Housing Finance and Regulatory Affairs
David L. Ledford
Executive Vice President
dledford@nahb.org

June 11, 2018

Alfred M. Pollard
General Counsel
Federal Housing Finance Agency
400 7th Street, SW
Washington, DC 20219

RE: Affordable Housing Amendments (RIN 2590-AA83)

Submitted by Electronic Delivery to http://www.regulations.gov and RegComments@fhfa.gov

Dear Mr. Pollard:

On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I appreciate the opportunity to submit feedback in response to the Federal Housing Finance Agency's (FHFA) Proposed Rule suggesting amendments to the Federal Home Loan Banks' Affordable Housing Program (AHP). The AHP offers home builders and developers access to unique partnership options to help them finance homeownership or the purchase, construction, or rehabilitation of rental housing for low-to moderate-income families in their communities.

NAHB is a Washington DC-based trade association representing, among others, companies involved in the development and construction of for-sale single family homes, including homes for first-time and low- and moderate-income homebuyers. The ability of the home building industry to meet the demand for housing, including addressing affordable housing needs, and contribute significantly to the nation's economic growth is dependent on an efficiently operating housing finance system, of which the Federal Home Loan Banks (FHLBanks) are an important component.

Background

The Federal Home Loan Bank Act (FHLB Act) created the FHLBanks in 1932. The FHLBanks are government-sponsored enterprises with a specific mission to support housing and economic development. The eleven regional FHLBanks provide cash advances to their members for financing affordable housing and economic development in each FHLBank's region. FHLBank members include commercial banks, thrift institutions, credit unions, community development financial institutions and insurance companies. As of December 31, 2017, there were just under 7,000 members in the FHLBank System.

The Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) of 1989 amended the FHLBank Act and significantly changed the regulation of the FHLBanks. FIRREA created the AHP and the Community Investment Program. Beginning in 1990, the AHP required FHLBanks to provide funds equal to five percent of profits or $50 million, whichever was greater, to their members to finance homeownership or provide low-cost loans to borrowers for the purchase, construction or rehabilitation of rental and owner-occupied housing units for low- and moderate-income home owners and renters. As specified in FIRREA, the percentage was required to increase to the greater of 10 percent of profits or $100 million in 1995 where it remains today.

The AHP is widely acknowledged to play a significant and valuable role in supporting affordable housing nationwide. The AHP subsidies can be used to finance the purchase, construction or rehabilitation of affordable

rental and ownership housing, low-cost loans to assist in the development and revitalization of communities, downpayment assistance grants to low- and moderate-income homebuyers, and grants to finance the purchase or rehabilitation of homes.

<u>Proposed Rule</u>

FHFA's Proposed Rule would make the most significant changes to the AHP regulations in the program's 28-year history. FHFA believes the proposed amendments would provide the FHLBanks additional flexibility to allocate their AHP funds to better meet the needs of low- and moderate income homebuyers and renters in their communities. However, NAHB believes the rule does not provide additional flexibility, but instead will make it harder for each FHLBank to design and deliver innovative programs targeted to its members and the communities its members serve.

<u>Fund Options</u>

Currently, the AHP provides for a Competitive Application Program and a Homeownership Set-Aside. FHFA proposes to add a third component to the AHP by splitting the Competitive Application Program into two parts - a General Fund and Targeted Funds. Each FHLBank would be required to allocate annually at least 50 percent of its required annual AHP contribution to the General Fund component (down from 65 percent required for the current Competitive Application Program.) Like the original Competitive Application Program, the AHP contribution to the General Fund would be mandatory.

The structure of the noncompetitive Homeownership Set-Aside, which FHLBank members use to help low- and moderate-income homebuyers or homeowners purchase or rehabilitate their homes, will remain generally the same albeit the proposed rule would increase the allowed maximum annual allocation to 40 percent (from 35 percent) or $4.5 million, whichever is greater. The maximum set-aside grant that an FHLBank could provide would increase from $15,000 to $22,000 and would be subject to annual increases according to FHFA's Housing Price Index. Creating a Homeownership Set-Aside fund would remain optional.

The proposed Targeted Funds component would be a competitive application program under which an FHLBank would have the option to allocate annually up to 40 percent of its required annual AHP contribution to a maximum of three Targeted Funds.

In summary, after allocating 50 percent of AHP contributions to the General Fund, 50 percent is available for allocating between the Homeownership Set-Aside, Targeted Funds, and the General Fund depending on an FHLBank's assessment of how it can best address the homeownership and rental needs of its communities. As the maximum allowed for Homeownership Set-Aside Funds is 40 percent, the structure effectively requires at least 60 percent of their total annual AHP funds to be allocated to the competitive application programs. FHFA believes the proposed General Fund and any Targeted Funds are likely to meet more types of housing needs than the Homeownership Set-Aside Funds and may ensure that a significant percentage of AHP funds continue to support rental projects.

<u>Scoring Approach</u>

The proposed rule would require the FHLBanks to develop and implement an ‘‘outcome-based approach’’ for scoring the project applications for their competitive application programs. This approach would differ significantly from the existing project selection process and presents the primary challenge of the proposed rule.

Currently, project applications are scored and ranked in descending order by the FHLBanks. Awards are given to the highest-scoring projects until the funds are exhausted. The proposed outcome framework would require awarded AHP dollars to meet multiple regulatory and statutory outcomes that meet FHFA-designated statutory and regulatory priorities rather than priorities determined by the individual FHLBanks. This would create situations in which the highest-scoring projects may not receive funding. The proposed rule would create a complex award structure that may result in unintended consequences that reduce scoring transparency and program flexibility to meet local needs. In addition, certain types of projects and sponsors would be favored.

General NAHB Comments:

NAHB appreciates FHFA's stated intention to provide the FHLBanks more flexibility to serve the needs of their communities. Unfortunately, this proposal falls far short of this goal. In fact, NAHB's members are gravely concerned that the proposed rule is cumbersome, confusing, and actually will *inhibit* the FHLBanks' flexibility to respond to local circumstances.

Furthermore, a number of builders expressed concerns that the proposed rule will substantially reduce transparency in the scoring process for AHP funds. The current scoring protocol is generally understood by builders, developers and project sponsors. Unfortunately, the proposed national outcomes, statutory and regulatory priorities and "cure first" requirements undermine transparency in the scoring process.

For reasons detailed in this comment letter, NAHB respectfully urges FHFA to consider withdrawing the proposed rule. We request that FHFA issue a new proposal that enhances the strengths of the AHP program while building in more flexibility for FHLBanks to respond to local needs. At a minimum, the Agency should not finalize the AHP amendments until it has satisfactorily addressed wide-spread concerns that:

- Transparency in the scoring and selection process is substantially diminished;
- The scoring criteria will be driven by the national outcomes established under the statutory and regulatory priorities rather than local needs;
- The proposed regulatory priorities and specified housing needs are inflexible and infeasible;
- New project sponsor qualification requirements will expose project sponsors to liability and create disincentives to participate in the AHP program; and
- A "cure first" requirement for modification requests will jeopardize sponsors' funding and cause project delays.

These concerns are explained in greater detail in the pages that follow, along with answers to a number of the Agency's questions for comment.

Detailed Comments and Answers

Proposed Project Sponsor Qualifications

The definition of a "project sponsor" and the qualifications of those sponsors are substantially expanded in the proposed rule. A "project sponsor" would be defined as "*all affiliates and team members*, such as the general contractor." (Italics added.) The FHLBanks' project sponsor qualification criteria must evaluate the ability of the project sponsor (including all affiliates and team members such as the general contractor) to perform the responsibilities committed to in the application. Likewise, the project sponsor would be required to provide certifications or respond to specific questions about whether the project sponsor (and affiliates and team

members such as the general contractor) have engaged in misconduct as defined in FHFA's Suspended Counterparty Program regulation (12 CFR part 1227) (i.e. fraud, false statements, obstruction of justice, etc.), or as defined by the FHLBank. An FHLBank's AHP subsidy disbursement form or other related form shall include a requirement for similar certifications or questions for the project sponsor to complete prior to each disbursement of AHP subsidy.

NAHB strongly opposes the proposed project sponsor definition and project sponsor qualifications. These provisions would create excessive and unnecessary liability for project sponsors, and they should be removed. The requirements are also impractical. For instance, the development team may not be entirely in place at the time of the application. NAHB is concerned that these provisions will have a chilling effect on the willingness of qualified sponsors, developers and builders to participate in the AHP program.

NAHB urges FHFA to remove the proposed project sponsor definition and qualifications prior to publication of any final AHP regulation. The existing project sponsor regulatory requirements should be retained.

Modifications of Approved AHP Applications

When sponsors with awarded AHP projects are not able to satisfy the commitments made in their AHP applications, FHFA proposes that sponsors must attempt to cure the issue before requesting a modification to their project.

NAHB does not support a "cure first" requirement. If implemented, this change will increase funding risks to the sponsor, increase project costs and cause project delays. Unfortunately, instances arise when a cure is not possible and a modification is the only solution. In many cases, the circumstances are beyond the sponsor's control, such as when a third party service provider has dropped out of the project.

NAHB recommends that FHFA retain the FHLBanks' current practice of verifying that any modified project would still have scored high enough in the funding round to receive the AHP award had the sponsor applied for AHP funding with the modifications in place.

Notice to Bank of LIHTC Project Noncompliance

The proposed rule would require sponsors to provide prompt written notice to the FHLBank if an LIHTC project is in noncompliance with the LIHTC income-targeting or rent requirements at any time during the AHP 15-year retention period. The FHLBank must then review such LIHTC project noncompliance notices received from project sponsors during the AHP retention period.

Question #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?

NAHB opposes these provisions. FHFA should not require this reporting. When an LIHTC project is deemed in noncompliance, the owner has a limited period of time to correct the noncompliance so the credits are not lost.

The financial penalty of lost credits provides incentive for the project owners to correct noncompliance. The notice requirement proposed will only add confusion to the process and hinder compliance efforts.

Proposal to Eliminate the Five-Year Retention Agreement for Homeownership Units

The proposed rule would allow homeowners who accepted an AHP grant to rehabilitate, construct or purchase a home to sell the home before the current five-year retention agreement has expired without having to repay a portion of the grant.

Question #6: What are the advantages and disadvantages of an AHP owner occupied retention agreement, would eliminating it impact FHFA's ability to ensure that AHP funds are being used for the statutorily intended purposes, and are there ways to deter flipping other than a retention agreement?

NAHB believes there are circumstances when retention provides a disincentive to flip the property and others when it does not. This is most likely dependent on the housing markets in different geographic areas and the size of the subsidy. NAHB proposes that in the interest of flexibility and under the assumption that each FHLBank understands its unique housing market, the use of retention agreements should be at the discretion of the FHLBank and not eliminated altogether as proposed.

Tenant Income Qualification in Rental Projects

Under the proposed rule, in order for the project to satisfy the income targeting commitments at initial occupancy, the project must have a relocation plan for those occupants not meeting the income targeting commitments that is approved by one of the project's primary funders. In the absence of a relocation plan, the households in the project must satisfy the income targeting commitments at the time of AHP application, as required in the current regulation.

Question #15. How should preservation of rental projects be encouraged through the AHP while discouraging displacement of current occupants with higher incomes than those targeted in the AHP application submitted to the Bank for approval, and is the proposed requirement for a relocation plan approved by the primary funder reasonable?

The most practical solution to avoid displacement in a preservation deal is to grandfather existing over-income residents (who were income-qualified when they moved in) and require the sponsor to meet the AHP income targeting requirements if that over-income resident moves out.

Another possibility could be to exempt the over-income resident's unit if the project included equity generated by LIHTCs or other financing mechanisms that allowed that resident to remain "low income" for purposes of the project under the rules of the other financing program.

Maximum Subsidy Limit per Project Sponsor

The proposed rule allows FHLBanks to set a maximum subsidy limit per project sponsor in a single AHP funding period.

Question #18. What are the potential advantages and disadvantages of allowing the Banks to impose a maximum subsidy limit per project sponsor?

NAHB is concerned this limit would allow less qualified projects and sponsors to benefit at the expense of more qualified projects and sponsors. It would also erode transparency, since a worthy project could be passed over simply because the sponsor has "maxed out" on funding for the period.

Targeting Rental Units to Very-Low-Income Households

The proposed rule establishes an outcome requirement for a regulatory priority that requires FHLBanks to target awards for rental projects to very-low-income renters. Specifically, the FHLBanks must ensure that 55 percent of rental units awarded each year serve households whose incomes are at or below 50 percent AMI.

Question #28: What is the utility of this 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?

NAHB strongly urges FHFA to strike this burdensome and impractical mandate. Please consider that builders are finding it increasingly difficult to serve even higher income households without rental subsidies. For example, builders report difficulty in justifying new construction to serve higher income households between 50 percent and 120 percent of AMI unless there is some form of subsidy. Targeting 55 percent of units to very-low-income households is well-intentioned, but sponsors will not be able to make their projects financially viable without deep rental subsidies, and such subsidies are increasingly scarce.

Income targeting is best left as a consideration in the scoring criteria. As proposed, this mandate reduces transparency in the awards process and is inconsistent with income targeting requirements in other programs, such as the Low Income Housing Tax Credit. FHFA should continue to utilize the statutory requirement to reserve 20 percent of units for very-low-income households.

Regulatory Priorities & Specified Housing Needs for Multifamily Will Be Difficult to Achieve and Sustain

Each year, each FHLBank must ensure that at least 55 percent of the FHLBank's required annual AHP contribution is awarded under the FHLBank's General Fund and any Targeted Funds and Homeownership Set-Aside Programs to projects or households that, in the aggregate, meet at least two of the three regulatory priorities.

The regulatory priorities proposed by FHFA are underserved communities and populations, creating economic opportunities and affordable housing preservation. Within the priorities, there are several specified housing needs. FHLBanks must meet one or more of the specified housing needs included under the regulatory priority, and award at least 10 percent of the funds to projects meeting each of such regulatory priorities. However, an award can only count toward meeting one regulatory priority and one specified housing need under a regulatory priority, even if it would meet other priorities or needs. Another complication FHLBanks must negotiate is that an award to a project may not be counted toward meeting a regulatory priority unless the specified housing need that it meets is identified in the Bank's Targeted Community Lending Plan as an affordable housing need the Bank indicated it would address through its AHP scoring criteria (emphasis added).

The specified housing needs proposed under each regulatory priority are described below.

For Underserved Communities and Populations, the specified housing needs include:

- Housing for homeless households;
- Housing for special needs populations (which only includes projects that provide supportive services or access to supportive services for the specific special needs populations being served);
- Housing for other targeted populations (which does not require supportive services);
- Housing in rural areas; and
- Rental housing for extremely-low-income households.

FHFA is proposing to substantially increase the number of units reserved for homeless households, special needs populations and housing for other targeted populations from 20 percent to 50 percent. The Agency is also proposing a 20 percent minimum threshold for the number of units in a project reserved for extremely low-income households.

For the regulatory priority Creating Economic Opportunity, the specified housing needs include:

- Promotion of Empowerment (i.e. child care, health services, workforce preparation / integration); and
- Residential Economic Diversity (as defined in accordance with the Duty to Serve definition and FHFA's Duty to Serve Evaluation Guidance).

Specified housing needs for the regulatory priority Affordable Housing Preservation, include:

- Affordable Rental Housing Preservation (includes specific programs identified in FHFA's Duty to Serve Rule):
    - Rental housing with energy or water efficiency improvements;
    - Project-Based and Tenant-Based Section 8 Rental Assistance Housing Programs;
    - The Section 236 Rental and Cooperative Housing Program for Lower Income Families;
    - Section 221(d)(4) Housing Program for Moderate-Income and Displaced Families;
    - Section 202 Supportive Housing Program for the Elderly;
    - Section 811 Supportive Housing Program For Persons With Disabilities;
    - Permanent supportive housing projects subsidized under Title IV of the McKinney-Vento Homeless Assistance Act;
    - Section 515 Rural Rental Housing Program;
    - Low-Income Housing Tax Credits; and
    - Other comparable state or local affordable housing programs.

- Affordable Homeownership Preservation (specifies certain affordable preservation programs that are included in FHFA's Duty to Serve Rule)
    - Shared equity homeownership programs; and
    - Owner-occupied housing with energy or water efficiency improvements.

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

Question #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?

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

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

NAHB does not consider these proposed threshold increases appropriate for several practical reasons. First, sponsors are likely to balk at the new requirements because the projects will not be financially viable. These populations are likely to have very-low to no income, and reserving at least half of the units is simply impractical without deep rental subsidies. In the current budget climate, rental subsidies are increasingly scarce. These thresholds will also prevent sponsors from creating mixed-income communities that would reduce projects' subsidy dependence. Such occupancy standards may also reduce the geographic diversity of AHP awards. For example, it may be difficult to find 20 homeless households for a 40 unit property in a rural area. Plus, these ratios are not consistent with standard LIHTC requirements, thereby complicating long-term compliance issues. A further unintended consequence of these thresholds could be reducing sponsors' participation in the AHP program, thereby reducing the pool of quality applicants, and making it unlikely such targeting can be achieved.

For these reasons, NAHB strongly urges the Agency to strike these proposed threshold increases. FHFA should retain the current 20 percent unit reservation threshold for homeless, special needs and other targeted populations. Moreover, FHFA should not establish a 20 percent minimum threshold for the number of units in a project reserved for extremely low-income households.

Question #33. Do the 3 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?

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

Question #35. Do the Banks 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?

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

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

As NAHB commented in questions 29 – 32, the proposed regulatory priorities and housing needs represent an inflexible and impractical approach that is likely to deter project sponsors from participating in the AHP program and reduce the pool of quality applicants. In addition, the approach proposed reduces transparency in scoring AHP applications because the FHLBanks will have to select projects based on whether they satisfy FHFA's required outcomes, rather than based on how well they address local needs.

FHLBanks should have wide latitude to tailor their Community Lending Plans and AHP scoring criteria to the needs of their districts. NAHB does not believe the proposed rule permits FHLBanks the necessary flexibility to

respond to their local needs. It is reasonable to assume that worthy projects that are not specifically identified in the proposed regulatory priorities and housing needs would be at a competitive disadvantage. Examples of projects omitted from the regulatory priorities and housing needs in the proposed rule include new construction, adaptive reuse, and urban projects. Housing for the homeless, special needs or other targeted populations where fewer than 50 percent of the units are reserved for that population is also not specifically listed among the regulatory priorities or housing needs, and therefore less likely to receive AHP awards.

NAHB supports FHFA's goal to provide more flexibility for FHLBanks to adapt AHP programs to local conditions, but the proposed rule actually works against accomplishment of that goal. In the absence of an alternative, more flexible, locally based AHP scoring-based system to evaluate, NAHB considers the current regulatory scoring protocol preferable to the proposed outcome-based system.

Rental Monitoring Requirements

FHFA proposed revisions to simplify monitoring standards for AHP projects. First, the proposal would eliminate the requirement that FHLBanks review back-up income and rent documentation (other than rent rolls) at initial monitoring for AHP projects receiving LIHTC funds. The proposed rule also revises initial and long-term monitoring standards for AHP projects receiving other government funding by eliminating the requirement that FHLBanks review back-up income and rent documentation (other than rent rolls at initial monitoring) for projects receiving funds from federal housing programs to be specified in separate FHFA guidance.

FHFA Question # 39. Are the proposed reductions in the FHLBanks' monitoring requirements reasonable, taking into consideration the risks of noncompliance and the costs of project monitoring?

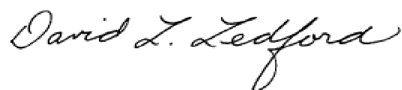
NAHB supports these changes.

Conclusion

NAHB believes FHFA's proposal to amend the AHP would not accomplish the stated goal of providing the FHLBanks' more flexibility to design innovative programs to meet the needs of the unique communities in each FHLBank's region. Rather, the outcome-based framework requires an FHLBank to meet FHFA priorities that may not meet the needs of families and communities in an FHLBank's region. FHFA has designed an unnecessarily prescriptive and overly complicated process for accessing AHP funds. While NAHB could agree the AHP might be improved with marginal enhancements, the significant changes proposed by FHFA are unwarranted and would cause unintended harm to a program that is working well.

Thank you for your consideration of NAHB's comments. For more information, please contact Rebecca Froass, Director of Financial Institutions and Capital Markets at rfroass@nahb.org or Michelle Kitchen, Director of Multifamily Finance at mkitchen@nahb.org.

Sincerely,



David L. Ledford
Executive Vice President
Housing Finance and Regulatory Affairs