



June 11, 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: Notice of Proposed Rulemaking and Request for Comments: Affordable Housing Program Amendments (RIN 2590-AA83)

Dear Mr. Pollard:

Thank you for the opportunity to comment on the Federal Housing Finance Agency's (FHFA) Proposed Rulemaking of amendments to the Affordable Housing Program (Proposed Rule). The Federal Home Loan Bank of Des Moines (FHLB Des Moines) is a signatory to the letter submitted by all eleven Federal Home Loan Banks, and I respectfully refer FHFA to that letter. The following comments are those which FHLB Des Moines wishes to further emphasize.

1. Relocation requirements for income noncompliance discourage rental preservation. (Question 15)

The Proposed Rule would introduce flexibility for occupied rental projects by allowing projects to meet the minimum eligibility requirements of the Affordable Housing Program (AHP) application upon "initial occupancy of the rental unit"<sup>1</sup> provided that "...the project has a plan approved by one of its primary funders to relocate the household not meeting the income targeting commitments . . . ."<sup>2</sup> FHLB Des Moines appreciates the direction of the proposed changes to the rental housing minimum eligibility requirements for evaluating how rental projects should be evaluated if they are occupied at the time of the AHP application by residents with incomes that differ from those proposed in the AHP application. However, FHLB Des Moines has approximately fifteen percent of its rental rehabilitation projects where AHP funds and the projects' replacement reserves are the only sources of funds.

Because of this, FHLB Des Moines recommends removing the language "If the project has a plan approved by one of its primary funders" and replacing it with "If the project has a plan to relocate the households not meeting the income targeting commitments . . . ." The relocation plan requirements in the Proposed Rule would be counterproductive to the proposed emphasis on preservation projects that will likely, although not exclusively, be occupied at the time the AHP application is submitted and that may or may not include other sources of financing beyond the AHP.

2. Removing the Banks' ability to forego collection when noncompliance is not the result of a party's "actions or omissions" will deter AHP participation. (Question 41)

The Proposed Rule is more restrictive than the current rule's requirements for Banks and members attempting to collect subsidies for noncompliant projects. The current rule allows Banks to forgive claims for repayment without pursuing collection if the noncompliance is not the result of

---

<sup>1</sup> 83 Fed. Reg. 11380 (Mar. 14, 2018).

<sup>2</sup> *Id.*

the “actions or omissions” of the project sponsor, owner, member or Bank.<sup>3</sup> The Proposed Rule removes a cure option that is currently available, and instead requires the Banks to pursue reasonable collection efforts even in circumstances in which the noncompliance is not the result of the project sponsor, owner, member or Bank’s “actions or omissions.” This proposed change could lead AHP users to conclude that they are acting as a guarantor of the AHP, which would alter their perception of AHP as a grant and, thus, impact AHP’s value a relevancy. Such a change could also deter sponsors and members from participating in the AHP.

Projects face a plethora of scenarios that can cause noncompliance. Many of these scenarios are unforeseen at the time of AHP application. For example, FHLB Des Moines provided an AHP grant for a farm worker project that provided housing for workers at an agriculture processing plant in rural Idaho. When the plant was closed, all the employees lost their job and the project became vacant. The project was located in a rural market and, in the absence of the agricultural processing plant, the market conditions were such that the vacancy could not be cured. The Bank did not pursue collection against the member or sponsor because the noncompliance was not the result of either party’s actions or omissions. In light of the facts and circumstances, the Bank’s action was reasonable and appropriate.

FHLB Des Moines requests that the agency maintain the current provisions of 1291.8(a) in the final rule, thus allowing a Bank to forego collection of the AHP when noncompliance is not the result of the actions or omissions of the project sponsor, owner, member or Bank.

*3. Exposure of outside assets will deter AHP participation. (Question 41)*

FHLB Des Moines is further concerned about the implications of the proposed requirement for a Bank to take “into account factors such as the financial capacity of the project sponsor or project owner, assets securing the AHP subsidy, other assets of the project sponsor or project owners” when evaluating a settlement amount.<sup>4</sup> It is important to note that the predominant legal structure that FHLB Des Moines observes for AHP projects are single-project limited liability companies (LLCs), particularly for LIHTC projects. Typically there are no other assets beyond the project’s assets due to the project being the only asset of the owner, the single-project LLC. In addition, it will be difficult for Banks to determine where other assets are held since they are owned by separate legal entities. Lastly, even if a Bank can identify other assets to monitor as part of its due diligence in collections, the Bank will have to create a contractual obligation for the parties involved in the project to disclose information regarding entities outside the single-project LLC. As described in the comment letter provided by the eleven Federal Home Loan Banks, this issue may be further complicated by uncertainty regarding the FHFA’s proposed definition of a project sponsor to also include “all affiliates and team members such as the general contractor.”

Requiring companies that are not involved in the project to share financial information with the Bank will deter applicants, as sponsors and other third parties (i.e. general contractors) will not want to expose assets from another business or project to AHP liability.

FHLB Des Moines requests that FHFA remove this requirement for determining settlements.

---

<sup>3</sup> 12 CFR § 1291.8.

<sup>4</sup> 83 Fed. Reg. 11388-11389 (Mar. 14, 2018).

4. Board delegation to committees is sound corporate governance.

Proposed Rules 12 CFR § 1291.12 - § 1291.14 prohibit the Bank's Board of Directors from delegating to a committee of the Board, Bank officers, or other Bank employees the responsibilities of adopting the Bank's policies for its General Fund, Targeted Funds and Homeownership Set-Aside Programs, consulting with the Advisory Council on the AHP Implementation Plan, and adopting or amending the Implementation Plan.<sup>5</sup> The preamble of the Notice of Proposed Rulemaking states that the intended effect of the Proposed Rule is to "encourage increased engagement in the AHP and increased integration of the Banks' low-income housing and community development activities and issues, as well as Advisory Council input, into the overall strategic planning of the Bank" and "also for the full board to have more engagement with the board committee's recommendations."<sup>6</sup>

The changes in the Proposed Rule do not conform to basic principles of corporate governance. Under FHFA regulation, the standard of care for directors of Federal Home Loan Banks is the same as required under the Revised Model Business Corporation Act (RMBCA) or the body of law the board of directors has chosen to follow for its corporate governance and indemnification practices and procedures under 12 CFR § 1239.3(b).<sup>7</sup> The RMBCA permits boards to appoint committees to manage much of the board's responsibilities.<sup>8</sup> Under the RMBCA, the full board must consider only those activities that "so substantially affect the rights of the shareholders or are so fundamental to the governance of the corporation."<sup>9</sup>

Furthermore, board delegation to one or more committees is contemplated in FHFA regulations specifically.<sup>10</sup> Similar to the expertise required of members of the Audit and Risk Committees,<sup>11</sup> Banks delegate the board's responsibility for AHP matters to a committee comprised of members with specific experience in the affordable housing industry. The AHP is an important part of the Bank's mission, but it is no more important than the risk management and the audit functions of the board. It would be unnecessary and inefficient for the full board to consider particular matters of the internal audit function of the Bank, such as the Audit Committee must do.<sup>12</sup> Likewise, it is unnecessary and inefficient to require the full board to consider particular matters of the AHP such as policies relating to the General Fund, Targeted Funds and Homeownership Set-Aside Programs, or the adoption and amendment of the Implementation Plan. Moreover, the full board is ultimately responsible for the operation of the Bank,<sup>13</sup> and therefore directors must be engaged in all aspects of the Bank's business in order to discharge their statutory, regulatory and fiduciary duties.

FHLB Des Moines encourages the FHFA to reconsider the language of the Proposed Rule preventing the board of directors from delegating affordable housing responsibilities to a committee comprised of directors with expertise on affordable housing matters. Such delegation is a fundamental concept of efficient and competent corporate governance. Prohibiting delegation

---

<sup>5</sup> *Id.* at 11377.

<sup>6</sup> *Id.* at 11347.

<sup>7</sup> 12 CFR § 1239.4(b)(1). FHLB Des Moines has elected to follow the Iowa Business Corporations Act (IBCA) for its corporate governance and indemnification practices and procedures. The IBCA is Iowa's adoption of the RMBCA.

<sup>8</sup> RMBCA § 8.25; *accord* Iowa Code § 490.825 (2018).

<sup>9</sup> Comment on RMBCA §8.25.

<sup>10</sup> 12 CFR § 1239.5.

<sup>11</sup> See 12 CFR § 1239.32(b)(4); 12 CFR § 1239.11(b)(1).

<sup>12</sup> 12 CFR § 1239.32(e)(3).

<sup>13</sup> 12 CFR § 1239.4(a).

to specialized committees will not materially increase the duty of the full boards to engage in oversight of the AHPs.

5. Conclusion.

In conclusion, FHLB Des Moines appreciates the thoughtful effort FHFA has made to improve the AHP. There are aspects of the Proposed Rule that measurably will improve the Banks' abilities to achieve their goals in providing affordable housing throughout their districts. However, we hope FHFA will correct some of the practical shortcomings in the Proposed Rule as noted by the Banks in the system-wide comment letter and this letter to modernize the AHP in a way that maintains its value and relevancy and positions it to be adaptable to changing and unforeseen affordable housing needs and opportunities.

Sincerely,



Michael L Wilson  
President and Chief Executive Officer  
Federal Home Loan Bank of Des Moines