

June 1, 2018

Submitted Electronically

Alfred M. Pollard, General Counsel
Attn: Comments/RIN 2590-AA83
Federal Housing Finance Agency
400 Seventh Street SW
Eighth Floor
Washington, D.C. 20219

**Re: Proposed Rulemaking and Request for Comments: Affordable Housing Program
Amendments (RIN 2590-AA83)**

Dear Mr. Pollard:

The Federal Housing Finance Agency (FHFA) has requested comments on its Proposed Rulemaking on amendments to the Affordable Housing Program (AHP) regulation published on March 14, 2018 (the Proposed Rule)¹ and re-published with a correction and deadline extension on May 2, 2018.² The Federal Home Loan Banks (the FHLBanks) appreciate the opportunity to comment on the Proposed Rule and the extension of the comment period deadline to June 12, 2018.

As the FHFA recognizes in the Proposed Rule's preamble, "[t]he 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 FHLBanks awarded approximately \$5.4 billion in AHP subsidies to assist the financing of over 827,000 housing units...."³ Since its inception 28 years ago, the AHP has been a model program of cooperative partnerships among the FHLBanks, their members, and community partners providing gap funding that leverages public and private resources in a highly complex and competitive affordable housing industry. The AHP partnerships are supported by the FHLBanks' cooperative structure of regional member institutions, boards of directors (Boards), and Affordable Housing Advisory Councils (AHACs), all with deep knowledge and experience of local affordable housing needs in their communities.

From this shared perspective, the FHLBanks and their AHACs engaged with the FHFA, in accordance with the FHFA's five-year regulatory review plan of 2013, to modernize certain aspects of the AHP. Over the course of this collaboration, the FHLBanks and AHACs provided specific recommendations to expand the discretionary authority of the FHLBanks to: a) allocate, design, and implement the AHP requirements; b) simplify program administration; c) harmonize the AHP with other funding entities; and d) address certain compliance requirements. The

¹ 83 Fed. Reg. 11344 (Mar. 14, 2018).

² 83 Fed. Reg. 19188 (May 2, 2018).

³ See Proposed Rule at 11344.

FHLBanks believe the Proposed Rule offers modest improvements. However, taken as a whole, the FHLBanks believe the introduction of a prescriptive outcomes-based framework for awarding AHP funds create a complicated award structure resulting in unintended consequences that increase program complexity, establishes preferences for certain project types, and lessen the transparency of AHP. The FHLBanks are further concerned that the proposal codifies a variety of analytic and administrative practices that have evolved over time through examination practices and that, in the FHLBanks' opinion, add administrative burden to AHP users without enhancing the program's effectiveness. Taken as a whole, the FHLBanks are concerned that the value and relevancy of the AHP may be compromised by the Proposed Rule.

The comments below identify areas of significant concern.

I. Proposed outcome requirements increase AHP complexity.

The FHLBanks welcome the additional discretion to increase each FHLBanks' Homeownership Set-Aside Program (Set-Aside) allocation from 35 to 40 percent and the discretion to establish Targeted Funds. As noted in our response to Question 25, the FHLBanks also believe that increasing the Set-Aside(s) subsidy per household from \$15,000 to \$22,000, combined with an annual escalation factor, provides additional flexibility. We also support the expanded definition of "first-time homebuyer" to include rehabilitation. With respect to monitoring and compliance-related changes, the FHLBanks believe that the proposed reductions in monitoring requirements are reasonable and do not add any risk, per our response to Question 39. However, the stated flexibility of the proposal is undermined by a complicated layering of prescriptive statutory and regulatory award outcome requirements, which, as applied, have the result of controlling a majority of an FHLBank's annual contribution (§ 1291.48).⁴

A. The proposed outcome requirements determine how the majority of the AHP subsidy is awarded.

Consider the following illustration of an FHLBank with a required annual AHP contribution of \$30.0 million. The FHLBank chooses to allocate 30 percent (\$9.0 million) to its Set-Aside Program and 70 percent (\$21.0 million) to the AHP Competitive Fund, which consists of the General Fund and any Targeted Funds. In order to meet the regulatory priorities, \$16.5 million (55 percent of \$30.0 million) of the FHLBank's required annual AHP contribution must meet two of three required regulatory priorities. When adding the statutory requirement that 10 percent of an FHLBank's required annual AHP contribution must be for homeownership, this increases the amount controlled by the FHFA-prescribed priorities to 65 percent of the FHLBank's required annual AHP contribution. This means that the uses for more than half of that FHLBank's required

⁴ *Id* at 11385.

annual AHP contribution will be permanently defined in the regulations and may not reflect the real affordable housing needs of its district. As stewards of regional cooperatives, it is imperative that the FHLBanks have the flexibility to direct resources locally.

Although the FHFA published a correction to the Proposed Rule on May 2, 2018, allowing the FHLBanks to include awards under their Set-Aside Programs to count towards meeting the statutory and regulatory outcome requirements, the FHLBanks do not believe this additional consideration is enough to offset the prescriptive, and not necessarily district-responsive, nature of the requirements. The FHFA's statutory requirement to establish priorities for the AHP and the FHLBanks' desire to modernize the AHP can both be met via a revised, scoring-based methodology.

Recommendation: Therefore, the FHLBanks recommend the FHFA adopt a scoring-based methodology similar to that outlined in the FHLBank System's response to the FHFA's *2017 AHP Program Design and Project Selection Criteria White Paper*, incorporating the revisions suggested by the Community Investment Officers (CIOs).

B. The proposed outcome requirements may reduce the pool and diversity of sponsors.

The FHLBanks believe that the proposed concentration of prescribed outcomes will reduce the pool and diversity of Competitive AHP sponsors that will apply, knowing they are unlikely to qualify under the FHFA-required regulatory priorities: Underserved Communities and Populations; Creating Economic Opportunity; and Affordable Housing Preservation.⁵ Due to the punitive nature of not meeting the outcome requirements (addressed in paragraph E of this section), the FHLBanks will focus their scoring on meeting the outcomes required by the FHFA priorities. This will have the effect of certain types of housing and certain sponsors being placed at a disadvantage by the proposed outcome framework.

For example, AHP projects sponsored by Habitat for Humanity affiliates, or similar owner-occupied sponsors providing newly constructed owner-occupied housing, that do not serve any of the specified Underserved Communities and Populations will not meet this regulatory priority. These sponsors can only meet the second regulatory priority, Creating Economic Opportunity, through the provision of homebuyer counseling or locating the housing unit(s) in a high opportunity or mixed-income area. The third regulatory priority, Affordable Housing Preservation, would only apply in limited circumstances if, for example, the AHP sponsor were engaged in owner-occupied rehabilitation. The categories enumerated within these three regulatory priorities all respond to worthy housing needs, but they do not account for the totality of all project

⁵ *Id* at 11386.

types or populations that have, or may be, served through the AHP, such as low-to-moderate-income households in urban areas, new construction in urban areas, or repurposed vacant, blighted, or substandard properties not in a high-opportunity or mixed-income area. Additionally, the FHLBanks are prohibited from including these categories in meeting the regulatory priorities if they are not specified in an FHLBank's Targeted Community Lending Plan (TCLP). The FHLBanks believe they should be able to identify their own district priorities based on input from respective AHAC members, the successful history of the program, and the FHLBanks' desire for the AHP to be adaptive to evolving affordable housing needs.

Recommendation: Therefore, the FHLBanks recommend the FHFA adopt a scoring-based methodology similar to that outlined in the FHLBank System's response to the FHFA's *2017 AHP Program Design and Project Selection Criteria White Paper*, incorporating the revisions suggested by the CIOs.

C. The minimum requirements for special needs and homeless populations are excessive.

The outcome requirement that sponsors reserve a minimum of 50 percent of a project's units for special needs or homeless populations may have a chilling effect on rental projects and is counter to policy and best practices of integrated housing models. The concentration would likely require the projects to secure significant operating subsidy. That type of capital and operational financing may not be available to support the types of projects envisioned by the FHFA at a national level.

In addition to these requirements being excessive, they may also be incompatible with other funding sources. For example, in New Jersey, due to economic integration policies, the New Jersey Housing and Mortgage Finance Agency limits the percentage of special needs units in mixed-income housing to no more than 25 percent in order to avoid the promotion of concentrated poverty. Likewise, the New York State Housing Finance Agency requires that a project only reserve 30 percent of its units for homeless households to be competitive in its low-income housing tax credit (LIHTC) program. Furthermore, oftentimes tax credit syndicators will limit the percentage of units targeted to homeless and/or special needs households for a variety of reasons.

Recommendation: The FHLBanks recommend that projects remain subject to the current regulatory requirement that projects serving special needs or homeless households reserve a minimum of 20 percent of their units for special needs households or homeless households.

D. The minimum requirement for very-low income households is excessive.

The Proposed Rule more than doubles the threshold for units reserved for households with incomes at or below 50 percent.⁶ Fifty-five percent, as opposed to the statutory requirement of 20 percent, of units must be reserved for households with incomes at or below 50 percent of the Area Median Income (AMI) under the Proposed Rule. This is overly prescriptive and inconsistent with national housing trends that promote economic diversity. The proposal does not take into account the financing involved, market considerations, and policy considerations of incenting mixed-income projects, and is likely to discourage sponsors from applying for AHP funds. This requirement does not align AHP with other state and federal funding sources, many of which are encouraging mixed-income housing and moving away from concentrated poverty. Additionally, the Proposed Rule appears to be incompatible with the LIHTC-income averaging option available to developers through the passage of the Consolidated Appropriations Act of 2018.

Recommendation: The FHLBanks recommend that projects remain subject only to the statutory requirement of 20 percent of units. Any further prioritization of income targeting can be achieved through the flexibility of a scoring methodology, as it is today.

E. The proposed outcomes-based framework penalizes the FHLBanks if outcome requirements are not met.

The amended Proposed Rule states that, to satisfy the regulatory requirement, “[e]ach 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 and Homeownership Set-Aside Programs to projects or households, as applicable, that, in the aggregate, meet at least two of the three regulatory priorities in this paragraph . . .”⁷ Under the current regulation, the FHLBanks use scoring criteria to incentivize certain types of developments. However, there is no penalty if the FHLBanks do not approve any awards, or a minimum number of awards, to the projects that have received points in those scoring categories (e.g., homeless or special needs). Under the Proposed Rule, the “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.”⁸ For example, if an FHLBank’s required annual AHP contribution is \$30.0 million, it must award \$16.5 million towards the regulatory priorities. If the FHLBank awards \$15.0 million towards meeting those priorities (due to a lack of qualifying projects), it may have to reimburse the AHP fund \$1.5 million (\$16.5

⁶ See Proposed Rule at 11386.

⁷ 83 Fed. Reg. 19188, 19189.

⁸ See Proposed Rule at 11389.

million minus \$15.0 million). This is a harsh penalty that does not exist under the current regulation, especially given the limited ability of the FHLBanks to drive the nature of the projects for which applications are submitted, coupled with the fact that the prescribed regulatory outcomes may not reflect the nature of affordable housing that is most required in their districts in any given year.

The FHFA has suggested that other deterrent tools are available to ensure compliance with the proposed outcome requirements, citing FHLBank examination findings as an example. While the FHLBanks appreciate that financial penalties are not the only enforcement mechanism available to the FHFA, the concern remains that the proposed outcome requirements would introduce an additional layer of compliance to AHP allocations and that layer of compliance will significantly restrict a FHLBank's real and practical ability to respond to its district affordable housing needs.

Recommendation: Therefore, the FHLBanks recommend the FHFA adopt a scoring-based methodology similar to that outlined in the FHLBank System's response to the FHFA's *2017 AHP Program Design and Project Selection Criteria White Paper*, incorporating the revisions suggested by the CIOs.

F. Re-ranking of applications reduces the AHP's transparency.

Under the Proposed Rule, if an FHLBank fails to satisfy the regulatory requirements, it may re-rank applications.⁹ This proposed re-ranking undermines the integrity, predictability, and transparency of the AHP. However, re-ranking may become a necessary tool for complying with the outcome requirements. Re-ranking adversely impacts the simplicity and rationale of the current award process, the AHP's predictability and transparency, and may further deter sponsors from participating in the program. This proposal has the result of creating a circumstance in which competitive projects are denied an AHP award in favor of lower-scoring projects. In practice, there may be several cycles of re-ranking projects needed to comply with FHFA outcomes because simply substituting one project for another may satisfy compliance with one or more FHFA outcome requirements, but not all of those requirements. Thus, it is possible to imagine a scenario in which one or more otherwise competitive projects are replaced by one or more lower-scoring and otherwise non-competitive projects for the sole purpose of meeting the FHFA's outcome requirements.

An additional unintended consequence of re-ranking a project is negating the value of FHLBank technical assistance provided to project sponsors to improve the competitiveness of unsuccessful AHP applications. The current scoring system is transparent and clearly articulated in each FHLBank's Implementation Plan, making it

⁹ *Id* at 11383.

easy for the FHLBanks to provide technical assistance to members and sponsors. Therefore, it is fairly easy to improve the quality of project submissions and increase goodwill by providing technical assistance to applicants. In contrast, the regulatory outcome requirements, as proposed, include the potential for circumventing an objective scoring process that awards projects from highest to lowest scores by requiring FHLBanks to re-rank projects in order to meet the outcomes set by the FHFA at the time of application approval. This could compromise the integrity of the AHP process and introduce an opaque application award process that increases the FHLBanks' reputational risk.

Recommendation: The FHLBanks recommend the FHFA adopt a scoring-based methodology similar to that outlined in the FHLBank System's response to the FHFA's *2017 AHP Program Design and Project Selection Criteria White Paper*, incorporating the revisions suggested by the CIOs.

As proposed, the FHLBanks believe that the mandatory outcome requirements should be eliminated, but the flexibility to offer a Targeted Fund(s) retained. Currently, the FHFA effectively sets the priorities of the FHLBanks' AHPs through its control of a majority of the scoring categories. This is preferable to a system in which the FHFA controls a majority of the AHP dollars. As an alternative, the FHLBanks will present a proposed scoring-based methodology under separate cover.

II. Expanded Targeted Community Lending Plan (TCLP) is unnecessary.

- A. As a result of the outcome requirements, the FHFA is effectively establishing each FHLBank's priorities for housing needs. Therefore, the proposed process circumvents the need for expanded TCLPs, which require additional research and empirical data for the housing market and affordable housing needs of each FHLBank's district. Additionally, it is unclear how the proposed requirements for the TCLP impact the value of the advice of the AHACs.
- B. The Proposed Rule requires FHLBanks to publish the TCLP at least six months before the TCLP's effective date and 12 months in advance if an FHLBank offers a Targeted Fund.¹⁰ The timing requirements inhibit the FHLBanks' ability to respond to unforeseeable and emerging events, such as disasters or new district priorities, in a timely manner. The lead times may also result in placing the AHP at an incompatible planning schedule with other funding sources, such as the Housing Finance Agencies, which have notably shorter lead times. The proposed lead times limit the FHLBanks' ability to respond to changing affordable housing needs in a timely manner. Currently, the scoring methodology for the FHLBanks' Competitive AHP is presented annually in the

¹⁰ *Id* at 11350, 11380.

FHLBanks' Implementation Plans, without the proposed six- and 12-month lead times to publish the priorities beforehand, and the Competitive AHPs are consistently oversubscribed. This illustrates that the proposed lead times for publication of the TCLP are unnecessary.

- C. Even if the TCLP publication timing requirements were eliminated, the requirement that the FHLBanks include all statutory and regulatory priorities in the TCLP is too prescriptive and inhibits the ability of the FHLBanks to be flexible and address emerging needs and disasters in their scoring criteria. Under the Proposed Rule, any applications approved by an FHLBank that might satisfy the statutory or regulatory priorities may not be counted towards satisfying those priorities if the priorities are not expressly addressed in an FHLBank's TCLP.

The intent of the TCLP is to identify those affordable housing needs critical to a specific FHLBank district. Those needs may or may not be compatible with the FHFA's housing needs articulated in the Proposed Rule. Not allowing an FHLBank to count an award to a project that meets a regulatory priority, simply because the FHLBank has not prioritized that need as a district need within its TCLP, contradicts the purpose of the TCLP. In this instance, the FHLBank would not have been credited for addressing a valid affordable housing need. It is also important to note that the Proposed Rule requires the FHLBanks to demonstrate that there is a defined need in each district to support the continued use of their Set-Aside programs, many of which have been effectively supporting first-time homebuyers for nearly 18 years. This is an unnecessary and overly burdensome requirement.

Recommendation: In the absence of relief from the statutory and regulatory requirements contained in § 1291.48, the FHLBanks request that the requirements of the TCLP remain unchanged from the existing regulation, except in the event that an FHLBank offers a Targeted Fund. In that instance, an FHLBank should document the need that is being addressed by the Targeted Fund in the TCLP, but without the six- or 12-month advance notice requirements.

III. Need for AHP Subsidy examination standard burdens special needs projects.

- A. The Proposed Rule expands the Need for Subsidy (NFS) requirement to include an assessment of a rental project's operating pro forma. NFS has been a source of debate between the FHLBanks and the FHFA for years.

When evaluating NFS, it is important to understand how the AHP fits into the national system for the production and financing of affordable housing. It is also important to recall the statutory requirement that the FHFA shall promulgate regulations that, among other things, ensure that AHP "...coordinate activities under this subsection with other

Federal or federally-subsidized affordable housing activities to the maximum extent possible.”¹¹

By definition, the AHP subsidy provides gap financing for affordable housing projects and, as stated in the Proposed Rule’s preamble, has the “capacity to leverage additional public and private resources for affordable housing...”¹² The AHP subsidy, though crucial to the development of affordable housing, typically represents only a small percentage of a project’s overall financing.

The Proposed Rule simply states that the project’s cash flow and cost be “reasonable.” However, the FHLBanks are concerned that the language of the preamble prescribing various standards for evaluation of the project’s cash flow to determine NFS and accordingly, the project’s eligibility for subsidy, will be rigidly enforced. Doing so could severely limit the FHLBanks’ ability to: 1) effectively coordinate with major funders, including federal funders as required by statute, and 2) arrive at sensible, fair, and pragmatic judgments in instances where a project may appear to have sufficient funds to proceed with development and operation of the project without the use of the AHP subsidy.

As noted on several occasions, including most recently at a meeting among the 11 FHLBanks, their AHAC leadership and the FHFA on April 27, 2018,¹³ the FHFA has indicated that it will examine the FHLBanks to the standard set in the preamble, not the Proposed Rule. This practice enables the FHFA examination staff to establish *de facto* regulatory precedent regarding NFS through their examination findings. The FHFA has also indicated that additional guidance may be issued through Advisory Bulletins or Regulatory Interpretations.¹⁴ As noted in the FHLBank of Des Moines’ *Response to Draft Advisory Bulletin on Need for Subsidy Requirements in the Affordable Housing Program*,¹⁵ the appropriate means for establishing regulatory precedent is in a regulation, not an Advisory Bulletin, Regulatory Interpretation or other informal guidance mechanism.

- B. Not only do the FHLBanks believe that enforcing the preamble instead of the regulation is inappropriate, the FHLBanks believe that the standard outlined in the preamble is problematic. The preamble notes that “[a]s 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

¹¹ 12 U.S.C. 1430(j)(9)(G).

¹² See Proposed Rule at 11344.

¹³ April 27, 2018, meeting in Cincinnati, Ohio, of representatives of the 11 FHLBanks, AHAC leadership, and FHFA. A report of this meeting will be submitted by FHFA as a public comment record.

¹⁴ April 27, 2018 meeting.

¹⁵ Dated December 22, 2017.

offered.”¹⁶ The FHLBanks understand that the FHFA’s historical interpretation of the statutory authority has been that supportive services are not an eligible use of AHP subsidy and therefore should not be a development expense paid for by the AHP subsidy. However, the FHLBanks recognize, and have advocated strongly, that supportive services expenses are standard operating expenses necessary to operate most, if not all, affordable rental housing projects serving special needs households. Supportive services expenses are included on projects’ operating pro formas, not their development budgets, so it is clear that AHP subsidy is not being used to pay for them. Therefore, supportive services should be treated the same as other standard operating costs and included in the operating pro forma along with other customary operating expenses, such as property management costs, security costs, maintenance costs, etc.

The Proposed Rule explicitly links the special needs subcategory of “Underserved Communities and Populations” to the provision of supportive services. This further highlights the importance of supportive services to affordable housing projects serving special needs households. It is a compelling reason to treat supportive services the same as other customary operating expenses. The AHP is the only funding source with this bifurcation requirement. Many major funders require that supportive services expenses appear on the operating pro forma. Requiring the FHLBanks to separate supportive services expenses from the project’s operating pro forma leads to misrepresentation and confusion and adds an unnecessary burden to sponsors and the FHLBanks. Sponsors have increasingly expressed their frustration with the extra burden of establishing two separate sets of accounting records and tracking expenses by funding source for a gap-funding partner that provides only a small portion of total project development costs.

Recommendation: As noted in the FHLBanks *Need for Subsidy Position Paper*,¹⁷ the FHLBanks reiterate their position that the current AHP regulatory language related to NFS is sufficient and recommend that it remain unchanged and that the FHLBanks be examined to the standard codified in the regulation. Additionally, the FHLBanks recommend that the Final Rule clarify that each FHLBank may determine whether or not to include supportive services within the operating pro forma, or via a separate pro forma, at its discretion.

IV. Proposed governance changes may hinder effective Board and AHAC engagement and value.

A. The Proposed Rule introduces a new burden on FHLBank Boards. Specifically, § 1291.14(f) of the Proposed Rule prohibits a Board from designating a Board committee to meet with the AHAC quarterly.¹⁸ This proposal negates a longstanding practice across

¹⁶ See Proposed Rule at 11355.

¹⁷ Dated November 23, 2016.

¹⁸ See Proposed Rule at 11387.

the FHLBanks that has proven successful. The FHLBanks are unclear as to why the FHFA is proposing this change. Operationally, it may be quite difficult and expensive to convene the entire Board and AHAC, particularly in larger districts such as Des Moines.

In addition, § 1291.14(f) seems to contradict § 1291.14(d)(1)(i) of the Proposed Rule. The latter states “[t]he Advisory Council shall meet with representatives of the Bank’s board of directors at least quarterly....” This implies that the full Board does not have to meet with the AHAC. However, § 1291.14(f) states 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.”¹⁹ It is worth noting that the relevant statute requires only “representatives of the board” to attend quarterly AHAC meetings, suggesting Congress intended for this role to be delegated, and that the proposed regulatory requirement contradicts the statute.²⁰

At the aforementioned April 27 meeting, the AHAC Chairs and Vice Chairs also noted their preference that the FHLBanks have discretion to determine whether or not the entire Board, a committee of the Board, or representatives of the Board meets with the AHAC. The AHAC leadership noted that the Proposed Rule introduced an additional unrequested and unnecessary requirement and asked that the current regulatory language remain in place.

Recommendation: The FHLBanks recommend that the current regulatory language, which permits representatives of the Board to meet with the AHAC, remain in place.

- B. The FHLBanks are also concerned that the prescriptive outcome requirements and enhanced TCLPs diminish the role of the AHACs. As previously mentioned, the outcome requirements establish a predetermined amount of AHP subsidy that must be awarded to certain affordable housing needs, regardless of the applicability of those needs to the specific FHLBank’s district. While the FHLBanks and AHACs have some discretion as to which of the three regulatory outcome requirements an FHLBank may pursue, to avoid any potential penalty (e.g., reimbursement of AHP pool, development of a housing plan, etc.), the FHLBanks will take a significantly more conservative approach in structuring their AHP in order to ensure that the outcome requirements are fully satisfied. This approach will have the effect of limiting the FHLBanks’ ability to respond to emerging regional needs identified by the AHACs.

Recommendation: Please reference the FHLBanks’ recommendations regarding the proposed outcome requirements under Section I, above.

¹⁹ *Id.*

²⁰ 12 U.S.C. 1430(j)(11).

- C. Finally, the publication requirements in the TCLP may adversely impact the value of the AHACs' advice to each FHLBank's board of directors. AHACs often provide policy framework and insight on specific district needs as those needs emerge. Under the Proposed Rule, the absence of empirical data would preclude the FHLBanks from incorporating that advice into the AHP.

Recommendation: Please reference the FHLBanks' recommendation(s) regarding the TCLPs under Section II, above.

V. Discretion to require owner-occupied retention mechanism needed.

- A. While the Proposed Rule would eliminate a retention mechanism requirement on owner-occupied, AHP-assisted units, the FHLBanks request the discretion to require ownership retention mechanisms as they deem appropriate given the structure and operations of their respective Competitive AHP and Set-Aside programs. Such discretion is necessary to accommodate differences in housing markets across districts as well as within the districts themselves. It is also necessary in order to accommodate differences in grant amounts within the Set-Aside Programs as well as between the Set-Aside and the Competitive AHP.

- B. The FHFA has suggested that every homebuyer or homeowner across the country receiving AHP subsidy (both Competitive and Set-Aside) should either have retention or not. This may not be the best approach for several reasons. First, it does not account for differences in real estate markets. For example, assume FHLBank Des Moines established a maximum Set-Aside grant amount of \$10,000 per homebuyer. The differences in home prices and values across its 13-state district would dictate whether or not \$10,000 is material enough to incite "flipping" and warrant a retention mechanism.

Second, the FHLBanks also need discretion due to differences in grant amounts. The FHLBank Cincinnati, for example, offers grants up to \$5,000 per household under its Set-Aside Program for acquisition and construction of owner-occupied housing. However, it offers grants up to \$50,000 per household under its Competitive AHP for purchase, construction or rehabilitation of owner-occupied housing. From the FHLBank Cincinnati's perspective, the incentive for a beneficiary of a Competitive AHP grant of \$50,000 to "flip" his property is significant enough to warrant a retention mechanism.

Finally, on several occasions the FHFA posed a scenario to the FHLBanks where two homebuyers receive AHP Set-Aside subsidy via two different FHLBanks. One homebuyer has a retention mechanism and one homeowner does not. The FHFA indicated that, in such an instance, the homebuyers would be treated unfairly. Given the wide variety of mortgage options and local and state down payment assistance programs, all offering different terms and requirements; it is highly likely that neighbors are, in fact, accessing different programs. It should also be noted that the Set-Aside Program is a

voluntary affordable housing product offered by individual FHLBanks at their discretion. As such, the FHLBanks establish different allocations, different maximum grant amounts and even different uses (e.g., down payment assistance versus rehabilitation). Therefore, having a retention agreement or not is consistent with the variances in product offerings. The Proposed Rule also does not recognize that each homeowner most likely accessed the Set-Aside Program subsidy through different financial institutions. Therefore, it is unlikely that each homebuyer has the same mortgage product and terms. The Proposed Rule does not recognize that each homebuyer may have also received a significantly different amount of subsidy. Not only do different FHLBanks offer different subsidy limits, but even within the same FHLBank, member institutions may elect to apply for different amounts of AHP subsidy.

The FHLBanks, in conjunction with their AHACs and Boards, have the experience, knowledge and familiarity with local real estate markets to determine whether it is appropriate to require a retention mechanism and under what conditions.

Recommendation: Therefore, the FHLBanks request discretion to apply retention requirements as they deem appropriate.

VI. Resolution of noncompliance discretion requested.

A. Under the Proposed Rule, projects are required to pursue a cure for noncompliance before a project modification may be considered. While there are some projects for which this approach may be appropriate, it should not be required in all cases. Oftentimes, the need for a project modification results from circumstances beyond a sponsor's control, such as market conditions or changes in the availability of a third-party service provider who committed to provide an empowerment service. In these cases, having a "cure first" requirement increases funding risk to the sponsor and may increase cost and delay the disbursement of funds. Delays caused by this new requirement will impact members that have committed construction or permanent financing or are providing equity to the project. For example, if a sponsor submits a modification requesting a change to their green building commitments or homeless unit reservation based on a good cause change in the project's budget or financing commitments, it would not make sense to ask them to "cure" the noncompliance. Their "good cause" explanation would have already had to include a reason why they could not fulfill the commitment or why fulfilling the commitment would now harm the project in ways that were not originally anticipated.

Recommendation: The FHLBanks request that the current regulatory requirements remain in place. Those requirements enable the FHLBanks to exercise discretion in evaluating the facts and circumstances of each situation.

VII. Increased burden on Sponsors may deter participation.

- A. The Proposed Rule would require sponsors to demonstrate that all members of the project development team, including all affiliates and team members, such as the general contractor, are qualified and able to perform their project responsibilities. The current regulation is sufficient to address sponsor capacity and the sponsor and developer should be viewed as having the experience and expertise in selecting their respective development teams. Furthermore, members are increasingly providing financing to AHP projects; therefore, their, and other primary funders', due diligence should be sufficient for the entire development team. The sponsor capacity assessment under the current regulation and the ability to suspend or debar sponsors and members with awarded AHP, are sufficient tools to ensure sponsors are able to fulfill their commitments and to identify and address member and sponsor bad actors.
- B. Expanding the FHLBanks' requirement to assess sponsor capacity to include compliance by all parties, employees, etc. with the FHFA's Suspended Counterparty Program is not necessary. The FHLBanks are not in privity of contract with general contractors or other parties and, therefore, cannot compel other parties to disclose such information. This is especially true for owner-occupied rehabilitation grants where multiple contractors are used over the term of the grant and may also cover a large geography. The FHLBanks look to the successful history of the AHP as indicative of the ability to manage this risk.

Recommendation: The FHLBanks recommend that the existing regulatory requirement remain unchanged.

VIII. Mandatory funding of alternates is an unnecessary requirement.

- A. The current AHP regulation provides that an FHLBank *may* fund alternates within one year of approval if any previously committed AHP subsidies become available.²¹ Under the Proposed Rule, an FHLBank “must approve such alternates for funding if any previously committed AHP subsidies become available” within one year of approval.²² This mandatory requirement will have several unintended consequences. First, it forces the FHLBanks to fund projects that may not address the prioritized housing needs as outlined in an FHLBank's TCLP. Second, an FHLBank may not de-obligate or recapture AHP subsidy until several months after a project has been designated as an alternate. Oftentimes, upon notice that a project did not receive funding, it seeks other funding sources, reduces the scope of the project, or discontinues the project altogether. Therefore, the entire funding structure may have

²¹ 12 CFR §1291.5(e)(2).

²² See Proposed Rule at 11382(emphasis added).

changed, thereby requiring the FHLBank to re-underwrite the application, with an uncertain outcome as to whether the alternate would remain a viable project. Third, the FHLBank would have to underwrite the project again, which adds additional costs to the administration of the AHP. Finally, the additional requirements associated with this section of the Proposed Rule limit an FHLBank's ability to manage the reallocation of subsidy. Currently, FHLBanks have discretion to use previously committed subsidies to fund projects that request a modification for an increase in subsidy or to provide additional funding for their Set-Aside Programs. The Proposed Rule eliminates that flexibility.

Recommendation: The FHLBanks recommend not changing the current regulation's requirements for approval of alternates and continue to allow individual FHLBanks to determine how and when to fund alternate projects.

IX. Effective Date of Final Rule; Implementation Timetable.

The FHLBanks request that the FHFA provide an effective date for the final regulation that is at least two years after publication. As the Proposed Rule makes substantive changes to several components of the AHP, if adopted as proposed, the FHLBanks require sufficient time to implement the extensive number of regulatory changes. Internally, the FHLBanks need to revise agreements, develop and implement changes to systems, create new processes and procedures, and train staff. The FHLBanks anticipate needing considerable development efforts to update their online AHP systems to accommodate the Proposed Rule. As this regulatory overhaul is extensive, implementation will entail coordination with each FHLBank's staff from nearly every department including the AHP team, communications, information technology, legal, membership, and transactions departments. Externally, the FHLBanks will need to educate members, sponsors, community organizations, and affordable housing developers that serve as project sponsors. The FHLBanks believe that a two-year period is the minimum timeframe to allow for an appropriate implementation.

X. List of Specific Questions.

In addition to the FHLBanks' comments above, please find specific responses to certain of the 41 questions found in the Proposed Rule:

Subpart B—Program Administration and Governance

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

Absent the outcomes-based approach, the FHLBanks believe there are benefits of allowing the FHLBanks to establish Targeted Funds. Targeted Funds provide the

FHLBanks with the ability to target specific affordable housing needs within their districts that align with their strategic plan objectives or are unmet or difficult to address through the existing competitive application process. Secondly, allowing Targeted Funds provides additional flexibility and responsiveness to changing needs and permits the FHLBanks to establish and tailor separate scoring priorities. Targeted Funds also increase a sponsor's options given the ability to submit applications for multiple funds (i.e., General Fund and one or more Targeted Funds).

However, the benefits of establishing a Targeted Fund are undermined by the burdens of the outcome-based requirements. Because the FHLBanks have a regulatory requirement to meet the complex required outcomes, the FHFA priorities will become the *de facto* driver for scoring and may overshadow the local needs in each FHLBank district. The consequence of the outcomes structure is that it creates a national, prescriptive program that limits flexibility to address local needs or respond to and leverage local opportunities, giving the AHP less ability to respond to those needs or leverage those opportunities than exists under the current regulatory regime. Secondly, the outcome requirements could create compliance risk for each FHLBank. The Proposed Rule introduces a complex, vague, undefined requirement that each Targeted Fund will "receive sufficient numbers of applications . . . to facilitate a genuinely competitive scoring process." It is unclear whether the Proposed Rule intends to measure sufficiency in terms of an FHLBank's methodology in soliciting applications or based on applications actually received.

In lieu of an outcomes structure, the final regulation should adopt a scoring-based methodology for the Targeted Funds. Specifically, the FHLBanks recommend the FHFA adopt a scoring-based methodology similar to that outlined in the FHLBank System's response to the FHFA's *2017 AHP Program Design and Project Selection Criteria White Paper*, incorporating the revisions suggested by the CIOs. The FHLBanks will present such a proposed scoring-based methodology under separate cover.

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?

The FHLBanks initially requested discretion to determine the appropriate amount to allocate to any of its funds, i.e., Competitive, Set-Aside and Targeted Fund(s). However, the FHLBanks appreciate the flexibility to choose an aggregate allocation of up to 40 percent for one or more Targeted Funds.

3. Would the proposed expansion of the contents of the TCLP impede the FHLBanks' ability to respond to disasters through the AHP?

The FHLBanks believe expansion of the contents of the TCLP would likely impede the FHLBanks' ability to respond to disasters through the AHP. For instance, if an FHLBank did not establish a Targeted Fund prioritizing disasters in advance, the Proposed Rule does not provide an FHLBank the flexibility to immediately create one in response to a disaster using funding from the existing General Fund. While disasters are inevitable, they are unpredictable. Therefore, especially with respect to disaster scenarios, a hindering requirement is that an FHLBank would not be allowed to establish or administer a Targeted Fund unless at least 12 months have passed since the publication of the TCLP in which an FHLBank identifies the affordable housing needs to be addressed by that Targeted Fund. The FHLBanks recommend that the Proposed Rule provide the FHLBanks greater flexibility with respect to the timing in the creation of a Targeted Fund to allow for the unplanned nature of a disaster.

Additionally, the competitive scoring requirement for a Targeted Fund for disasters could be an impediment. Competitive scoring may only be necessary if demand for the disaster funds exceed supply. In the event of a disaster, an FHLBank considers an organization's ability to timely complete the work needed to rehabilitate affordable housing units to be most important. Timing is understandably critical to getting low- and moderate-income families back into their homes. An organization may receive a reduced amount of funding based on its ability to perform work on the affected units. In disaster situations, timing is a more important concept than competitive scoring. An additional consideration is if several counties are affected but the projects in one or two counties score the most competitively, it would exclude other areas even if there was a demonstrated need. Accordingly, the FHLBanks recommend removing competitive scoring and outcome requirements for Targeted Funds for disasters and instead allow the FHLBanks the flexibility to determine how best to award funds when a Targeted Fund has been established in response to a disaster.

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

The FHLBanks support the proposed TCLP expansion only if the outcomes-based approach is eliminated, the expansion of the TCLP only applies if an FHLBank creates a Targeted Fund, and a scoring-based methodology is retained—preferably one consistent with the FHLBanks' response to the FHFA's *2017 AHP Program Design and Project Selection Criteria White Paper*. The TCLP would add value in allowing the FHLBanks to tailor an award structure that aligns with local housing needs. However, if the outcomes approach is adopted in the final regulation, the FHLBanks believe that the AHP Implementation Plan will identify housing needs through the scoring criteria, which will

be primarily based on FHFA priorities and housing needs. The expanded research that is proposed to be conducted and reflected in the TCLP would be, to a great extent, irrelevant, given that the statutory and regulatory outcomes would drive scoring. The TCLP does not need to be expanded for the purpose of supporting housing needs for the General Fund; the only real purpose would be to support Targeted Funds.

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?

The FHLBanks believe that the requirement to report noncompliance would have limited utility. This element of the Proposed Rule adds a new requirement and burden on sponsors to actively monitor LIHTC projects for 15 years. Therefore, the FHLBanks recommend eliminating the requirement that sponsors provide prompt written notice to an FHLBank in the event of noncompliance with LIHTC income-targeting or rent requirements.

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?

If the final regulation includes a retention agreement requirement for owner-occupied units, the FHLBanks recommend exempting from repayment net proceeds or net gain in an amount determined by the individual FHLBank based on facts and circumstances. The FHLBanks believe that AHP-assisted households should be able to receive the benefits that come with homeownership, which include the appreciation in the value of their homes. Rather than apply a maximum dollar amount, the FHLBanks recommend permitting discretion for FHLBanks to exempt repayment based on facts and circumstances.

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?

Yes. If the final regulation requires a retention agreement for owner-occupied units, the FHLBanks believe that the regulation should clarify that the obligation to repay AHP subsidy to an FHLBank shall terminate not only after the 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. The FHLBanks' understanding of the retention provisions for owner-occupied units is consistent with this approach. We support this clarification as it would be useful for sponsors and members using AHP and homeownership set-aside programs.

Subpart C – General Fund and Targeted Funds

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?

As presented earlier in this letter, the FHLBanks believe that it is not possible for re-ranking applications to meet the outcome requirements while also maximizing the extent to which the highest scoring applications are approved. The FHLBanks recognize that, in order to satisfy the outcome requirements identified in the Proposed Rule, the FHLBanks will have to prioritize the outcomes in their scoring processes. Accordingly, the new outcomes framework may force the FHLBanks to diverge from the long-standing process of selecting projects in descending application score order. In some instances, the FHLBanks would have to “re-rank” the projects and select lower-scoring projects simply to achieve the outcome requirements. The FHLBanks would make every effort possible to adjust their respective programs to avoid a possible re-ranking, but if re-ranking were necessary, it would make the process for selecting awarded projects more complex and less transparent, and increase reputational risk. Focusing on FHFA-led priorities would also reduce the ability of the FHLBanks to address the unique housing needs of their districts. The FHLBanks anticipate this may have an adverse effect on the participation of sponsors and members in the program.

Conversely, each FHLBank has a transparent scoring system developed through a governance structure of an elected Board of Directors, with expert advice from its AHAC. The scoring criteria and framework are published annually in each FHLBank's AHP Implementation Plan, which is transparent and well-understood by members and sponsors/developers. Therefore, the FHLBanks recommend the final regulation adopt a scoring-based methodology similar to that outlined in the FHLBank System's response to the FHFA's *2017 AHP Program Design and Project Selection Criteria White Paper*, incorporating the revisions suggested by the CIOs. The FHLBanks will present such a proposed scoring-based methodology under separate cover.

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?

The FHLBanks initially requested discretion to determine the maximum subsidy per household, which they have under the Competitive AHP. However, the FHLBanks believe that increasing the AHP subsidy per household from \$15,000 to \$22,000, combined with an annual escalation factor, provides additional flexibility to the FHLBanks. The increase in limits may be particularly beneficial to high cost areas, as well as to owner-occupied rehabilitation to promote accessibility, aging in place, and to correct for deteriorating older housing stock across the country.

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?

The FHLBanks support the FHFA’s proposed use of the Housing Price Index as an appropriate index to automatically adjust subsidy limits for the Set-Aside. It is a point-in-time reference of home prices that can measure average price fluctuations in the single-family housing market and can accurately provide insight for increasing subsidy limits in relation to housing markets that are losing their affordability. Furthermore, the FHLBanks appreciate the language that prohibits a downward adjustment of the maximum.

Subpart E – Outcome Requirements for Statutory and Regulatory Priorities

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

The FHLBanks believe that the outcome requirement is not necessary and should be eliminated as overly prescriptive. In addition, in high cost areas, it will be very difficult to meet this requirement. Although most of the FHLBanks already meet or exceed the outcome requirement of 10 percent of an FHLBank’s total AHP funds for the home purchase priority on a consistent basis, one FHLBank has not met this requirement in the last two years.

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?

It is the position of the FHLBanks that the proposed outcome requirements should be replaced with a scoring based approach for the reasons stated in Section I of this letter.

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

The FHLBanks believe that the increase is not appropriate because it will negatively impact otherwise viable projects. This new threshold is not compatible with the requirements of other funders and does not recognize the benefit of a mixed-occupancy development, which allows developers to cross-subsidize units in a project. Ultimately, since rental subsidies are scarce and difficult to secure, raising the minimum number of units required to serve targeted populations could have a negative effect on a project's feasibility and may discourage some sponsors/developers from applying for AHP. In addition, this structure would affect a project's cash flow, as homeless households are likely to have little to zero income and therefore cannot provide rent.

As mentioned previously, the purpose of the Proposed Rule is to provide the FHLBanks with more authority to allocate AHP funds. The increase in restrictions such as this will have the opposite effect. Therefore, the FHLBanks recommend retaining the current 20 percent minimum threshold.

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?

See response to Question #29.

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

Similar to the concerns for units reserved for homeless and special needs households, as discussed in Question #29, the FHLBanks believe that a 50 percent minimum threshold is not appropriate and may preclude projects from reserving any units for targeted populations. This new threshold is not compatible with the requirements of other funders and does not recognize the benefit of a mixed-occupancy development, which allows developers to cross-subsidize units in a project. Ultimately, since rental subsidies are difficult to secure, raising the minimum number of units required to serve targeted populations could have a negative effect on a project's feasibility and may discourage some sponsors/developers from applying for AHP. Therefore, the FHLBanks recommend retaining the current 20 percent threshold minimum.

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

The FHLBanks believe that the proposed 20 percent minimum threshold for the number of units in a project reserved for extremely low-income households may preclude applicants for applying for AHP funding that otherwise may meet the statutory and regulatory priorities. In addition, some projects that otherwise meet the proposed priorities may not be able to secure rental subsidies to support a minimum of 20 percent reservation of units for extremely low-income households. Accordingly, the FHLBanks believe the proposed 20 percent minimum threshold reserved for extremely low-income households is not appropriate and should not be adopted in the final regulation. The FHLBanks can address this need through scoring as they do currently.

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?

The FHLBanks believe that the proposed regulatory priorities do not allow the FHLBanks sufficient flexibility in meeting the changing needs of its communities. Therefore, the FHLBanks recommend the FHFA adopt a scoring-based methodology similar to that outlined in the FHLBank System’s response to the FHFA’s *2017 AHP Program Design and Project Selection Criteria White Paper*, incorporating the revisions suggested by the CIOs. The FHLBanks will present such a proposed scoring-based methodology under separate cover.

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

See response to Question #33.

35. Do the FHLBanks 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?

The FHLBanks recommend the FHFA adopt a scoring-based methodology similar to that outlined in the FHLBank System’s response to the FHFA’s *2017 AHP Program Design and Project Selection Criteria White Paper*, incorporating the revisions suggested by the CIOs. The FHLBanks will present such a proposed scoring-based methodology under separate cover. In the alternative, should the FHFA decline to adopt the scoring methodology proposed by the FHLBanks under separate cover, the FHLBanks believe that the current scoring system, while imperfect, provides the FHLBanks with greater flexibility to target specific housing needs in their districts than the outcomes-based

system set forth in the Proposed Rule. Although the FHLBanks support more flexibility with AHP scoring, we do not believe the proposed outcomes framework is a better solution to the current scoring framework.

For the past 28 years, the AHP has used a transparent scoring system for its competitive program. Project applications are scored and ranked in descending order. Awards are then given to the highest-scoring projects until the funds are exhausted. The proposed outcomes framework would require awarded AHP dollars to meet multiple outcomes. This would create a complex award structure, resulting in unintended consequences that reduce program flexibility, shrink the pool of sponsors, establish preferences for certain project types, and lessen the transparency of the AHP.

The current AHP application scoring structure has worked successfully since its inception. The scoring-based system, under the current regulation, also allows the FHFA to establish program priorities as required by the Federal Home Loan Bank Act. The final regulation should eliminate the outcomes framework and retain a scoring structure that provides the FHLBanks with scoring discretion beyond what is available in the current regulation, and adds the ability to create Targeted Funds, as proposed in the amendments.

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

The FHLBanks recommend the FHFA adopt a scoring-based methodology similar to that outlined in the FHLBank System's response to the FHFA's *2017 AHP Program Design and Project Selection Criteria White Paper*, incorporating the revisions suggested by the CIOs. The FHLBanks will present such a proposed scoring-based methodology under separate cover. However, the FHLBanks prefer the current scoring system to the proposed outcome requirements.

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

See response to Question #36.

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?

See response to Question #36.

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?

The FHLBanks believe that the proposed reductions in monitoring requirements are reasonable and do not add any risk. The monitoring reduction for LIHTC, HUD 202/811 and USDA 514 and 151 funded projects presents very little risk.

Subpart G – Remedial Actions for Noncompliance

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

The Proposed Rule clarifies that if non-compliance results from occupancy by over-income households, the AHP subsidy repayment is calculated based on the number of units in noncompliance, the length of noncompliance, and the portion of the AHP subsidy attributed to the noncompliant units. The FHLBanks support this clarification because only a partial recapture for the noncompliance would be required, which would potentially allow the project to continue to operate and provide affordable housing, rather than the entire subsidy award, which is more likely to put the affordable units in jeopardy.

As defined currently, the regulation offers a process for recovery of AHP subsidies, including settlements. 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 FHLBank's recovery efforts. The Proposed Rule excludes the language currently contained in § 1291.8(a) of the current regulation, which states that recovery of the AHP that is not used in compliance with the terms of the application is not required if the "misuse is the result of the actions or omission of the member, the project sponsor, or the project owner." The FHLBanks believe that language should be retained in the Final Rule.

The Proposed Rule maintains taking into account the degree of culpability of the project sponsor or owner and the extent of the collection efforts; however, it provides for other factors to be considered in determining reasonable collection efforts, including the financial capacity of the project sponsor or owner, assets securing the AHP subsidy, and other assets of the project sponsor or owner. While the FHLBanks support the spirit of these considerations, these are just a few of the considerations used in the recapture process, including making a determination for a settlement. The attempt to codify an incomplete set of considerations leaves little flexibility for the FHLBanks. Governance policies and risk-based approaches to underwriting and monitoring AHP should inform each FHLBank's recovery and settlement guidelines.

In addition, the FHLBanks have noticed a not-insignificant discrepancy between the language of the preamble and that of the proposed definition of "sponsor." The proposed

definition remains unchanged from the existing definition in § 1291.1 and is limited to a not-for-profit or for-profit organization or public entity that meets one of four criteria. The preamble, however, states that “Proposed § 1291.21(b) on eligible applicants *would clarify that a project sponsor includes all affiliates and team members such as the general contractor.*” (Emphasis added.) The FHLBanks are concerned as to how, given these two disparate definitions, the term “sponsor” will be interpreted under a final rule, and specifically with respect to the considerations set forth above for evaluating whether a settlement for less than the full amount of recapture is reasonable. As set forth above (Section VII. A.), there are issues of practicality when interpreting “sponsor” to mean an expanded team of entities beyond the not-for-profit or for-profit entity. Those issues are equally applicable in the settlement context. The FHLBanks request that this discrepancy be rectified in any final rule either by maintaining the existing definition of sponsor, thus ensuring that the definition of sponsor is clear and not open to interpretation, or by clarifying that the expanded definition of sponsor in proposed § 1291.21(b) applies solely for the purposes of evaluating project sponsor qualifications.

There is further concern and need for clarification when it comes to the criteria enumerated in the preamble and the Proposed Rule with respect to reasonable collection efforts, including settlement. “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.” Depending on the definition of “sponsor” to be applied in any final rule, this set of considerations could be deemed to require the FHLBanks to evaluate the assets of other entities involved in a particular project beyond the entities that have been traditionally considered project sponsor and owner. Based on the language of the preamble and the Proposed Rule, this could include the assets of “all affiliates and team members, such as the general contractor.”

This poses several problems, not the least of which is FHLBank access to such information. “[A]ll affiliates and team members” are not currently signatories to the AHP agreements; there is no consideration between the FHLBanks and these tangential “team members” to justify their participation in an AHP agreement. Given the inability to contractually require the production of this information from those entities, the FHLBanks would be left with relying merely on their cooperation. It is unlikely that “all affiliates and team members, such as the general contractor” would merely be willing to provide financial information in support of a proposed recapture.

Assuming that the intention is for these facts and circumstances to be factors to assist the FHLBanks in determining the reasonableness of a proposed settlement and is limited to the project sponsor, in the traditional/current definition, and the project owner, the FHLBanks are not opposed to the facts and circumstances proposed as being worthy of consideration, but caution that this narrow set of considerations suggests that other

considerations are not applicable. Again, these, among others, are generally a reflection of facts and considerations that are currently operationalized by the FHLBanks. The FHLBanks request that the FHFA not codify selected guidelines that are best established by each FHLBank to evaluate the fact-specific scenarios of a recapture and settlement process.

XI. Conclusion

The FHLBanks appreciate the good faith efforts of the FHFA in proposing enhancements to the existing AHP regulation. We believe that with marginal adjustments to the existing regulatory framework, the FHLBanks can build upon the success of their AHPs to efficiently respond to regional housing needs and better harmonize program use with our members, sponsors and stakeholders.

Sincerely,

The Federal Home Loan Banks

[Signature Page Follows]

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Federal Home Loan Bank of Boston



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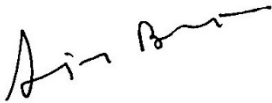
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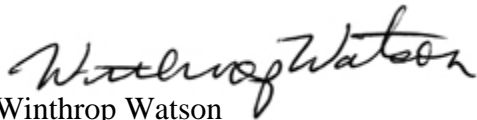
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