

Federal Home Loan Bank Affordable Housing Program

12 C.F.R. Parts 1290, 1291

Questions and Answers on the November 28, 2018 Final Rule—Part II

This document sets forth answers prepared by Federal Housing Finance Agency (FHFA) staff in response to questions raised about amendments to the Affordable Housing Program (AHP) regulation by the final rule issued on November 28, 2018.¹ The questions and answers constitute informal staff explanations or clarifications of certain provisions of the final rule for the Federal Home Loan Banks (Banks), Bank members, and AHP participants. The final rule became effective on December 28, 2018, with a compliance date of January 1, 2021, except for section 1291.15(a)(7) on owner-occupied units, which has a compliance date of January 1, 2020, with one variance.² Section 1291.2 of the final rule provides that, starting December 28, 2018, a Bank may elect to comply with any provision of the final rule before its applicable compliance date.

Establishment of Targeted Funds

Supporting Evidence or Information for Affordable Housing Needs Selected

Q1: What are acceptable types of evidence or information to include in a Bank’s Targeted Community Lending Plan (TCLP) to support the Bank’s selection of particular affordable housing needs to be addressed by a Targeted Fund?

A1: The final rule requires a Bank to identify and assess in its TCLP significant affordable housing needs in its district that will be addressed through its AHP, reflecting market research conducted or obtained by the Bank. For any Targeted Funds established by a Bank under its AHP, the Bank must specify in the TCLP, from among the identified affordable housing needs, the particular affordable housing needs the Bank plans to address through such Targeted Funds.³ The final rule defines a “Targeted Fund” as one that addresses specific affordable housing needs within a Bank’s district that are unmet, have proven difficult to address through its General Fund, or align with objectives identified in its strategic plan.⁴

As discussed in the preamble to the final rule, a Bank is not required to support the identification and assessment of significant affordable housing needs with empirical data, although these needs must be reflected in market research.⁵ The market research may be conducted by the Bank itself, obtained by the Bank from other parties with or without commissioning, or obtained by the Bank from the public domain. The final rule does not specifically require that the market research itself be included in the TCLP. A Bank may include in its TCLP citations or cross-references to the specific market research. Examples of acceptable types of market research include:

- U.S. Census data demonstrating the existence of the housing need;
- Research or surveys conducted by, or information provided by, the Bank, the Bank’s Advisory Council, governmental agencies, colleges or universities, policy organizations, or other credible organizations demonstrating the existence of the housing need;
- Evidence that the housing need has been identified as a housing need by a governmental entity in a community revitalization or economic development plan,

or identified as a housing need in connection with the establishment of a local-, state-, or federally-declared area or community of distress and in need of investment.

Where a Bank selects significant unmet affordable housing needs to address in its Targeted Fund that have proven difficult to address through its General Fund, or that align with objectives identified in its strategic plan, the Bank should describe in its TCLP the bases supporting these factors.

Parameters for Robust Competition

Q2: What are adequate parameters for ensuring that a Targeted Fund is designed to receive sufficient numbers of applicants for the amount of AHP funds allocated to it to enable the Bank to facilitate a robust competitive scoring process?

A2: The final rule requires that, in establishing a Targeted Fund, a Bank adopt and implement parameters, which must be included in its AHP Implementation Plan, for ensuring that the Targeted Fund is designed to receive sufficient numbers of applicants for the amount of AHP funds allocated to it to enable the Bank to facilitate a robust competitive scoring process.⁶ A Bank should design the criteria for the Targeted Fund to foster fair and open competition, with the intent to minimize opportunities for favoritism to specific Bank members or project sponsors, and to receive sufficient numbers of projects and project sponsors eligible to apply. To encourage a sufficiently large pool of eligible applicants, a Bank should ensure that adequate outreach is conducted to members, project sponsors and other interested parties.

As discussed in the preamble to the final rule, the requirement that each Targeted Fund be designed to receive sufficient numbers of applicants “pertains to the scope and scoring methodology of the Targeted Fund, and is not a guarantee of the actual number of applications received.”⁷ Therefore, if a Bank receives an insufficient number of applications for a Targeted Fund, this would not in itself mean that the Bank failed to implement the parameters established for that Fund. However, it should prompt the Bank to consider whether changes are needed to its parameters. In addition, a Bank should consider whether it is appropriately varying its Targeted Funds so that the same members or project sponsors are not receiving AHP subsidy through a Targeted Fund repeatedly.

AHP Subsidy Limits

Q1: How many different AHP subsidy limits may a Bank establish within each General Fund and Targeted Fund, or across multiple Funds?

A1: The final rule authorizes a Bank to establish, in its discretion, a limit on the maximum amount of AHP subsidy available per member, per project sponsor, per project, or per project unit in a single AHP funding round.⁸ Each General Fund or Targeted Fund may contain up to all four of these optional limits, each of which must apply to all applicants to the specific Fund. A Bank’s AHP subsidy limit per member must be the same for all of its Funds and its limit per project sponsor must be the same for all of its Funds, but a Bank’s AHP subsidy limit per project and per project unit may differ among the Funds,⁹ as illustrated in the following table:

| Type of AHP Subsidy Limit | General Fund and Targeted Fund(s) |
|---------------------------|--|
| Per member | Same subsidy limit required for all Funds. |
| Per sponsor | Same subsidy limit required for all Funds. |
| Per project | Subsidy limit may differ among the Funds. |
| Per project unit | Subsidy limit may differ among the Funds. |

Scoring Criteria for the General Fund

Housing in Rural Areas

Q1: Must a project be located entirely in a rural area in order to qualify under the “Housing in Rural Areas” scoring criterion?

A1: No. The final rule provides that a Bank may adopt a scoring criterion, under the “Underserved Communities and Populations” scoring category, for “the financing of housing located in a rural area, as defined by the Bank in its AHP Implementation Plan.”¹⁰ As indicated, the final rule leaves it to the Bank’s discretion to define “located in” and “rural area” in the Bank’s AHP Implementation Plan. If a Bank adopts this scoring criterion, it must define in its AHP Implementation Plan not only “rural area,” but also how many units or percentage of a project must be situated in the rural area for the project to be considered “located in” that rural area for purposes of qualifying under this scoring criterion.

Residential Economic Diversity

Q2: How is “high opportunity area” defined under the “Residential Economic Diversity” scoring criterion?

A2: The final rule provides that a Bank may adopt a scoring criterion, under the “Creating Economic Opportunity” scoring category, for “Residential Economic Diversity,” *i.e.*, the “financing of either affordable housing in a high opportunity area, or mixed-income housing in an area designated by the Bank, with those terms defined and area designated by the Bank in its AHP Implementation Plan.”¹¹ As indicated, the final rule leaves it to the Bank’s discretion to

define “high opportunity area” in the Bank’s AHP Implementation Plan. If a Bank adopts a scoring criterion for affordable housing in high opportunity areas, it must define “high opportunity area” in its AHP Implementation Plan. FHFA recognizes that there are multiple definitions for terms comparable to “high opportunity area” that are used by federal, state, and local funders. Accordingly, as discussed in the preamble to the final rule, a Bank may define “high opportunity area” to align with definitions used by such other affordable housing funders.¹²

Remedial Actions for Project Noncompliance

Noncompliance That is Incurable

Q1: How should a Bank comply with and document its compliance with the requirement to first require a project sponsor or owner to make reasonable efforts to cure any project noncompliance within a reasonable period of time, where cure of the noncompliance is beyond their control?

A1: The final rule establishes a sequence of remedial actions for a Bank to follow before recovering AHP subsidy in cases of noncompliance by a project with the commitments made in its AHP application or the AHP regulation.¹³ A Bank must first require the project sponsor or owner to make reasonable efforts to cure the project noncompliance within a reasonable period of time. As discussed in the preamble to the final rule,

“If cure of the noncompliance is beyond the control of the project sponsor or owner, they may be unable to cure the noncompliance within a reasonable period of time. The project sponsor or owner does not have to try to cure noncompliance that is incurable; it would simply provide a reasonable written justification to the Bank indicating why it could not cure the noncompliance. If the justification is reasonable, the Bank would then evaluate whether it could approve a modification under the final rule’s modification’s requirements.”¹⁴

The final rule requires that the Bank’s analysis and justification for a modification, including why a cure of noncompliance was not successful or attempted, be documented by the Bank in writing.¹⁵ The final rule does not otherwise prescribe how a Bank should document this, leaving it to the Bank’s discretion. A Bank should include in the project file appropriate documentation and notes, including the project sponsor’s or owner’s written justification, to demonstrate that the Bank performed its due diligence and determined that the noncompliance could not be cured within a reasonable period of time.

Reserved Units Thresholds under Bank District Priorities and Regulatory Priorities

Q1: May a Bank include a District Priority in its General Fund scoring methodology that is the same as one of the Regulatory Priorities, but which sets the threshold percentage of reserved units in the project at a different level than the level required in the Regulatory Priority? For example, may a Bank include a District Priority for projects in which at least 10 percent, or at least 30 percent, of the total units are reserved for homeless households, as opposed to the minimum 20 percent level required in the Regulatory Priority for homeless households?

A1: Generally, no. Where the regulation specifies a percentage of units that must be reserved for occupancy by members of a certain population, this reflects FHFA’s determination that, as a

matter of policy, the most appropriate way for a project to serve the subject population is to reserve that specified percentage of units. A Bank may not modify a Regulatory Priority by adopting it as a District Priority in such a way as to contravene the policy intent of the Regulatory Priority. A Bank may not adopt a District Priority with a different minimum units threshold level than the level required in the Regulatory Priority, as this would contravene FHFA's policy intent with respect to the Regulatory Priority, as in the above-described example. However, a Bank may allocate additional scoring points for projects that reserve more than the minimum percentage of reserved units required under the Regulatory Priority.

In certain rare instances, however, such as where there are substantial impediments (e.g., fair housing laws) that preclude a Bank from implementing a Regulatory Priority with a specified threshold percentage level, a Bank may adopt as a District Priority a Regulatory Priority with a different or no threshold percentage of reserved units. A Bank should seek an opinion from counsel if the threshold percentage of reserved units in a Regulatory Priority raises any fair housing issues for the particular population to be served. A Bank should seek guidance from FHFA before including a District Priority with a different or no threshold percentage of reserved units in its General Fund scoring methodology. Under no circumstances may a Bank include the exact same housing need as both a Regulatory Priority and a District Priority in its General Fund scoring methodology.

Calculation of Reserved Units Thresholds

Q1: In the 2018 final rule, three of the housing needs scoring criteria under the “Underserved Populations and Communities” Regulatory Priority require that the project reserve at least 20 percent of the units for occupancy by members of the relevant population.¹⁶ Is this threshold calculated as a percentage of the total units, or as a percentage of the AHP-assisted units, in the project? Is the answer the same for the two analogous scoring criteria – Housing for Homeless Households and Special Needs – in the AHP regulation in effect prior to the 2018 final rule?¹⁷

A1: For each of these scoring criteria, with respect to rental projects, the 20 percent threshold must be calculated as a percentage of the total units in the project. This is consistent with the plain language meaning of the regulation, as well as long-standing FHFA policy and guidance issued to various Banks, and was not changed by the 2018 final rule.

With respect to owner-occupied projects, because the Federal Home Loan Bank Act (Bank Act) only allows AHP homeownership subsidies to assist low- or moderate-income families,¹⁸ the 20 percent threshold must be calculated as a percentage of the AHP-assisted units (which will be the same as total units). This is also consistent with the plain language meaning of the regulation, when read in conjunction with the Bank Act, as well as long-standing FHFA policy and guidance issued to various Banks, and was also not changed by the 2018 final rule.

As was the case prior to the 2018 final rule, in performing any of the above-referenced calculations or the income targeting calculation referenced in 12 C.F.R. § 1291.26(d), a Bank may exclude a unit reserved for occupancy by a manager by omitting it from the denominator (i.e., total project units) and numerator (i.e., units reserved for occupancy by members of the applicable population).

¹ 83 Fed. Reg. 61186 (Nov. 28, 2018).

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

³ 12 C.F.R. § 1290.6(a)(5)(v), (vi).

⁴ 12 C.F.R. § 1292.1 (definition of “Targeted Fund”).

⁵ 83 Fed. Reg. at 61197.

⁶ 12 C.F.R. § 1291.20(b)(2)(i).

⁷ 83 Fed. Reg. at 61191, 61208.

⁸ 12 C.F.R. § 1291.24(c)(1).

⁹ Id.

¹⁰ 12 C.F.R. § 1291.26(e)(4).

¹¹ 12 C.F.R. § 1291.26(f)(2).

¹² 83 Fed. Reg. at 61220.

¹³ 12 C.F.R. § 1291.60.

¹⁴ 83 Fed. Reg. at 61194.

¹⁵ 12 C.F.R. § 1291.29(a)(4).

¹⁶ 12 C.F.R. § 1291.26(e)(1), (2), (3).

¹⁷ 12 C.F.R. § 1291.5(d)(5)(iv), (vi)(A) (January 1, 2018 edition).

¹⁸ 12 U.S.C. § 1430(j)(2)(A).