



Federal Housing Finance Board

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Regulatory Interpretation: Questions on the Revised Affordable Housing Program (AHP)
Regulation (98-RI-9)

Dear Curt:

This is in response to a number of questions posed in your June 17, 1998 electronic mail message to the Federal Housing Finance Board (Finance Board), regarding certain provisions of the revised AHP regulation.

Q1. Does the requirement under the AHP regulation for execution of legally enforceable retention agreements include a requirement that such agreements be recorded?

A1. Section 960.13(a) of the AHP regulation requires a Federal Home Loan Bank (Bank) to have in place with each member receiving AHP subsidy an agreement containing the provisions set forth in section 960.13. See 12 C.F.R. § 960.13(a). One of these provisions is a requirement that the member ensure that the AHP-funded project is subject to a "deed restriction or other legally enforceable retention agreement or mechanism" containing the requirements set forth in section 960.13, including: (i) for rental projects, the project's rental units must remain occupied by and affordable for households with incomes at or below the levels committed to be served in the AHP application for the duration of the retention period; (ii) the Bank or its designee is to be given notice of any sale or refinancing of the project occurring prior to the end of the retention period; and (iii) in the case of a sale or refinancing of the project prior to the end of the retention period, AHP subsidy must be recaptured under certain circumstances, as specified in section 960.13. See *id.* §§ 960.13(c)(4), (5), (d)(1), (2).

Whether a retention agreement entered into pursuant to these regulatory requirements is legally enforceable will depend on the local real estate, contract and any other laws applicable to this type of agreement in the state where the agreement is executed. For example, if local law requires that such an agreement be recorded in order for the Bank to receive notice of a sale or refinancing and be able to recapture AHP subsidy, then the retention agreement should be recorded. In short, the Federal Home Loan Bank of Des Moines (Des Moines Bank) should take whatever actions are required under local law, including recordation if necessary, to ensure that the contractual affordability, notice and recapture requirements of section 960.13 can be enforced.

- Q2. For projects in federally declared disaster areas, may a Bank waive the AHP regulatory requirement that households must be qualified as income-eligible based on back-up income verification documentation, and allow households to be qualified as income-eligible based on self-certifications of their incomes?
- A2. The AHP regulation requires the owner of an AI-P-funded rental project to provide a list of actual occupant incomes to the member, certify that they are accurate and in compliance with the income targeting commitments made in the AHP application, and maintain documentation regarding such incomes available for review by the member or Bank to support such certifications. See id. § 960.10(a)(2)(ii)(B)(1), (C). The member is required to review the project documentation and certify to the Bank that the project meets its income targeting commitments. See id. §960.10(b)(2)(ii)(B). The Bank is required to take the steps necessary to determine that the AHP subsidies were used for eligible purposes. See id. § 960.10(c)(2)(ii).

For AHP-funded owner-occupied projects, the AHP regulation requires the project sponsor to certify to the member and the Bank that households receiving AHP subsidies were eligible households, and to support such certifications by household income verification documentation maintained by the sponsor and available for review by the member or the Bank. See id. § 960.10(a)(1)(ii). The member is required to review the project documentation and certify to the Bank that the AHP subsidies have been used according to the commitments made in the AHP application. See id. § 960.10(b)(1)(ii)(A). The Bank is required to take the steps necessary to determine, based on a review of the documentation for a sample of projects and units, that the incomes of the households that own the AHP-assisted units did not exceed the levels committed to in the AHP application. See id. § 960.10(c)(1)(i).

The fact that an AHP-funded project will be located in a federally declared disaster area does not necessarily mean that all potential households being qualified for the project will have lost their income verification documentation in the disaster. In addition, while income verification documentation may not be readily available for households who have lost such documentation in a disaster, copies of the documentation usually can be obtained from government agencies or other sources within a reasonable period of time after the disaster. Therefore, a blanket waiver of the income documentation requirements in the AHP regulation to allow for

verification of household incomes through review of household income self-certifications is not appropriate for such projects. However, individual waivers of the income verification documentation requirements may be appropriate in specific circumstances, such as waivers contingent upon the household obtaining and providing copies of the documentation within a certain period of time. There is no provision in the AHP regulation permitting a Bank unilaterally to waive AHP regulatory requirements, including the income verification documentation requirements. However, a Bank may seek approval, on a case-by-case basis, of a waiver by the Finance Board, for good cause, of the income verification documentation requirements contained in the AHP regulation, pursuant to the procedures and requirements of section 902.6 of the Finance Board's regulations. See id. §902.6.

Q3. May a Bank verify income eligibility for occupants of an AHP-funded shelter by reviewing self-certifications of occupants' income contained in intake sheets collected by the shelter? What is the maximum length of stay allowed in a shelter in the absence of income verification documentation?

A3. Yes. The AHP regulation requires the owner of an AHP-funded rental project (including shelters) to provide a list of actual occupant incomes to the member, certify that they are accurate and in compliance with the income targeting commitments made in the AHP application, and maintain documentation regarding such incomes available for review by the member or Bank to support such certifications. See id. § 960.10(a)(2)(ii)(B)(1), (C). The member is required to review the project documentation and certify to the Bank that the project meets its income targeting commitments. See id. § 960.10(b)(2)(ii)(B). The Bank is required to take the steps necessary to determine that the AHP subsidies were used for eligible purposes. See id. § 960.10(c)(2)(ii).

Income verification documentation in most cases is not available from shelter occupants, such as homeless persons, victims of domestic abuse, and youth offenders or runaways. Instead, shelters prepare intake sheets containing self-certifications that potential occupants meet the income-eligibility requirements of the shelter. Given the impossibility of obtaining income verification documentation in these special circumstances, the income verification documentation requirements of the AHP regulation may be read as inapplicable in such circumstances. The Des Moines Bank, therefore, may verify income eligibility for occupants of an AHP-funded shelter by reviewing self-certifications of occupants' income contained in intake sheets collected by the shelter. Accordingly, there is no AHP regulatory requirement for a maximum length of stay for shelter occupants.

Q4. May AHP funds be used for the purchase or rehabilitation of manufactured housing that is attached to a lot by tie-downs but not attached to a foundation (unattached manufactured housing), and is treated for tax and title purposes as personal property upon which may be placed five-year retention liens?

- A4. Section 960.13(a) of the AHP regulation requires a Bank to have in place with each member receiving AHP subsidy an agreement containing the provisions set forth in section 960.13. See *id.* § 960.13(a). One of these provisions is a requirement that the member ensure that the AHP-funded project is subject to a deed restriction or other legally enforceable retention agreement or mechanism containing the requirements set forth in section 960.13, including, for owner-occupied projects: (i) the Bank or its designee is to be given notice of any sale or refinancing of the project occurring prior to the end of the retention period; and (ii) in the case of a sale or refinancing of the project prior to the end of the retention period, AHP subsidy must be recaptured under certain circumstances, as specified in section 960.13. See *id.* §§ 960.13(c)(4), (d)(1).

Whether the notice and AHP subsidy recapture requirements of the retention agreement will be enforceable for unattached manufactured housing will depend on the local real estate, contracts and any other laws applicable to this type of agreement in the state where the agreement is executed (including laws applicable to property located on tribal lands). For example, if local law requires that manufactured housing be real property in order for the Bank to receive notice of a sale or refinancing and be able to recapture AHP subsidy, and does not treat unattached manufactured housing as real property, then the retention agreement may not enable the Des Moines Bank to receive notice of a sale or refinancing and recapture AHP subsidy. In short, the Des Moines Bank may award AHP funds to unattached manufactured housing only if, under local law, the contractual notice and recapture requirements of section 960.13 can be carried out.

- Q5. Why is a Bank precluded from using the Mortgage Revenue Bond (MRB) program's income limits for targeted areas as a basis for determining household income eligibility?
- A5. The AHP regulation allows a Bank to choose as the basis for determining household income eligibility among several median area income standards set forth in the regulation, including the "applicable median family income, as determined under the MRB program set forth in 26 U.S.C. 143(f) and published by a state agency or instrumentality. See *id.* § 960.1 (definition of "median income for the area" for owner-occupied projects). As explained in the Preamble to the AHP regulation, under the Internal Revenue Code, household income eligibility for mortgage financing provided by qualifying MRBs is based on the "applicable median family income," which is the greater of (1) the area median gross income for the area in which a residence is located; or (2) the statewide median gross income for the state in which the residence is located. See 26 U.S.C. 143(f)(4). The "applicable median family income" is based on income data published by HUD. For purposes of the AHP, the applicable median family income may be adjusted for family size, but may not be adjusted based on the location of a residence in a targeted area, see 26 U.S.C. § 143(f)(3), (5), because in targeted areas, the MRB program does not use the "applicable median family income" as the basis for household income eligibility. In targeted areas, "applicable median family income" is adjusted by a factor of 120

percent based solely on the location of the residence in a targeted area. See id. § 143(f)(3). Consequently, the baseline measure of area median income in targeted areas is 120 percent of the "applicable median family income," rather than simply the "applicable median family income." The Federal Home Loan Bank Act (Bank Act) requires that the AHP income limit be based on 80 percent of some measure of the "median income for the area." Since the MRB program does not use the "applicable median family income" as a measure of median income for targeted areas, use of that program's income limits for targeted areas would not be permissible under the Bank Act. See 62 Fed. Reg. 41812,41814-15 (Aug. 4, 1997).

- Q6.** Do principal and interest reserves qualify as closing costs eligible for funding with AHP subsidies under the competitive AHP application program or the homeowner-ship set-aside program?
- A6. Principal and interest reserves are not eligible uses of AHP subsidy under the AHP regulation. See 12 C.F.R. § 960.5(a)(4), (b)(1). Finance Board staff currently is reviewing this issue, and will determine whether to recommend amendment of the AHP regulation to authorize the use of AHP? subsidies for this purpose.
- Q7.** Are AHP rental projects with retention agreements of less than 15 years that were executed prior to the effective date of the revised AHP regulation (January 1, 1998) subject to the 15-year retention period requirement specified in the revised regulation?
- A7. Yes. The revised AHP regulation provides that AHP retention agreements executed prior to January 1, 1998 are amended by operation of law to conform with any new applicable AHP regulatory requirements. See id. § 960.16. To the extent that existing agreements do not on their face reflect the requirements of the AHP regulation, they are deemed to incorporate such requirements and to bind the parties accordingly. See id. The revised AHP regulation requires a 15-year retention period for AHP-funded rental projects. Therefore, rental projects with retention agreements of less than 15 years that were executed prior to January 1, 1998 are now subject to a 15-year retention period.

However, pursuant to the procedures and requirements of section 902.6 of the Finance Board's regulations, the Des Moines Bank may seek approval by the Finance Board for a waiver of the regulatory 15-year retention period requirement, for good cause, to permit the projects to be subject to the retention periods committed to in their AHP retention agreements. See id. § 902.6.

- Q8.** May a Bank place a limit on the amount of AHP subsidy per unit that may be requested in order to limit the amount of AHP subsidy buying down unit construction costs to make mortgages more, affordable for very low-income households, or should the Bank rely solely on the subsidy-per-unit scoring criterion to achieve this objective?

- A8. The AHP regulation allows a Bank to adopt an eligibility requirement that the amount of AHP subsidy requested by a project may not exceed a specific maximum amount per unit in a single AHP funding period. See id. §960.5(b)(10)(i)(A). The AHP regulation also requires a Bank to score projects, among other things, based on the extent to which the project proposes to use the least amount of AHP subsidy per AHP-targeted unit. See id. § 960.6(b)(4)(iv)(H). The Bank must allocate at least five points to this scoring criterion. See id. § 960.6(b)(4)(ii). Therefore, if the Des Moines Bank wishes to award shallower subsidies per unit in order to limit such buy downs, it may establish a lower maximum limit on the amount of AHP subsidy per unit that may be requested, and/or allocate more points to the subsidy-per-unit scoring criterion. Which approach or combination of approaches will work best to achieve the Des Moines Bank's objective will depend on the types of projects and housing markets in the Bank's district. It is in the Bank's discretion to determine what eligibility and scoring criteria to adopt to best achieve its AHP objectives.
- Q9. Has the Finance Board determined how to treat AHP grants approved as revolving funds?
- A9. Finance Board staff currently is reviewing information received from the Banks and other sources on revolving fund projects, and will determine whether to recommend amendment of the AHP regulation to authorize the use of AHP subsidies for such purpose.

If you have any additional questions, please contact Janet Fronckowiak of my staff at (202) 408-2575, or myself at (202) 408-2848.

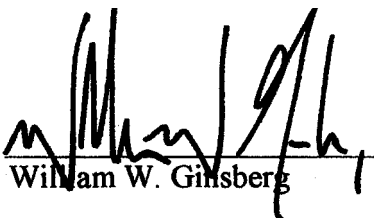
Sincerely,



Richard Tucker
Deputy Director
Program Assistance Division
Office of Policy

This is a Finance Board regulatory interpretation within the meaning of the Procedures for Requests and Applications adopted by the Board of Directors of the Finance Board pursuant to Resolution No. 98-51 (October 28, 1998). The regulatory guidance set forth herein may be relied upon subject to modification or rescission by action of the Board of Directors of the Finance Board.

I concur:



William W. Ginsberg

cc: William W. Ginsberg
James L. Bothwell
Deborah Silberman
Mitchell Berns