes are higher than the income commitments in the approved AHP application.

FHFA considered allowing occupied projects to satisfy income targeting commitments at initial occupancy as with unoccupied projects. This change would increase the chances of occupied projects scoring successfully under the AHP where they target lower incomes than the current income mix of the occupants in the project. This could encourage more AHP subsidy awards for preservation of affordable rental housing through purchase or rehabilitation, which is an important housing priority in many areas. It would also account for tenant moves during the renovation process and the fact that new residents at different income levels may occupy the project at initial occupancy, when the rehabilitation is complete.

At the same time, FHFA is concerned that such a change could encourage displacement of current occupants whose incomes exceed those committed to in the approved AHP application because the project sponsor must meet its income targeting commitments. To mitigate this concern, proposed § 1291.23(a)(2)(ii) would provide that, in order for the project to satisfy the income targeting commitments at initial occupancy, the project must have a relocation plan for those occupants not meeting the income targeting commitments that is approved by one of the project's primary funders. In the absence of a relocation plan, the households in the project must satisfy the income targeting commitments at the time of AHP application, as required in the current regulation.

FHFA specifically requests comments on how to encourage preservation of

rental projects through the AHP while discouraging displacement of current occupants with higher incomes, including whether the proposed requirement for a relocation plan approved by the primary funder is reasonable.

#### Proposed § 1291.24 Eligible Uses

*Eligible uses of AHP subsidy.* Proposed § 1291.24 would group together a number of provisions in current § 1291.5(c) related to the eligible uses of AHP subsidy. These include the use of the AHP subsidy for purchase, construction, or rehabilitation of owner-occupied or rental housing, the need for AHP subsidy determination, reasonable project costs determinations, reasonable financing costs determinations, eligible counseling costs, eligible refinancing, optional Bank district eligibility requirements, and calculation of the AHP subsidy.

*Prohibited uses of AHP subsidy.* Proposed § 1291.24 would also include the prohibited uses of AHP subsidy set forth in current § 1291.5(c)(16). These prohibited uses are certain prepayment fees, fees for Bank cancellation of a subsidized advance commitment, and processing fees charged by members for providing AHP direct subsidies to a project.

Proposed § 1291.24(b)(4) would add that, consistent with current practice, capitalized reserves, periodic deposits to reserve accounts, operating expenses, and supportive services expenses are not eligible uses of AHP subsidy.

*Need for AHP subsidy.* The need for AHP subsidy eligibility requirement in current § 1291.5(c)(2) would move to proposed § 1291.24(a)(3), with clarifying changes. The current regulation requires that to be eligible for AHP subsidy, rental projects must demonstrate: (1) A need for the AHP subsidy; (2) developmental and operational feasibility; and (3) cost reasonableness. The regulation states that the estimated sources of funds for a project must equal its estimated uses of funds, as reflected in the project's development budget. Where the project's uses of funds exceed its sources of funds, the difference demonstrates a funding gap and a need for AHP subsidy.

Some stakeholders have pointed to the regulatory language, as well as preamble language from an earlier AHP rulemaking, to support their contention that, for rental projects, the Banks are only required to review the project's development budget and not its operating pro forma in determining its need for AHP subsidy. However, long-standing policy and practice has been that the Banks review both the project

development budget and the operating pro forma in determining the project's need for AHP subsidy.

As a policy matter, it is important for the Banks to review a rental project's operating pro forma as well as its development budget. The Bank must review the project's development budget to confirm a funding gap between the sources and uses of funds. The Bank must review the project's operating pro forma to assess the reasonableness of cash flow. A debt coverage ratio or cash flow amount that exceeds the Bank's feasibility standards can indicate that the project does not need the full amount of AHP subsidy requested, especially in cases where the primary funder's requirements or special project circumstances do not explain or justify the excess.

The following discussion clarifies how the Banks should evaluate under the proposed rule that a project's cash flow and costs are reasonable, and how the Banks should perform the need for subsidy analysis in cases where (1) capitalized reserves exceed a Bank's project cost guidelines; (2) supportive services are provided; and (3) the cash flow or debt coverage ratio exceeds a Bank's project cost guidelines.

*Capitalized Reserves in Projects' Development Budgets.* Development budgets frequently include capitalized reserves, although AHP subsidy may not be used to fund such reserves under the Bank Act and AHP regulation. At reasonable levels, capitalized reserves are appropriate to ensure that projects remain viable throughout their AHP 15-year retention periods. Project development budgets must incorporate all capitalized costs, including reserves.

When capitalized reserves exceed the project cost guidelines established by a Bank, the Bank must evaluate the reasonableness of these reserves. Such analysis includes assessing whether the capitalized reserves are required by the project's primary funders. However, the Bank has the discretion to determine that the reserves are not reasonable even if they are required or permitted by a project's primary funders.

In very rare instances with non-LIHTC projects, a Bank may allow a project to exceed the Bank's project cost guidelines for capitalized reserves even when the primary funders do not require additional reserves. For LIHTC projects, the limited partnership agreement typically serves as the final determinant on the maximum allowable amount of capitalized reserves.

*Supportive Services Expenses in Operating Pro Formas.* AHP subsidy may not fund supportive services expenses under the Bank Act and AHP

regulation. As part of the project application review, FHFA expects the Banks to require a separate supportive services budget that captures income and expenses for all supportive services activities to ensure they can be reasonably offered. However, for projects where a government entity provides operating subsidies that fund both housing operating costs and supportive services and these operating subsidies cannot be readily bifurcated, the supportive services income and expenses should be captured in the project's operating pro forma.

When a project expects to pay for supportive services expenses from cash flow, the supportive services budget should indicate project cash flow as the income source. A Bank must review the supportive services budget to determine whether there is adequate income to pay for the supportive services.

*Cash Flow and Its Impact on Need for AHP Subsidy.* In instances where a project's operating pro forma reflects cash flow or a debt coverage ratio that exceeds the Bank's feasibility guidelines, the Bank must assess whether the excess cash flow could have reasonably been used for debt service on a larger loan and thereby could supplant part, or all, of the AHP subsidy. FHFA acknowledges that it is difficult for a completed affordable housing project to obtain an increase in its debt commitments. In such cases, the Bank should determine if the project continues to require the full amount of the AHP subsidy and recapture subsidy as appropriate. A project may exceed a Bank's feasibility guidelines for cash flow or debt coverage ratio when the underwriting guidelines of the primary funder of the project require higher thresholds and the Bank concurs that the requirements are reasonable or when reasonable written support from the project sponsor demonstrates that circumstances require additional cash flow or a higher debt coverage ratio to maintain the operational viability of the project.

In summary, FHFA proposes to clarify in the regulation that the Banks must base the need for AHP subsidy determination for rental projects on both the project's development budget and its operating pro forma. This will help ensure that projects will not be over-subsidized through AHP funds.

*Sponsor-provided permanent financing to homeowners.* The requirements in current § 1291.5(c)(2)(ii) for sponsor-provided permanent financing would move unchanged to proposed § 1291.24(a)(3)(ii). The regulation provides that when a Bank determines the need for AHP subsidy in

homeownership projects where the sponsor extends permanent financing to the homebuyer, the sponsor's cash contribution (which is included in the project's cash sources of funds) shall include the present value of any payments the sponsor is to receive from the buyer, including any cash down payment from the buyer, plus the present value of any purchase note the sponsor holds on the unit. If the note carries a market interest rate commensurate with the credit quality of the buyer, the present value of the note equals the face value of the note. If the note carries an interest rate below the market rate, the present value of the note shall be determined using the market rate to discount the cash flows.

Some stakeholders requested that FHFA remove this provision, citing the complexity of the calculation. Others suggested that the sponsors should be treated like revolving loan funds under the regulation, as their financing model essentially operates as a revolving loan fund. As further discussed below under proposed § 1291.29, FHFA is considering undertaking a separate rulemaking for revolving loan funds, which could include sponsor-provided permanent financing. FHFA specifically requests comments on whether the current AHP requirements for sponsor-provided permanent financing are reasonable, including whether the sponsors have a need for AHP subsidy in light of their particular financing model, and whether the current method in the regulation for determining their need for AHP subsidy understates or overstates the amount of AHP subsidy needed. FHFA also requests comments on whether sponsors using this financing model should be considered revolving loan funds and, if so, whether they should be subject to current or different AHP revolving loan fund requirements.

*Optional Bank district eligibility requirements—maximum subsidy limits.* Proposed § 1291.24(c) would retain the provision in current § 1291.5(c)(15) allowing a Bank, in its discretion, to adopt a requirement that the amount of AHP subsidy requested for a project does not exceed limits established by the Bank as to the maximum amount of AHP subsidy available per member, per project, or per project unit in a single AHP funding period, with several proposed changes. Any such eligibility requirements adopted by a Bank would be required to be included in its AHP Implementation Plan.

*Maximum subsidy limit per member each year.* The proposed rule would remove the reference to "per member

each year” as unnecessary because it can be factored into the subsidy limit per member in a single AHP funding period, especially as no Bank currently conducts more than one AHP funding period per year.

*Maximum subsidy limit per project sponsor.* The proposed rule would revise the regulation to allow a Bank to adopt a maximum subsidy limit per project sponsor in a single AHP funding period. A Bank might choose to establish such a limit in order to provide opportunities for smaller or less experienced project sponsors to compete successfully for AHP subsidies. On the other hand, a project sponsor limit could prevent worthy projects developed by larger, more experienced sponsors from receiving AHP subsidy. FHFA specifically requests comments on the potential advantages and disadvantages of allowing the Banks to impose a maximum subsidy limit per project sponsor.

*Number of maximum subsidy limits per Fund.* Consistent with agency guidance for the Competitive Application Program, the proposed rule would provide that a Bank may establish only one maximum AHP subsidy limit per member, per project, or per project unit for the General Fund and for each Targeted Fund, which shall apply to all applicants to the specific Fund. This would also apply to the proposed maximum subsidy limit per sponsor. The purpose of this requirement is to ensure consistency, clarity, and a level playing field for all applicants to a specific Fund, and reduce administrative burden for the Banks in trying to determine different subsidy limits for different regions or types of projects.

The proposed rule would further provide that the maximum AHP subsidy limit per project or per project unit may differ for each Fund. This is intended to allow the Banks to create maximum subsidy limits for each Fund that address the specific characteristics of project applicants for that Fund. For instance, a Bank may want to establish a higher maximum subsidy limit per project for a Targeted Fund focused on certain geographies or development types in light of differences in housing development costs, such as high-cost areas or projects where most units contain three or more bedrooms to accommodate larger households.

*Applications to multiple Funds—subsidy amount.* Proposed § 1291.24(d) would provide that if an AHP application for the same project is submitted to more than one Fund in the same AHP funding period, each application must be for the same

amount of AHP subsidy. This would ensure that the project demonstrates the same need for subsidy in each application. If the project sponsor applied for a different amount of subsidy in each application, it would raise questions about whether the project would be over-subsidized if awarded the higher amount of subsidy.

#### Proposed § 1291.25 Scoring Methodology

*Bank scoring methodology.* The proposed rule would revise current § 1291.5(d) by removing the required scoring framework specified in the regulation, with its mandatory scoring criteria, minimum scoring points allocations and related definitions, and requiring each Bank to devise its own scoring methodology. Each Bank’s scoring methodology would be required to set forth competitive application scoring criteria, related definitions and point allocations under a 100-point scale for the Bank’s General Fund and any Targeted Fund. The Bank would be required to score applications received for a particular Fund pursuant to the applicable scoring methodology for that Fund.

The Bank’s scoring methodology may be different for each Fund. The Bank’s scoring criteria for each Fund must be justified in the Bank’s Targeted Community Lending Plan and specified in its AHP Implementation Plan. The Bank would need to design its scoring criteria and point allocations to ensure that the Bank will meet the outcome requirements for the statutory and regulatory priorities under proposed § 1291.48, as further discussed below. Each scoring methodology may include scoring criteria addressing specific affordable housing needs in the Bank’s district (Bank district priorities) that differ from the affordable housing needs specified under the statutory and regulatory priorities, as long as the outcome requirements specified in proposed § 1291.48 are achieved.

FHFA considered whether to allow the Banks complete discretion to determine how to allocate and award their AHP funds by removing the scoring criteria for the current Competitive Application Program and the current minimum and maximum AHP funding allocation requirements for that program and the Homeownership Set-Aside Program. While such discretion might enable the Banks to better target specific affordable housing needs in their districts, it is not included in the proposed rule for several reasons.

First, it would allow a Bank to allocate and approve all of its AHP

funds through noncompetitive processes. In contrast, the current regulation requires each Bank generally to award at least 65 percent of its total AHP funds through the Competitive Application Program,<sup>19</sup> which helps ensure access to the limited pool of AHP funds available each year for a wide variety of applicants. Second, it would allow a Bank to allocate all of the AHP funds for only one purpose, such as homeownership or rental housing, which would be inconsistent with the statute which requires that both homeownership and rental housing be funded.<sup>20</sup> Third, it would contravene the statutory requirement that FHFA establish priorities for the use of the AHP funds, as only the Banks would be establishing such priorities.<sup>21</sup>

*In-district projects.* The proposed rule would retain the option under the Bank First District Priority in current § 1291.5(d)(5)(vi)(L) for a Bank to adopt in its scoring methodology a scoring criterion for housing located in the Bank’s district, but would provide at proposed § 1291.25(c) that a Bank shall not use the scoring criterion as a way to exclude all out-of-district projects from its General Fund. This provision strengthens the statement in the preamble to the 2006 AHP final rule that a Bank should not use the scoring criterion in this way by explicitly prohibiting it in the regulation.

*Scoring tie-breaker policy.* The proposed rule would require the Banks to establish scoring tie-breaker policies to address the possibility of two or more applications receiving identical scores in the same AHP funding period where there is insufficient AHP subsidy to approve all of the tied applications. The proposed requirements for the scoring tie-breaker policies are consistent with guidance FHFA has provided to the Banks.

#### Proposed § 1291.26 Approval of AHP Applications

*Approvals generally.* Consistent with the application approval requirements in the current regulation, the proposed rule would provide generally that a Bank’s board of directors shall approve (*i.e.*, award) applications for AHP subsidy under the General Fund and any Bank Targeted Funds that meet all of the applicable AHP eligibility requirements, in descending order

<sup>19</sup> As discussed previously, if a Bank with lower earnings allocates the alternative maximum amount of \$4.5 million to its Homeownership Set-Aside Programs, it may allocate less than 65 percent of its total AHP funds through its Competitive Application Program.

<sup>20</sup> 12 U.S.C. 1430(j).

<sup>21</sup> 12 U.S.C. 1430(j)(9)(B).

starting with the highest scoring application until the total funding amount for the particular AHP funding period, except for any amount insufficient to fund the next highest scoring application, has been approved.

*Alternates.* As under the current Competitive Application Program, for the General Fund, the Bank's board of directors would be required to approve at least the next four highest scoring applications as alternates, but in a change from the current regulation, would be required to fund those alternates within one year of approval if any previously committed AHP subsidies become available. This is intended to ensure that Banks award AHP funds to alternates in the General Fund as opposed to selecting alternates but transferring AHP funds from the General Fund to the Bank's Homeownership Set-Aside Program or Targeted Funds instead. The Banks may need to consider selecting more than four alternates under their General Fund in order to be able to fully commit any uncommitted funds that transfer from their Targeted Funds to their General Fund. For any Bank Targeted Funds, the Bank may, in its discretion, approve alternates.

As discussed above under the scoring tie-breaker policies in proposed § 1291.25(d), and consistent with current FHFA guidance to the Banks, where there is insufficient AHP subsidy to approve all tied applications, the Bank must approve a tied application as an alternate if it does not prevail under the scoring tie-breaker methodology, or if it is tied with another application but requested more subsidy than the amount of AHP funds that remain to be awarded.

*Applications to multiple Funds—approval under one Fund.* The proposed rule would provide that if an application for the same project is submitted to more than one Fund at a Bank in an AHP funding period and the application scores high enough to be approved under each Fund, the Bank shall approve the application under only one of the Funds, which the Bank shall select pursuant to the Bank's policy established in its AHP Implementation Plan. For example, a Bank's policy could provide that any project that is competitive in multiple Funds will be approved under the General Fund.

*Re-ranking of scored applications and alternates.* To satisfy the outcome requirements for the statutory and regulatory priorities in proposed § 1291.48, a Bank would be permitted to deviate from the normal descending ranking selection order only to the

minimum extent necessary by re-ranking scored applications and alternates meeting the outcome requirements above the lowest scoring applications and alternates not meeting the outcome requirements. A Bank would be required to describe the possibility of re-ranking in its AHP Implementation Plan.

FHFA specifically requests comments on possible approaches for re-ranking applications to meet the outcome requirements while at the same time maximizing the extent to which the highest scoring applications are approved.

*No delegation.* The proposed rule would provide that a Bank's board of directors may not delegate to a committee of the board the responsibility to approve or disapprove the AHP subsidy applications and alternates under the Bank's General Fund and any Targeted Funds, for the reasons discussed above.

#### Proposed § 1291.27 Modifications of Approved AHP Applications

The provisions for modifications of approved AHP applications would be moved from current § 1291.5(f) to proposed § 1291.27, and would include a number of clarifying and other changes.

*Approval of modifications.* The proposed rule would provide that if the requirements for a modification (other than a request for AHP subsidy increase) are satisfied, the Bank must approve the modification request. This a change from the current regulation which allows for Bank discretion in approving a modification request. One of the requirements for approving a modification is that the project, as modified, must rescore successfully in its original AHP funding period. If a project rescoring successfully and other modification requirements are satisfied, there should be no reason for the Bank to fail to approve the modification.

*Cure of noncompliance.* The proposed rule would add a requirement that before a Bank may approve a modification request, it must have first requested that the project cure any AHP noncompliance, and subsequent to the request, the cure was unsuccessful within a reasonable period of time. This is consistent with the proposed new "waterfall" provisions for remedying project noncompliance discussed in the Remedial Actions for Noncompliance section. The proposed waterfall provision would provide that in the event of project noncompliance, a project must first attempt to cure the noncompliance within reasonable period of time before the Bank may

consider approving a project modification or recapturing AHP subsidy from the project.

*Rescoring of application.* The current regulation includes a requirement that the application, as reflective of the changes requested, must continue to score high enough to have been approved in the funding period in which it was originally scored and approved by the Bank. Questions have arisen as to what it means to score high enough where a Bank also approved applications as alternates during the original funding period. The proposed rule would clarify that the application must continue to score as high as the lowest ranking alternate that was not just selected as an alternate but approved for funding by the Bank in the application's original funding period.

*Good cause.* The current regulation also requires that there be good cause for a modification, with the Bank's analysis and justification for the modification documented in writing. The proposed rule would clarify that remediation of project noncompliance is not, in and of itself, good cause for a modification. There must be some other reasonable justification for the modification, such as a change in market conditions, or loss of a major employer in the community, that makes it difficult to find households at the incomes committed to in the project's AHP application to occupy the targeted units in the project. Otherwise, there would be less of an incentive to cure noncompliance if project sponsors knew they could simply request a modification of the project terms to no longer be in noncompliance.

The proposed rule would also make technical changes to the language to clarify any ambiguity about the requirement that requests for subsidy increase modifications must also meet the requirements for approval in paragraph (a) of this section.

#### Proposed § 1291.28 Procedures for Funding

The procedures for AHP funding would carry over from existing § 1291.5(g) to proposed § 1291.28 with two proposed changes.

*Notification under subsidy re-use programs.* Current § 1291.5(g)(6) requiring project sponsor notification to the Bank and member of the reuse of repaid AHP direct subsidy where the Bank has authorized a subsidy re-use program under § 1291.8(f)(2) would be removed. Subsidy re-use programs would no longer be operable if subsidy repayment obligations are removed in conjunction with discontinuation of the owner-occupied retention agreements.

*Bank board duties and delegation.* Current § 1291.5(h) addressing Bank board duties and delegations would be removed as the duties and delegations would be addressed elsewhere in the proposed rule.

**Proposed § 1291.29 Lending and Re-Lending of AHP Direct Subsidy by Revolving Loan Funds**

Current § 1291.5(c)(13) addressing the requirements for lending and re-lending of AHP direct subsidies by revolving loan funds would move to proposed § 1291.29, with proposed changes related to the proposed elimination of the owner-occupied retention agreement requirement and other issues discussed below.

The authority for the Banks to provide AHP direct subsidies to revolving loan funds for purposes of lending and re-lending was added in the AHP regulation in 2006. The revolving loan fund provisions were designed for distinct projects in specific locations, or for pipelines of expected projects meeting specific criteria that the revolving loan fund anticipates funding and that would be specified in its AHP application. Under the regulation, the revolving loan fund may be scored on the specific criteria it establishes in its AHP application for its pipeline of projects, without having to actually identify specific projects in the AHP application.

These types of revolving loan funds that were expected to be able to participate in the AHP either no longer exist or have evolved into different financing models. Current revolving loan funds are financing programs that utilize interest and principal payments on current loans to make new loans. The sources and uses of revolving loan funds are typically hypothetical in nature, based on future lending expectations, and the prospective households requiring assistance are yet to be determined. Revolving loan funds have faced challenges meeting certain AHP eligibility requirements, such as the subsidy repayment requirement under the five-year owner-occupied retention agreement, and receiving sufficient numbers of points under certain scoring criteria to receive an AHP award for purposes of lending and re-lending the grant. Revolving loan funds have received AHP grants for use as a one-time pass-through to identified projects, not for lending and re-lending of the subsidy to such projects or anticipated future projects.

To address these challenges, FHFA is considering undertaking a separate rulemaking on the current AHP revolving loan funds provisions. FHFA

requests comments on the current AHP revolving loan fund provisions and how the financing mechanisms of revolving loan funds could be used successfully with AHP subsidies. FHFA specifically requests comments on why certain AHP scoring criteria have been difficult to meet, how the AHP retention periods could be satisfied, how AHP subsidy would be repaid in the event of project noncompliance, and how the revolving loan fund can demonstrate a need for the AHP subsidy. FHFA also requests comments on whether and how the proposed outcome requirements for the statutory and regulatory priorities discussed under proposed § 1291.48 might facilitate use of AHP subsidies by revolving loan funds.

The proposed rule would eliminate the requirement for retention agreements for all owner-occupied units, including those funded by revolving loan funds. FHFA specifically requests comments on the potential positive or negative impacts of eliminating the owner-occupied retention agreement requirement for revolving loan funds.

**Proposed § 1291.30 Use of AHP Subsidy in Loan Pools**

Current § 1291.5(c)(14) addressing the requirements for use of AHP subsidies in loan pools would move to proposed § 1291.30, with the proposed change to remove the requirement for owner-occupied retention agreements in current paragraph § 1291.5(c)(14)(iii).

The authority for the Banks to provide AHP subsidy to loan pools was added in the AHP regulation in 2006. The regulation establishes specific conditions under which a Bank may provide AHP subsidies under its Competitive Application Program for the origination of first mortgage loans or rehabilitation loans with subsidized interest rates to AHP-eligible households through a purchase commitment by an entity that will purchase and pool the loans.

FHFA is not aware that any loan pools meeting these conditions have applied for AHP subsidy since the regulatory authority was added in 2006. FHFA is also unaware of any loan pools of this type currently existing in the housing market. Therefore, FHFA is considering removing the loan pool provisions from the regulation. FHFA specifically requests comments on whether there are loan pools currently operating in the market that meet the conditions in the regulation, how the loan pools are addressing current housing market needs, and the potential positive or negative impacts of eliminating the

owner-occupied retention agreement requirement for loan pools.

*Subpart D—Homeownership Set-Aside Programs*

**Proposed § 1291.40 Establishment of Programs**

The current provision addressing Bank establishment of Homeownership Set-Aside Programs would move from § 1291.6(a) to proposed § 1291.40. The proposed rule would emphasize that these programs are optional by adding that a Bank may establish such programs “in its discretion.” The proposed rule would also include a requirement that a Bank’s justifications for establishing such programs be included in its Targeted Community Lending Plan, as provided in proposed § 1291.13(a).

**Proposed § 1291.41 Eligible Applicants**

The proposed rule would move the current provision on applications from members unchanged from § 1291.6(b) to proposed § 1291.41.

**Proposed § 1291.42 Eligibility Requirements**

The provisions in current § 1291.6(c) on eligibility requirements would move to proposed § 1291.42, with several proposed changes discussed below.

*Adoption of additional eligibility requirements.* FHFA has provided informal guidance to Banks about the extent to which the Banks may adopt eligibility requirements under their Homeownership Set-Aside Programs beyond those set forth in this section. Consistent with the guidance, the proposed rule would clarify that the Banks may not adopt additional eligibility requirements under their Homeownership Set-Aside Programs except those related to household eligibility, pursuant to proposed § 1291.42(b)(3).

*One-third allocation requirement—first-time homebuyers and owner-occupied rehabilitation.* As discussed in the funding allocation section under proposed § 1291.12(b) above, the current regulation requires that at least one-third of a Bank’s annual Homeownership Set-Aside Program funding allocation be for first-time homebuyers. The proposed rule would authorize the Banks to include first-time homebuyers and households receiving set-aside funds for owner-occupied rehabilitation in the one-third allocation. Conforming language for households receiving set-aside funds for owner-occupied rehabilitation would be added in this section of the proposed rule.

*Maximum grant amount.* Current § 1291.6(c)(3) states that members may provide set-aside grants to households in an amount up to a maximum of \$15,000 per household, as established by the Bank in its AHP Implementation Plan, which limit shall apply to all households. The proposed rule would authorize the Banks to provide up to \$22,000 per household, subject to automatic annual upward adjustment in accordance with FHFA's Housing Price Index (HPI).

The purpose of the proposed increase in the subsidy limit is to respond to increases in the costs associated with buying or rehabilitating homes in high cost areas, as well as the high costs of certain types of rehabilitation generally. It would also bring the subsidy limit in line with changes in the HPI since 2002, when the \$15,000 subsidy limit was established in the regulation. For example, the HPI shows that \$15,000 in January 2002 has approximately the same buying power as \$21,500 today.<sup>22</sup> The proposed rule would also clarify that a Bank may establish a different maximum subsidy per household limit for each Homeownership Set-Aside Program it establishes.

Many of the Banks have set their subsidy limits below \$15,000, with a number of Banks at \$5,000. In 2016, the average set-aside grant per household was \$6,311. Several stakeholders recommended that FHFA increase the subsidy limit due to increases in the costs associated with buying or rehabilitating homes in high cost areas, which in some areas are substantially higher than the rest of the country. Banks located in high cost areas are more likely to take advantage of a higher subsidy limit because of the higher costs in their districts.

Increasing the subsidy limit could also have a significant impact on housing rehabilitation in all districts. The demand for rehabilitation is likely to increase as the country's population ages.<sup>23</sup> Expenses for certain types of rehabilitation, such as replacing a roof, windows, doors, or HVAC system, or installing a wheelchair ramp, often exceed \$15,000. The older a home, the more likely it needs repairs and systems replaced. According to the U.S. Census Bureau, 18.7 percent of all housing units in the United States were built before 1950 and are, therefore, more likely to

require rehabilitation.<sup>24</sup> A higher subsidy limit would increase the Banks' ability to address high costs associated with buying and rehabilitating homes. While lower subsidy limits help ensure that more households have access to set-aside subsidies, the households may need to find additional sources of funds to help them pay for the full costs associated with buying or rehabilitating a home.

Bank adoption of the proposed higher subsidy limit could result in fewer households receiving set-aside subsidies, but Banks could choose to offset this by increasing the maximum amount of AHP funds they allocate to their set-aside programs from 35 to 40 percent, as would be permitted under the proposed rule. In addition, most Banks have established subsidy limits below the current \$15,000 limit. Thus, FHFA believes that an increase in the subsidy limit to \$22,000 is not likely to result in a significant overall reduction in the number of households assisted by the Banks under their set-aside programs.

The proposed rule would provide that the \$22,000 subsidy limit would be subject to an automatic annual upward adjustment only, in accordance with the HPI. As noted above, the current \$15,000 subsidy limit was established in the regulation in 2002. The regulation does not provide for an automatic HPI adjustment. Increasing the subsidy limit to \$22,000 would reflect increases in the HPI since that time. Rather than periodically revise the subsidy limit by regulation to account for future housing price increases, the proposed rule would provide for automatic HPI upward adjustments to the subsidy limit. The subsidy limit would adjust upward, but not downward, in response to changes in the HPI. In the event of a decrease in the HPI, the subsidy limit would remain at its then-current level until the HPI increased above the subsidy limit, at which point the subsidy limit would adjust to that higher level. FHFA would notify the Banks annually of the maximum subsidy amount based on the HPI.

FHFA specifically requests comments on any potential positive and negative impacts of increasing the subsidy limit from \$15,000 to \$22,000, including whether the subsidy limit should be higher or lower. FHFA also requests comments on use of the HPI to automatically adjust the subsidy limit upward over time, and whether other

housing price adjustment indices would be preferable and why.

#### Proposed § 1291.43 Approval of AHP Applications

Current § 1291.6(d) would move unchanged to proposed § 1291.43. It provides that a Bank shall approve applications for AHP direct subsidy under its Homeownership Set-Aside Program in accordance with the Bank's criteria governing the allocation of funds.

#### Proposed § 1291.44 Procedures for Funding

Current § 1291.6(e) on the procedures for funding would move unchanged to proposed § 1291.44.

#### Subpart E—Outcome Requirements for Statutory and Regulatory Priorities

##### Proposed § 1291.48 Outcome Requirements for Statutory and Regulatory Priorities

The current regulation's point-based project selection system serves as a means of ensuring that project awards reflect housing priorities established by the Bank Act.<sup>25</sup> The regulation achieves prioritization of these statutory priorities by requiring each Bank, in developing its 100-point scoring system, to allocate at least 5 points each to two statutory priorities—a combined 10 points minimum.<sup>26</sup> The Bank Act also requires that FHFA establish priorities for the use of the AHP funds.<sup>27</sup> To implement this requirement, the current regulation includes five regulatory priorities addressing specific housing needs, with each such scoring criterion required to receive a minimum of 5 points, except for one scoring criterion receiving a minimum of 20 points—a combined 40 points minimum. The remaining maximum of 50 points are allocated by the Banks to priority housing needs in the Banks' district that are selected by the Banks.

There are a number of benefits associated with the current scoring system. It establishes a degree of uniformity among various scoring criteria that all of the Banks must include, thereby prioritizing certain pressing affordable housing needs existing throughout the country, and facilitating project sponsors' applications for AHP subsidy at multiple Banks. In addition, it provides flexibility for the Banks in how they allocate the points beyond the required minimums to target specific housing needs in their districts, the ability to

<sup>22</sup> See FHFA HPI, <https://www.fhfa.gov/DataTools/Downloads/pages/house-price-index.aspx>.

<sup>23</sup> *Housing America's Older Adults*, Harvard Joint Center for Housing Studies, September 2, 2014. [http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs-housing\\_americas\\_older\\_adults\\_2014-ch4.pdf](http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs-housing_americas_older_adults_2014-ch4.pdf).

<sup>24</sup> See U.S. Census Bureau, *2015 American Community Survey*, <https://www.census.gov/programs-surveys/ahs/>.

<sup>25</sup> 12 U.S.C. 1430(j)(3).

<sup>26</sup> 12 CFR 1291.5(d)(5)(i), (ii).

<sup>27</sup> 12 U.S.C. 1430(j)(9)(B).



choose which types of populations to target within certain scoring criteria, and the ability to include other district housing needs selected by the Banks, which may be allocated up to half of all points.

After considering input from Bank CIOs and stakeholders, FHFA believes that the Banks may be able to more effectively target specific housing needs in their districts through a more flexible scoring system. FHFA considered how to incorporate in the regulation greater flexibility for the Banks to design their own scoring systems, while at the same time to ensure that FHFA is establishing priorities for the use of the AHP funds as required by the statute. FHFA believes that the proposed rule would achieve an appropriate balance between these two objectives by authorizing the Banks to design their own scoring systems, subject to each Bank's AHP awards under its scoring system meeting specific outcome requirements established by FHFA in the regulation. The Banks would be required to demonstrate satisfaction of the outcome requirements each year. FHFA notes that comparable housing programs (*e.g.*, HUD's HOME Investment Partnerships Program and Housing Opportunities for Persons with HIV/AIDS) are administered pursuant to outcome-based evaluation criteria. The proposed AHP outcome requirements are further discussed below.

#### Statutory Priorities for Government Properties and Project Sponsorship

Proposed § 1291.48(a) would require that, each year, each Bank must award at least 55 percent of the total AHP funds allocated to its General Fund and any Bank Targeted Funds to projects that meet the priority for the use of donated or conveyed government-owned or other properties ("government properties priority"), or the priority for projects sponsored by a not-for-profit organization or government entity ("project sponsorship priority"). These priorities, which correspond to those established by the Bank Act,<sup>28</sup> would be retained unchanged from current § 1291.5(d)(5)(i), (ii). While certain projects may meet both of these priorities, any awards counted towards meeting one of the priorities could not also be counted towards meeting the other priority, in order not to distort the calculation of the 55 percent.

Under the proposed standard, a Bank could satisfy the outcome requirement if it awarded 55 percent or more of total funds to projects meeting one of the priorities, and none to the other priority.

FHFA considered requiring a Bank to award a specified minimum percentage of total funds to each priority. However, in the Program's experience, a relatively limited number of projects satisfy the government properties priority. During the period 2012 through 2016, for example, only 2.5 percent of total AHP funds were awarded to projects that used properties meeting the government properties priority. Most AHP projects currently meet the project sponsorship priority. Accordingly, FHFA expects that the overwhelming majority of projects that would satisfy the proposed outcome requirement would do so by meeting the project sponsorship priority.

FHFA also considered requiring a Bank to award at least 55 percent of its required annual AHP contribution (which includes the funds allocated not only to its General Fund and any Bank Targeted Funds but also to any Bank Homeownership Set-Aside Programs) to these two statutory priorities. FHFA anticipates that most Banks will take advantage of the opportunity to expand their allocations of AHP funds to their Homeownership Set-Aside Programs if the proposed increase in the annual set-aside allocation from 35 to 40 percent is adopted in the final rule. However, grant recipients under the Homeownership Set-Aside Program are households, not project sponsors, and therefore cannot meet the project sponsorship priority. In addition, the households generally do not purchase government properties. Thus, funds awarded under Homeownership Set-Aside Programs generally could not be counted towards meeting these statutory priorities. To enable the Banks to take full advantage of the proposed higher set-aside allocation, the proposed rule would limit this proposed outcome requirement to 55 percent of total funds allocated to the General Fund and any Bank Targeted Funds.

#### Statutory Priority for Purchase of Homes by Low- or Moderate-Income Households

Proposed § 1291.48(b) would require that, each year, each Bank must award at least 10 percent of its annual required AHP contribution to low- or moderate-income households, or to projects targeting such households, for the purchase by such households of homes under any or some combination of the Bank's General Fund, any Bank Targeted Funds, and any Bank Homeownership Set-Aside Programs. This is consistent with the priority in the Bank Act for the purchase of homes

by low- or moderate-income families ("home purchase priority").<sup>29</sup>

Based on the Banks' widespread use of Homeownership Set-Aside Programs since their authorization, the home purchase priority has been consistently prioritized by the Banks, and FHFA expects this to continue given the continuing and significant demand by households for set-aside funds for home purchases. However, because the establishment of Homeownership Set-Aside Programs is optional for the Banks, and under the proposed regulatory priorities outcome requirements discussed below, a Bank would have discretion not to choose home purchase as a housing need in its scoring system, the proposed rule would require that at least 10 percent of a Bank's annual required AHP contribution be awarded to home purchases by low- or moderate-income households.

FHFA specifically requests comments on whether 10 percent of a Bank's annual required AHP contribution constitutes sufficient prioritization for the home purchase priority or whether the percentage should be higher or lower.

#### Regulatory Priority for Very Low-Income Targeting for Rental Units

The proposed rule would establish an outcome requirement for a regulatory priority for very low-income targeting for rental units. Proposed § 1291.48(c) would provide that, each year, each Bank must ensure that at least 55 percent of all rental units in rental projects receiving AHP awards under the Bank's General Fund and any Bank Targeted Funds are targeted to very low-income households (households with incomes at or below 50 percent of AMI). Targeting for very low-income renters is prioritized in the current regulation through the income-targeting scoring criterion.<sup>30</sup> The proposed rule would maintain a priority for such households through this proposed income-targeting outcome approach.

FHFA specifically requests comments on the utility of this proposed outcome approach, including whether the proposed 55 percent threshold, applicability solely to rental units, and income-targeting at 50 percent of AMI are appropriate.

<sup>29</sup> 12 U.S.C. 1430(j)(3)(A).

<sup>30</sup> 12 CFR 1291.5(d)(5)(iii).

<sup>28</sup> 12 U.S.C. 1430(j)(3)(B), (C).

Regulatory Priorities for Underserved Communities and Populations; Creating Economic Opportunities; and Affordable Housing Preservation

Proposed § 1291.48(d) would establish outcome requirements for three regulatory priorities for housing needs that FHFA considers current and pressing throughout the country. These regulatory priorities are underserved communities and populations; creating economic opportunities; and affordable housing preservation. The proposed outcome requirements for these regulatory priorities would satisfy the statutory requirement that FHFA establish priorities for the use of the AHP funds. Each regulatory priority would comprise a number of specified housing needs identified by FHFA, some of which are in the current regulation. FHFA could also identify other specific housing needs under the regulatory priorities by separate guidance, as new housing needs arise.

The proposed rule would provide that, every year, each Bank shall ensure that at least 55 percent of the Bank's required annual AHP contribution is awarded under the Bank's General Fund and any Bank Targeted Funds to projects that, in the aggregate, meet at least two of the three regulatory priorities by meeting one or more of the specified housing needs included under the regulatory priority, and awarding at least 10 percent of the funds to projects meeting each of such regulatory priorities. If an awarded project meets more than one of the regulatory priorities, it may be counted towards meeting only one of them. If an awarded project meets more than one specified housing need under a regulatory priority, it may be counted towards meeting only one of those housing needs. In addition, an award to a project may not be counted towards meeting a regulatory priority unless the specified housing need that it meets is identified in the Bank's Targeted Community Lending Plan as an affordable housing need the Bank indicated it would address through its AHP scoring criteria.

The specified housing needs proposed under each regulatory priority are described below.

#### 1. Underserved Communities and Populations

##### Housing for Homeless Households

The current regulation includes housing for homeless households as a mandatory scoring criterion. The proposed rule would retain this housing need under this proposed regulatory priority, but increase the minimum threshold for the number of units

reserved for homeless households from 20 to 50 percent to encourage projects dedicated to serving the needs of homeless households. FHFA specifically requests comments on whether this proposed increase is appropriate.

##### Housing for Special Needs Populations

The current regulation includes housing for special needs populations as one of the eligible housing needs under the Bank First District Priority. The proposed rule would retain this housing need under this proposed regulatory priority, with the following changes. The proposed rule would include only projects that provide supportive services or access to supportive services for the specific special needs populations being served.

These populations have special needs associated with their particular life circumstances that could be addressed by targeted supportive services. Research by the Corporation for Supportive Housing estimates that 1.1 million homes are required for people with special needs, not including the need for units for households experiencing homelessness.<sup>31</sup> The proposed rule also would increase the minimum threshold for the number of units reserved for households with a specific special need from 20 to 50 percent to encourage projects dedicated to serving these populations. FHFA specifically requests comments on whether this proposed increase is appropriate.

The proposed rule would continue to include the elderly, persons recovering from physical abuse or alcohol or drug abuse, persons with AIDS, persons with disabilities, and housing that is visitable by persons with physical disabilities who are not occupants of such housing as special need populations. The proposed rule would expand the list of special needs populations to include formerly incarcerated persons; victims of domestic violence, dating violence, sexual assault or stalking; and unaccompanied youth. These populations could particularly benefit from housing with supportive services targeted to address their specific needs.

In addition, the proposed rule would update the reference to "persons with AIDS" to "persons with HIV/AIDS" to more closely align it with common nomenclature and in recognition of the fact that persons with HIV experience comparable housing needs to persons with AIDS. The term "mentally or physically disabled persons" in the

<sup>31</sup> <http://www.csh.org/wp-content/uploads/2016/10/Total-10-12-16.pdf>.

current regulation would similarly be updated to "persons with disabilities," to reflect more commonly acceptable terminology.

##### Housing for Other Targeted Populations

The proposed rule would also include housing for other targeted populations under this proposed regulatory priority. In contrast to housing for special needs populations, this housing need would include housing that does not necessarily provide supportive services or access to supportive services, as there are specific populations in need of housing who may not require such services. The proposed rule would include as other targeted populations—agricultural workers, military veterans, persons with disabilities, Native Americans, multi-generational households, and households requiring large units. The proposed rule would set the minimum threshold for the number of units reserved for such targeted populations at 50 percent to encourage projects dedicated to serving the needs of these populations. FHFA specifically requests comments on whether the proposed minimum 50 percent threshold is appropriate.

The inclusion of agricultural workers and Native Americans would align with other FHFA goals and programs, specifically, FHFA's Duty to Serve regulation that applies to Fannie Mae and Freddie Mac, under which agricultural workers and Native Americans are identified as high-needs rural populations.<sup>32</sup> Agricultural workers face significant housing challenges due in large part to their low income levels.<sup>33</sup> Migrant and seasonal agricultural workers often have difficulty finding adequate housing and are likely to live in over-crowded conditions.<sup>34</sup> Native Americans also have significant housing needs. According to the U.S. Interagency Council on the Homeless, nearly one in

<sup>32</sup> See generally, 12 CFR part 1282.

<sup>33</sup> Sixteen percent of workers earned less than \$10,000 from agricultural employment during the previous calendar year, 33 percent had earnings of \$10,000 to \$19,999, 22 percent earned 20,000 to 29,999, and eight percent earned \$30,000 or more. Sixteen percent of respondents reported no income from agricultural employment the previous year. See [https://www.doleta.gov/naws/pages/research/docs/NAWS\\_Research\\_Report\\_12.pdf](https://www.doleta.gov/naws/pages/research/docs/NAWS_Research_Report_12.pdf).

<sup>34</sup> Crowding is often an issue within agricultural worker housing, as an estimated 31 percent of non-dormitory/barack-style farmworker housing units are crowded—meaning there is more than one occupant per room, excluding bathrooms. This estimate is over six times the national rate of crowded housing units. Agricultural workers and their families are also more likely to encounter pesticide-related environmental hazards when compared to other populations. <http://www.ruralhome.org/storage/documents/farmworkers.pdf>.

five people residing on tribal lands live in overcrowded conditions. Native Americans also disproportionately live in shelters relative to their population size.<sup>35</sup>

Persons with disabilities would be included as other targeted populations in recognition of the benefits that features such as wheelchair-accessibility and enhancements for people with visual or hearing impairments can provide so that persons with disabilities can live independently.

Military veterans would be included as other targeted populations due to their significant housing needs. The Veterans Administration's *January 2017 Point in Time* counted over 40,000 veterans who were experiencing homelessness on a single night in January 2017. Further, there has been a 1.5 percent increase in the estimated number of homeless veterans nationwide since 2016.<sup>36</sup>

Households requiring large units would be included as other targeted populations in light of the scarcity of affordable 3-, 4- and 5-bedroom unit apartments required to adequately house large households, for example, families with more than three children or with several related adult members.

Finally, multi-generational households would be included as other targeted populations because of their special housing needs. For example, grandparents raising grandchildren may benefit from housing that includes features of elderly projects (such as handrails in bathrooms and hallways) as well as features of family housing (such as outdoor play spaces).

#### Housing in Rural Areas

The current regulation includes housing in rural areas as one of the eligible housing needs under the Bank First District Priority, and the Banks have discretion to define "rural area." The proposed rule would retain this housing need under this regulatory priority, but would define "rural area" according to the definition in FHFA's Duty to Serve regulation in order to align with other FHFA goals and programs.<sup>37</sup> Rural populations generally experience significant and particularized housing needs. According to data in the Housing Assistance Council's Rural Data Portal, the poverty rate for individuals in rural areas is 17.7 percent, compared to 15.4 percent for individuals in the United States as a

<sup>35</sup> [https://www.usich.gov/resources/uploads/asset\\_library/Expert\\_Panel\\_on\\_Homelessness\\_among\\_American\\_Indians%2C\\_Alaska\\_Natives%2C\\_and\\_Native\\_Hawaiians.pdf](https://www.usich.gov/resources/uploads/asset_library/Expert_Panel_on_Homelessness_among_American_Indians%2C_Alaska_Natives%2C_and_Native_Hawaiians.pdf).

<sup>36</sup> [https://www.va.gov/HOMELESS/pit\\_count.asp](https://www.va.gov/HOMELESS/pit_count.asp).

<sup>37</sup> 12 CFR 1282.1.

whole.<sup>38</sup> The Harvard Joint Center for Housing Studies' report, *America's Rental Housing 2017*, notes that despite the fact that housing costs tend to be lower in rural areas, 40 percent of rural renters across the country are cost burdened.<sup>39</sup>

#### Rental Housing for Extremely Low-Income Households

The proposed rule would include rental projects in which at least 20 percent of the units are reserved for extremely low-income households under this proposed regulatory priority. A definition of "extremely low-income household" would be added in § 1291.1 to mean a household with an income at or below 30 percent of AMI. According to HUD's *2017 Worst Case Housing Needs Report* to Congress, households at the extremely low-income level have severe challenges in obtaining affordable housing. The report notes that only 38 of every 100 affordable units are available for extremely low-income renters, and that the vacancy rate for units affordable to renters with extremely low incomes was less than 4 percent.<sup>40</sup>

This housing need would be measured in dollars awarded to AHP projects in which at least 20 percent of the units are reserved for extremely low-income households to conform to the other housing needs under this proposed regulatory priority, which are also measured in dollars. In contrast, the regulatory priority in proposed § 1291.48(c) for very low-income targeting for rental units, described above, would be measured in the number of rental units reserved for very low-income households. FHFA specifically requests comments on whether the proposed 20 percent minimum threshold for units reserved for extremely low-income households is appropriate.

#### 2. Creating Economic Opportunity Promotion of Empowerment

The current regulation includes promotion of empowerment as a mandatory scoring criterion. The proposed rule would retain this housing need under this proposed regulatory priority, with the following changes. The proposed rule would add to the list of empowerment services—child care; adult daycare services; afterschool care; tutoring; health services; and workforce preparation and integration.

<sup>38</sup> <http://www.ruraldataportal.org/search.aspx>.

<sup>39</sup> <http://www.jchs.harvard.edu/americas-rental-housing>.

<sup>40</sup> See <https://www.huduser.gov/portal/sites/default/files/pdf/Worst-Case-Housing-Needs.pdf>.

The current regulation includes daycare as an eligible empowerment service. The proposed rule would replace daycare with child care, which encompasses daycare but is broader in that it includes programs offered not only during the day but outside of work hours and during summers, and programs that target older children. Residents of AHP projects may benefit from having such programs for their children depending on their work schedules and other commitments, thereby enabling them to work and improve their economic situations. Where child care programs are education-based, they may enhance the future economic opportunities of the children residing in AHP projects.

The proposed rule would add adult daycare services as an eligible empowerment service. These services can assist residents in AHP projects who may be caring for parents, or adult children with disabilities, who require supervised care so that the residents may work outside of the home.

Afterschool care would be added as an eligible empowerment service in recognition of the benefits of supervised afterschool programs for children and teens residing in AHP projects. For example, these programs may increase younger residents' future economic opportunities by assisting with schoolwork, encourage interest in the arts or community service, or teach job skills. Further, adult residents may benefit from the knowledge that their children are supervised in the hours before they return from work.

Tutoring would be included as an eligible empowerment service in light of the benefits that supplemental academic assistance may provide to children and teens for educational attainment. Tutoring may also be beneficial to adult residents who require tutoring in basic remedial education or English for limited-English-proficiency residents, for example, in order to obtain or retain work.

Health services would be added as an eligible empowerment service based on the research demonstrating the benefits of integrating health services into affordable housing, thereby enabling residents to stay healthy and continue to work. For example, early findings from a three-year research study by the Center for Outcomes Research and Education and Providence Health and Services in 145 affordable housing projects in Oregon found that integration of health care services (including access to healthy food, health care, nutrition counseling, and mental and behavioral health services) led to a

12 percent decrease in health costs per resident per month.<sup>41</sup>

Finally, workforce preparation and integration services would be included as eligible empowerment services because of the benefit that these programs may yield to residents to obtain and retain work. Workforce integration services may help residents with disabilities obtain and retain jobs. Workforce preparation may assist residents with no previous work experience in obtaining skills helpful to securing a job, such as interviewing techniques or other communication techniques, and skills necessary to retain work, such as conflict resolution strategies.

#### Residential Economic Diversity

The current regulation includes economic diversity as one of the eligible housing needs under the Bank First District Priority. The proposed rule would retain this housing need as empowerment, but would refer to it as “residential economic diversity” to align with the usage in FHFA’s Duty to Serve regulation and would define it in accordance with the Duty to Serve definition and FHFA’s Duty to Serve Evaluation Guidance.

### 3. Affordable Housing Preservation

#### Affordable Rental Housing Preservation

The current regulation does not include any scoring criteria specifically for affordable rental housing preservation, but some Banks have included this housing need under their Bank Second District Priority. The proposed rule would include this housing need under the this proposed regulatory priority, and would include the specific affordable rental housing preservation programs and housing needs identified in FHFA’s Duty to Serve regulation in order to align with related FHFA goals and programs. These are:

(a) Rental housing with energy or water efficiency improvements;

(b) Section 8. The project-based and tenant-based rental assistance housing programs under section 8 of the U.S. Housing Act of 1937;<sup>42</sup>

(c) Section 236. The rental and cooperative housing program for lower income families under section 236 of the National Housing Act;<sup>43</sup>

(d) Section 221(d)(4). The housing program for moderate-income and

displaced families under section 221(d)(4) of the National Housing Act;<sup>44</sup>

(e) Section 202. The supportive housing program for the elderly under section 202 of the Housing Act of 1959;<sup>45</sup>

(f) Section 811. The supportive housing program for persons with disabilities under section 811 of the Cranston-Gonzalez National Affordable Housing Act;<sup>46</sup>

(g) McKinney-Vento Homeless Assistance. Permanent supportive housing projects subsidized under Title IV of the McKinney-Vento Homeless Assistance Act;<sup>47</sup>

(h) Section 515. The rural rental housing program under section 515 of the Housing Act of 1949;<sup>48</sup>

(i) Low-income housing tax credits. Low-income housing tax credits under section 42 of the Internal Revenue Code of 1986;<sup>49</sup> and

(j) Other comparable state or local affordable housing programs.

#### Affordable Homeownership Preservation

The current regulation does not include scoring criteria specifically for affordable homeownership preservation, but some Banks have included this housing need, *e.g.*, housing with energy efficiency features, under their Bank Second District Priority. The proposed rule would include this housing need under this proposed regulatory priority, and would specify certain affordable preservation programs that are included in FHFA’s Duty to Serve regulation—shared equity homeownership programs and owner-occupied housing with energy or water efficiency improvements.

FHFA specifically requests comments on whether the three proposed regulatory priorities—underserved communities and populations, creating economic opportunities, and affordable housing preservation—constitute significant housing priorities that should be included in the regulation, or whether other housing priorities should be included. FHFA also requests comments on whether the specified housing needs identified under each regulatory priority, or other specific housing needs, should be included in the regulation.

#### Annual Report

Proposed § 1291.48(e) would require each Bank to submit an annual report to

FHFA demonstrating the Bank’s compliance with the outcome requirements.

#### Proposed § 1291.49 Determination of Compliance With Outcome Requirements; Notice of Determination

Under proposed § 1291.49, the Director of FHFA would be required to determine annually each Bank’s compliance with the outcome requirements for the statutory and regulatory priorities under proposed § 1291.48. Proposed § 1291.49 would establish procedures, including time periods, for the compliance determination process. These procedures would include issuance of a notice of preliminary determination, an opportunity for the Bank to respond, and issuance of a final determination and whether compliance was feasible, taking into consideration market and economic conditions and the financial condition of the Bank. These proposed procedures are generally analogous to those in the Enterprise Housing Goals regulation.<sup>50</sup>

#### Requests for Comments on Current Regulatory Scoring System

As discussed above, in determining whether to revise the current AHP regulatory scoring system, FHFA considered how the current mandatory and discretionary scoring criteria address housing priorities established by FHFA and impact the Banks’ ability to address specific housing needs in their districts. FHFA requests comments on whether the Banks have sufficient flexibility under the current scoring system to target specific housing needs in their districts, including awarding subsidy to address multiple housing needs in a single AHP funding period. If they do, FHFA requests comments on whether the current regulatory scoring system should be maintained without change, or whether any of the current mandatory scoring criteria and minimum required point allocations should be modified to reflect other specific housing needs. FHFA also requests comments on whether the Bank First and Second District Priorities should be combined and the list of housing needs in the Bank First District Priority eliminated. FHFA notes that the Banks do not currently allocate the full 45 points available to their Bank Second District Priority, and they include multiple housing needs under this Priority, resulting in no one housing need effectively receiving priority under the current scoring system.

<sup>41</sup> See <https://www.nhchc.org/wp-content/uploads/2016/06/linking-health-and-housing-improving-resident-health-and-reducing-health-care-costs-through-affordable-housing-saul.pdf>.

<sup>42</sup> 42 U.S.C. 1437f.

<sup>43</sup> 12 U.S.C. 1715z-1.

<sup>44</sup> 12 U.S.C. 1715l.

<sup>45</sup> 12 U.S.C. 1701q.

<sup>46</sup> 42 U.S.C. 8013.

<sup>47</sup> 42 U.S.C. 11361, *et seq.*

<sup>48</sup> 42 U.S.C. 1485.

<sup>49</sup> 26 U.S.C. 42.

<sup>50</sup> 12 CFR 1282.21.

*Subpart F—Monitoring*

## Proposed § 1291.50 Monitoring Under General Fund and Targeted Funds

The Bank Act requires the AHP regulation to ensure that adequate long-term monitoring is available to guarantee that affordability standards and other AHP requirements are satisfied.<sup>51</sup> The Bank Act also requires the AHP regulation to coordinate AHP activities with other Federal or federally-subsidized affordable housing activities to the maximum extent possible.<sup>52</sup> The current regulation's requirements for long-term monitoring of AHP rental projects are based on those statutory provisions.

Specifically, the current regulation requires the Banks to adopt written policies for monitoring projects and households awarded AHP subsidies under both the Competitive Application Program and Homeownership Set-Aside Programs.

For initial monitoring under the Competitive Application Program, the regulation requires the Banks to monitor owner-occupied and rental projects prior to, and within a reasonable period after, project completion by:

- Reviewing documentation to determine whether AHP eligibility requirements have been satisfied, services and activities committed in the approved AHP application have been provided, and AHP retention agreements are in place; and
- Reviewing back-up project documentation (such as rent rolls and households' W-2 forms) on a risk-based sampling basis, of household incomes and rents maintained by the project sponsors to verify that the household incomes and rents comply with the commitments in the approved AHP applications. In practice, for initial monitoring, the Banks review the project sponsor documentation and rent rolls at initial monitoring, and review other back-up documentation on a risk-basis.

For long-term monitoring under the Competitive Application Program, the regulation generally requires the Banks to monitor completed AHP rental projects commencing in the second year after project completion to determine, at a minimum, whether household incomes and rents comply with the income targeting and rent commitments in the approved AHP applications during the AHP 15-year retention period by:

- Reviewing annual project owner certifications of household incomes and

rents for compliance with the AHP application commitments, which may be reviewed on a risk-based sampling basis; and

- Reviewing back-up project documentation for incomes and rents, including project rent rolls, maintained by the project owner, which may also be reviewed on a risk-based sampling basis pursuant to the Bank's risk-based sampling plan.

In practice, for long-term monitoring, the Banks review all of the annual project sponsor certifications but review the rent rolls and other back-up documentation on a risk basis.

The regulation provides that a Bank's written monitoring policies must take into account risk factors such as the amount of AHP subsidy in the project, type of project, size of project, location of project, sponsor experience, and any monitoring of the project provided by a federal, state, or local government entity.

The regulation permits the Banks to develop and implement reasonable sampling plans to monitor rental projects that receive subsidies under the Competitive Application Program as well as households that receive subsidies under the Homeownership Set-Aside Program. The regulation permits the Banks to use the sampling plans to monitor back-up documentation of household incomes and rents. The regulation does not permit the use of sampling plans for monitoring member certifications under the Homeownership Set-Aside Program.

The regulation makes some exceptions to the long-term monitoring requirements for certain types of AHP rental projects. Specifically, for AHP projects that also receive LIHTC, the Banks may rely on the long-term monitoring of LIHTC household incomes and rents performed by state-designated housing credit agencies that administer LIHTC, and the Banks do not have to review any monitoring documentation.

The regulation also makes an exception to the long-term monitoring requirements for AHP rental projects that received funds from federal, state, or local government entities provided the Bank is able to demonstrate the following: (1) The compliance profile of the program is substantively equivalent to AHP requirements; (2) the governmental entity has the ability to monitor the project; (3) the governmental entity agrees to provide reports to the Bank on the project's incomes and rents for the full AHP 15-year retention period; and (4) the Bank reviews the reports from the

governmental entity to confirm compliance with its monitoring policies. However, this monitoring option has not proved feasible for the Banks.

*Initial monitoring of AHP projects receiving LIHTC.* The proposed rule would retain the initial monitoring requirement that the Banks review certifications from LIHTC project sponsors that the residents' incomes and the rents comply with the income-targeting and rent commitments in the approved AHP application. The proposed rule would also include a requirement, consistent with Bank practice, that the Banks review the project's rent rolls. However, the proposed rule would remove the requirement that the Banks review other back-up documentation on incomes and rents at initial monitoring for LIHTC projects. The proposed rule would also streamline the LIHTC monitoring provisions for greater conciseness.

In 2016, 51 percent of AHP projects received LIHTC allocations, comprising 62 percent of total AHP competitive funds awarded. The current regulation has allowed the Banks to rely on the long-term monitoring of LIHTC projects by state-designated housing tax credit allocation agencies since 2006 because the LIHTC income, rent, and long-term retention period requirements are the same as or substantially equivalent to those of the AHP, and because LIHTC projects rarely go out of compliance with those requirements. As noted by some stakeholders, the same analysis for long-term monitoring of LIHTC projects could be applied to initial monitoring of LIHTC projects and, therefore, the Banks should also be permitted to rely at initial monitoring upon the income and rent monitoring performed by the state-designated tax credit allocation agencies.

The initial rationale for allowing the Banks to rely on monitoring of LIHTC projects by the state-designated tax credit allocation agencies continues to hold true—the LIHTC income, rent, and long-term retention period requirements are substantially equivalent to those of the AHP, the state-designated tax credit allocation agencies monitor the projects, and LIHTC projects rarely go out of compliance with the income and rent requirements.<sup>53</sup> Further, multiple

<sup>53</sup> A minimum of 40 percent of units in an LIHTC project must be affordable to tenants earning 60 percent of AMI, or a minimum of 20 percent of units in an LIHTC project must be affordable to tenants earning 50 percent of AMI. However, the vast majority of LIHTC units serve residents at 50 percent of AMI or below. A HUD report published in December 2016, *Data on Tenants in LIHTC Units as of December 31, 2014*, indicates that the median income for LIHTC households was \$17,152. Of all LIHTC units, 81 percent serve households at 50

<sup>51</sup> 12 U.S.C. 1430(j)(9)(C).

<sup>52</sup> 12 U.S.C. 1430(j)(9)(G).

parties retain a strong incentive to monitor LIHTC projects for income and rent compliance.

LIHTC project owners bear responsibility for ensuring that their projects comply with the program's income, rent, and retention period requirements. The owners face severe consequences for noncompliance, which serve as a substantial deterrent to noncompliance. Because LIHTC investors cannot receive the benefits of the tax credits for units that are not in compliance, LIHTC project owners guarantee to their investors that their projects remain in compliance, or must repay investors the amount of tax credits lost plus any penalties or interest levied by the Internal Revenue Service.

LIHTC projects are monitored not only by the state-designated tax credit allocation agencies, but also annually by the LIHTC project owners and LIHTC investors. LIHTC project owners must certify the income of each household at move-in, and must re-certify the income of each household annually.

As noted above, the Banks currently may review LIHTC back-up documentation at initial monitoring on a risk basis. Given the low risks of noncompliance by LIHTC projects, the Banks can establish review schedules for the back-up documentation that are not especially burdensome. For example, a Bank might choose to review LIHTC back-up documentation once or twice during the project's 15-year AHP retention period. Although the administrative burden on the project sponsors to provide, and the Banks to review, LIHTC back-up documentation may not be significant, FHFA believes that eliminating this monitoring requirement would benefit the Banks and project sponsors by reducing their administrative costs.

*Notice Requirement for LIHTC Project Noncompliance during AHP Retention Period.* Notwithstanding the infrequent instances of LIHTC project noncompliance, in the event of such

percent of AMI or below, while 11 percent serve households between 50.1 percent and 60 percent of AMI. See <https://www.huduser.gov/portal/publications/LIHTCTenantReport-2014.html>.

Further, LIHTC projects rarely go out of compliance, with analysis showing that the average LIHTC investor has realized 98 percent of its promised credits, and a cumulative foreclosure rate for 9 percent credits between 1986 and 2014 at 0.04 percent. See A CohnReznick Webinar, *The Low Income Housing Tax Credit Program at Year 30: A Performance Update*, January 21, 2016. Slides 24 and 35. [http://ahic.org/images/downloads/Research\\_and\\_Education/cohnreznick\\_lihtc\\_performance\\_study.pdf](http://ahic.org/images/downloads/Research_and_Education/cohnreznick_lihtc_performance_study.pdf). Finally, LIHTC carries more stringent retention requirements than the AHP. LIHTC projects must remain affordable for an initial 15-year retention period, and an additional 15-year extended use period.

noncompliance during the AHP 15-year retention period, a Bank likely would not become aware of the noncompliance because the Banks do not monitor LIHTC projects during the retention period. FHFA is proposing to add a requirement, as discussed under proposed § 1291.15(a)(5)(ii) above, that members' monitoring agreements with project sponsors and owners require such parties to provide prompt written notice to the Bank if the LIHTC project goes out of compliance with the applicable LIHTC income-targeting or rent requirements during the AHP 15-year retention period. The proposed rule would add a corresponding requirement in the monitoring section of the regulation that the Banks must review LIHTC project noncompliance notices received from project sponsors or owners during the AHP 15-year retention period. In this way, the Banks would become aware of any noncompliance and could take remedial actions with respect to the project.

The proposed rule would not require that the Bank's AHP agreement with the member or project sponsor or owner include a provision for the project sponsor or owner to send written notice of noncompliance with other government programs to the Banks. As discussed below, the Banks would be receiving other information that would help inform them of potential or actual project noncompliance. The Banks would be required to obtain information from project sponsors or owners on their projects' compliance with these other government programs, as well as the projects' on-going financial viability ("enhanced certifications"), which the Banks obtain currently but to varying degrees. The Banks would also continue to review annual project sponsor certifications. In addition, the noncompliance rates for projects under these other government programs are low.

*Initial and long-term monitoring of AHP projects funded by certain other government programs specified in FHFA guidance.* The proposed rule would also provide that, for AHP projects funded by certain other government programs specified in separate FHFA guidance, the Banks would only be required to review project sponsor certifications and rent rolls, and not any other back-up documentation, at initial monitoring. For long-term monitoring, the Banks would only be required to review annual project sponsor certifications on incomes and rents, and would not be required to review any back-up documentation for incomes and rents, including rent rolls. FHFA would include in the guidance only

government programs that have the same or substantially equivalent rent, income, and retention period requirements as the AHP, very low occurrences of noncompliance with those requirements, and where the monitoring entity has demonstrated and continues to demonstrate its ability to monitor the program. The proposed rule would specify that other compatible government programs, for monitoring purposes, will be set forth in FHFA guidance. FHFA will employ the guidance to remain current with federal program developments.

The FHFA guidance initially would specify the following federal government programs as eligible for this reduced monitoring:

- HUD Section 202 Program for the Elderly;
- HUD Section 811 Program for Housing the Disabled;
- USDA Section 515 Rural Multifamily Program; and
- USDA Section 514 Farmworker Multifamily Program.

Stakeholders requested that FHFA allow the Banks to rely upon the income qualification tests performed by USDA Rural Development and HUD-funded projects at initial monitoring. Further, stakeholders requested that FHFA allow a Bank, in its discretion, for purposes of long-term monitoring, to rely upon the monitoring conducted by HUD and USDA Rural Development, as the Banks are currently allowed to rely on the monitoring of the agency administering LIHTC.

In 2016, approximately two-thirds of AHP projects received funding from other federal programs. FHFA analyzed the extent to which AHP projects also receive subsidies from HUD and USDA programs to determine the extent to which Banks could conceivably rely on HUD and USDA monitoring for these projects. In 2016, 26 percent of AHP projects received HOME Investment Partnerships Program (HOME) financing, 8 percent received Community Development Block Grant (CDBG) funds, and 12 percent received other federal financing, including from USDA. FHFA then analyzed HUD and USDA programs to determine which programs have substantially equivalent rent, income, and retention requirements to the AHP, very low noncompliance rates, and where the monitoring entity has demonstrated and continues to demonstrate its ability to monitor the program. These programs are further discussed below.

*HUD Section 202 and 811 Programs.* The income, rent and retention period standards for HUD's Section 202 Program for the Elderly and Section 811

for Housing the Disabled meet or exceed the AHP standards.<sup>54</sup> Further, HUD monitors eligibility for rental assistance on an annual basis, and has demonstrated and continues to demonstrate its ability to monitor the programs. The Banks have indicated to FHFA that in their experience, there are very low or no instances of noncompliance with AHP-funded Section 202 or Section 811 projects. Congress has not appropriated capital advances for the Sections 202 and 811 programs since 2011. Thus, the proposed reduction in monitoring would only apply to Section 202 and 811 projects in the Banks' existing portfolios or to Section 202 or 811 projects seeking rehabilitation funding.

*USDA Section 515 and 514 Programs.* There are some differences in the income-eligibility and rent requirements between the Section 515 rural multifamily projects and Section 514 farmworker multifamily projects and those of the AHP. However, in practice, the household incomes served and rents are substantially similar to the AHP standards.<sup>55</sup> Further, USDA has

<sup>54</sup> Section 811 projects are funded by a capital advance that requires a project to be occupied only by very low-income persons with disabilities (at or below 50 percent of AMI). Section 202 projects must be occupied by low- or very low-income elderly people. In 2017, 98% of households in Section 811 units had incomes at or below 50 percent of AMI. See <https://www.huduser.gov/portal/datasets/assthsgh.html>. Residents of Section 202 and 811 programs pay 30 percent or less of their monthly adjusted income for rent. These requirements are the same, and in some cases more stringent, than the AHP's 30 percent of income standard for rents. See Section 811 Supportive Housing for Persons with Disabilities Handbook (4571.2) <https://www.hud.gov/sites/documents/45712C1HSGH.PDF> and HUD Handbook 4571.3. In both the Section 202 and 811 programs, the affordability term is 40 years. HUD has demonstrated the ability to monitor both Section 202 and Section 811 projects. The low default rates in both these programs are indicative that that HUD's monitoring has been effective. See *811 Operating Costs Needs*, Ken Lam, Jill Khadduri, March 2007, [https://www.huduser.gov/portal/publications/pubasst/Sec\\_202\\_811.html](https://www.huduser.gov/portal/publications/pubasst/Sec_202_811.html), and Brauner, Bill, (2016) *A First Look at Supportive Housing for the Elderly (Section 202) Housing in Massachusetts* and Haley, Barbara and Robert Gray (June, 2008) *Section 202 Supportive Housing for the Elderly: Program Status and Performance Measurement*, [https://www.huduser.gov/portal/publications/sec\\_202\\_1.pdf](https://www.huduser.gov/portal/publications/sec_202_1.pdf).

<sup>55</sup> While incomes in Section 515 projects may go up to 80 percent of AMI plus \$5,500 and incomes in Section 514 projects may rise to 80 percent of AMI, in actuality household incomes are much lower. In 2015, 92 percent of households in Section 515 and 514 projects had very low incomes, and the average rent for units in all states is below the 50 percent of AMI adjusted rent level. Tenants pay basic rent or 30 percent of adjusted income, whichever is greater. USDA Section 521 Rental Assistance subsidy can be used to limit tenants' payments to 30 percent of their income. Tenants may receive rent subsidies from other sources as well. Most tenants pay no more than 30 percent of their income in rent (88 percent of Section 515

demonstrated and continues to demonstrate its ability to monitor the programs.<sup>56</sup> USDA 514 and 515 projects have low delinquency rates,<sup>57</sup> and the Banks have indicated to FHFA that in their experience, there are very low or no instances of noncompliance with AHP-funded Section 515 and 514 projects. An additional argument in favor of aligning the AHP with USDA's monitoring is that this might encourage more USDA-funded projects to apply for AHP funds, thus increasing the proportion of rural families served by the AHP.

FHFA also reviewed HUD's HOME Program, CDBG Program, Rental Assistance Demonstration Program, Housing Trust Fund, and Project-Based Rental Assistance (PBRA) Section 8 Program, as well as single-family mortgage revenue bond financing programs. FHFA found that each program has some standards that differ from the AHP in income, rent or retention periods, varying monitoring practices around the country, or a lack of available data on the projects' noncompliance rates (in the case of the PBRA Section Program). Therefore, relying on the monitoring of these other government funding programs is not currently feasible for the AHP.

Because the income, rent, and retention period standards, monitoring practices, and compliance profiles of government housing subsidy programs may change over time, FHFA is

households, and 97 percent of Section 514 households in 2016). See 7 CFR 3560.203. A USDA report published in December 2016, *Results of the 2016 Multi-Family Housing Annual Fair Housing Occupancy Report*, found that in FY 2016, 92.3 percent of units were occupied by very low-income households—a percentage consistent with past years. In Section 514 projects 77.1 percent of units were occupied by very low income households, and 19.73 percent of units were occupied by low income households. See [http://www.ruralhome.org/storage/documents/rd\\_obligations/mfh-occupancy/occupancymfh2016.pdf](http://www.ruralhome.org/storage/documents/rd_obligations/mfh-occupancy/occupancymfh2016.pdf). The standard term for an initial Section 515 loan is 30 years with a 50-year amortization period. The term for subsequent (made to an existing Section 515 project for subsequent rehabilitation or repairs to the project) and loans for special types of properties, such as manufactured housing, may be made for a shorter term based on the project's expected useful life; and, the loans are amortized over 50 years.

<sup>56</sup> USDA field staff performs careful monitoring of Section 515 and 514 projects, including on-site physical inspections, on-site tenant file review and management review, annual project budget review, and project financial statement review. All reviews are performed by USDA area office staff.

<sup>57</sup> USDA Section 515 and 514 projects perform well: Section 515 projects had a 2.4 percent delinquency rate for the ten years ending 2014, while Section 514 projects had a 3.4 delinquency rate. See *Statement of Tony Hernandez, Administrator Before the Subcommittee on Housing and Insurance Committee on Financial Services*, May 19, 2015, [https://www.rd.usda.gov/files/testimony/USDA\\_Rural%20Housing\\_May%2019\\_15.pdf](https://www.rd.usda.gov/files/testimony/USDA_Rural%20Housing_May%2019_15.pdf).

proposing to include a list of federal government programs that currently meet the requirements discussed above in separate guidance, which FHFA could occasionally revise in the event that programs' requirements become compatible or incompatible with the AHP requirements, or new programs are established that have compatible requirements.

The proposed monitoring changes would create a modest decrease in the Banks' administrative responsibilities by expanding their ability to rely on other government programs for both initial and long-term monitoring. The Banks currently have an average of 260 AHP rental projects per Bank to monitor, although the monitoring is reduced significantly by the Banks' ability to conduct long-term monitoring of the projects on a risk-basis.

FHFA specifically requests comments on whether the proposed reductions in the Banks' monitoring responsibilities are reasonable, taking into consideration the risks of noncompliance and the costs of project monitoring. FHFA also requests comments on whether data is available on the noncompliance rates of projects funded under the PBRA Section 8 Program.

*Enhanced long-term monitoring certifications.* Proposed § 1291.50(c)(1) would codify existing Bank best practices that require submission by project sponsors of annual project certifications that include not only the required household income and rent information, but also information on the on-going financial viability of the project, such as whether the project is current on property taxes and loan payments, its vacancy rate, or whether it is in compliance with its commitments to other funding sources.

During long-term monitoring, the Banks are only required to monitor projects for compliance with the household income-targeting and rent commitments in their AHP applications. Reviewing income and rent information alone limits the ability of the Banks to determine whether projects are experiencing operational challenges or in danger of foreclosure. Thus, in addition to obtaining household income and rent information, Banks have, to varying degrees, been requesting additional information from project sponsors in order to discover project issues before they escalate. This additional information enables the Banks to work with other funders to address project concerns and any noncompliance, including attempting remediation through workout strategies or recovery of AHP subsidy for noncompliance. It also mitigates the risk

that Banks may be less aware of noncompliance by AHP projects that are also funded by the federal programs for which FHFA may determine through guidance that the Banks may reduce their long-term monitoring. The proposed change may slightly increase the monitoring requirement for project sponsors and the Banks that are not currently requiring such enhanced certifications.

Accordingly, the proposed rule would require the Banks to obtain such “enhanced” annual certifications from project sponsors during the AHP 15-year retention period that include information on the ongoing financial viability of the project.

#### Proposed § 1291.51 Monitoring Under Homeownership Set-Aside Programs

The current monitoring provisions for the Homeownership Set-Aside Program would move from § 1291.7(b) to proposed § 1291.51. The requirement to monitor compliance with the owner-occupied retention agreement requirement would be removed because FHFA is proposing to eliminate this requirement.

#### Subpart G—Remedial Actions for Noncompliance

The current provisions addressing remedial actions for AHP noncompliance in § 1291.8 would move to proposed Subpart G, and each type of noncompliance—project sponsor or owner, member, or Bank—would be included in a separate section so that the responsibilities and potential liabilities of each party are clear. Substantive changes would also be made regarding the order in which certain remedial actions must be taken.

Subpart G would also include a new section addressing remedies for Bank noncompliance with the proposed outcome requirements for the statutory and regulatory priorities, including housing plans and reimbursement of the AHP fund.

The proposed changes are discussed below.

#### Proposed § 1291.60 Remedial Actions for Project Noncompliance

Proposed § 1291.60 would address AHP project noncompliance. The language would be revised and streamlined to provide greater clarity on the scope of the section and the responsibilities of the various parties. The proposed rule would also make substantive changes by establishing an order of remedial steps that a Bank would be required to follow before recovering AHP subsidy. The proposed rule would clarify factors for Bank

consideration in determining whether to settle for less than the full amount of AHP subsidy due. These changes are discussed below.

*Scope.* Proposed § 1291.60 would apply to noncompliance by an AHP-assisted project with its AHP application commitments and the requirements of the regulation, including any use of AHP subsidy by the project sponsor or owner for purposes other than those committed to in the AHP application. Consistent with the current regulation, the proposed rule would clarify that this section would not apply to individual AHP-assisted households, or to the sale or refinancing by such households of their homes, as there is no ongoing Bank monitoring of households once they purchase their homes, and sale or refinancing during the AHP five-year retention period is not considered noncompliance.

*Elimination of project noncompliance.* The current regulation provides for three types of remedies for project noncompliance without mandating the order in which they must be attempted—cure of the noncompliance; project modification; and recovery of AHP subsidy or settlement. Because the objective of the AHP is to provide affordable housing for eligible households for the duration of the AHP retention period, recovery of AHP subsidy should be the last resort. Accordingly, the proposed rule would require that certain remedial actions be attempted before subsidy is recaptured, as discussed further below.

*Cure.* The project sponsor or owner would first be required to cure the project noncompliance within a reasonable period of time. Banks generally follow this practice currently. For example, if a project has a certain number of households with incomes exceeding the AHP application’s income-targeting commitments, cure would be achieved by renting the next available vacant units to that number of income-eligible households. If the noncompliance is cured, then no AHP subsidy would be required to be repaid by the project sponsor or owner to the Bank.

*Project modification.* If the project noncompliance cannot be cured within a reasonable period of time, the Bank would be required to determine whether the circumstances of the noncompliance could be eliminated through a project modification under proposed § 1291.27. If so, then the Bank would be required to approve the modification, and the project sponsor or owner would not be required to repay AHP subsidy to the Bank.

Under proposed § 1291.27(a), a modification must be approved by the Bank if the project, as modified, meets all of the modification requirements in that section, including that there is good cause for the modification that is not solely eliminating the noncompliance, and that the project rescores as high as the lowest ranking alternate approved for funding by the Bank in the project’s original AHP funding period. In the above example, if the project sponsor or owner were not able to find enough households meeting its income-targeting commitments to occupy the next available vacant units, the Bank would determine whether the project could be modified to target those units to higher income (but still AHP income-eligible) households by rescoring the project based on the number of units to be targeted to the higher incomes. If the project rescored successfully, then the project would be modified, thereby eliminating the circumstances of the noncompliance, and no subsidy recovery would be required.

*Reasonable collection efforts, including settlement.* If the circumstances of a project’s noncompliance cannot be eliminated through a cure or modification, the Bank, or the member if delegated the responsibility, would be required to first make a demand on the project sponsor or owner for repayment of the full amount of the subsidy not used in compliance with the commitments in the AHP application or the requirements of the regulation. This is intended to ensure that the Banks attempt to recover all of the subsidy due before considering settlements. The proposed rule would clarify that if the noncompliance is occupancy by over-income households, the amount of AHP subsidy due is calculated based on the number of units in noncompliance, the length of the noncompliance, and the portion of the AHP subsidy attributable to the noncompliant units.

If the demand for repayment of the full amount of subsidy due is unsuccessful, then the member, in consultation with the Bank, would be required to make reasonable efforts to collect the subsidy from the project sponsor or owner. Members have this role under the current regulation. The proposed rule would clarify that members would carry out these efforts in consultation with the Bank, consistent with current practice.

Under the current regulation, reasonable collection efforts may include settlement for less than the full amount of subsidy due, taking into account the facts and circumstances of the noncompliance, including the



degree of culpability of the noncomplying parties and the extent of the Bank's recovery efforts. The proposed rule would clarify that the facts and circumstances to consider also include the financial capacity of the project sponsor or owner, assets securing the AHP subsidy, and other assets of the project sponsor or owner.

As under the current regulation, the proposed rule would require that a settlement be supported by sufficient documentation showing that the sum agreed to be repaid is reasonably justified, based on the facts and circumstances of the noncompliance discussed above. FHFA specifically requests comments on whether those facts and circumstances are appropriate for consideration during reasonable collection efforts, and whether there are other factors that should be considered as well.

The proposed rule would eliminate current § 1291.8(d)(2), which provides Banks the option to seek prior approval from FHFA of a proposed subsidy settlement. Since inception of this option, only one Bank has used it and for two similar cases. The Banks may enter into subsidy settlements, in their discretion, provided the settlements are supported by reasonable justifications. The Banks have made these types of business decisions for many years without seeking prior FHFA approval. Moreover, the proposed rule would further clarify the factors the Banks should consider in deciding whether to settle with the project sponsor or owner. Accordingly, there is no need to retain this prior approval provision in the regulation.

#### Proposed § 1291.61 Recovery of Subsidy for Member Noncompliance

Proposed § 1291.61 would address member noncompliance, which is currently addressed in § 1291.8(b)(1). As under the current regulation, if a member uses AHP subsidy for purposes other than those committed to in the AHP application or the requirements of the regulation, the Bank would be required to recover from the member the amount of subsidy used for such impermissible purposes.

#### Proposed § 1291.62 Bank Reimbursement of AHP Fund

Current § 1291.8(e), which addresses circumstances where a Bank would be required to reimburse its AHP fund, would move to proposed § 1291.62, with no substantive changes.

#### Proposed § 1291.63 Suspension and Debarment

Current § 1291.8(g) addressing suspension or debarment of members, project sponsors, or project owners would move unchanged to proposed § 1291.63.

#### Proposed § 1291.64 Use of Repaid AHP Subsidies for Other AHP-Eligible Projects and Households

Proposed § 1291.64 would include current § 1291.8(f)(1), which provides that AHP subsidy repaid to a Bank under the AHP regulation must be made available by the Bank for other AHP-eligible projects. The proposed rule would clarify that the repaid subsidy may also be made available by the Bank for AHP-eligible households.

The proposed rule would remove the provision in current § 1291.8(f)(2) providing for re-use of repaid AHP direct subsidies in the same project because it applies where AHP subsidy is repaid by a household due to sale or refinancing of the home to a household that is not low- or moderate-income household during the retention period, and FHFA is proposing to eliminate this subsidy repayment requirement in connection with elimination of the owner-occupied retention agreement requirement.

#### Proposed § 1291.65 Remedial Actions for Bank Noncompliance With Outcome Requirements

Proposed new § 1291.65 would provide that if the Director of FHFA determines that a Bank has failed to comply with an outcome requirement for the statutory and regulatory priorities and compliance was feasible, the Director may require the Bank to take actions to remedy the noncompliance, including but not limited to, reimbursement by the Bank of its AHP fund for the difference in the amount of AHP funds required to be awarded to meet the outcome requirement and the amount the Bank actually awarded, or implementation of a housing plan. A housing plan would describe the specific actions the Bank would take to comply with the outcome requirements for the next calendar year. The proposed procedures, including time periods, for submission, review and approval of a proposed housing plan, are generally analogous to those under the Enterprise Housing Goals regulation.<sup>58</sup>

<sup>58</sup> 12 CFR 1282.21.

#### Proposed § 1291.66 Transfer of Program Administration

The proposed rule would move current § 1291.8(h), which addresses transfer of a Bank's Program to another Bank in the event of mismanagement of its Program, to proposed § 1291.66 with no changes.

#### Removal of Obsolete Provision

The proposed rule would rescind current § 1291.8(i) because the provision refers to a now-repealed Finance Board regulatory provision that was intended to establish a formal process for review by the Board of Directors of the Finance Board of certain types of supervisory decisions, which FHFA opted not to adopt.<sup>59</sup> Though it is not directly comparable to the repealed Finance Board provision, FHFA's Ombudsman regulation provides an avenue for the Banks to present complaints and appeals to the agency about their regulation or supervision.<sup>60</sup>

#### Subpart H—Affordable Housing Reserve Fund

##### Proposed § 1291.70 Affordable Housing Reserve Fund

Current § 1291.12 addressing the requirements for an Affordable Housing Reserve Fund would move to proposed § 1291.70. In the 28 years of the Program, there has never been cause for the agency to establish an Affordable Housing Reserve Fund because the demand for AHP funds at each Bank has always exceeded the amount available, and no Bank has failed to use or commit in full its required annual AHP contribution.

The proposed rule would revise the current provision by requiring that amounts remaining unused or uncommitted at year-end would be deemed to be used or committed if, in combination with AHP funds that have been returned to the Bank or decommitted from canceled projects, they are insufficient to fund the next highest scoring AHP applications in the Bank's final funding period of the year for its General Fund first and then for any Targeted Funds established by the Bank.

#### IV. List of Specific Requests for Comments

In addition to requesting comments on the entire proposed rule, FHFA is listing below, for ease of reference, the specific requests for comments included throughout the preamble above. Please identify the specific request for

<sup>59</sup> 12 CFR 907.9.

<sup>60</sup> See 12 CFR part 1213.

comment to which you are responding by its request number.

*Subpart B—Program Administration and Governance*

1. What are the benefits and risks of allowing the Banks to establish Targeted Funds?

2. Is the proposed allocation of 40 percent of total AHP funds to Targeted Funds an appropriate percentage, or should the percentage be higher or lower?

3. Would the proposed expansion of the contents of the Targeted Community Lending Plans impede the Banks' ability to respond to disasters through the AHP?

4. What are the benefits of the proposed expansion of the contents of the Targeted Community Lending Plans and their linkage to the AHP Implementation Plans?

5. Is the requirement that members' AHP agreements with LIHTC project sponsors include a provision requiring the sponsors to provide prompt written notice to the Bank if the project is in noncompliance with the LIHTC income-targeting or rent requirements at any time during the AHP 15-year retention period practical, and should it also be required of project sponsors in the event of noncompliance by their projects with the income-targeting or rent requirements of the government housing programs discussed under the Monitoring section?

6. What are the advantages and disadvantages of an AHP owner-occupied retention agreement, would eliminating it impact FHFA's ability to ensure that AHP funds are being used for the statutorily intended purposes, and are there ways to deter flipping other than a retention agreement?

7. Should the proposed increase in the maximum permissible grant to households from \$15,000 to \$22,000 under the Homeownership Set-Aside Program impact the decision on whether to eliminate the retention agreement?

8. Should the current provision in retention agreements requiring that notice of a sale or refinancing during the retention period be provided to either the Bank or its designee (typically the member) be revised to require that the notice be provided to both the Bank and its designee if a retention agreement requirement is retained in the final rule?

9. Should the AHP retention agreement, if retained in the final rule, require the AHP-assisted household to repay AHP subsidy to the Bank from any net proceeds on the sale or refinancing of the home or from the net gain?

10. What are the merits and disadvantages of the net proceeds and net gain calculations from the standpoint of the AHP-assisted households and the Banks, and are there other subsidy repayment approaches FHFA should consider, if the AHP retention agreement requirement is retained in the final rule?

11. What approaches would provide a reasonable basis to assume that the subsequent purchaser of an AHP-assisted unit is likely to be low- or moderate-income, including proxies that could serve this purpose?

12. What proxies would be reasonable for assuming a subsequent purchaser's income, including the following or others: Certification from the subsequent purchaser or a third party that the subsequent purchaser's income is at or below the low- or moderate-income limit; evidence that the subsequent purchaser is receiving direct homebuyer assistance from another government program with household income targeting requirements substantially equivalent to those of the AHP; the purchase price of the AHP-assisted unit is less than the median home price in the area; the AHP-assisted unit is located in a census tract or block group where at least 51 percent of the households are low- or moderate-income; or FHA or other underwriting standards indicating that the income required to purchase the AHP-assisted unit at the purchase price is low- or moderate-income?

13. Should there be an exception to the AHP subsidy repayment requirement in the AHP retention agreement, if retained in the final rule, where the amount of AHP subsidy subject to repayment, after calculating the net proceeds or net gain, is \$1,000 or less?

14. If the AHP retention agreement is retained in the final rule, should the rule clarify that the obligation to repay AHP subsidy to a Bank shall terminate not only after any event of foreclosure, but also after transfer by deed in lieu of foreclosure, assignment of an FHA mortgage to HUD, or death of the owner(s) of the unit?

*Subpart C—General Fund and Targeted Funds*

15. How should preservation of rental projects be encouraged through the AHP while discouraging displacement of current occupants with higher incomes than those targeted in the AHP application submitted to the Bank for approval, and is the proposed requirement for a relocation plan approved by the primary funder reasonable?

16. Are the current AHP requirements for sponsor-provided permanent financing reasonable, do the sponsors have a need for AHP subsidy in light of their particular financing model, and does the current method in the regulation for determining their need for AHP subsidy understate or overstate the amount of AHP subsidy needed?

17. Should sponsors using the sponsor-provided permanent financing model be considered revolving loan funds and, if so, should they be subject to the current or different AHP revolving loan fund requirements?

18. What are the potential advantages and disadvantages of allowing the Banks to impose a maximum subsidy limit per project sponsor?

19. What are possible approaches for re-ranking applications to meet the outcome requirements while at the same time maximizing the extent to which the highest scoring applications are approved?

20. Are the current AHP revolving loan fund provisions reasonable, and how could the financing mechanisms of revolving loan funds be used successfully with AHP subsidies?

21. Why have certain AHP scoring criteria for revolving loan funds been difficult to meet, how would AHP subsidy be repaid in the event of project noncompliance, and how can a revolving loan fund demonstrate a need for the AHP subsidy?

22. Would the proposed outcome requirements for the statutory and regulatory priorities facilitate use of AHP subsidies by revolving loan funds, and if so, how?

23. What are the potential positive or negative impacts of eliminating the owner-occupied retention agreement requirement for revolving loan funds?

24. Are there loan pools currently existing in the market that meet the conditions in the current regulation, how are the loan pools addressing current housing market needs, and what are the potential positive or negative impacts of eliminating the owner-occupied retention agreement requirement for loan pools?

*Subpart D—Homeownership Set-Aside Programs*

25. Are there any potential positive and negative impacts of increasing the subsidy limit per household from \$15,000 to \$22,000, and should the subsidy limit be higher or lower?

26. Is the proposed use of FHFA's Housing Price Index to automatically adjust the subsidy limit upward over time appropriate, or are there other housing price adjustment indices that would be preferable and why?

*Subpart E—Outcome Requirements for Statutory and Regulatory Priorities*

27. Does the proposed outcome requirement of 10 percent of a Bank's total AHP funds constitute prioritization for the home purchase priority, or should the percentage be higher or lower?

28. What is the utility of the proposed outcome approach to income targeting, and are the proposed 55 percent threshold, its applicability solely to rental units, and income-targeting at 50 percent of AMI appropriate?

29. Is the proposed increase in the minimum threshold from 20 to 50 percent for the number of units reserved for homeless households appropriate?

30. Is the proposed increase in the minimum threshold from 20 to 50 percent for the number of units in a project reserved for households with a specific special need appropriate?

31. Is the proposed 50 percent minimum threshold for the number of units in a project reserved for other targeted populations appropriate?

32. Is the proposed 20 percent minimum threshold for the number of units in a project reserved for extremely low-income households appropriate?

33. Do the three proposed regulatory priorities described in proposed § 1291.48—underserved communities and populations, creating economic opportunities, and affordable housing preservation—constitute significant housing priorities that should be included in the regulation, or should other housing priorities be included?

34. Should the specific housing needs identified under each regulatory priority be included, or are there other specific housing needs that should be included?

35. Do the Banks have sufficient flexibility under the current scoring system to target specific housing needs in their districts, including awarding subsidy to address multiple housing needs in a single AHP funding period?

36. Should the current regulatory scoring system be maintained without change?

37. Should any of the current mandatory scoring criteria and minimum required point allocations be modified to reflect other specific housing needs?

38. Should the current Bank First and Second District Priorities be combined and the list of housing needs in the Bank First District Priority eliminated?

*Subpart F—Monitoring*

39. Are the proposed reductions in the Banks' monitoring requirements reasonable, taking into consideration the risks of noncompliance and the costs of project monitoring?

40. Is data available on the noncompliance rates of projects funded under the PBRA Section 8 Program?

*Subpart G—Remedial Actions for Noncompliance*

41. Are the facts and circumstances described in proposed § 1291.60 appropriate for consideration by a Bank during reasonable subsidy collection efforts, and are there other factors that should be considered as well?

**V. Consideration of Differences Between the Banks and the Enterprises**

Section 1313(f) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 requires the Director of FHFA, when promulgating regulations relating to the Banks, to consider the differences between the Banks and the Enterprises (Fannie Mae and Freddie Mac) as they relate to the Banks': Cooperative ownership structure; mission of providing liquidity to members; affordable housing and community development mission; capital structure; and joint and several liability. The proposed rule would apply only to the Banks. It would amend the current regulation to provide additional authority to the Banks regarding certain Program operations, streamline project monitoring requirements, clarify various parties' responsibilities regarding noncompliance, and clarify certain operational requirements. There is no direct Enterprise-specific analog to the Banks' AHP. In preparing this proposed rule, the Director considered the differences between the Banks and the Enterprises as they relate to the above factors, and determined that the rule is appropriate. FHFA requests comments regarding whether differences related to those factors should result in any revisions to the proposed rule.

**VI. Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, requires that Federal agencies, including FHFA, consider the impact of paperwork and other information collection burdens imposed on the public. Under the PRA, no agency may conduct or sponsor, and no person is required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. Existing part 1291 contains a number of requirements that constitute collections of information under the PRA. These collections have been approved by OMB and assigned OMB control number 2590-0007 (entitled "Affordable Housing Program"), which expires on March 31, 2020. As detailed below, the

proposed rule would modify some of the information collection requirements in part 1291 and would make other changes to the regulation requiring FHFA to revise the burden estimates approved by OMB when the control number was last renewed in early 2017. FHFA intends to submit the revised information collection to OMB for review and approval of a three-year extension of the control number.

*A. Comments on Paperwork Burden Requested*

FHFA is soliciting comments on: (1) Whether the collection of information is necessary for the proper performance of FHFA functions, including whether the information has practical utility; (2) the accuracy of FHFA's estimates of the burden of the collection of information; (3) ways to enhance the quality, utility and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on Bank members, project sponsors, and project owners, including through the use of automated collection techniques or other forms of information technology.

You may submit written comments on the information collection requirements on or before May 14, 2018 and should direct them to the Office of Information and Regulatory Affairs of the Office of Management and Budget, Attention: Desk Officer for the Federal Housing Finance Agency, Washington, DC 20503, Fax: (202) 395-3047, Email: [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov). Please also submit copies of comments on information collection issues to FHFA, identified by "Proposed Collection; Comment Request: 'Affordable Housing Program (RIN 2590-AA83)'" by any of the methods listed above in the **ADDRESSES** section.

*B. Background*

Part 1291 requires the Banks to collect various types of information relating to their AHPs from their members and (both directly and indirectly) from AHP project sponsors and owners. Those information collection requirements fall into six categories: (1) AHP Competitive Applications; (2) compliance submissions for approved Competitive Application projects at AHP subsidy disbursement; (3) modification requests for approved Competitive Application projects; (4) initial monitoring submissions for approved Competitive Application projects; (5) long-term monitoring submissions for approved Competitive Application projects; and (6) Homeownership Set-Aside Program applications and certifications. As revised by the proposed rule, the collections of information under part

1291 would continue to fall into the foregoing six basic categories, but would be somewhat modified as described below.

The proposed rule would eliminate the existing requirement that each Bank establish a Competitive Application Program. As revised, part 1291 would instead require each Bank to establish a General Fund, and authorize each Bank to establish up to three Targeted Funds (subject to a phase-in period), each of which would be subject to a competitive application process similar to that required for the Banks' Competitive Application Programs under the current regulation. Projects funded under the Banks' General Fund and any Targeted Funds established would be subject to requirements regarding subsidy disbursements, modification requests, and initial and long-term monitoring that are similar to those that currently apply to their Competitive Application Programs. Thus, the descriptions of the first five of the six information collection categories, which relate to the Banks' Competitive Application Programs, would be modified to refer instead to the Banks' General Funds and Targeted Funds. The description of the sixth category, relating to the Banks' Homeownership Set-Aside Programs, would remain the same.

### C. Burden Estimates for Respondents

FHFA has analyzed each of the six categories of information that would be collected under part 1291, as revised by the proposed rule, in order to estimate the hour burdens that the collection would impose upon Bank members and AHP project sponsors and owners annually over the three years following the effective date of the final rule. Based on that analysis, FHFA estimates that the total annual hour burden will be 127,605. This represents an increase of 11,855 hours over the estimate of 115,750 made in connection with the most recent renewal of the OMB control number. This increase is attributable to an expected increase in the number of AHP competitive applications received by the Banks due to some of the proposed revisions, as well as an expected increase in the number of AHP competitive projects and Homeownership Set-Aside direct subsidies approved because of anticipated higher required annual AHP contributions arising from projected higher Bank incomes. On balance, the proposed rule would not increase information collection burdens on a per-submission basis.

The method FHFA used to determine the annual hour burden for each category of information collected is

explained in detail below. Set forth for each category are: (1) A summary of the existing information collection requirement, including the types of respondents and frequency of collection; (2) a short description of the manner in which the proposed regulatory amendments would affect the requirement and the associated burden estimates; (3) the need for and use of the information to be collected; and (4) the new annualized hourly burden estimates, as compared to the estimates made in the PRA submissions that are the basis for the current clearance.

#### 1. Competitive Applications for AHP Subsidy Under General Funds and Targeted Funds

(a) *Existing requirement:* Each Bank must establish a Competitive Application Program under which the Bank accepts applications for AHP subsidies submitted by its members on behalf of non-member entities having a significant connection to the projects for which subsidy is being sought (project sponsors or owners).<sup>61</sup> Each Bank accepts applications for AHP subsidy under its Competitive Application Program during a specified number of funding periods each year, as determined by the Bank.<sup>62</sup> The Bank must score each application according to an AHP regulatory and Bank-specific scoring methodology, and approve the highest scoring projects within that funding period for AHP subsidy.<sup>63</sup>

(b) *Effect of proposed rule:* The proposed rule would allow the Banks substantially more flexibility to devise their own competitive application scoring criteria for selecting the projects to be approved for AHP subsidies under their General Fund and any Targeted Funds established. In revising the scoring criteria for their General Funds, the Banks would likely also revise their application requirements to reflect the new criteria. In addition, Banks that establish one or more Targeted Funds would likely also develop application requirements for each of those Funds that are different from both their current competitive application requirements and the General Fund application requirements they would establish under the revised regulation. Because of the greater flexibility the Banks would have under the proposed rule, it is not possible at this point to determine precisely how the Banks' competitive application processes would change or to estimate with any accuracy the effect that any such changes would have on

the average amount of time needed to complete the competitive application process.

The proposed rule would, to a minor extent, require the Banks to obtain from Bank members and project sponsors and owners applying for AHP subsidies certain information when evaluating AHP applications that they are not expressly required to evaluate under the current regulation. Under the proposed rule, the Banks would be required to obtain from all AHP applicants information needed to evaluate whether the project sponsor (including all affiliates and team members such as the general contractor) is able to perform the responsibilities committed to in the AHP application, as well as information needed to provide assurance that those parties have not engaged in certain types of misconduct. The proposed rule would also require the Banks to obtain from applicants for rental project subsidies the project's operating pro forma (in addition to the project's development budget, which is expressly required under the current regulation) for use in confirming the need for the AHP subsidy. FHFA anticipates that these submission requirements may be met with materials that have already been prepared for other purposes and that, therefore, they will not materially add to the time required to prepare an AHP competitive application.

To the extent that Banks choose to establish Targeted Funds, as would be permitted under the proposed rule, they could see an increase in AHP applications in connection with projects that would be unlikely to be approved under the existing scoring criteria for their Competitive Application Programs. Based on this expectation, FHFA estimates that the number of AHP competitive applications received by the Banks annually would increase by 10 percent—from 1,350 to 1,485—over the estimates made in FHFA's most recent submissions to OMB for the information collection requirements under part 1291.

(c) *Use:* The Banks would use the information collected during the competitive application process to determine whether projects for which Bank members and project sponsors and owners are seeking subsidies under the Banks' General Funds and Targeted Funds satisfy the applicable regulatory requirements and score highly enough in comparison with other applications submitted during the same funding period to be approved for AHP subsidies.

(d) *Revised burden estimates:* For the reasons stated above, FHFA is increasing its estimate as to the average

<sup>61</sup> See 12 CFR 1291.5.

<sup>62</sup> See 12 CFR 1291.5(b)(1).

<sup>63</sup> See 12 CFR 1291.5(d).

number of competitive applications for AHP subsidies that Bank members, on behalf of project sponsors and owners, would submit to the Banks annually from 1,350 to 1,485. The estimate for the average preparation time for each application would remain at 24 hours. Thus, FHFA's estimate for the total annual hour burden on members and project sponsors and owners in connection with the preparation and submission of applications under the Banks' General Funds and Targeted Funds is 35,640 hours (1,485 applications × 24 hours).

## 2. Compliance Submissions for Approved General Fund and Targeted Fund Projects at AHP Subsidy Disbursement

(a) *Existing requirement:* The current regulation provides that, prior to each disbursement of AHP subsidy for a project approved under a Bank's Competitive Application Program, the Bank must confirm that the project continues to meet the AHP regulatory eligibility requirements, as well as all commitments made in the approved AHP application.<sup>64</sup> As part of this process, Banks typically require that the member and project sponsor provide documentation demonstrating continuing compliance.

(b) *Effect of proposed rule:* The proposed rule would add a requirement that, prior to each AHP subsidy disbursement, Banks obtain and review certifications and other information needed to provide assurance that the project sponsor (including all affiliates and team members such as the general contractor) have not engaged in certain types of misconduct since providing similar information at the application stage or in connection with a prior subsidy disbursement. FHFA anticipates that these additional requirements will not materially add to the time required to prepare a compliance submission.

(c) *Use:* The Banks would use the compliance submissions to determine whether projects approved under their General Funds and Targeted Funds continue to meet the applicable requirements and to comply with the commitments made in the approved AHP applications each time subsidy is disbursed.

(d) *Revised burden estimates:* FHFA is increasing its estimate as to the annual average number of compliance submissions made by Bank members, on behalf of project sponsors and owners, from 700 to 715 to reflect anticipated higher amounts of funds being available for the AHP due to higher projected

Bank incomes (and therefore more projects approved). The estimate for the average preparation time for each submission would remain at 1 hour. Thus, FHFA's estimate for the total annual hour burden on members and project sponsors and owners in connection with the preparation and submission of these compliance submissions for projects approved under the Banks' General Funds and Targeted Funds is 715 hours (715 submissions × 1 hour).

## 3. Modification Requests for Approved General Fund and Targeted Fund Projects

(a) *Existing requirement:* The current regulation permits a Bank to approve a modification to the terms of an approved competitive application that would change the score that the application received in the funding period in which it was originally scored and approved, had the changed facts been operative at that time. In order to be considered for a modification: (i) The project, incorporating the changes, must continue to meet the regulatory eligibility requirements; (ii) the application, as reflective of the changes, must continue to score high enough to have been approved in the funding period in which it was originally scored and approved; and (iii) there must be good cause for the modification, and the analysis and justification for the modification must be documented by the Bank in writing.<sup>65</sup> Banks typically require the member and project sponsor or owner requesting a modification to provide a written analysis and justification as part of their modification request.

(b) *Effect of proposed rule:* The proposed rule would add a requirement that before a Bank may approve a modification request, it must have first requested that the project cure any AHP noncompliance and that the cure was unsuccessful after a reasonable period of time. FHFA estimates that this revision will result in about five percent fewer approved AHP projects requesting modifications. The proposed rule would have no effect on the amount of time needed to prepare and submit a modification request and any supporting materials.

(c) *Use:* The Banks would use the information submitted to determine whether requests for modifications of approved projects under their General Funds and Targeted Funds meet the regulatory requirements for approval.

(d) *Revised burden estimates:* FHFA is decreasing its estimate as to the annual

average number of modification requests made by Bank members, on behalf of project sponsors and owners, from 300 to 290. This takes into account both the estimated five percent decrease in the percentage of approved projects requesting modifications arising from the effects of the proposed rule and an estimated two percent increase in the number of approved projects due to higher projected Bank income. The estimate for the average preparation time for each submission would remain at 2.5 hours. Thus, FHFA's estimate for the total annual hour burden on members and project sponsors and owners in connection with the preparation and submission of these modification requests is 725 hours (290 requests × 2.5 hours).

## 4. Initial Monitoring Submissions for Approved General Fund and Targeted Fund Projects

(a) *Existing requirement:* The current regulation requires generally that a Bank monitor each owner-occupied and rental project receiving AHP subsidy under its Competitive Application Program prior to and after project completion. For initial monitoring, a Bank must determine whether the project is making satisfactory progress towards completion, in compliance with the commitments made in the approved AHP application, Bank policies, and the AHP regulatory requirements. Following project completion, the Bank must determine whether satisfactory progress is being made towards occupancy of the project by eligible households, and whether the project meets the regulatory requirements and the commitments made in the approved AHP application.<sup>66</sup>

(b) *Effect of proposed rule:* In the case of approved projects that also receive funding through LIHTCs, the proposed rule would retain the initial monitoring requirement that project sponsors certify to the Banks that the residents' incomes and the rents comply with the income-targeting and rent commitments in the approved AHP application. The proposed rule would also include a requirement, consistent with Bank practice, that the Banks obtain and review the project's rent rolls, a type of back-up documentation. However, the proposed rule would remove the requirement that the Banks obtain and review other back-up documentation on incomes and rents, such as W-2 forms, at initial monitoring for LIHTC projects, which they are currently required to review on a risk basis.

<sup>64</sup> See 12 CFR 1291.5(g)(3).

<sup>65</sup> See 12 CFR 1291.5(f).

<sup>66</sup> See 12 CFR 1291.7(a)(1).

The proposed rule would also provide that, for AHP projects funded by certain other government programs specified in separate FHFA guidance, the Banks would be required to obtain and review only project sponsor certifications and rent rolls at the initial monitoring stage. For such projects, the Banks would not be required to review any back-up documentation for incomes and rents, as is generally required at the initial monitoring stage.

FHFA estimates that these proposed revisions would decrease the average amount of time needed for Bank members and project sponsors or owners to prepare and submit materials related to the initial monitoring of approved projects by ten percent.

(c) *Use:* The Banks would use the information collected in connection with their initial monitoring of approved General Fund and Targeted Fund projects to determine whether the projects are making satisfactory progress towards completion, and following project completion, are making satisfactory progress towards occupancy of the project by eligible households, in compliance with the commitments made in the approved AHP applications, Bank policies, and the regulatory requirements.

(d) *Revised burden estimates:* FHFA is increasing its estimate as to the annual average number of submissions related to the initial monitoring of in-progress and recently completed AHP projects from 500 to 510, which reflects an estimated two percent increase in the number of approved projects due to projected higher Bank incomes. FHFA is decreasing its estimate for the average preparation time for each submission from 5 hours to 4.5 hours, which reflects the effects of the proposed rule, as described above. Thus, FHFA's estimate for the total annual hour burden on members and project sponsors and owners in connection with the preparation and submission of documentation required for initial monitoring of the Banks' General Fund and Targeted Fund projects is 2,295 hours (510 submissions  $\times$  4.5 hours).

#### 5. Long-Term Monitoring Submissions for Approved General Fund and Targeted Fund Projects

(a) *Existing requirement:* The current regulation requires that for long-term monitoring of rental projects, subject to certain exceptions, a Bank must determine whether, during the 15-year retention period, the household incomes and rents comply with the income-targeting and rent commitments made in

the approved AHP application.<sup>67</sup> A Bank must obtain and review appropriate documentation maintained by the project sponsor or owner.

(b) *Effect of proposed rule:* The proposed rule would implement a number of changes to streamline certain aspects of the long-term monitoring process. Under the proposed rule, as under the current regulation, project sponsors or owners of LIHTC projects would not be required to submit compliance reports for such projects to the Bank during the AHP retention period. The proposed rule, however, would add a requirement that the members' AHP agreements with project sponsors and owners include a provision requiring the party to notify the Bank if a LIHTC project is noncompliant with the LIHTC income-targeting or rent requirements at any time during the AHP 15-year retention period. The proposed rule would also provide that, for AHP projects funded by certain other government programs, the Banks would be required to review only project sponsor certifications each year during the long-term retention period. The Banks would not be required to review any back-up documentation for incomes and rents, including rent rolls, for those projects, as they are generally required to do on a risk basis.

The proposed rule would codify existing Bank best practices that require submission by project sponsors of annual project certifications during the AHP 15-year retention period that include not only the required household income and rent information, but also information on the ongoing financial viability of the project, such as whether the project is current on property taxes and loan payments, its vacancy rate, or whether it is in compliance with its commitments to other funding sources.

FHFA estimates that the net effect of the above-described revisions would be to decrease the average amount of time needed for Bank members and project sponsors or owners to prepare and submit materials related to the long-term monitoring of approved projects by ten percent.

(c) *Use:* The Banks would use the information collected as part of their long-term monitoring to determine whether during the 15-year retention period, completed rental projects under their General Funds and Targeted Funds continue to comply with the household income-targeting and rent commitments made in the approved AHP applications.

(d) *Revised burden estimates:* FHFA is increasing its estimate as to the annual average number of submissions related to the long-term monitoring of completed AHP rental projects from 4,800 to 4,900, which reflects an estimated two percent increase in the number of approved projects due to projected higher Bank incomes. FHFA is decreasing its estimate for the average preparation time for each submission from 3 hours to 2.7 hours, which reflects the effects of the proposed rule, as described above. Thus, FHFA's estimate for the total annual hour burden on members and project sponsors and owners in connection with the preparation and submission of documentation required for long-term monitoring of completed rental projects approved under the Banks' General Funds and Targeted Funds is 13,230 hours (4,900 submissions  $\times$  2.7 hours).

#### 6. Homeownership Set-Aside Program Applications and Certifications

(a) *Existing requirement:* The current regulation authorizes each Bank, in its discretion, to allocate up to the greater of \$4.5 million or 35 percent of its annual required AHP contribution to establish Homeownership Set-Aside Programs for the purpose of promoting homeownership for low- or moderate-income households.<sup>68</sup> Under these Homeownership Set-Aside Programs, a Bank provides to its members AHP direct subsidies, which are provided by the members to eligible households as grants to pay for down payment, closing cost, counseling cost, or rehabilitation assistance in connection with the household's purchase of a primary residence or rehabilitation of an owner-occupied residence.<sup>69</sup> Prior to the Bank's disbursement of a direct subsidy under its Homeownership Set-Aside Program, the member must provide a certification that the subsidy will be provided in compliance with all applicable regulatory eligibility requirements.<sup>70</sup>

(b) *Effect of proposed rule:* The proposed rule would increase the maximum permissible percentage allocation amount for each Bank's Homeownership Set-Aside Program from 35 to 40 percent of the Bank's annual required AHP contribution, while retaining the existing alternative maximum permissible allocation amount of \$4.5 million. In addition, the proposed rule would increase the maximum permissible direct subsidy amount that a Bank could provide to a

<sup>68</sup> See 12 CFR 1291.2(b)(2); 1291.6.

<sup>69</sup> See 12 CFR 1291.6(c)(4).

<sup>70</sup> See 12 CFR 1291.7(b)(2).

<sup>67</sup> See 12 CFR 1291.7(a)(4).

household from \$15,000 to \$22,000, which would be adjusted annually to reflect increases in FHFA's Housing Price Index. While adoption of the proposed higher subsidy limit could result in fewer households receiving set-aside subsidies, Banks could choose to offset this by increasing the maximum amount of AHP funds they allocate to their Homeownership Set-Aside Programs from 35 to 40 percent. Notwithstanding that the Banks would be authorized to adopt a higher subsidy limit than is permitted under the current regulation, FHFA expects that most Banks will continue to establish lower subsidy limits in order to serve a greater number of households. Accordingly, FHFA anticipates that the proposed regulatory revisions may cause the Banks to provide a higher number of set-aside subsidies annually.

None of the proposed revisions would affect the amount of time needed for a Bank member to prepare a Homeownership Set-Aside Program application or monitoring certification.

(c) *Use:* The Banks would use the information collected in connection with their Homeownership Set-Aside Programs to determine whether applications for direct subsidy under those programs were approved, and the direct subsidies disbursed, in accordance with the regulatory requirements.

(d) *Revised burden estimates:* FHFA is increasing its estimate as to the annual average number of applications and required certifications for AHP direct subsidies under the Banks' Homeownership Set-Aside Programs from 13,000 to 15,000 to reflect anticipated higher amounts of funds being available for the AHP due to projected higher Bank incomes, in addition to the effect of the proposed increase—from 35 to 40 percent—in the percentage of their AHP contributions that the Banks may allocate to their Homeownership Set-Aside Programs. The estimate for the average preparation time for each submission would remain at 5 hours. Thus, FHFA's estimate for the total annual hour burden on members in connection with the preparation and submission of Homeownership Set-Aside Program applications and certifications is 75,000 hours (15,000 applications/certifications × 5 hours).

## VII. Regulatory Flexibility Act

The Regulatory Flexibility Act<sup>71</sup> requires that a regulation that has a significant economic impact on a substantial number of small entities,

small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities.<sup>72</sup> FHFA has considered the impact of the proposed rule under the Regulatory Flexibility Act. The General Counsel of FHFA certifies that the proposed rule, if adopted as a final rule, is not likely to have a significant economic impact on a substantial number of small entities because the regulation applies to the Banks, which are not small entities for purposes of the Regulatory Flexibility Act.

### List of Subjects

#### 12 CFR Part 1290

Banks and banking, Credit, Federal home loan banks, Housing, Mortgages, Reporting and recordkeeping requirements.

#### 12 CFR Part 1291

Community development, Credit, Federal home loan banks, Housing, Low- and moderate-income housing, Mortgages, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, FHFA proposes to amend parts 1290 and 1291 of Title 12 of the Code of Federal Regulations as follows:

### PART 1290—COMMUNITY SUPPORT REQUIREMENTS

- 1. The authority citation for part 1290 is revised to read as follows:

**Authority:** 12 U.S.C. 1430(g).

- 2. Amend § 1290.6 by revising paragraph (a)(5) and adding paragraphs (c) and (d) to read as follows:

#### § 1290.6 Bank community support programs.

(a) \* \* \*

(5) Include an annual Targeted Community Lending Plan, approved by the Bank's board of directors and subject to modification. The Bank's board of directors shall not delegate to a committee of the board, Bank officers, or other Bank employees the responsibility to adopt or amend the Targeted Community Lending Plan. The Targeted Community Lending Plan shall:

- (i) Reflect market research conducted in the Bank's district;
- (ii) Describe how the Bank will address identified credit needs and

market opportunities in the Bank's district for targeted community lending;

- (iii) Be developed in consultation with (and may only be amended after consultation with) its Advisory Council and with members, housing associates, and public and private economic development organizations in the Bank's district in developing and implementing its Targeted Community Lending Plan;

- (iv) Establish quantitative targeted community lending performance goals; and

- (v) Describe how the Bank will address identified significant affordable housing needs in its district through its Affordable Housing Program, reflecting:

- (A) Market research conducted or obtained by the Bank on affordable housing needs in the Bank's district;

- (B) Identification and assessment of significant affordable housing needs in the Bank's district, supported by empirical data; and

- (C) Specification, from among the identified affordable housing needs, of the specific affordable housing needs the Bank will address through its funding allocations and scoring criteria under its General Fund and any Bank Targeted Funds and Homeownership Set-Aside Programs, as set forth in its AHP Implementation Plan pursuant to 12 CFR 1291.13(b).

\* \* \* \* \*

(c) *Public access.* A Bank shall publish its current Targeted Community Lending Plan on its publicly available website, and shall publish any amendments to its Targeted Community Lending Plan on the website within 30 days after the date of their adoption by the Bank's board of directors. Publication of the Targeted Community Lending Plan on the website shall be at least six months before the beginning of the Plan year.

(d) *Notification of Plan amendments to FHFA.* A Bank shall notify FHFA of any amendments to its Targeted Community Lending Plan within 30 days after the date of their adoption by the Bank's board of directors.

### PART 1291—FEDERAL HOME LOAN BANKS' AFFORDABLE HOUSING PROGRAM

- 3. Revise part 1291 to read as follows:

#### PART 1291—FEDERAL HOME LOAN BANKS' AFFORDABLE HOUSING PROGRAM

##### Subpart A—General

Sec.

1291.1 Definitions.

<sup>71</sup> 5 U.S.C. 601 *et seq.*

<sup>72</sup> 5 U.S.C. 605(b).

**Subpart B—Program Administration and Governance**

- 1291.10 Required annual AHP contribution.
- 1291.11 Temporary suspension of AHP contributions.
- 1291.12 Allocation of required annual AHP contribution.
- 1291.13 Targeted Community Lending Plan; AHP Implementation Plan.
- 1291.14 Advisory Councils.
- 1291.15 Agreements.
- 1291.16 Conflicts of interest.

**Subpart C—General Fund and Targeted Funds**

- 1291.20 Establishment of programs.
- 1291.21 Eligible applicants.
- 1291.22 Funding periods; application process.
- 1291.23 Eligible projects.
- 1291.24 Eligible uses.
- 1291.25 Scoring methodology.
- 1291.26 Approval of AHP applications.
- 1291.27 Modifications of approved AHP applications.
- 1291.28 Procedures for funding.
- 1291.29 Lending and re-lending of AHP direct subsidy by revolving loan funds.
- 1291.30 Use of AHP subsidy in loan pools.

**Subpart D—Homeownership Set-Aside Programs**

- 1291.40 Establishment of programs.
- 1291.41 Eligible applicants.
- 1291.42 Eligibility requirements.
- 1291.43 Approval of AHP applications.
- 1291.44 Procedures for funding.

**Subpart E—Outcome Requirements for Statutory and Regulatory Priorities**

- 1291.48 Outcome requirements for statutory and regulatory priorities.
- 1291.49 Determination of compliance with outcome requirements; notice of determination.

**Subpart F—Monitoring**

- 1291.50 Monitoring under General Fund and Targeted Funds.
- 1291.51 Monitoring under Homeownership Set-Aside Programs.

**Subpart G—Remedial Actions for Noncompliance**

- 1291.60 Remedial actions for project noncompliance.
- 1291.61 Recovery of subsidy for member noncompliance.
- 1291.62 Bank reimbursement of AHP fund.
- 1291.63 Suspension and debarment.
- 1291.64 Use of repaid AHP subsidies for other AHP-eligible projects and households.
- 1291.65 Remedial actions for Bank noncompliance with outcome requirements.
- 1291.66 Transfer of Program administration.

**Subpart H—Affordable Housing Reserve Fund**

- 1291.70 Affordable Housing Reserve Fund.

Authority: 12 U.S.C. 1430(j).

**Subpart A—General****§ 1291.1 Definitions.**

As used in this part:

*Affordable* means that:

(1) The rent charged to a household for a unit that is to be reserved for occupancy by a household with an income at or below 80 percent of the median income for the area, does not exceed 30 percent of the income of a household of the maximum income and size expected, under the commitment made in the AHP application, to occupy the unit (assuming occupancy of 1.5 persons per bedroom or 1.0 persons per unit without a separate bedroom); or

(2) The rent charged to a household, for rental units subsidized with Section 8 assistance under 42 U.S.C. 1437f or subsidized under another assistance program where the rents are charged in the same way as under the Section 8 Program, if the rent complied with this definition at the time of the household's initial occupancy and the household continues to be assisted through the Section 8 or another assistance program, respectively.

*AHP* means the Affordable Housing Program required to be established by the Banks pursuant to 12 U.S.C. 1430(j) and this part.

*AHP project* means a single-family or multifamily housing project for owner-occupied or rental housing that has been awarded or has received AHP subsidy under a Bank's General Fund and any Targeted Funds established by the Bank.

*Cost of funds* means, for purposes of a subsidized advance, the estimated cost of issuing Bank System consolidated obligations with maturities comparable to that of the subsidized advance.

*Direct subsidy* means an AHP subsidy in the form of a direct cash payment.

*Eligible household* means a household that meets the income limits and other requirements specified by a Bank for its General Fund and any Targeted Funds and Homeownership Set-Aside Programs established by the Bank, provided that:

(1) In the case of owner-occupied housing, the household's income may not exceed 80 percent of the median income for the area; and

(2) In the case of rental housing, the household's income in at least 20 percent of the units may not exceed 50 percent of the median income for the area.

*Eligible project* means a project eligible to receive AHP subsidy pursuant to the requirements of this part.

*Extremely low-income household* means a household that has an income at or below 30 percent of the median

income for the area, with the income limit adjusted for household size in accordance with the methodology of the applicable median income standard selected from those enumerated in the definition of "median income for the area," unless such median income standard has no household size adjustment methodology.

*Family member* means any individual related to a person by blood, marriage, or adoption.

*Funding period* means a time period, as determined by a Bank, during which the Bank accepts AHP applications for subsidy under the Bank's General Fund and any Targeted Funds established by the Bank.

*General Fund* means a program required to be established by a Bank under which the Bank approves (*i.e.*, awards) applications for AHP subsidy through a competitive application scoring process developed by the Bank and disburses the subsidy, pursuant to the requirements of this part.

*Homeownership Set-Aside Program* means a program established by a Bank, in its discretion, under which the Bank approves (*i.e.*, awards) applications for AHP direct subsidy through a noncompetitive process developed by the Bank and disburses the subsidy, pursuant to the requirements of this part.

*Loan pool* means a group of mortgage or other loans meeting the requirements of this part that are purchased, pooled, and held in trust.

*Low- or moderate-income household* means a household that has an income of 80 percent or less of the median income for the area, with the income limit adjusted for household size in accordance with the methodology of the applicable median income standard selected from those enumerated in the definition of "median income for the area," unless such median income standard has no household size adjustment methodology.

*Low- or moderate-income neighborhood* means any neighborhood in which 51 percent or more of the households have incomes at or below 80 percent of the median income for the area.

*Median income for the area* means one or more of the following median income standards as determined by a Bank, after consultation with its Advisory Council, in its AHP Implementation Plan:

(1) The median income for the area, as published annually by HUD;

(2) The median income for the area obtained from the Federal Financial Institutions Examination Council;



(3) The applicable median family income, as determined under 26 U.S.C. 143(f) (Mortgage Revenue Bonds) and published by a state agency or instrumentality;

(4) The median income for the area, as published by the United States Department of Agriculture; or

(5) The median income for an applicable definable geographic area, as published by a federal, state, or local government entity, and approved by FHFA, at the request of a Bank, for use under the AHP.

*Multifamily building* means a structure with five or more dwelling units.

*Net earnings of a Bank* means the net earnings of a Bank for a calendar year before declaring or paying any dividend under section 16 of the Bank Act (12 U.S.C. 1436). For purposes of this part, “dividend” includes any dividends on capital stock subject to a redemption request even if under GAAP those dividends are treated as an “interest expense.”

*Owner-occupied project* means, for purposes of a Bank’s General Fund and any Targeted Funds established by the Bank, one or more owner-occupied units in a single-family or multifamily building, including condominiums, cooperative housing, and manufactured housing.

*Owner-occupied unit* means a dwelling unit occupied by the owner of the unit. Housing with two to four dwelling units consisting of one owner-occupied unit and one or more rental units is considered a single owner-occupied unit.

*Program* means the Affordable Housing Program established pursuant to this part.

*Regulatory priority* means underserved communities and populations, creating economic opportunity, or affordable housing preservation, as described in § 1291.48(d)(1), (d)(2), or (d)(3), respectively.

*Rental project* means, for purposes of a Bank’s General Fund and any Targeted Funds established by the Bank, one or more dwelling units for occupancy by households that are not owner-occupants, including overnight and emergency shelters, transitional housing for homeless households, mutual housing, single-room occupancy housing, and manufactured housing communities.

*Retention period* means fifteen years from the date of completion for a rental project.

*Revolving loan fund* means a capital fund established to make mortgage or other loans whereby loan principal is

repaid into the fund and re-lent to other borrowers.

*Single-family building* means a structure with one to four dwelling units.

*Sponsor* means a not-for-profit or for-profit organization or public entity that:

(1) Has an ownership interest (including any partnership interest), as defined by the Bank in its AHP Implementation Plan, in a rental project;

(2) Is integrally involved, as defined by the Bank in its AHP Implementation Plan, in an owner-occupied project, such as by exercising control over the planning, development, or management of the project, or by qualifying borrowers and providing or arranging financing for the owners of the units;

(3) Operates a loan pool; or

(4) Is a revolving loan fund.

*Statutory priority* means use of donated or conveyed government-owned or other properties, project sponsorship by a not-for-profit organization or government entity, or purchase of homes by low- or moderate-income households, as described in § 1291.48(a)(1), (a)(2), or (b), respectively.

*Subsidized advance* means an advance to a member at an interest rate reduced below the Bank’s cost of funds by use of a subsidy.

*Subsidy* means:

(1) A direct subsidy, provided that if a direct subsidy is used to write down the interest rate on a loan extended by a member, sponsor, or other party to a project, the subsidy must equal the net present value of the interest foregone from making the loan below the lender’s market interest rate; or

(2) The net present value of the interest revenue foregone from making a subsidized advance at a rate below the Bank’s cost of funds.

*Targeted Fund* means a program established by a Bank, in its discretion, under which the Bank approves (*i.e.*, awards) applications for AHP subsidy through a competitive application scoring process developed by the Bank and disburses the subsidy, pursuant to the requirements of this part.

*Very low-income household* means a household that has an income at or below 50 percent of the median income for the area, with the income limit adjusted for household size in accordance with the methodology of the applicable median income standard selected from those enumerated in the definition of “median income for the area,” unless such median income standard has no household size adjustment methodology.

*Visitable* means, in either owner-occupied or rental housing, at least one

entrance is at-grade (no steps) and approached by an accessible route such as a sidewalk, and the entrance door and all interior passage doors are at least 2 feet, 10 inches wide, offering 32 inches of clear passage space.

## Subpart B—Program Administration and Governance

### § 1291.10 Required annual AHP contribution.

Each Bank shall contribute annually to its Program the greater of:

(a) 10 percent of the Bank’s net earnings for the previous year; or

(b) That Bank’s pro rata share of an aggregate of \$100 million to be contributed in total by the Banks, such proration being made on the basis of the net earnings of the Banks for the previous year, except that the required annual AHP contribution for a Bank shall not exceed its net earnings in the previous year.

### § 1291.11 Temporary suspension of AHP contributions.

(a) *Request to FHFA.* If a Bank finds that the contributions required pursuant to § 1291.10 are contributing to the financial instability of the Bank, the Bank may apply in writing to FHFA for a temporary suspension of such contributions.

(b) *Director review.*—(1) In determining the financial instability of a Bank, the Director shall consider such factors as:

- (i) Severely depressed Bank earnings;
- (ii) A substantial decline in Bank membership capital; and
- (iii) A substantial reduction in Bank advances outstanding.

(2) *Limitations on grounds for suspension.* The Director shall not suspend a Bank’s annual AHP contributions if it determines that the Bank’s reduction in earnings is due to:

- (i) A change in the terms of advances to members that is not justified by market conditions;
- (ii) Inordinate operating and administrative expenses; or
- (iii) Mismanagement.

### § 1291.12 Allocation of required annual AHP contribution.

Each Bank, after consultation with its Advisory Council and pursuant to written policies adopted by the Bank’s board of directors, shall meet the following requirements for allocation of its required annual AHP contribution.

(a) *General Fund.* Each Bank shall allocate annually at least 50 percent of its required annual AHP contribution to provide funds to members through a General Fund established and

administered by the Bank pursuant to the requirements of this part.

(b) *Homeownership Set-Aside Programs.* A Bank may, in its discretion, allocate annually, in the aggregate, up to the greater of \$4.5 million or 40 percent of its required annual AHP contribution to provide funds to members participating in Homeownership Set-Aside Programs established and administered by the Bank pursuant to the requirements of this part, provided that at least one-third of the Bank's aggregate annual set-aside allocation to such programs is allocated to assist first-time homebuyers or households for owner-occupied rehabilitation.

(c) *Targeted Funds.*—(1) *Phase-in requirements for funding allocations.* Unless otherwise directed by FHFA and subject to the phase-in requirements for the number of Targeted Funds in § 1291.20(b), a Bank may, in its discretion, allocate annually, up to:

(i) 20 percent, in the aggregate, of its required annual AHP contribution to any Targeted Funds;

(ii) 30 percent, in the aggregate, of its required annual AHP contribution to any Targeted Funds, provided that it allocated at least 20 percent, in the aggregate, of its required annual AHP contribution to one or more Targeted Funds in any preceding year; or

(iii) 40 percent, in the aggregate, of its required annual AHP contribution to any Targeted Funds, provided that it allocated at least 30 percent, in the aggregate, of its required annual AHP contribution to one or more Targeted Funds in any preceding year.

(2) *Transfer of uncommitted funds.* A Bank shall transfer any uncommitted Targeted Fund amounts to its General Fund for awards to alternates under the General Fund in the same calendar year.

(d) *Acceleration of funding.* A Bank may, in its discretion, accelerate to its current year's Program from future required annual AHP contributions an amount up to the greater of \$5 million or 20 percent of its required annual AHP contribution for the current year. The Bank may credit the amount of the accelerated contribution against required AHP contributions under this part 1291 over one or more of the subsequent five years.

(e) *No delegation.* A Bank's board of directors shall not delegate to a committee of the board, Bank officers, or other Bank employees the responsibility for adopting the Bank's policies for its General Fund and any Bank Targeted Funds and Homeownership Set-Aside Programs.

### § 1291.13 Targeted Community Lending Plan; AHP Implementation Plan.

(a) *Targeted Community Lending Plan.* Pursuant to the requirements of 12 CFR 1290.6(a)(5)(v), a Bank's annual Targeted Community Lending Plan adopted under its community support program shall, among other things, identify the significant affordable housing needs in its district that will be addressed through its General Fund and any Bank Targeted Funds and Homeownership Set-Aside Programs, as set forth in its AHP Implementation Plan.

(b) *AHP Implementation Plan.* Each Bank's board of directors, after consultation with its Advisory Council, shall adopt a written AHP Implementation Plan, and shall not amend the AHP Implementation Plan without first consulting its Advisory Council. The Bank's board of directors shall not delegate to a committee of the board, Bank officers, or other Bank employees the responsibility for such prior consultations with the Advisory Council or the responsibility for adopting or amending the AHP Implementation Plan. The AHP Implementation Plan shall set forth, at a minimum:

(1) The applicable median income standard or standards adopted by the Bank consistent with the definition of median income for the area in § 1291.1.

(2) For the General Fund established by the Bank pursuant to § 1291.20(a), the Bank's requirements for the General Fund, including the specific funding allocation pursuant to § 1291.12(a), the Bank's scoring criteria, including its scoring tie-breaker policy, adopted pursuant to § 1291.25(d), and the possibility of re-ranking scored applications and alternates pursuant to § 1291.26.

(3) For each Targeted Fund established by the Bank, if any, pursuant to § 1291.20(b), the Bank's requirements for the Targeted Fund, including the specific funding allocation pursuant to § 1291.12(c), the Bank's scoring criteria, including its scoring tie-breaker policy, adopted pursuant to § 1291.25(d), the possibility of re-ranking scored applications and alternates pursuant to § 1291.26, and the controls adopted pursuant to § 1291.20(c)(1).

(4) The Bank's policy on how it will decide under which Fund to approve a project that scores high enough to be approved under multiple Funds, pursuant to § 1291.26(d).

(5) For each Homeownership Set-Aside Program established by the Bank, if any, pursuant to § 1291.40, the Bank's requirements for the program, including

the specific funding allocation, how the one-third allocation requirement is apportioned with respect to first-time homebuyers and households for owner-occupied rehabilitation pursuant to § 1291.12(b), and the Bank's application and subsidy disbursement methodology.

(6) The Bank's retention agreement requirements for rental projects under its General Fund and any Bank Targeted Funds pursuant to § 1291.15(a)(7).

(7) Any optional Bank district eligibility requirements adopted by the Bank pursuant to § 1291.24(c).

(8) The Bank's requirements for funding revolving loan funds, if adopted by the Bank pursuant to § 1291.29;

(9) The Bank's requirements for funding loan pools, if adopted by the Bank pursuant to § 1291.30;

(10) The Bank's requirements for monitoring under its General Fund and any Bank Targeted Funds and Homeownership Set-Aside Programs pursuant to §§ 1291.50 and 1291.51.

(c) *Advisory Council review.* Prior to the amendment of a Bank's AHP Implementation Plan, the Bank shall provide its Advisory Council an opportunity to review the document, and the Advisory Council shall provide its recommendations to the Bank's board of directors for its consideration.

(d) *Notification of Plan amendments to FHFA.* A Bank shall notify FHFA of any amendments made to its AHP Implementation Plan within 30 days after the date of their adoption by the Bank's board of directors.

(e) *Public access.* A Bank shall publish its current AHP Implementation Plan on its publicly available website, and shall publish any amendments to the AHP Implementation Plan on the website within 30 days after the date of their adoption by the Bank's board of directors.

### § 1291.14 Advisory Councils.

(a) *Appointment.*—(1) Each Bank's board of directors shall appoint an Advisory Council of 7 to 15 persons who reside in the Bank's district and are drawn from community and not-for-profit organizations that are actively involved in providing or promoting low- and moderate-income housing, and community and not-for-profit organizations that are actively involved in providing or promoting community lending, in the district. Community organizations include for-profit organizations.

(2) Each Bank shall solicit nominations for membership on the Advisory Council from community and not-for-profit organizations pursuant to a nomination process that is as broad

and as participatory as possible, allowing sufficient time for responses.

(3) The Bank's board of directors shall appoint Advisory Council members from a diverse range of organizations so that representatives of no one group constitute an undue proportion of the membership of the Advisory Council, giving consideration to the size of the Bank's district and the diversity of low- and moderate-income housing and community lending needs and activities within the district.

(b) *Terms of Advisory Council members.* Pursuant to policies adopted by the Bank's board of directors, Advisory Council members shall be appointed by the Bank's board of directors to serve for terms of three years, which shall be staggered to provide continuity in experience and service to the Advisory Council, except that Advisory Council members may be appointed to serve for terms of one or two years solely for purposes of reconfiguring the staggering of the three-year terms. No Advisory Council member may be appointed to serve for more than three full consecutive terms. An Advisory Council member appointed to fill a vacancy shall be appointed for the unexpired term of his or her predecessor in office.

(c) *Election of officers.* Each Advisory Council shall elect from among its members a chairperson, a vice chairperson, and any other officers the Advisory Council deems appropriate.

(d) *Duties—(1) Meetings with the Banks.*—(i) The Advisory Council shall meet with representatives of the Bank's board of directors at least quarterly to provide advice on ways in which the Bank can better carry out its housing finance and community lending mission, including, but not limited to, advice on the low- and moderate-income housing and community lending programs and needs in the Bank's district, and on the use of AHP subsidies, Bank advances, and other Bank credit products for these purposes.

(ii) The Advisory Council's advice shall include recommendations on:

(A) The Bank's Targeted Community Lending Plan, and any amendments thereto, adopted by the Bank pursuant to 12 CFR 1290.6(a)(5)(iii);

(B) The amount of AHP funds to be allocated to the Bank's General Fund and any Bank Targeted Funds, and the amount of AHP funds to be allocated to any Bank Homeownership Set-Aside Programs, including the apportionment of the funds between first-time homebuyers and households for owner-occupied rehabilitation under the one-third allocation requirement in § 1291.12(b);

(C) The AHP Implementation Plan and any subsequent amendments thereto;

(D) The Bank's scoring criteria, related definitions, and any additional optional district eligibility requirements for the Bank's General Fund and any Bank Targeted Funds; and

(E) The eligibility requirements and any priority criteria for any Bank Homeownership Set-Aside Programs.

(2) *Summary of AHP applications.* The Bank shall comply with requests from the Advisory Council for summary information regarding AHP applications from prior funding periods.

(3) *Annual analysis; public access.*—(i) Each Advisory Council annually shall submit to FHFA by May 1 its analysis of the low- and moderate-income housing and community lending activity of the Bank by which it is appointed.

(ii) Within 30 days after the date the Advisory Council's annual analysis is submitted to FHFA, the Bank shall publish the analysis on its publicly available website.

(e) *Expenses.* The Bank shall pay Advisory Council members' travel expenses, including transportation and subsistence, for each day devoted to attending meetings with representatives of the board of directors of the Bank and meetings requested by FHFA.

(f) *No delegation.* A Bank's board of directors may delegate to a committee of the board, but not to Bank officers or other Bank employees, the responsibility to appoint persons as members of the Advisory Council. A Bank's board of directors may not delegate to a committee of the board, Bank officers, or other Bank employees the responsibility to meet with the Advisory Council at the quarterly meetings required by the Bank Act (12 U.S.C. 1430(j)(11)).

#### § 1291.15 Agreements.

(a) *Agreements between Banks and members.* A Bank shall have in place with each member receiving an AHP subsidized advance or AHP direct subsidy an agreement or agreements containing, at a minimum, the following provisions, where applicable:

(1) *Notification of member.* The member has been notified of the requirements of this part as they may be amended from time to time, and all Bank policies relevant to the member's approved application for AHP subsidy.

(2) *AHP subsidy pass-through.* The member shall pass on the full amount of the AHP subsidy to the project or household, as applicable, for which the subsidy was approved.

(3) *Use of AHP subsidy.*—(i) *Use of AHP subsidy by the member.* The member shall use the AHP subsidy in accordance with the terms of the member's approved application for the subsidy and the requirements of this part.

(ii) *Use of AHP subsidy by the project sponsor or owner.* The member shall have in place an agreement with each project sponsor or project owner in which the project sponsor or project owner agrees to use the AHP subsidy in accordance with the terms of the member's approved application for the subsidy and the requirements of this part.

(4) *Repayment of AHP subsidies in case of noncompliance.*—(i) *Noncompliance by the member.* The member shall repay AHP subsidies to the Bank in accordance with the requirements of § 1291.61.

(ii) *Noncompliance by a project sponsor or project owner.*—(A) *Agreement.* The member shall have in place an agreement with each project sponsor or project owner in which the project sponsor or project owner agrees to repay AHP subsidies to the member or the Bank in accordance with the requirements of § 1291.60.

(B) *Recovery of AHP subsidies.*—(i) *Noncompliance by the member.* The member shall recover from the project sponsor or project owner and repay to the Bank AHP subsidy in accordance with the requirements of § 1291.60 (if applicable).

(5) *Project monitoring.*—(i) *Monitoring by the member.* The member shall comply with the monitoring requirements applicable to it, as established by the Bank in its monitoring policies pursuant to §§ 1291.50 and 1291.51.

(ii) *Agreement.* The member shall have in place an agreement with each project sponsor and project owner, in which the project sponsor and project owner agree to comply with the monitoring requirements applicable to such parties, as established by the Bank in its monitoring policies pursuant to § 1291.50, which shall also include agreeing to provide prompt written notice to the Bank if the project also received tax credits under the Low-Income Housing Tax Credit Program and the project is in noncompliance with the income targeting or rent requirements applicable under the Low-Income Housing Tax Credit Program at any time during the AHP 15-year retention period.

(6) *Transfer of AHP obligations.*—(i) *To another member.* The member shall make best efforts to transfer its obligations under the approved

application for AHP subsidy to another member in the event of its loss of membership in the Bank prior to the Bank's final disbursement of AHP subsidies.

(ii) *To a nonmember.* If, after final disbursement of AHP subsidies to the member, the member undergoes an acquisition or a consolidation resulting in a successor organization that is not a member of the Bank, the nonmember successor organization assumes the member's obligations under its approved application for AHP subsidy, and where the member received an AHP subsidized advance, the nonmember assumes such obligations until prepayment or orderly liquidation by the nonmember of the subsidized advance.

(7) *Retention agreements for rental projects.* The member shall ensure that an AHP-assisted rental project is subject to a deed restriction or other legally enforceable retention agreement or mechanism requiring that:

(i) The project's rental units, or applicable portion thereof, must remain occupied by and affordable for households with incomes at or below the levels committed to be served in the approved AHP application for the duration of the retention period;

(ii) The Bank and its designee is to be given notice of any sale, transfer, assignment of title or deed, or refinancing of the project during the retention period;

(iii) In the case of a sale, transfer, assignment of title or deed, or refinancing of the project by the owner during the retention period, the full amount of the AHP subsidy received by the owner shall be repaid to the Bank, unless:

(A) The project continues to be subject to a deed restriction or other legally enforceable retention agreement or mechanism incorporating the income-eligibility and affordability restrictions committed to in the approved AHP application for the duration of the retention period; or

(B) If authorized by the Bank, in its discretion, the households are relocated, due to the exercise of eminent domain, or for expansion of housing or services, to another property that is made subject to a deed restriction or other legally enforceable retention agreement or mechanism incorporating the income-eligibility and affordability restrictions committed to in the approved AHP application for the remainder of the retention period; and

(iv) The income-eligibility and affordability restrictions applicable to the project shall terminate after any foreclosure.

(8) *Lending of AHP direct subsidies.* If a member or a project sponsor lends AHP direct subsidy to a project, any repayments of principal and payments of interest received by the member or the project sponsor must be paid forthwith to the Bank, unless the direct subsidy is being both lent and re-lent by a revolving loan fund pursuant to § 1291.29(d).

(9) *Special provisions where members obtain AHP subsidized advances.*—(i) *Repayment schedule.* The term of an AHP subsidized advance shall be no longer than the term of the member's loan to the project funded by the advance, and at least once in every 12-month period, the member shall be scheduled to make a principal repayment to the Bank equal to the amount scheduled to be repaid to the member on its loan to the project in that period.

(ii) *Prepayment fees.* Upon a prepayment of an AHP subsidized advance, the Bank shall charge a prepayment fee only to the extent the Bank suffers an economic loss from the prepayment.

(iii) *Treatment of loan prepayment by project.* If all or a portion of the loan or loans financed by an AHP subsidized advance are prepaid by the project to the member, the member may, at its option, either:

(A) Repay to the Bank that portion of the advance used to make the loan or loans to the project, and be subject to a fee imposed by the Bank sufficient to compensate the Bank for any economic loss the Bank experiences in reinvesting the repaid amount at a rate of return below the cost of funds originally used by the Bank to calculate the interest rate subsidy incorporated in the advance; or

(B) Continue to maintain the advance outstanding, subject to the Bank resetting the interest rate on that portion of the advance used to make the loan or loans to the project to a rate equal to the cost of funds originally used by the Bank to calculate the interest rate subsidy incorporated in the advance.

(b) *Agreements between Banks and project sponsors or project owners.*—(1) A Bank may have in place an agreement with each project sponsor or project owner, in which the project sponsor or project owner agrees to repay AHP subsidies directly to the Bank in accordance with the requirements of § 1291.60.

(2) *Project sponsor qualifications.* A Bank's AHP subsidy application form or other related document must include project sponsor qualification criteria that evaluate the ability of the project sponsor (including all affiliates and team members such as the general

contractor) to perform the responsibilities committed to in the application. The application form or other related document shall include a requirement for the project sponsor to provide certifications or respond to specific questions about whether the project sponsor (and affiliates and team members such as the general contractor) have engaged in misconduct as defined in FHFA's Suspended Counterparty Program regulation (12 CFR part 1227), or as defined by the Bank. A Bank's AHP subsidy disbursement form or other related form shall include a requirement for similar certifications or questions for the project sponsor to complete prior to each disbursement of AHP subsidy.

(c) *Application to existing AHP projects and units.* The requirements of section 10(j) of the Bank Act (12 U.S.C. 1430(j)) and the provisions of this part, as amended, are incorporated into all agreements between Banks, members, project sponsors, and project owners receiving AHP subsidies under the General Fund and any Bank Targeted Funds, and between Banks, members and unit owners under any Bank Homeownership Set-Aside Programs. To the extent the requirements of this part are amended from time to time, such agreements are deemed to incorporate the amendments to conform to any new requirements of this part. No amendment to this part shall affect the legality of actions taken prior to the effective date of such amendment.

#### § 1291.16 Conflicts of interest.

(a) *Bank directors and employees.*—(1) Each Bank's board of directors shall adopt a written policy providing that if a Bank director or employee, or such person's family member, has a financial interest in, or is a director, officer, or employee of an organization involved in, a project that is the subject of a pending or approved AHP application, the Bank director or employee shall not participate in or attempt to influence decisions by the Bank regarding the evaluation, approval, funding, monitoring, or any remedial process for such project.

(2) If a Bank director or employee, or such person's family member, has a financial interest in, or is a director, officer, or employee of an organization involved in, an AHP project such that he or she is subject to the requirements in paragraph (a)(1) of this section, such person shall not participate in or attempt to influence decisions by the Bank regarding the evaluation, approval, funding, monitoring, or any remedial process for such project.

(b) *Advisory Council members.*—(1) Each Bank's board of directors shall adopt a written policy providing that if an Advisory Council member, or such person's family member, has a financial interest in, or is a director, officer, or employee of an organization involved in, a project that is the subject of a pending or approved AHP application, the Advisory Council member shall not participate in or attempt to influence decisions by the Bank regarding the approval for such project.

(2) If an Advisory Council member, or such person's family member, has a financial interest in, or is a director, officer, or employee of an organization involved in, an AHP project such that he or she is subject to the requirements in paragraph (b)(1) of this section, such person shall not participate in or attempt to influence decisions by the Bank regarding the approval for such project.

(c) *No delegation.* A Bank's board of directors shall not delegate to Bank officers or other Bank employees the responsibility to adopt the conflict of interest policies required by this section.

### Subpart C—General Fund and Targeted Funds

#### § 1291.20 Establishment of programs.

(a) *General Fund.* A Bank shall establish a General Fund pursuant to the requirements of this part.

(b) *Targeted Funds.*—(1) *Number of Funds.* A Bank may establish, in its discretion, a maximum of three Targeted Funds pursuant to the requirements of paragraph (b)(2) of this section, the phase-in funding allocation requirements in § 1291.12(c)(1), and any other applicable requirements of this part. A Bank may not establish or administer a Targeted Fund unless at least 12 months have passed since the publication of the Targeted Community Lending Plan in which the Bank identifies the specific housing needs to be addressed by that Targeted Fund.

(2) *Phase-in requirements for number of Funds.* Unless otherwise directed by PHFA, a Bank may establish:

- (i) One Targeted Fund;
- (ii) Two Targeted Funds to be administered concurrently, provided that the Bank administered at least one Targeted Fund in any preceding year; or
- (iii) Three Targeted Funds to be administered concurrently, provided that the Bank administered at least two Targeted Funds in any preceding year.

(c) *Eligibility requirements.*—(1) A Bank shall adopt and implement controls, which shall be included in its AHP Implementation Plan, for ensuring

that each Targeted Fund is designed to receive sufficient numbers of applicants for the amount of AHP funds allocated to the Targeted Fund to enable the Bank to facilitate a genuinely competitive scoring process.

(2) A Bank may not adopt additional eligibility requirements for its General Fund and any Targeted Funds except as specifically authorized in this part.

#### § 1291.21 Eligible applicants.

(a) *Member applicants.* A Bank shall accept applications for AHP subsidy under its General Fund and any Bank Targeted Funds only from institutions that are members of the Bank at the time the application is submitted to the Bank.

(b) *Project sponsor qualifications.*—(i) *In general.* A project sponsor, including all affiliates and team members such as the general contractor, must be qualified and able to perform its responsibilities as committed to in the application for AHP subsidy funding the project.

(ii) *Revolving loan fund.* Pursuant to written policies adopted by a Bank's board of directors, a revolving loan fund sponsor that intends to use AHP direct subsidy in accordance with § 1291.29 shall:

(A) Provide audited financial statements that its operations are consistent with sound business practices; and

(B) Demonstrate the ability to re-lend AHP subsidy repayments on a timely basis and track the use of the AHP subsidy.

(iii) *Loan pool.* Pursuant to written policies adopted by a Bank's board of directors, a loan pool sponsor that intends to use AHP subsidy in accordance with § 1291.30 shall:

(A) Provide evidence of sound asset/liability management practices;

(B) Provide audited financial statements that its operations are consistent with sound business practices; and

(C) Demonstrate the ability to track the use of the AHP subsidy.

#### § 1291.22 Funding periods; application process.

(a) *Funding periods.* A Bank may accept applications for AHP subsidy under its General Fund and any Bank Targeted Funds during a specified number of funding periods each year, as determined by the Bank.

(b) *Submission of applications.* Except as provided in § 1291.29(a), a Bank shall require applications for AHP subsidy to contain information sufficient for the Bank to:

(1) Determine that the proposed AHP project meets the eligibility requirements of this part; and

(2) Evaluate the application pursuant to the scoring methodology adopted by the Bank pursuant to § 1291.25.

(c) *Review of applications submitted.* Except as provided in § 1291.29(b), a Bank shall review the applications for AHP subsidy to determine that the proposed AHP project meets the eligibility requirements of this part, and shall evaluate the applications pursuant to the Bank's scoring methodology adopted pursuant to § 1291.25.

#### § 1291.23 Eligible projects.

Projects receiving AHP subsidies pursuant to a Bank's General Fund and any Bank Targeted Funds must meet the following eligibility requirements:

(a) *Owner-occupied or rental housing.* The AHP subsidy shall be used exclusively for:

(1) *Owner-occupied housing.* The purchase, construction, or rehabilitation of an owner-occupied project by or for very low-income or low- or moderate-income households, where the housing is to be used as the household's primary residence. A household must have an income meeting the income targeting commitments in the approved AHP application at the time it is qualified by the project sponsor for participation in the project;

(2) *Rental housing.* The purchase, construction, or rehabilitation of a rental project, where at least 20 percent of the units in the project are occupied by and affordable for very low-income households.

(i) *Projects that are not occupied.* For a rental project that is not occupied at the time the AHP application is submitted to the Bank for approval, a household must have an income meeting the income targeting commitments in the approved AHP application upon initial occupancy of the rental unit.

(ii) *Projects that are occupied.* For a rental project involving purchase or rehabilitation that is occupied at the time the AHP application is submitted to the Bank for approval, a household must have an income meeting the income targeting commitments in the approved AHP application at the time of such submission. If the project has a plan approved by one of its primary funders to relocate the households not meeting the income targeting commitments, a household must have an income meeting the income targeting commitments upon initial occupancy of the rental unit.

(b) *Project feasibility.*—(1) *Developmental feasibility.* The project must be likely to be completed and occupied, based on relevant factors contained in the Bank's project

feasibility guidelines, including, but not limited to, the development budget, market analysis, and project sponsor's experience in providing the requested assistance to households.

(2) *Operational feasibility of rental projects.* A rental project must be able to operate in a financially sound manner, in accordance with the Bank's project feasibility guidelines, as projected in the project's operating pro forma.

(c) *Timing of AHP subsidy use.* Some or all of the AHP subsidy must be 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 funding the project.

(d) *Retention agreements for rental projects.* AHP-assisted rental projects are, or are committed to be, subject to a 15-year retention agreement as described in § 1291.15(a)(7).

(e) *Fair housing.* The project, as proposed, must comply with applicable federal and state laws on fair housing and housing accessibility, including, but not limited to, the Fair Housing Act, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, and the Architectural Barriers Act of 1969, and must demonstrate how the project will be affirmatively marketed.

#### § 1291.24 Eligible uses.

(a) *Eligible uses of AHP subsidy.* AHP subsidies shall be used only for:

(1) *Owner-occupied housing.* The purchase, construction, or rehabilitation of owner-occupied housing.

(2) *Rental housing.* The purchase, construction, or rehabilitation of rental housing.

(3) *Need for AHP subsidy—(i) Review of project development budget and operating pro forma—(A)* In the case of an owner-occupied project, a Bank shall review the project's development budget in determining its need for AHP subsidy. The project's estimated sources of funds must equal its estimated uses of funds, as reflected in the project's development budget. The difference between the project's sources of funds and uses of funds is the project's need for AHP subsidy, which is the maximum amount of AHP subsidy the project may receive.

(B) In the case of a rental project, a Bank shall review both the project's development budget and operating pro forma in determining its need for AHP subsidy. Where the project's uses of funds exceed its sources of funds, the difference demonstrates a funding gap and provides support for the project's need for AHP subsidy, provided that the project's cash flow and costs are

reasonable. This is the maximum amount of AHP subsidy that the project may receive.

(C) A Bank, in its discretion, may permit a project's sources of funds to include or exclude the estimated market value of in-kind donations and voluntary professional labor or services (excluding the value of sweat equity), provided that the project's uses of funds also include or exclude, respectively, the value of such estimates.

(ii) *Cash sources of funds.* A project's cash sources of funds shall include any cash contributions by the sponsor, any cash from sources other than the sponsor, and estimates of funds the project sponsor intends to obtain from other sources but which have not yet been committed to the project. In the case of homeownership projects where the sponsor extends permanent financing to the homebuyer, the sponsor's cash contribution shall include the present value of any payments the sponsor is to receive from the buyer, which shall include any cash down payment from the buyer, plus the present value of any purchase note the sponsor holds on the unit. If the note carries a market interest rate commensurate with the credit quality of the buyer, the present value of the note equals the face value of the note. If the note carries an interest rate below the market rate, the present value of the note shall be determined using the market rate to discount the cash flows.

(iii) *Cash uses.* A project's cash uses are the actual outlay of cash needed to pay for materials, labor, and acquisition or other costs of completing the project. Cash costs do not include in-kind donations, voluntary professional labor or services, or sweat equity.

(4) *Project costs.—(i) In general.—(A)* Taking into consideration the geographic location of the project, development conditions, and other non-financial household or project characteristics, a Bank shall determine that a project's costs, as reflected in the project's development budget, are reasonable, in accordance with the Bank's project cost guidelines.

(B) For purposes of determining the reasonableness of a developer's fee for a project as a percentage of total development costs, a Bank may, in its discretion, include estimates of the market value of in-kind donations and volunteer professional labor or services (excluding the value of sweat equity) committed to the project as part of the total development costs.

(ii) *Cost of property and services provided by a member.* The purchase price of property or services, as reflected in the project's development budget,

sold to the project by a member providing AHP subsidy to the project, or, in the case of property, upon which such member holds a mortgage or lien, may not exceed the market value of such property or services as of the date the purchase price was agreed upon. In the case of real estate owned property sold to a project by a member providing AHP subsidy to the project, or property sold to the project upon which the member holds a mortgage or lien, the market value of such property is deemed to be the "as-is" or "as-rehabilitated" value of the property, whichever is appropriate. That value shall be reflected in an independent appraisal of the property performed by a state certified or licensed appraiser, as defined in 12 CFR 564.2(j) and (k), within 6 months prior to the date the Bank disburses AHP subsidy to the project.

(5) *Financing costs.* The rate of interest, points, fees, and any other charges for all loans that are made for the project in conjunction with the AHP subsidy shall not exceed a reasonable market rate of interest, points, fees, and other charges for loans of similar maturity, terms, and risk.

(6) *Counseling costs.* Counseling costs, provided:

(i) Such costs are incurred in connection with counseling of homebuyers who actually purchase an AHP-assisted unit; and

(ii) The cost of the counseling has not been covered by another funding source, including the member.

(7) *Refinancing.* Refinancing of an existing single-family or multifamily mortgage loan, provided that the refinancing produces equity proceeds and such equity proceeds up to the amount of the AHP subsidy in the project shall be used only for the purchase, construction, or rehabilitation of housing units meeting the eligibility requirements of this part.

(8) *Calculation of AHP subsidy.—(i)* Where an AHP direct subsidy is provided to a project to write down the interest rate on a loan extended by a member, sponsor, or other party to a project, the net present value of the interest foregone from making the loan below the lender's market interest rate shall be calculated as of the date the application for AHP subsidy is submitted to the Bank, and subject to adjustment under § 1291.28(d).

(ii) Where an AHP subsidized advance is provided to a project, the net present value of the interest revenue foregone from making a subsidized advance at a rate below the Bank's cost of funds shall be determined as of the earlier of the date of disbursement of the

subsidized advance or the date prior to disbursement on which the Bank first manages the funding to support the subsidized advance through its asset/liability management system, or otherwise.

(b) *Prohibited uses of AHP subsidy.* AHP subsidy may not be used to pay for:

(1) *Certain prepayment fees.* Prepayment fees imposed by a Bank on a member for a subsidized advance that is prepaid, unless:

(i) The project is in financial distress that cannot be remedied through a project modification pursuant to § 1291.27;

(ii) The prepayment of the subsidized advance is necessary to retain the project's affordability and income targeting commitments;

(iii) Subsequent to such prepayment, the project will continue to comply with the terms of the approved AHP application and the requirements of this part for the duration of the original retention period;

(iv) Any unused AHP subsidy is returned to the Bank and made available for other AHP projects; and

(v) The amount of AHP subsidy used for the prepayment fee may not exceed the amount of the member's prepayment fee to the Bank;

(2) *Cancellation fees.* Cancellation fees and penalties imposed by a Bank on a member for a subsidized advance commitment that is canceled;

(3) *Processing fees.* Processing fees charged by members for providing AHP direct subsidies to a project; or

(4) *Reserves and certain expenses.* Capitalized reserves, periodic deposits to reserve accounts, operating expenses, or supportive services expenses.

(c) *Optional Bank district eligibility requirements.* A Bank may require a project receiving AHP subsidies to meet one or more of the following additional eligibility requirements adopted by the Bank's board of directors and included in its AHP Implementation Plan after consultation with its Advisory Council:

(1) *AHP subsidy limits.* A requirement that the amount of AHP subsidy requested for the project does not exceed limits established by the Bank as to the maximum amount of AHP subsidy available per member, per project sponsor, per project, or per project unit in a single AHP funding period. A Bank may establish only one maximum subsidy limit per member, per sponsor, per project, or per project unit for the General Fund and for each Targeted Fund, which shall apply to all applicants to the specific Fund, but the maximum subsidy limit per project or

per project unit may differ for each Fund; or

(2) *Homebuyer or homeowner counseling.* A requirement that a household must complete a homebuyer or homeowner counseling program provided by, or based on one provided by, an organization recognized as experienced in homebuyer or homeowner counseling, respectively.

(d) *Applications to multiple Funds.* If an application for the same project is submitted to multiple Funds in an AHP funding period, each application must be for the same amount of AHP subsidy.

#### § 1291.25 Scoring methodology.

(a) *Scoring methodology.* A Bank shall establish a written scoring methodology for its General Fund and each Targeted Fund it establishes, and shall score applications received for a particular Fund pursuant to the scoring methodology for that Fund. The scoring methodology may be different for each Fund. The scoring methodology shall set forth the Bank's competitive application scoring criteria, related definitions and point allocations, and shall reflect the affordable housing needs that the Bank identified in its Targeted Community Lending Plan would be addressed under its Funds. The Bank shall design its scoring methodology for the General Fund and each Targeted Fund to ensure that the Bank will meet the outcome requirements for the statutory and regulatory priorities in § 1291.48. The scoring methodology may include scoring criteria adopted by the Bank to address specific affordable housing needs in the Bank's district (Bank district priorities) that differ from the housing needs specified under the statutory and regulatory priorities in § 1291.48, as long as the outcome requirements specified in § 1291.48 are achieved.

(b) *Point allocations.* A Bank shall allocate 100 points among its scoring criteria for its General Fund and for each Targeted Fund.

(c) *In-district projects.* If a Bank adopts a scoring criterion under its General Fund for housing located in the Bank's district, the Bank shall not allocate points to the scoring criterion in such a way as to exclude all out-of-district projects from its General Fund.

(d) *Scoring tie-breaker policy.* A Bank shall establish a scoring tie-breaker policy to address the possibility of two or more applications to a Fund having identical scores in the same AHP funding period and there is insufficient AHP subsidy to approve all of the tied applications. A Bank shall meet the

following requirements in establishing its scoring tie-breaker policy:

(1) The Bank shall consult with its Advisory Council prior to adoption of its policy;

(2) The Bank shall adopt the policy in advance of an AHP funding period and include it in its AHP Implementation Plan;

(3) The policy shall include the methodology used to break a scoring tie, which may differ for each Fund, and which shall be drawn from the particular Fund's scoring criteria adopted in the Bank's AHP Implementation Plan;

(4) The scoring tie-breaker methodology shall be reasonable, transparent, verifiable, and impartial;

(5) The scoring tie-breaker methodology shall be used solely to break a scoring tie and may not affect the eligibility of the applications, including financial feasibility, or their scores and resultant rankings;

(6) The Bank shall approve a tied application as an alternate pursuant to § 1291.26(c) if the application does not prevail under the scoring tie-breaker methodology, or if the application is tied with another application but requested more subsidy than the amount of AHP funds that remain to be awarded; and

(7) The Bank shall document in writing its analysis and results for each use of the scoring tie-breaker methodology.

#### § 1291.26 Approval of AHP applications.

(a) *Approval of applications.* Except as provided in paragraphs (c), (d), and (e) of this section, a Bank's board of directors shall approve applications for AHP subsidy under its General Fund and any Bank Targeted Funds that meet all of the applicable AHP eligibility requirements in this part, in descending order starting with the highest scoring application until the total funding amount for the particular AHP funding period, except for any amount insufficient to fund the next highest scoring application, has been approved.

(b) *Alternates.* For the General Fund, the Bank's board of directors also shall approve at least the next four highest scoring applications as alternates and, within one year of approval, must approve such alternates for funding if any previously committed AHP subsidies become available. For any Bank Targeted Funds, the Bank may, in its discretion, approve alternates.

(c) *Tied applications.* Where two or more applications to a Fund have identical scores in the same AHP funding period and there is insufficient AHP subsidy to approve all of the tied

applications, a Bank shall approve the tied application that prevails under the Bank's scoring tie-breaker methodology in its policy adopted pursuant to § 1291.25(d). The Bank must approve a tied application as an alternate if it does not prevail under the scoring tie-breaker methodology, or if it is tied with another application but requested more subsidy than the amount of AHP funds that remain to be awarded under the Fund.

(d) *Applications to multiple Funds.* If an application for the same project is submitted to more than one Fund at a Bank in an AHP funding period and the application scores high enough to be approved under each Fund, the Bank shall approve the application under only one of the Funds pursuant to the Bank's policy established in its AHP Implementation Plan.

(e) *Re-ranking of scored applications and alternates.* To satisfy the outcome requirements of § 1291.48, a Bank may deviate from the ranking order after scoring applications and alternates under this section, but only to the minimum extent necessary by re-ranking scored applications and alternates meeting the outcome requirements above the lowest scoring applications and alternates not meeting the outcome requirements. A Bank shall describe the possibility of re-ranking in its AHP Implementation Plan.

(f) *No delegation.* A Bank's board of directors may not delegate to a committee of the board, Bank officers, or other Bank employees the responsibility to approve or disapprove the AHP subsidy applications and alternates under the Bank's General Fund and any Bank Targeted Funds.

#### § 1291.27 Modifications of approved AHP applications.

(a) *Modification procedure.* Except as provided in paragraph (b) of this section for modification requests for AHP subsidy increases, if, prior to or after final disbursement of funds to a project from all funding sources, in order to remedy noncompliance or receive additional subsidy, there is or will be a change in the project that would change the score that the project application received in the funding period in which it was originally scored and approved, had the changed facts been operative at that time, a Bank shall approve in writing a request for a modification to the terms of the approved application, provided that:

(1) The Bank first requested that the project cure any noncompliance and the cure was not successful after a reasonable period of time;

(2) The project, incorporating any such changes, would meet the eligibility requirements of this part;

(3) The application, as reflective of such changes, continues to score as high as the lowest ranking alternate that was approved for funding by the Bank in the AHP funding period in which the application was originally scored and approved by the Bank; and

(4) There is good cause for the modification, which may not be solely remediation of noncompliance, and the analysis and justification for the modification are documented by the Bank in writing.

(b) *AHP subsidy increases; no delegation.*—(1) *AHP subsidy increases.* A Bank's board of directors may, in its discretion, approve or disapprove requests for modifications involving an increase in AHP subsidy in accordance with the requirements of paragraph (a) of this section.

(2) *No delegation.* The authority to approve or disapprove requests for modifications involving an increase in AHP subsidy shall not be delegated by the Bank's board of directors to Bank officers or other Bank employees.

#### § 1291.28 Procedures for funding.

(a) *Disbursement of AHP subsidies to members.*—(1) A Bank may disburse AHP subsidies only to institutions that are members of the Bank at the time they request a draw-down of the subsidies.

(2) If an institution with an approved application for AHP subsidy loses its membership in a Bank, the Bank may disburse AHP subsidies to a member of such Bank to which the institution has transferred its obligations under the approved AHP application, or the Bank may disburse AHP subsidies through another Bank to a member of that Bank that has assumed the institution's obligations under the approved AHP application.

(b) *Progress towards use of AHP subsidy.* A Bank shall establish and implement policies, including time limits, for determining whether progress is being made towards draw-down and use of AHP subsidies by approved projects, and whether to cancel AHP application approvals for lack of such progress. If a Bank cancels any AHP application approvals due to lack of such progress, the Bank shall make the AHP subsidies available for other AHP-eligible projects.

(c) *Compliance upon disbursement of AHP subsidies.* A Bank shall establish and implement policies for determining, prior to its initial disbursement of AHP subsidies for an approved project, and prior to each subsequent disbursement

if the need for AHP subsidy has changed, that the project meets the eligibility requirements of this part and all obligations committed to in the approved AHP application. If a Bank cancels any AHP application approvals due to noncompliance with eligibility requirements of this part, the Bank shall make the AHP subsidies available for other AHP-eligible projects.

(d) *Changes in approved AHP subsidy amount where a direct subsidy is used to write down prior to closing the principal amount or interest rate on a loan.* If a member is approved to receive AHP direct subsidy to write down prior to closing the principal amount or the interest rate on a loan to a project, and the amount of AHP subsidy required to maintain the debt service cost for the loan decreases from the amount of AHP subsidy initially approved by the Bank due to a decrease in market interest rates between the time of approval and the time the lender commits to the interest rate to finance the project, the Bank shall reduce the AHP subsidy amount accordingly. If market interest rates rise between the time of approval and the time the lender commits to the interest rate to finance the project, the Bank, in its discretion, may increase the AHP subsidy amount accordingly.

(e) *AHP outlay adjustment.* If a Bank reduces the amount of AHP subsidy approved for a project, the amount of such reduction shall be returned to the Bank's AHP fund. If a Bank increases the amount of AHP subsidy approved for a project, the amount of such increase shall be drawn first from any currently uncommitted or repaid AHP subsidies and then from the Bank's required AHP contribution for the next year.

#### § 1291.29 Lending and re-lending of AHP direct subsidy by revolving loan funds.

Pursuant to written policies established by a Bank's board of directors after consultation with its Advisory Council, a Bank, in its discretion, may provide AHP direct subsidy under its General Fund or any Bank Targeted Funds for eligible projects and households involving both the lending of the subsidy and subsequent lending of subsidy principal and interest repayments by a revolving loan fund, provided the following requirements are met:

(a) *Submission of application.*—(1) An application for AHP subsidy under this section shall include the revolving loan fund's criteria for the initial lending of the subsidy, identification of and information on a specific proposed AHP project if required in the Bank's discretion, the revolving loan fund's



criteria for subsequent lending of subsidy principal and interest repayments, and any other information required by the Bank.

(2) The information in the application shall be sufficient for the Bank to:

(i) Determine that the criteria for the initial lending of the subsidy, the specific proposed project if applicable, and the criteria for subsequent lending of subsidy principal and interest repayments, meet the eligibility requirements of § 1291.23; and

(ii) Evaluate the criteria for the initial lending of the subsidy, and the specific proposed project if applicable, pursuant to the scoring methodology established by the Bank pursuant to § 1291.25(a).

(b) *Review of application.* A Bank shall review the application for AHP subsidy to determine that the criteria for the initial lending of the subsidy, the specific proposed project if applicable, and the criteria for subsequent lending of subsidy principal and interest repayments, meet the eligibility requirements of § 1291.23, and shall evaluate the criteria for the initial lending of the subsidy and the specific proposed project, if applicable, pursuant to the scoring methodology established by the Bank pursuant to § 1291.25(a).

(c) *Initial lending of subsidy.*—(1) The revolving loan fund's initial lending of the AHP subsidy shall meet the eligibility requirements of paragraph (a) of this section, shall be to projects or households meeting the commitments in the approved application for AHP subsidy, and shall be subject to the requirements in §§ 1291.15 and 1291.50, respectively.

(2) If a project funded under this paragraph (c) is in noncompliance with the commitments in the approved AHP application, or is sold or refinanced prior to the end of the applicable AHP retention period, the required amount of AHP subsidy shall be repaid to the revolving loan fund in accordance with §§ 1291.15(a)(8) and 1291.60, and the revolving loan fund shall re-lend such repaid subsidy, excluding the amounts of AHP subsidy principal already repaid to the revolving loan fund, to another project meeting the initial lending requirements of this paragraph (c) for the remainder of the retention period.

(d) *Subsequent lending of AHP subsidy principal and interest repayments.*—(1) AHP subsidy principal and interest repayments received by the revolving loan fund from the initial lending of the AHP direct subsidy shall be re-lent by the revolving loan fund in accordance with the requirements of this paragraph (d), except that the revolving loan fund, in its discretion, may provide part or all of such

repayments as nonrepayable grants to eligible projects in accordance with the requirements of this paragraph (d).

(2) The revolving loan fund's subsequent lending of AHP subsidy principal and interest repayments shall be for the purchase, construction, or rehabilitation of owner-occupied projects for households with incomes at or below 80 percent of the median income for the area, or of rental projects where at least 20 percent of the units are occupied by and affordable for households with incomes at or below 50 percent of the median income for the area, and shall meet all other eligibility requirements of this paragraph (d).

(3) A Bank may, in its discretion, require the revolving loan fund's subsequent lending of subsidy principal and interest repayments to be subject to retention period, monitoring, and recapture requirements for rental projects, as defined by the Bank in its AHP Implementation Plan.

(e) *Return of unused AHP subsidy.* The revolving loan fund shall return to the Bank any AHP subsidy that will not be used according to the requirements in this section.

#### **§ 1291.30 Use of AHP subsidy in loan pools.**

Pursuant to written policies established by a Bank's board of directors after consultation with its Advisory Council, a Bank, in its discretion, may provide AHP subsidy under its General Fund or any Bank Targeted Funds for the origination of first mortgage or rehabilitation loans with subsidized interest rates to AHP-eligible households through a purchase commitment by an entity that will purchase and pool the loans, provided the following requirements are met:

(a) *Eligibility requirements.* The loan pool sponsor's use of the AHP subsidies shall meet the requirements under this section, and shall not be used for the purpose of providing liquidity to the originator or holder of the loans, or paying the loan pool's operating or secondary market transaction costs.

(b) *Forward commitment.*—(1) The loan pool sponsor shall purchase the loans pursuant to a forward commitment that identifies the loans to be originated with interest-rate reductions as specified in the approved application for AHP subsidy to households with incomes at or below 80 percent of the median income for the area. Both initial purchases of loans for the AHP loan pool and subsequent purchases of loans to substitute for repaid loans in the pool shall be made pursuant to the terms of such forward commitment and subject to time limits

on the use of the AHP subsidy as specified by the Bank in its AHP Implementation Plan and the Bank's agreement with the loan pool sponsor, which shall not exceed 1 year from the date of approval of the AHP application.

(2) As an alternative to using a forward commitment, the loan pool sponsor may purchase an initial round of loans that were not originated pursuant to an AHP-specific forward commitment, provided that the entities from which the loans were purchased are required to use the proceeds from the initial loan purchases within time limits on the use of the AHP subsidy as specified by the Bank in its AHP Implementation Plan and the Bank's agreement with the loan pool sponsor, which shall not exceed 1 year from the date of approval of the AHP application. The proceeds shall be used by such entities to assist households that are income-eligible under the approved AHP application during subsequent rounds of lending, and such assistance shall be provided in the form of a below-market AHP-subsidized interest rate as specified in the approved AHP application.

(c) Each AHP-assisted rental project receiving AHP direct subsidy or a subsidized advance shall be subject to the requirements of §§ 1291.15, 1291.50(a), and 1291.60, respectively.

(d) Where AHP direct subsidy is being used to buy down the interest rate of a loan or loans from a member or other party, the loan pool sponsor shall use the full amount of the AHP direct subsidy to buy down the interest rate on a permanent basis at the time of closing on such loan or loans.

#### **Subpart D—Homeownership Set-Aside Programs**

##### **§ 1291.40 Establishment of programs.**

A Bank may establish, in its discretion, one or more Homeownership Set-Aside Programs pursuant to the requirements of this part. The Bank's analyses supporting establishment of such programs shall be included in its Targeted Community Lending Plan, as provided in § 1291.13(a).

##### **§ 1291.41 Eligible applicants.**

A Bank shall accept applications for AHP direct subsidy under its Homeownership Set-Aside Programs only from institutions that are members of the Bank at the time the application is submitted to the Bank.

##### **§ 1291.42 Eligibility requirements.**

A Bank's Homeownership Set-Aside Programs shall meet the eligibility requirements set forth in this section. A

Bank may not adopt additional eligibility requirements for its Homeownership Set-Aside Programs except for eligible households pursuant to paragraph (b) of this section.

(a) *Member allocation criteria.* AHP direct subsidies shall be provided to members pursuant to allocation criteria established by the Bank in its AHP Implementation Plan.

(b) *Eligible households.* Members shall provide AHP direct subsidies only to households that:

(1) Have incomes at or below 80 percent of the median income for the area at the time the household is accepted for enrollment by the member in the Bank's Homeownership Set-Aside Program, with such time of enrollment by the member defined by the Bank in its AHP Implementation Plan;

(2) Complete a homebuyer or homeowner counseling program provided by, or based on one provided by, an organization experienced in homebuyer or homeowner counseling, in the case of households that are first-time homebuyers; and

(3) Are first-time homebuyers or households receiving AHP subsidy for the purpose of owner-occupied rehabilitation, in the case of households receiving subsidy pursuant to the one-third set-aside funding allocation requirement in § 1291.12(b), and meet such other eligibility criteria that may be established by the Bank in its AHP Implementation Plan, such as a matching funds requirement, homebuyer or homeowner counseling requirement for households that are not first-time homebuyers, or criteria that give priority for the purchase or rehabilitation of housing in particular areas or as part of a disaster relief effort.

(c) *Maximum grant amount.* Members shall provide AHP direct subsidies to households as a grant, in an amount up to a maximum established by the Bank, not to exceed \$22,000 per household, which limit shall automatically adjust upward on an annual basis in accordance with increases in FHFA's Housing Price Index (HPI). In the event of a decrease in the HPI, the subsidy limit shall remain at its then-current level until the HPI increases above the subsidy limit, at which point the subsidy limit shall adjust to that higher level. FHFA will notify the Banks annually of the maximum subsidy amount, based on the HPI. A Bank may establish a different maximum grant amount for each Homeownership Set-Aside Program it establishes. A Bank's maximum grant amount for each such program shall be included in its AHP Implementation Plan, which limit shall

apply to all households in the specific program for which it is established.

(d) *Eligible uses of AHP direct subsidy.* Households shall use the AHP direct subsidies to pay for down payment, closing cost, counseling, or rehabilitation assistance in connection with the household's purchase or rehabilitation of an owner-occupied unit, including a condominium or cooperative housing unit or manufactured housing, to be used as the household's primary residence.

(e) *Financial or other concessions.* The Bank may, in its discretion, require members and other lenders to provide financial or other concessions, as defined by the Bank in its AHP Implementation Plan, to households in connection with providing the AHP direct subsidy or financing to the household.

(f) *Financing costs.* The rate of interest, points, fees, and any other charges for all loans made in conjunction with the AHP direct subsidy shall not exceed a reasonable market rate of interest, points, fees, and other charges for loans of similar maturity, terms, and risk.

(g) *Counseling costs.* The AHP direct subsidies may be used to pay for counseling costs only where:

(1) Such costs are incurred in connection with counseling of homebuyers who actually purchase an AHP-assisted unit; and

(2) The cost of the counseling has not been covered by another funding source, including the member.

(h) *Cash back to household.* A member may provide cash back to a household at closing on the mortgage loan in an amount not exceeding \$250, as determined by the Bank in its AHP Implementation Plan, and a member shall use any AHP direct subsidy exceeding such amount that is beyond what is needed at closing for closing costs and the approved mortgage amount as a credit to reduce the principal of the mortgage loan or as a credit toward the household's monthly payments on the mortgage loan.

#### **§ 1291.43 Approval of AHP applications.**

A Bank shall approve applications for AHP direct subsidy in accordance with the Bank's criteria governing the allocation of funds.

#### **§ 1291.44 Procedures for funding.**

(a) *Disbursement of AHP direct subsidies to members—*(1) A Bank may disburse AHP direct subsidies only to institutions that are members of the Bank at the time they request a draw-down of the subsidies.

(2) If an institution with an approved application for AHP direct subsidy loses its membership in a Bank, the Bank may disburse AHP direct subsidies to a member of such Bank to which the institution has transferred its obligations under the approved AHP application, or the Bank may disburse AHP direct subsidies through another Bank to a member of that Bank that has assumed the institution's obligations under the approved AHP application.

(b) *Reservation of homeownership set-aside subsidies.* A Bank shall establish and implement policies for reservation of homeownership set-aside subsidies for households enrolled in the Bank's Homeownership Set-Aside Program. The policies shall provide that set-aside subsidies be reserved no more than two years in advance of the Bank's time limit in its AHP Implementation Plan for draw-down and use of the subsidies by the household and the reservation of subsidies be made from the set-aside allocation of the year in which the Bank makes the reservation.

(c) *Progress towards use of AHP direct subsidy.* A Bank shall establish and implement policies, including time limits, for determining whether progress is being made towards draw-down and use of the AHP direct subsidies by eligible households, and whether to cancel AHP application approvals for lack of such progress. If a Bank cancels any AHP application approvals due to lack of such progress, it shall make the AHP direct subsidies available for other applicants for AHP direct subsidies under the Homeownership Set-Aside Program or for other AHP-eligible projects.

### **Subpart E—Outcome Requirements for Statutory and Regulatory Priorities**

#### **§ 1291.48 Outcome requirements for statutory and regulatory priorities.**

(a) *Statutory priorities—government properties; project sponsorship.* Each year, each Bank shall award at least 55 percent of the total AHP funds allocated, in the aggregate, to the Bank's General Fund and any Bank Targeted Funds to projects that meet paragraph (a)(1) or paragraph (a)(2) of this section. If an awarded project meets both paragraphs, it may be counted towards meeting only one of the paragraphs.

(1) *Use of donated or conveyed government-owned or other properties.* The financing of housing that uses a significant proportion, as defined by the Bank in its AHP Implementation Plan, of:

(i) Land or units donated or conveyed by the federal government or any agency or instrumentality thereof; or

(ii) Land or units donated or conveyed by any other party for an amount significantly below the fair market value of the property, as defined by the Bank in its AHP Implementation Plan.

(2) *Sponsorship by a not-for-profit organization or government entity.* Project sponsorship by a not-for-profit organization, a state or political subdivision of a state, a state housing agency, a local housing authority, a Native American Tribe, an Alaskan Native Village, or the government entity for Native Hawaiian Home Lands.

(b) *Statutory priority—purchase of homes by low- or moderate-income households.* Each year, each Bank shall award at least 10 percent of its required annual AHP contribution to low- or moderate-income households, or to projects targeting such households, for the purchase by such households of homes under any or some combination of the Bank's General Fund, any Bank Targeted Funds, and any Bank Homeownership Set-Aside Programs.

(c) *Regulatory priority—very low-income targeting for rental units.* Each year, each Bank shall ensure that at least 55 percent of all rental units in rental projects receiving AHP awards under the Bank's General Fund and any Bank Targeted Funds are reserved for very low-income households.

(d) *Regulatory priorities—Underserved Communities and Populations; Creating Economic Opportunity; and Affordable Housing Preservation.* Each year, each Bank shall ensure that at least 55 percent of the Bank's required annual AHP contribution is awarded under the Bank's General Fund and any Bank Targeted Funds to projects that, in the aggregate, meet at least two of the three regulatory priorities in this paragraph (d) (paragraphs (d)(1), (d)(2), and (d)(3)) by meeting one or more of the specified housing needs included under the regulatory priority, and awarding at least 10 percent of the funds to projects meeting each of such regulatory priorities. If an awarded project meets more than one of the regulatory priorities, it may be counted towards meeting only one of them. If an awarded project meets more than one specified housing need under a regulatory priority, it may be counted towards meeting only one of those housing needs. An award to a project may not be counted towards meeting a regulatory priority in this paragraph (d) unless the specified housing need that it meets is identified in the Bank's Targeted Community Lending Plan as an affordable housing need the Bank indicated it would address through its AHP scoring criteria.

(1) *Regulatory priority—Underserved Communities and Populations.* The financing of housing for underserved communities or populations, by addressing one or more of the following specific housing needs:

(i) *Housing for homeless households.* The financing of rental housing, excluding overnight shelters, reserving at least 50 percent of the units for homeless households, the creation of transitional housing for homeless households permitting a minimum of 6 months occupancy, or the creation of permanent owner-occupied housing reserving at least 50 percent of the units for homeless households, with the term "homeless households" as defined by the Bank in its AHP Implementation Plan.

(ii) *Housing for special needs populations.* The financing of housing in which at least 50 percent of the units are reserved for, and provide supportive services or access to supportive services for, households with specific special needs, such as: The elderly; persons with disabilities; formerly incarcerated persons; persons recovering from physical abuse or alcohol or drug abuse; victims of domestic violence, dating violence, sexual assault or stalking; persons with HIV/AIDS; or unaccompanied youth; or the financing of housing that is visitable by persons with physical disabilities who are not occupants of such housing.

(iii) *Housing for other targeted populations.* The financing of housing, not necessarily with supportive services, in which at least 50 percent of the units are reserved for populations specifically in need of housing, such as agricultural workers, military veterans, Native Americans, multigenerational households, persons with disabilities, or households requiring large units.

(iv) *Rural housing.* The financing of housing located in rural areas (with the term "rural area" as defined in 12 CFR 1282.1).

(v) *Rental housing for extremely low-income households.* The financing of rental projects in which at least 20 percent of the units are reserved for extremely low-income households.

(vi) *Other.* The financing of other housing addressing specific housing needs of underserved communities or populations as FHFA may provide by guidance.

(2) *Regulatory priority—Creating Economic Opportunity.* The financing of housing that facilitates economic opportunity for the residents by addressing one or more of the following specific housing needs:

(i) *Promotion of empowerment.* The provision of housing in combination

with a program offering services that assist residents in attaining life skills or moving toward better economic opportunities, such as: Employment; education; training; homebuyer, homeownership or tenant counseling; child care; adult daycare services; afterschool care; tutoring; health services; resident involvement in decision making affecting the creation of operation of the project; or workforce preparation and integration.

(ii) *Residential economic diversity.* The financing of either affordable housing in a high opportunity area, or mixed-income housing in an area of concentrated poverty (as those terms are defined in 12 CFR 1282.1 and FHFA's Duty to Serve Evaluation Guidance).

(iii) *Other.* The financing of other housing that facilitates economic opportunity as FHFA may provide by guidance.

(3) *Regulatory priority—Affordable Housing Preservation.* The financing of affordable rental housing preservation or homeownership preservation, by addressing one or more of the following specific housing needs:

(i) *Affordable rental housing preservation.* Providing financing that preserves affordable rental housing such as existing housing in need of rehabilitation as indicated by deteriorating physical condition, high vacancy rates, or poor financial performance, affordable rental housing with energy or water efficiency improvements (meeting the requirements of 12 CFR 1282.34(d)(2)), and affordable housing under the following programs: Section 8 (42 U.S.C. 1437f), Section 236 (12 U.S.C. 1715z-1), Section 221(d)(4) (12 U.S.C. 1715l), Section 202 (12 U.S.C. 1701q), Section 811 (42 U.S.C. 8013), McKinney-Vento Homeless Assistance (42 U.S.C. 11361 *et seq.*), Section 515 (42 U.S.C. 1485), Low-Income Housing Tax Credits (26 U.S.C. 42), HUD Choice Neighborhoods Initiative (42 U.S.C. 1437v); HUD Rental Assistance Demonstration program (42 U.S.C. 1437f note), or other state or local affordable housing programs comparable to the foregoing housing programs.

(ii) *Affordable homeownership preservation.* The financing of housing that preserves affordable homeownership, including owner-occupied rehabilitation, shared equity programs, owner-occupied housing with energy or water efficiency improvements (meeting the requirements of 12 CFR 1282.34(d)(3)), or other housing finance strategies to preserve homeownership.

(iii) *Other.* The financing of other mechanisms for affordable rental

housing preservation or affordable homeownership preservation as FHFA may provide by guidance.

(e) *Annual report.* Each Bank shall submit an annual report to FHFA, at a time and in a form designated by FHFA, demonstrating compliance with this section.

**§ 1291.49 Determination of compliance with outcome requirements; notice of determination.**

(a) *Determination of compliance.* On an annual basis, the Director shall determine each Bank's compliance with the outcome requirements in § 1291.48.

(b) *Noncompliance with outcome requirements.* If the Director preliminarily determines that a Bank has failed to comply with § 1291.48, the Director shall notify the Bank in writing of such preliminary determination. Any notification to a Bank of such preliminary determination shall provide the Bank with an opportunity to respond in writing in accordance with the following procedures:

(1) *Notice.* The Director shall provide written notice to the Bank of the preliminary determination, the reasons for such determination, and the information on which the Director based the determination.

(2) *Response period*—(i) *In general.* During the 30-day period beginning on the date on which notice is provided under paragraph (b)(1) of this section, the Bank may submit to the Director any written information that the Bank considers appropriate for consideration by the Director in finally determining whether such noncompliance has occurred or whether compliance with § 1291.48 was feasible.

(ii) *Extended period.* The Director may extend the period under paragraph (b)(2)(i) of this section for good cause for not more than 30 additional days.

(iii) *Shortened period.* The Director may shorten the period under paragraph (b)(2)(i) of this section for good cause.

(iv) *Failure to respond.* The failure of a Bank to provide information during the response period shall waive any right of the Bank to comment on the proposed determination or action of the Director.

(3) *Consideration of information and final determination*—(i) *Considerations.* In making a final determination under paragraph (b)(3)(ii) of this section, the Director shall take into consideration any relevant information submitted by the Bank during the response period.

(ii) *Notice of final determination.* After the expiration of the response period or receipt of information provided during such period by the Bank, the Director shall provide written

notice to the Bank within a reasonable period of time of the final determination of:

(A) Whether the Bank has failed to comply with § 1291.48; and

(B) Whether, taking into consideration market and economic conditions and the financial condition of the Bank, compliance with § 1291.48 was feasible.

**Subpart F—Monitoring**

**§ 1291.50 Monitoring under General Fund and Targeted Funds.**

(a) *Initial monitoring policies for owner-occupied and rental projects.* A Bank shall adopt written policies pursuant to which the Bank shall monitor each AHP owner-occupied project and rental project approved under its General Fund and any Bank Targeted Funds prior to, and within a reasonable period of time after, project completion to verify, at a minimum, satisfaction of the requirements in this section.

(1) *Satisfactory progress.* The Bank shall determine that:

(i) The project is making satisfactory progress towards completion, in compliance with the commitments made in the approved AHP application, Bank policies, and the requirements of this part; and

(ii) Following completion of the project, satisfactory progress is being made towards occupancy of the project by eligible households.

(2) *Project sponsor or owner certification, rent roll and other documentation; backup and other project documentation.* Within a reasonable period of time after project completion, the Bank shall review a certification from the project sponsor or owner, the project rent roll, and any other documentation to verify that the project meets the following requirements, at a minimum:

(i) The AHP subsidies were used for eligible purposes according to the commitments made in the approved AHP application;

(ii) The household incomes and rents comply with the income targeting and rent commitments made in the approved AHP application;

(iii) The project's actual costs were reasonable in accordance with the Bank's project cost guidelines, and the AHP subsidies were necessary for the completion of the project as currently structured, as determined pursuant to § 1291.24(a)(4);

(iv) Each rental project is subject to an AHP retention agreement that meets the requirements of § 1291.15(a)(7); and

(v) The services and activities committed in the approved AHP

application have been provided in connection with the project.

(3) *Back-up and other project documentation.* The Bank's written monitoring policies shall include requirements for:

(i) Bank review within a reasonable period of time after project completion of back-up project documentation regarding household incomes and rents (not including the rent roll) maintained by the project sponsor or owner, except for projects that received funds from other federal, state or local government entities whose programs meet the requirements in paragraphs (b)(1) and (2) of this section as specified in separate FHFA guidance, or projects that have also been allocated federal Low-Income Housing Tax Credits; and

(ii) Maintenance and Bank review of other project documentation in the Bank's discretion.

(4) *Sampling plan.* The Bank shall not use a sampling plan to select the projects to be monitored under this paragraph (a), but may use a reasonable risk-based sampling plan to review the back-up project documentation.

(b) *Long-term monitoring—reliance on other governmental monitoring for certain rental projects.* For completed AHP rental projects that also received funds other than federal Low-Income Housing Tax Credits from federal, state, or local government entities, a Bank may, in its discretion, for purposes of long-term AHP monitoring under its General Fund and any Bank Targeted Funds, rely on the monitoring by such entities of the income targeting and rent requirements applicable under their programs, provided that the Bank can show that:

(1) The compliance profiles regarding income targeting, rent, and retention period requirements of the AHP and the other programs are substantively equivalent;

(2) The entity has demonstrated and continues to demonstrate its ability to monitor the project;

(3) The entity agrees to provide reports to the Bank on the project's incomes and rents for the full 15-year AHP retention period; and

(4) The Bank reviews the reports from the monitoring entity to confirm that they comply with the Bank's monitoring policies.

(c) *Long-term monitoring policies for rental projects.* In cases where a Bank does not rely on monitoring by a federal, state, or local government entity pursuant to paragraph (b) of this section, pursuant to written policies established by the Bank, the Bank shall monitor completed AHP rental projects approved under its General Fund and

any Bank Targeted Funds, commencing in the second year after project completion through the AHP 15-year retention period, to verify, at a minimum, satisfaction of the requirements in this section.

(1) *Annual project sponsor or owner certifications; backup and other project documentation.* A Bank's written monitoring policies shall include requirements for:

(i) Bank review of annual certifications by project sponsors or owners to the Bank that household incomes and rents are in compliance with the commitments made in the approved AHP application during the AHP 15-year retention period, along with information on the ongoing financial viability of the project, including whether the project is current on its property taxes and loan payments, its vacancy rate, and whether it is in compliance with its commitments to other funding sources;

(ii) Bank review of back-up project documentation regarding household incomes and rents, including the rent rolls, maintained by the project sponsor or owner, except for projects that also received funds from other federal, state or local government entities whose programs meet the requirements in paragraphs (b)(1) and (2) of this section as specified in separate FHFA guidance, or projects that have also been allocated federal Low-Income Housing Tax Credits (LIHTC), provided that the Bank shall review any notices received from project sponsors or owners pursuant to § 1291.15(a)(5)(ii) that an AHP project is in noncompliance with LIHTC income-targeting or rent requirements during the AHP 15-year retention period; and

(iii) Maintenance and Bank review of other project documentation in the Banks' discretion.

(2) *Risk factors and other monitoring*—(i) *Risk factors; other monitoring.* A Bank's written monitoring policies shall take into account risk factors such as the amount of AHP subsidy in the project, type of project, size of project, location of project, sponsor experience, and any monitoring of the project provided by a federal, state, or local government entity.

(ii) *Risk-based sampling plan.* A Bank may use a reasonable, risk-based sampling plan to select the rental projects to be monitored under this paragraph (c), and to review the back-up and any other project documentation. The risk-based sampling plan and its basis shall be in writing.

(d) *Annual adjustment of targeting commitments.* For purposes of determining compliance with the

targeting commitments in an approved AHP application for both initial and long-term AHP monitoring purposes under a Bank's General Fund and any Bank Targeted Funds, such commitments shall be considered to adjust annually according to the current applicable median income data. A rental unit may continue to count toward meeting the targeting commitment of an approved AHP application as long as the rent charged to a household remains affordable, as defined in § 1291.1, for the household occupying the unit.

#### **§ 1291.51 Monitoring under Homeownership Set-Aside Programs.**

(a) *Adoption and implementation.* Pursuant to written policies adopted by a Bank, the Bank shall monitor compliance with the requirements of its Homeownership Set-Aside Programs, including monitoring to determine, at a minimum, whether:

(1) The AHP subsidy was provided to households meeting all applicable eligibility requirements in § 1291.42(b) and the Bank's Homeownership Set-Aside Program policies; and

(2) All other applicable eligibility requirements in § 1291.42 and the Bank's Homeownership Set-Aside Program policies are met.

(b) *Member certifications; back-up and other documentation.* The Bank's written monitoring policies shall include requirements for:

(1) Bank review of certifications by members to the Bank, prior to disbursement of the AHP subsidy, that the subsidy will be provided in compliance with all applicable eligibility requirements in § 1291.42;

(2) Bank review of back-up documentation regarding household incomes maintained by the member; and

(3) Maintenance and Bank review of other documentation in the Bank's discretion.

(c) *Sampling plan.* The Bank may use a reasonable sampling plan to select the households to be monitored, and to review the back-up and any other documentation received by the Bank, but not the member certifications required in paragraph (b) of this section. The sampling plan and its basis shall be in writing.

#### **Subpart G—Remedial Actions for Noncompliance**

##### **§ 1291.60 Remedial actions for project noncompliance.**

(a) *Scope.* This section applies to noncompliance of an AHP-assisted project with the commitments made in its application for AHP subsidies and

the requirements of this part, including any use of AHP subsidy by the project sponsor or project owner for purposes other than those committed to in the AHP application. This section does not apply to individual AHP-assisted households or to the sale or refinancing by such households of their homes.

(b) *Elimination of project noncompliance*—(1) *Cure.* In the event of project noncompliance, the project sponsor or owner must cure the noncompliance within a reasonable period of time. If the noncompliance is cured within a reasonable period of time, no AHP subsidy is required to be repaid to the Bank by the project sponsor or owner.

(2) *Project modification.* If the project sponsor or project owner cannot cure the noncompliance within a reasonable period of time, the Bank shall determine whether the circumstances of the noncompliance can be eliminated through a modification of the terms of the AHP application pursuant to § 1291.27. If the circumstances of the noncompliance can be eliminated through a modification, the Bank shall approve the modification and no AHP subsidy is required to be repaid to the Bank by the project sponsor or owner.

(c) *Reasonable collection efforts*—(1) *Demand for repayment.* If the circumstances of a project's noncompliance cannot be eliminated through a cure or modification, the Bank, or the member if delegated the responsibility, shall make a demand on the project sponsor or owner for repayment of the full amount of the AHP subsidy not used in compliance with the commitments in the AHP application or the requirements of this part (plus interest, if appropriate). If the noncompliance is occupancy by households with incomes exceeding the income-targeting commitments in the AHP application, the amount of AHP subsidy due is calculated based on the number of units in noncompliance, the length of the noncompliance, and the portion of the AHP subsidy attributable to the noncompliant units.

(2) *Settlement*—(i) If the demand for repayment of the full amount due is unsuccessful, the member, in consultation with the Bank, shall make reasonable efforts to collect the subsidy from the project sponsor or project owner, which may include settlement for less than the full amount due, taking into account factors such as the financial capacity of the project sponsor or project owner, assets securing the AHP subsidy, other assets of the project sponsor or project owner, the degree of culpability of the project sponsor or

project owner, and the extent of the Bank's or member's collection efforts.

(ii) The settlement with the project sponsor or owner must be supported by sufficient documentation showing that the sum agreed to be repaid under the settlement is reasonably justified, based on the facts and circumstances of the noncompliance, including any factors in paragraph (c)(2)(i) of this section that were considered in reaching the settlement.

**§ 1291.61 Recovery of subsidy for member noncompliance.**

If a member uses AHP subsidy for purposes other than those committed to in the AHP application or the requirements of this part, the Bank shall recover from the member the amount of subsidy used for such impermissible purposes.

**§ 1291.62 Bank reimbursement of AHP fund.**

(a) *By the Bank.* A Bank shall reimburse its AHP fund in the amount of any AHP subsidies (plus interest, if appropriate) not used in compliance with the commitments in an AHP application or the requirements of this part as a result of the actions or omissions of the Bank.

(b) *By FHFA order.* FHFA may order a Bank to reimburse its AHP fund in an appropriate amount upon determining that:

(1) The Bank has failed to reimburse its AHP fund as required under paragraph (a) of this section; or

(2) The Bank has failed to recover the full amount of AHP subsidy due from a project sponsor, project owner or member pursuant to the requirements of §§ 1291.60 and 1291.61, and has not shown that such failure is reasonably justified, considering factors such as those in § 1291.60(c)(2)(i).

**§ 1291.63 Suspension and debarment.**

(a) *At a Bank's initiative.* A Bank may suspend or debar a member, project sponsor, or project owner from participation in the Program if such party shows a pattern of noncompliance, or engages in a single instance of flagrant noncompliance, with the terms of an approved application for AHP subsidy or the requirements of this part.

(b) *At FHFA's initiative.* FHFA may order a Bank to suspend or debar a member, project sponsor, or project owner from participation in the Program if such party shows a pattern of noncompliance, or engages in a single instance of flagrant noncompliance, with the terms of an approved application for AHP subsidy or the requirements of this part.

**§ 1291.64 Use of repaid AHP subsidies for other AHP-eligible projects and households.**

Amounts of AHP subsidy, including any interest, repaid to a Bank pursuant to this part shall be made available by the Bank for other AHP-eligible projects or households.

**§ 1291.65 Remedial actions for Bank noncompliance with outcome requirements.**

If the Director determines, pursuant to § 1291.49, that a Bank has failed to comply with an outcome requirement in § 1291.48 and that compliance was feasible, the Director may require the Bank to take actions to remedy the noncompliance, which may include, but are not limited to, the following actions:

(a) *Housing plan.* The Director may require the Bank to submit a housing plan for approval by the Director.

(1) *Nature of plan.* If the Director requires a housing plan, the housing plan shall:

(i) Be feasible;

(ii) Be sufficiently specific to enable the Director to monitor compliance periodically;

(iii) Describe the specific actions that the Bank will take to comply with § 1291.48 for the next calendar year; and

(iv) Address any additional matters relevant to the plan as required, in writing, by the Director.

(2) *Deadline for submission.* The Bank shall submit the housing plan to the Director within 45 days after issuance of a notice requiring the Bank to submit a housing plan under this section. The Director may extend the deadline for submission of a plan, in writing and for a time certain, to the extent the Director determines an extension is necessary.

(3) *Review of housing plan.* The Director shall review and approve or disapprove a housing plan under this section as follows:

(i) *Approval.* The Director shall review each submission by a Bank, including a housing plan submitted under this section and approve or disapprove the plan or other action within a reasonable time. The Director shall approve any plan that the Director determines is likely to succeed and conforms with the Bank Act, this part, and any other applicable provision of law.

(ii) *Notice of approval and disapproval.* The Director shall provide written notice to a Bank submitting a housing plan under this section of the approval or disapproval of the plan, which shall include the reasons for any disapproval of the plan, and of any extension of the period for approval or disapproval.

(iii) *Resubmission.* If the Director disapproves an initial housing plan

submitted by a Bank under this section, the Bank shall submit an amended plan acceptable to the Director not later than 30 days after the Director's disapproval of the initial plan. The Director may extend the deadline if the Director determines an extension is in the public interest. If the amended plan is not acceptable to the Director, the Director may afford the Bank 15 days to submit a new plan.

(b) *Reimbursement of AHP fund.* FHFA may order the Bank to reimburse its AHP fund for the difference in the amount of AHP funds required to be awarded to meet the outcome requirement and the amount the Bank actually awarded.

**§ 1291.66 Transfer of Program administration.**

Without limitation on other remedies, FHFA, upon determining that a Bank has engaged in mismanagement of its Program, may designate another Bank to administer all or a portion of the first Bank's annual AHP contribution, for the benefit of the first Bank's members, under such terms and conditions as FHFA may prescribe.

**Subpart H—Affordable Housing Reserve Fund**

**§ 1291.70 Affordable Housing Reserve Fund.**

(a) *Deposits.* If a Bank fails to use or commit the full amount it is required to contribute to the Program in any year pursuant to § 1291.10(a), 90 percent of the unused or uncommitted amount shall be deposited by the Bank in an Affordable Housing Reserve Fund established and administered by FHFA. The remaining 10 percent of the unused and uncommitted amount retained by the Bank should be fully used or committed by the Bank during the following year, and any remaining portion shall be deposited in the Affordable Housing Reserve Fund.

(b) *Use or commitment of AHP funds.* Approval of applications for AHP funds from members sufficient to exhaust the amount a Bank is required to contribute pursuant to § 1291.10(a) shall constitute use or commitment of funds. Amounts remaining unused or uncommitted at year-end are deemed to be used or committed if, in combination with AHP funds that have been returned to the Bank or de-committed from canceled projects, they are insufficient to fund:

(1) The next highest scoring AHP applications in the Bank's final funding period of the year for its General Fund first and then for any Targeted Funds established by the Bank;

(2) Pending applications for funds under the Bank's Homeownership Set-Aside Programs, if any; and

(3) Project modifications for AHP subsidy increases approved by the Bank pursuant to the requirements of this part.

(c) *Carryover of insufficient amounts.* Such insufficient amounts as described in paragraph (b) of this section shall be carried over for use or commitment in the following year in the Bank's General Fund, and any Targeted Funds or

Homeownership Set-Aside Programs established by the Bank.

Dated: March 1, 2018.

**Melvin L. Watt,**

*Director, Federal Housing Finance Agency.*

[FR Doc. 2018-04745 Filed 3-13-18; 8:45 am]

**BILLING CODE 8070-01-P**