

Federal Home Loan Bank Affordable Housing Program

Owner-Occupied Retention Agreements

12 CFR 1291.15(a)(7)

Questions and Answers on Affordable Housing Program Subsidy Repayment

This document sets forth answers prepared by Federal Housing Finance Agency (FHFA) staff in response to questions raised by Federal Home Loan Bank (Bank) staff about the 2018 amendments to the Affordable Housing Program (AHP) regulation regarding the requirements for calculating the amount of subsidy subject to repayment by AHP-assisted households under the AHP owner-occupied retention agreements. See section 1291.15(a)(7) (12 CFR 1291.15(a)(7)). The questions and answers constitute FHFA staff explanations or clarifications of section 1291.15(a)(7). The section provides that:

In the absence of one of the exceptions to the repayment requirements identified in the regulation, the AHP-assisted household must repay the Bank the lesser of:

- The AHP subsidy, reduced on a pro rata basis per month until the unit is sold, transferred, or its title or deed transferred, or is refinanced, during the five-year retention period; or
- Any net proceeds from the sale, transfer, or assignment of title or deed of the unit, or the refinancing, minus the AHP-assisted household's investment.

Component terms of the calculation are separately defined in section 1291.1 and further explained or clarified below.

Calculation of the Pro Rata Amount of AHP Subsidy Subject to Repayment

Q1: May the calculation of the pro rata amount of AHP subsidy subject to repayment be based on the number of days of ownership of the unit by the AHP-assisted household?

A1: Yes. Section 1291.15(a)(7)(v)(A) refers to the number of months of ownership, which may be reasonably interpreted to include the number of days of ownership. Accordingly, a Bank has the option to use either the number of months or the number of days of ownership in performing the calculation. Although not required, FHFA encourages the Banks to use the option for a particular AHP-assisted household, subject to the calculation, that would result in the household repaying less AHP subsidy.

Calculation of "Net Proceeds"

Section 1291.1 defines "net proceeds," in the case of a sale of a unit by an AHP-assisted household during the AHP five-year retention period, as the sales price minus the following:

(1) reasonable and customary costs paid by the AHP-assisted household in connection with the transaction (including real estate broker's commission, attorney's fees, and title search fees); and

(2) outstanding debt superior to the AHP subsidy lien or other legally enforceable AHP subsidy repayment obligation.

Q2: Do "reasonable and customary costs" paid by the AHP-assisted household, for purposes of the "net proceeds" calculation, include costs that would normally be borne by the subsequent purchaser of the unit, but which are instead paid by the AHP-assisted household (e.g., where the AHP-assisted household provides a seller credit that is used to pay the subsequent purchaser's closing costs)?

A2: Yes. The definition of "net proceeds" refers to reasonable and customary costs paid by the household "in connection with the transaction." Reasonable and customary costs paid by the AHP-assisted household on behalf of the subsequent purchaser are paid in connection with the transaction and are, therefore, covered by the definition.

Q3: How should seller credits be considered when calculating net proceeds?

A3: Seller credits, also referred to as "sales concessions," "seller paid costs," or "seller contributions," are used by an owner to facilitate the sale of the owner's unit. As a result, a seller credit would reduce the amount of money that a seller would receive from the sale of the unit. For example, the seller may offer a credit to potential purchasers for paying for the purchaser's closing costs or the cost of needed repairs to the unit to attract more potential purchasers. Accordingly, a Bank should reduce the net proceeds the seller would realize from the sale by the amount of any seller credits.

Q4: Are "Adjustments for Items Unpaid by the Seller" that are often found in Closing Disclosures always included as "reasonable and customary costs" in the "net proceeds" calculation?

A4: No. Closing Disclosures sometimes include "Adjustments for Items Unpaid by the Seller" as part of the calculation for determining the "Amount Due from the Seller at Closing." These adjustments are sometimes made to account for expenses the seller incurred but did not pay prior to loan closing, such as unpaid homeowners association dues and prorated, unpaid property taxes. Because such expenses are not transaction costs paid in connection with the sale of the unit, they may not be included in the amount of reasonable and customary costs for purposes of the "net proceeds" calculation. However, if the adjustments are for unpaid reasonable and customary costs related to the sale of the AHP-assisted unit, they must be included as reasonable and customary costs in the "net proceeds" calculation.

Q5: When determining the net proceeds, should a Bank always subtract all outstanding debt used to purchase or rehabilitate the home?

A5: No. Under the definition of “net proceeds,” a Bank is required to subtract any outstanding debt that is “superior to” the AHP subsidy lien or other legally enforceable AHP subsidy repayment obligation. Whether any outstanding debt is superior to a Bank’s or member’s claim under the AHP subsidy agreement is determined by applicable state or local law.

Calculation of “Household’s Investment”

Section 1291.1 defines “household’s investment” as:

- (1) reasonable and customary costs paid by the household in connection with the purchase of the unit (including real estate broker's commission, attorney's fees, and title search fees);
- (2) any down payment paid in connection with the household's purchase of the unit;
- (3) the cost of any capital improvements made after the household's purchase of the unit until the time of the subsequent sale, transfer, assignment of title or deed, or refinancing; and
- (4) the amount of principal on any mortgage senior to the AHP subsidy lien or other legally enforceable AHP subsidy repayment obligation repaid by the household.

Q6: Is the definition of “household’s investment” calculated differently depending on whether the AHP subsidy was provided under a Bank’s General Fund, Targeted Fund(s), or Homeownership Set-Aside Program(s)?

A6: No. The household’s investment is calculated the same way regardless of whether the AHP subsidy was provided under a Bank’s General Fund, Targeted Fund(s), or Homeownership Set-Aside Program(s).

Q7: Do “reasonable and customary costs,” for purposes of the “household’s investment” calculation, include prepaid expenses and escrow accounts?

A7: No. Prepaid expenses and funds that go into an initial escrow account at the time of closing on an AHP-assisted household’s original purchase of the unit are not considered costs incurred in connection with that transaction (in contrast to a broker’s commission or origination fees). Rather, they are funds set aside to pay the household’s future expenses related to the unit (*e.g.*, property taxes, hazard insurance, private mortgage insurance, special assessments). Accordingly, these types of expenditures may not be included as part of the “household’s investment.”

Q8: If an expense is otherwise eligible to be included as part of the “household’s investment” but the expense is funded with AHP subsidy, should the expense be offset by the amount of AHP subsidy used to fund it? What about an expense paid for by a party other than the Bank (*e.g.*, family member, household acquaintance, community organization, local, state, or federal program)?

A8: No. The expense may not be offset by the amount of AHP subsidy received from a Bank or any other source, as such funds are considered part of the household's investment regardless of the subsidy's source. For example, if the down payment provided in connection with the original purchase by an AHP-assisted household of the unit was \$10,000, and a Bank provided \$5,000 in AHP subsidy to pay towards the down payment, the entire \$10,000 down payment must be included as part of the household's investment.

Q9: Do "reasonable and customary costs," for purposes of the "household's investment" calculation, include costs that would normally be borne by the seller (*e.g.*, closing costs) but which the AHP-assisted household paid on behalf of the seller in connection with the household's original purchase of the unit?

A9: Yes. The definition of "household's investment" refers to reasonable and customary costs paid by the AHP-assisted household "in connection with the household's purchase of the unit." Reasonable and customary costs paid by the AHP-assisted household on behalf of the seller are paid in connection with the household's purchase of the unit and are, therefore, covered by the definition.

Q10: If any reasonable and customary costs paid in connection with an AHP-assisted household's original purchase of the unit were financed by debt senior to the AHP subsidy lien or other retention agreement (*e.g.*, closing costs financed through the first mortgage and included in the mortgage principal), should those funds be considered part of the "household's investment?"

A10: No. Because those funds increased the senior mortgage principal, thereby reducing the amount of net proceeds in the subsidy repayment calculation, including them as part of the household's investment would result in a reduction of the AHP subsidy repayment obligation twice.

Q11: Should Federal Housing Administration Section 203(k) funds earmarked for rehabilitation expenses be included as part of the "household's investment?"

A11: No. Section 203(k) funds, even though they may appear as "other" closing costs in the Closing Disclosure, should be reflected in the new mortgage balance on the Closing Disclosure. Accordingly, for the same reason financed closing costs do not qualify as any component of the "household's investment" definition (see Q&A 10), neither should Section 203(k) rehabilitation funds. However, unfinanced fees incurred by an AHP-assisted household in acquiring a Section 203(k) loan are part of the household's investment, provided they are reasonable and customary.

Q12: Do "capital improvements," for purposes of the "household's investment" calculation include routine home maintenance expenses?

A12: "Capital improvements" are typically considered to be those improvements that add to the value of the home, prolong its useful life, or adapt it to new uses. The Banks have discretion to

define “capital improvement” in their AHP Implementation Plans and may adopt standards used by the Internal Revenue Service (IRS) (*e.g.*, IRS Publication 523) or other sources.

Q13: The “household’s investment” is defined to include the amount of principal on any senior mortgage repaid by the AHP-assisted household since the household’s original purchase of the unit up to the time of subsequent sale or refinancing of the unit. What steps should be taken to obtain the information necessary to determine this amount?

A13: This information should be requested from the AHP-assisted household or the AHP-assisted household’s mortgage lender. (AHP-assisted households should also be encouraged, at the time of their original purchase of the unit, to retain documentation containing this information.) However, if waiting for receipt of this information would prevent timely calculation of the AHP subsidy subject to repayment, the amount of the senior mortgage principal repaid by the household may be estimated as the difference between (i) the original mortgage amount (as reflected in the Closing Disclosure issued at the time of the original purchase of the unit) and (ii) the payoff amount owed to the mortgage lender. When using an estimation, if the payoff amount owed to the mortgage lender is greater than the original mortgage amount, the amount of senior mortgage principal repaid by the household should be regarded as zero.