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FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1282

RIN 2590-AA27

Enterprise Duty to Serve Underserved Markets

AGENCY: Federal Housing Finance Agency.

ACTION: Final rule.

SUMMARY: The Housing and Economic Recovery Act of 2008 (HERA) amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act) to establish a duty for the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises) to serve three specified underserved markets – manufactured housing, affordable housing preservation, and rural markets – in order to increase the liquidity of mortgage investments and improve the distribution of investment capital available for mortgage financing for very low-, low-, and moderate-income families in those markets. The Federal Housing Finance Agency (FHFA) is issuing this final rule which specifies the scope of Enterprise activities that are eligible to receive Duty to Serve credit. These activities generally are those that facilitate a secondary market for mortgages related to: manufactured homes titled as real property or personal property; blanket loans for certain categories of manufactured housing communities; preserving the affordability of housing for renters and homebuyers; and housing in rural

markets. The final rule provides a framework for FHFA's method for evaluating and rating the Enterprises' compliance with the Duty to Serve each underserved market.

DATES: The final rule is effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER].**

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SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Background

The Safety and Soundness Act provides generally that the Enterprises "have an affirmative obligation to facilitate the financing of affordable housing for low- and moderate-income families."[1] Section 1129 of HERA amended section 1335 of the Safety and Soundness Act to establish a duty for the Enterprises to serve three specified underserved markets, to increase the liquidity of mortgage investments and improve the distribution of investment capital available for mortgage financing for certain categories

[1] 12 U.S.C. 4501(7).

of borrowers in those markets.[2] Specifically, the Enterprises are required to provide leadership in developing loan products and flexible underwriting guidelines to facilitate a secondary market for mortgages on housing for very low-, low-, and moderate-income families for manufactured housing, affordable housing preservation, and rural markets.[3] In addition, section 1335(d)(1) requires FHFA to establish, by regulation, a method for evaluating and rating the Enterprises' compliance with the Duty to Serve underserved markets.[4] FHFA is required to separately evaluate each Enterprise's compliance with respect to each underserved market, taking into consideration the following:

(i) The Enterprise's development of loan products, more flexible underwriting guidelines, and other innovative approaches to providing financing to each of the underserved markets (hereafter, the "loan product evaluation area");

(ii) The extent of the Enterprise's outreach to qualified loan sellers and other market participants in each of the underserved markets (hereafter, the "outreach evaluation area");

(iii) The volume of loans purchased by the Enterprise in each underserved market relative to the market opportunities available to the Enterprise, except that the Director shall not establish specific quantitative targets or evaluate the Enterprise based solely on the volume of loans purchased (hereafter, the "loan purchase evaluation area"); and

[2] 12 U.S.C. 4565.
[3] 12 U.S.C. 4565(a). The terms "very low-income," "low-income," and "moderate-income" are defined in 12 U.S.C. 4502.
[4] 12 U.S.C. 4565(d)(1).

(iv) The amount of investments and grants by the Enterprise in projects which assist in meeting the needs of the underserved markets (hereafter, the "investments and grants evaluation area").[5]

The Duty to Serve provisions and issues considered are discussed further below.

B. Conservatorship

On September 6, 2008 the Director of FHFA appointed FHFA as conservator of the Enterprises in accordance with the Safety and Soundness Act to maintain the Enterprises in a safe and sound financial condition and to help assure performance of their public mission. Since the establishment of FHFA as conservator, the Enterprises have returned to profitability. The U.S. Department of the Treasury (Treasury Department) has provided essential financial commitments of taxpayer funding under Senior Preferred Stock Purchase Agreements (PSPAs). Fannie Mae and Freddie Mac have drawn a combined total of $187.5 billion in taxpayer support under the PSPAs to date. Through September 30, 2016, the Enterprises have paid the Treasury Department a total of $250.5 billion in dividends on senior preferred stock. Under the provisions of the PSPAs, the Enterprises' dividend payments do not offset the amounts drawn from the Treasury Department.

While the Enterprises are in conservatorships, all of their activities are subject to FHFA review and approval. FHFA has delegated day-to-day management of the Enterprises to their senior management and boards of directors. In managing the conservatorships, FHFA sets the strategic direction of the Enterprises, approves

[5] 12 U.S.C. 4565(d)(2).

Enterprise actions as deemed appropriate by FHFA, and oversees and monitors Enterprise activities.

The law also requires and FHFA expects the Enterprises to continue to fulfill their core statutory purposes while they are in conservatorship, which include their support for affordable housing and underserved markets. Consistent with the conservatorships, Enterprise support for affordable housing and underserved markets must be accomplished within the confines of safety and soundness and the goals of conservatorship.

C. Regulatory History

Prior to issuing this final rule, FHFA engaged in a number of rulemaking activities to establish its regulatory expectations for the Enterprises' Duty to Serve obligations and FHFA's evaluation process for those activities. These prior regulatory actions are described below.

1. Advance Notice of Proposed Rulemaking

Rulemaking for the Duty to Serve commenced in August 2009 with FHFA's publication in the Federal Register of an Advance Notice of Proposed Rulemaking (ANPR) on the Enterprise Duty to Serve underserved markets.[6] FHFA received 100 comment letters in response to the ANPR.

2. 2010 Duty to Serve Proposed Rule

After reviewing the comment letters on the ANPR, FHFA published in the Federal Register on June 7, 2010 a proposed rule on the Duty to Serve.[7] The 45-day public comment period for the proposed rule closed on July 22, 2010. FHFA received 4,019 comments on the proposed rule. Commenters included individuals, trade

[6] See 74 FR 38572 (Aug. 4, 2009).
[7] See 75 FR 32099 (June 7, 2010).

associations, policy and housing advocacy groups, nonprofit organizations, corporations, government entities, management companies, homeowners' associations, developers, lenders, a legal services group, Members of Congress, and both Enterprises. No final Duty to Serve rule was issued after the close of the comment period in 2010.

3. 2015 Duty to Serve Proposed Rule

FHFA began work to develop a new Duty to Serve proposed rule in 2014, taking into consideration the comments received on the 2010 Duty to Serve proposed rule and subsequent input from diverse stakeholder groups. The comments and input received and FHFA's intervening years of experience with the Enterprises and their operations in the underserved markets suggested a different approach, sufficiently so that further notice and comment was necessary through issuance of a new proposed rule. Accordingly, FHFA published in the Federal Register on December 18, 2015 a second proposed rule on the Enterprises' Duty to Serve requirements.[8] The 90-day public comment period for the proposed rule closed on March 17, 2016.

FHFA received 1,567 comments on the 2015 proposed rule, including from the following stakeholder groups:

- Individuals, including owners of manufactured homes;
- Trade associations, including manufactured housing trade organizations, and lender, builder and energy efficiency trade organizations;
- Nonprofit lenders and developers, including loan funds, land trusts, community development financial institutions, intermediaries, and organizations focused on preservation and energy conservation;

[8] See 80 FR 79181 (Dec. 18, 2015).

- Policy and housing advocacy organizations, including civil rights organizations, fair housing organizations, and national and state consumer law organizations;
- Commercial enterprises including Low-Income Housing Tax Credit investors, manufactured housing construction companies and developers, and energy efficiency companies;
- Government entities, including federal, state, and local government entities and state and local housing finance agencies;
- Members of Congress;
- Academicians, including university professors; and
- Fannie Mae and Freddie Mac.

A number of commenters addressed one or more of the 79 specific requests for comment posed in the **SUPPLEMENTARY INFORMATION** to the proposed rule. Responses to the questions came from a diversity of stakeholders reflecting a wide range of opinions. FHFA appreciates the efforts made by commenters to respond to the questions, and FHFA considered these comments in developing the final rule. Some questions were answered by a large number of commenters, while other questions were not addressed by commenters at all. Some commenters offered a single answer to multiple questions. As a result, FHFA has incorporated applicable responses to the questions into the discussion below of comments on particular issues.

FHFA also held five roundtable discussions with commenters representing a diversity of interests on issues pertaining to the rulemaking.[9] The purpose of the roundtable discussions was to provide the commenters with an opportunity to elaborate on their comment letters, express their views on the comment letters submitted by others, and provide responses to FHFA questions seeking clarifications on their comment letters. Each roundtable discussion focused on specific groups of stakeholders:

- On April 19, 2016, FHFA met with rural housing stakeholders to discuss how the term "rural area" should be defined, high-needs rural areas, and other related issues.

- On April 20, 2016, FHFA met with advocates for consumers, civil rights, energy efficiency, and affordable housing to discuss manufactured housing, energy efficiency, Low-Income Housing Tax Credits, and other strategies to preserve affordable housing.

- On April 25, 2016, FHFA met with organizations representing the mortgage finance and insurance industries to discuss gaps in underserved market segments that are within acceptable credit risk tolerances for lenders, insurance companies, and investors, and other related issues.

- On April 26, 2016, FHFA met with organizations representing manufactured housing industry participants to discuss tenant protections in manufactured

[9] Summaries of each of these meetings are available on FHFA's website at: https://www.fhfa.gov/SupervisionRegulation/Rules/Pages/Comment-List.aspx?RuleID=543.

housing communities, manufactured housing units titled as real estate or personal property, and other related issues.

- On May 2, 2016, FHFA held a conference call with rural housing stakeholders who were unable to participate in the April 19 meeting described above.

II. Duty to Serve Underserved Markets

A. Implementing the Duty to Serve

The final rule implements the Enterprises' statutory Duty to Serve very low-, low-, and moderate-income families in the underserved markets of manufactured housing, affordable housing preservation, and rural housing. In doing so, the final rule creates two complementary processes for the Enterprises to plan for their Duty to Serve activities and for FHFA to annually evaluate each Enterprise's compliance with its Duty to Serve obligations. Under the final rule, each Enterprise must prepare an Underserved Markets Plan (Plan) describing the specific activities and objectives it will undertake to fulfill its Duty to Serve obligations in each underserved market over a three-year period. The Plan process as outlined in the final rule does not make any specific activity mandatory. Instead, the final rule establishes a set of procedures for the Enterprises to consider a range of activities for inclusion in their Plans and incentives for the Enterprises to include impactful activities in their Plans. In addition to the provisions described in the final rule, and in order to address implementation and operational questions that may arise, FHFA intends to release guidance from time to time as the Enterprises develop and execute their Plans.

The final rule also establishes an evaluation and ratings process for FHFA to assess the Enterprises' performance in fulfilling their Plans in each underserved market.

As part of this process, FHFA will prepare Evaluation Guidance which, together with the Enterprises' Plans, will be the basis for FHFA's evaluations and ratings. The public will have an opportunity to provide input on each Enterprise's draft Plan as well as FHFA's draft Evaluation Guidance. FHFA will annually assign each Enterprise a rating for each of the three underserved markets in its Plan, and FHFA will publicly report on its basis for assigning each rating. As part of these annual evaluations, FHFA will also monitor the Enterprises' Duty to Serve activities on an ongoing basis.

All activities that an Enterprise undertakes in furtherance of its Duty to Serve must be consistent with its charter act,[10] as well as with all other applicable federal and state laws. Nothing in the final rule authorizes or requires an Enterprise to engage in any activity that would be otherwise inconsistent with its charter or the Safety and Soundness Act, or prohibits an Enterprise from engaging in any activity. Rather, the final rule specifies the scope of Enterprise activities that are eligible to receive Duty to Serve credit, and provides a framework for evaluating the Enterprises' performance.

Consistent with safety and soundness and consistent with the conservatorships, FHFA expects the Enterprises to show tangible results in each underserved market and to effectively facilitate mortgage lending to very low-, low-, and moderate-income families in each underserved market. Consistent with their charters, the Enterprises should expect mortgage purchases and activities pursuant to the Duty to Serve to earn a reasonable

[10] See Federal National Mortgage Association Charter Act sec. 301, 12 U.S.C. 1716, et seq., and Federal Home Loan Mortgage Corporation Act sec. 301, 12 U.S.C. 1451 note, et seq. The Enterprises' public purposes include a broad obligation to serve lower- and moderate-income borrowers.

economic return, which may be less than the return earned on activities that do not serve these underserved markets.[11]

B. Underserved Markets Plans

The below section sets out the final rule's requirements for each Enterprise to submit a Plan that will describe the activities and objectives the Enterprise will undertake for Duty to Serve credit. Each Enterprise must not only describe in its Plan the activities it intends to engage in, but also why it decided not to include certain other activities in its Plan.

In the final rule, FHFA has established parameters for Enterprise Plans and the following aspects are described below: (1) requirement that the Plans have a three-year term; (2) definitions of those activities eligible to include in Enterprise Plans; (3) requirement that the Enterprises designate Plan activities for each underserved market; (4) requirement that the Enterprises designate Plan objectives for each activity and also specify the evaluation area for each Plan objective; (5) submission and review of Enterprise Plans; (6) modification of Enterprise Plans; and (7) the process for approving new products.

1. Requirement for Underserved Markets Plans With Three-Year Terms—§ 1282.32(a), (b)

Consistent with the proposed rule, § 1282.32(a) and (b) of the final rule provides that each Enterprise must prepare a Plan describing the specific activities and objectives it will undertake to fulfill its Duty to Serve obligations in each underserved market over a three-year period. As discussed further below, objectives are the specific action items

[11] See 12 U.S.C. 4513(a)(1)(B)(ii).

that the Enterprises will identify for each activity. The Plan, along with Evaluation Guidance to be provided by FHFA, will be the basis for FHFA's evaluation of each Enterprise's Duty to Serve performance. The Evaluation Guidance is discussed further below under § 1282.36.

Numerous commenters, including both Enterprises, supported the use of Plans, which commenters stated is a reasonable way for the Enterprises to describe their planned activities and objectives and for FHFA to evaluate Enterprise performance. Fannie Mae recommended that the Plans be simplified to align more closely with the requirements of other federal regulators for Community Reinvestment Act (CRA) Strategic Plans. Fannie Mae stated that such simplified Plans would require fewer Enterprise resources to develop, thereby enabling the Enterprises to devote more of their resources to engaging in activities in the underserved markets. Freddie Mac also commented on the level of detail required in the Plans and recommended that FHFA permit the Enterprises to update their Plans annually in order to address changes.

FHFA has considered the feedback from commenters and has determined that such Plans should be required in the final rule. Accordingly, § 1282.32(a) of the final rule requires the Enterprises to develop Plans describing the specific activities and objectives they will undertake to meet their Duty to Serve each underserved market.

Many commenters discussed the appropriateness of the proposed three-year term for the Plans, with the large majority supporting three years. A trade association commented that compliance with a requirement to submit Plans every three years would be burdensome for the Enterprises. Freddie Mac stated that reliably projecting activities and benchmarks beyond the first year of the Plan would be challenging due to changes in

market conditions, lessons learned, and market opportunities, and recommended that FHFA permit annual updates to the Plans. FHFA has determined that three-year cycles are an appropriate period of time for the Enterprises to be able to accomplish multiyear objectives and that it is feasible for the Enterprises to forecast activities and market conditions for Plan purposes. In addition, as discussed below, the Enterprises will be permitted to annually modify their Plans during the three-year cycle, , subject to FHFA Non-Objection.

2. Eligible Activities for Underserved Markets—§§ 1282.33(b), 1282.34(b), 1282.35(b), 1282.36(c)(3)

The final rule defines the scope of eligible activities that an Enterprise may include in a Plan as those that facilitate a secondary mortgage market on residential properties for very low-, low-, and moderate-income families, consisting of: (1) manufactured homes titled as real property or personal property and manufactured housing communities; (2) affordable rental housing preservation and affordable homeownership preservation; and (3) rental housing and homeownership housing in rural areas. See §§ 1282.33(b), 1282.34(b), 1282.35(b), and 1282.36(c)(3). In a change from the proposed rule, the scope of eligible activities in the final rule includes manufactured homes titled as personal property, which is discussed in greater detail below in Section C(1): Manufactured Housing.

Section 1282.36(c)(3) of the final rule also provides for extra credit-eligible activities, including those that promote residential economic diversity.

3. Underserved Markets Plan Activities—§§ 1282.32(d); 1282.33(c), (d); 1282.34(c), (d); 1282.35(c), (d); 1282.36(c)(3)

a. Statutory, Regulatory, and Additional Activities

Consistent with the proposed rule, § 1282.32 of the final rule retains the requirement that each Enterprise's Plan describe all activities that the Enterprise will undertake for Duty to Serve credit, with the activities grouped under the following categories, as applicable:

- Statutory Activities – Activities that assist affordable housing projects under the eight affordable housing programs specifically enumerated in the Safety and Soundness Act and any comparable state and local affordable housing programs (a category that is also specified in the Safety and Soundness Act);
- Regulatory Activities – Activities in the underserved markets that are designated as Regulatory Activities in the final rule; and
- Additional Activities – Other activities identified by an Enterprise in its Plan that are determined by FHFA to be eligible for that underserved market.

FHFA invites the Enterprises to include Additional Activities in their Plans for FHFA's review and consideration. Additional Activities may include, for example, activities that support other federal, state, and local programs not specifically enumerated in the final rule that would benefit from Enterprise support. Any Additional Activities must be eligible under one of the three specified underserved markets as defined in this final rule. If an Enterprise chooses to include an Additional Activity in its Plan, the Enterprise must provide sufficient explanation in its Plan of how the Additional Activity will target an underserved segment of the market. In addition, an Enterprise must describe how the Additional Activity ensures that there are adequate levels of consumer protections or benefits to the tenants or homeowners that are consistent with the

requirements of other Statutory and Regulatory Activities in the rule. As an example, for an Additional Activity that pertains to energy efficiency to be eligible to include in a Plan, an Enterprise would have to provide evidence that the activity would provide a benefit comparable to how affordable housing is preserved in the Regulatory Activities relating to energy efficiency.

FHFA will also take into consideration how different the proposed Additional Activity is from the other Duty to Serve Statutory and Regulatory Activities. Additional Activities that are very similar to a Statutory and Regulatory Activity will be subject to higher levels of scrutiny, recognizing that the protections embedded in those activities have been either statutorily enumerated by Congress, or have been subject to the public comment process in the proposed Duty to Serve rule, respectively and considered by FHFA.

The table below shows the Statutory and Regulatory Activities for each of the three underserved markets.

Activities	***UNDERSERVED MARKETS***		
	Manufactured Housing	**Affordable Housing Preservation**	**Rural Areas**
Statutorily-Enumerated Activities	None	1. Section 8 programs 2. Section 236 (rental and cooperative housing program) 3. Section 221(d)(4) (moderate-income and displaced families) 4. Section 202 (elderly) 5. Section 811 (persons with disabilities) 6. Permanent supportive housing projects (homeless assistance) 7. Section 515 (rural rental) 8. Low-Income Housing	None

		Tax Credits (LIHTCs) 9. Comparable state and local affordable housing programs	
Regulatory Activities	1. Support manufactured homes titled as real property 2. Support manufactured homes titled as personal property 3. Support manufactured housing communities owned by government instrumentalities, nonprofits, or residents 4. Manufactured housing communities with specified minimum tenant pad lease protections	1. Support small multifamily rental property financing activity 2. Support financing of multifamily energy efficiency improvements 3. Support financing of single-family energy efficiency improvements 4. Support affordable homeownership preservation (shared equity) financing 5. Support HUD's Choice Neighborhoods Initiative (CNI) 6. Support HUD's Rental Assistance Demonstration (RAD) Program 7. Support financing of purchase or rehabilitation of distressed properties	1. Support housing in high-needs rural regions: • Middle Appalachia • The Lower Mississippi Delta • Colonias • Rural tracts in persistent poverty counties 2. Support housing for high-needs rural populations: • Native Americans in Indian areas • Agricultural workers 3. Support financing by small financial institutions of rural housing 4. Support rural small multifamily rental property activity

Because the goal of the Duty to Serve statute is to increase the amount of investment capital available for mortgage financing for very low-, low-, and moderate-income households, §§ 1282.32(a), 1282.33(a), 1282.34(a), 1282.35(a) of the final rule require the Plans to include activities in each underserved market that serve all three income categories in each year in which the Enterprise is evaluated and rated. Any one activity may, but need not, serve more than one of the three income categories.

b. Extra Credit-Eligible Activities

Section 1282.36(c)(3) of the final rule provides that certain activities designated in the Evaluation Guidance, including those activities that reduce the economic isolation

of very low-, low-, and moderate-income households by promoting residential economic diversity, will be eligible for Duty to Serve extra credit.

FHFA received comments from a wide range of commenters who recommended providing extra credit for a diverse set of activities. Extra credit-eligible activities, including residential economic diversity activities, are not mandatory. However, in order to be eligible to for extra credit, the Enterprises must include and describe the designated activities and objectives in their Plans. Extra credit-eligible activities, including residential economic diversity activities, are discussed further below under § 1282.36(c)(3).

c. Consideration of Minimum Number of Activities

This final rule does not require the Enterprises to engage in any particular activity for Duty to Serve credit. However, the final rule does require that the Enterprises consider a certain number of activities and explain why they are either included in their Plans or why they have chosen not to include them in their Plans. Section 1282.32(d)(1) of the final rule provides that FHFA will designate in the Evaluation Guidance a minimum number of Statutory Activities or Regulatory Activities that the Enterprises must consider for each underserved market. For example, if FHFA decides that the Enterprises must consider at least three Statutory or Regulatory Activities for a given market, each Enterprise would be required to select any three Statutory or Regulatory Activities and explain in its proposed Plan whether it will engage in these activities, and if not, why not. This is a change from the proposed rule, which would have required the

Enterprises to consider, and include explanations in their Plans for, every Statutory and Regulatory Activity specified in the rule.[12]

Several policy advocacy organizations supported the proposed approach that the Enterprises be required to consider and address every Statutory and Regulatory Activity in their Plans. Some commenters reasoned that the proposed approach would maintain accountability for the programs enumerated in the statute, while at the same time provide the Enterprises the flexibility to decide which activities to undertake. A few commenters who advocated for the consideration of every Statutory or Regulatory Activity in a Plan also supported providing the Enterprises with broad discretion in deciding how to serve the underserved markets.

Freddie Mac commented that by FHFA designating certain activities as Statutory or Regulatory Activities, the proposed rule appeared to be intended to guide the Enterprises towards certain Activities. Freddie Mac also raised the concern that it might not be possible to create or sustain a secondary mortgage market in certain submarkets. Fannie Mae stated that the proposed approach could be simplified and made more cost effective. Both Enterprises commented on the importance of having discretion and flexibility to propose suitable activities for the underserved markets.

After considering the comments, FHFA has determined in § 1282.32(d)(1) of the final rule that it will state in the Evaluation Guidance a minimum number of Statutory or Regulatory Activities that the Enterprises must consider and address in their Plans, leaving to the Enterprises the decision on which specific Statutory or Regulatory Activities to consider and address under this requirement. This approach balances the

[12] The proposed rule referred to the Statutory and Regulatory Activities as "Core" Activities.

comments recommending that FHFA guide the scope of activities and maintain accountability for the statutorily-enumerated programs with the feasibility concerns of the Enterprises. In addition, because the Enterprises' capacity to address the Statutory and Regulatory Activities may change over time, providing flexibility for FHFA to specify in the Evaluation Guidance the minimum number of such activities to be considered and addressed in the Plans will enable FHFA to change the minimum number each Plan cycle as appropriate. The statutory programs in § 1282.34(c)(5) and (c)(6) are excluded for this purpose because they do not, at this time, lend themselves to Enterprise support, so FHFA does not expect the Enterprises to address these two programs in their Plans.

d. Activities and Objectives to be Undertaken

Section 1282.32(d)(1) and (2) of the final rule provides that for all Statutory, Regulatory, and Additional Activities that an Enterprise chooses to undertake in its Plan, the Enterprise must address in its Plan how it will undertake the activities and related objectives, which are discussed further below. Section 1282.32(d)(3) provides that if an Enterprise chooses to undertake an activity, such as a residential economic diversity activity, for extra credit under § 1282.36(c)(3), the Enterprise must describe the activity and related objectives in its Plan.

The Enterprises may include as many Statutory, Regulatory, and Additional Activities and related objectives in their Plans as they consider feasible. FHFA will review the number of activities and objectives included in an Enterprise's Plan, as well as the nature of those activities, to determine whether the number is reasonable and achievable, and the degree of potential impact on the underserved markets.

4. Underserved Markets Plan Objectives for Each Activity—§ 1282.32(e), 1282.32(f)

Consistent with the proposed rule, § 1282.32(e) of the final rule provides that for each activity set forth in a Plan, the Plan must include one or more objectives, which are the specific action items that the Enterprises will identify for each activity. Objectives are central to FHFA's Duty to Serve evaluation process and ratings determinations. Objectives may cover a single year or multiple years. Each objective must meet all of the following requirements:

- Strategic. Directly or indirectly maintain or increase liquidity to an underserved market;
- Measurable. Provide measurable benchmarks, which may include numerical targets, that enable FHFA to determine whether the Enterprise has achieved the objective;
- Realistic. Calibrated so that the Enterprise has a reasonable chance of meeting the objective with appropriate effort;
- Time-bound. Subject to a specific timeframe for completion by being tied to Plan calendar year evaluation periods; and
- Tied to analysis of market opportunities. Based on assessments and analyses of market opportunities in each underserved market, taking into account safety and soundness considerations.

A number of policy advocacy organizations and nonprofit lenders supported FHFA's proposed approach for the objectives. A policy advocacy organization and a nonprofit organization suggested regulatory language changes that it stated would enhance the specificity of the Enterprise's objectives, strengthen the ability of the public

and FHFA to assess compliance with the Enterprise's stated objectives, and measure their impact. FHFA believes that such changes are not necessary as the Evaluation Guidance will contain sufficient information regarding the process for developing the Plans.

Statutory Evaluation Areas

As proposed, § 1282.32(f) of the final rule provides that each Plan objective must incorporate one or more of the following four statutory evaluation areas (referred to as "assessment factors" in the proposed rule), which are set forth in § 1282.36(b) of the final rule:

- Outreach. The outreach evaluation area requires evaluation of "the extent of outreach [by the Enterprises] to qualified loan sellers and other market participants" in each of the three underserved markets.[13] A Plan objective could describe how an Enterprise would engage market participants, such as through conducting meetings and conferences with current and prospective seller/servicers and providing technical support to seller/servicers, in order to accomplish a Plan activity. Market participants could include traditional participants in Enterprise programs, as well as non-traditional participants such as consortia sponsored by banks, nonprofit organizations, real estate developers, and state and local governments.
- Loan Product. The loan product evaluation area requires evaluation of an Enterprise's "development of loan products, more flexible underwriting guidelines, and other innovative approaches to providing financing to each"

[13] 12 U.S.C. 4565(d)(2)(B).

underserved market.[14] A Plan objective could describe, for example, how the Enterprise will reevaluate its underwriting guidelines, which could include empirical testing of different parameters and modification of loan products in an effort to increase the availability of loans to families targeted by the Duty to Serve, consistent with safe and sound lending practices. FHFA expects the Enterprise to identify and assess current underwriting guidelines that may impede service to very low-, low-, and moderate-income families in the underserved markets.

- Loan Purchase. The loan purchase evaluation area requires FHFA to consider "the volume of loans purchased in each of such underserved markets relative to the market opportunities available to the [E]nterprise."[15] The Safety and Soundness Act further states that FHFA "shall not establish specific quantitative targets nor evaluate the [E]nterprises based solely on the volume of loans purchased."[16] A Plan objective could include the Enterprise's plans for purchasing loans in particular underserved markets, including its assessments and analyses of the market opportunities available for each underserved market and its expected volume of loan purchases for a given year.

  Although the final rule does not establish quantitative targets, FHFA will consider the Enterprise's past performance on the volume of loans purchased in a particular underserved market relative to the volume of loans the

[14] 12 U.S.C. 4565(d)(2)(A).
[15] 12 U.S.C. 4565(d)(2)(C).
[16] Id.

Enterprise actually purchases in that underserved market in a given year pursuant to its Plan. In reviewing the Plan and the loan purchase evaluation area, FHFA will take into account difficulties in forecasting future performance and the need for flexibility in dealing with unexpected market changes.

- Investments and Grants. The investments and grants evaluation area requires evaluation of "the amount of investments and grants in projects which assist in meeting the needs of such underserved markets."[17] A Plan objective could include investments. As with all activities, the investments must comply with the Enterprises' Charter Acts.[18] FHFA has directed the Enterprises to refrain from making grants because they are in conservatorship. Accordingly, during the period of conservatorship, FHFA does not intend to provide Duty to Serve credit to the Enterprises for making grants.

FHFA received a number of comments on the four evaluation areas. The two evaluation areas that received the most comments were loan products, and grants and investments. For the loan products evaluation area, commenters offered suggestions for specific pilots and for enhancing the criteria to use when assessing loan product activities. Commenters generally expressed support for the development of new loan products. The commenters were nearly unanimous in expressing their support for the Enterprises to be allowed to receive Duty to Serve credit for investments and grants, with many suggesting specific uses for those funds.

[17] 12 U.S.C. 4565(d)(2)(D).
[18] 12 U.S.C. 1451 et seq. and 12 U.S.C. 1716 et seq.

The proposed rule specifically requested comment on whether Duty to Serve credit should be given under the loan product evaluation area for research and development activities that may not show initial results. Several trade associations, nonprofit lenders, and policy advocacy organizations, as well as the Enterprises supported providing Duty to Serve credit for this activity even without initial results. A few commenters offered qualified support for research and development only for targeted markets and focused activities provided the research and development activities are robust, the data collected and findings are shared with industry stakeholders, and the research and development activities mesh with already well-developed concepts that have the potential to reach the market within a short period of time.

After considering the comments, FHFA has determined that it is reasonable to make Enterprise research and development activities eligible for Duty to Serve credit under the loan product or outreach evaluation areas because of their importance in encouraging innovation and creative solutions to the challenges that exist in the underserved markets.

Requirement of a Single Evaluation Area For Each Objective

Section 1282.32(f) of the final rule provides that an Enterprise must designate in its Plan the evaluation area under which each Plan Objective will be evaluated.

Under the proposed rule, an objective would have been eligible to receive Duty to Serve credit under only one evaluation area in each underserved market for each year. Both Enterprises objected to this proposed requirement, stating that Duty to Serve credit should be available under multiple evaluation areas within an underserved market. Fannie Mae argued that Plan activities, regardless of which evaluation area they are in,

are intertwined with achieving the end result of better serving an underserved market. Freddie Mac argued that the proposed requirement would undercount Enterprise support for activities that meet multiple evaluation areas within a particular market and could result in imprecise or arbitrary classification of the Enterprises' activities or objectives.

After considering the comments, FHFA has determined in the final rule that each objective should only be eligible to receive Duty to Serve credit under one evaluation area per year in an underserved market. This requirement is not intended to preclude or discourage the Enterprises from undertaking multi-faceted activities and objectives that take place over several years. Rather, the Enterprises will simply be required to identify one evaluation area for each objective during each year of a Plan cycle that reflects the Enterprise's primary focus for the objective. In many instances, this may involve an Enterprise specifying separate objectives to cover actions relating to different evaluation areas. For example, a multi-faceted objective, such as one involving research and development, could foreseeably be assessed under outreach in year one of a Plan, and under loan products in year two of the Plan. Identifying the primary evaluation area for each objective, for each year, will focus Enterprise efforts and make it easier for FHFA and other stakeholders to evaluate their performance.

5. Plan Procedures—§ 1282.32(g)

a. Submission of Proposed Plans—§ 1282.32(g)(1)

Section 1282.32(g)(1) of the final rule establishes a process and timeline for the Enterprises to submit their proposed Plans to FHFA for review, with some changes to the process and timeline in the proposed rule. The final rule also establishes distinct timelines for the first Plan development cycle and subsequent Plan cycles.

For the first Plan development cycle following the publication of the final rule,

the Enterprises will be required to submit their proposed Plans to FHFA within 90 days after the posting of the proposed Evaluation Guidance on FHFA's website. This is a change from the proposed rule, which would have required submitting the first proposed Plan to FHFA pursuant to a timeframe and procedures to be established by FHFA, and would have required FHFA to provide to each Enterprise an individualized Evaluation Guide containing a scoring matrix for its Plan after Non-Objection to the Plan.

For subsequent proposed Plans after the first Plans, FHFA will provide timelines 300 days before the termination date of the Plan in effect, or a later date if additional time is necessary for proposed Plan submission, public input periods, and Non-Objection to an undeserved market in a Plan. FHFA envisions that these timelines will be part of the Evaluation Guidance. Unless otherwise directed by FHFA, each Enterprise must submit a proposed Plan to FHFA at least 210 days before the termination date of the Enterprise's Plan in effect.

Several policy advocacy organizations, a trade organization, and both Enterprises expressed the need for greater certainty earlier in the Plan development process as to how the Enterprises will be evaluated by FHFA. FHFA agrees that providing more details on the Plan submission and review process will assist the Enterprises in developing their proposed Plans and assist the public in understanding how the Enterprises will be evaluated. Accordingly, under the final rule, FHFA will provide the proposed Evaluation Guidance to the Enterprises prior to the date the Enterprises must submit their proposed Plans to FHFA, as opposed to providing an Evaluation Guide to each Enterprise after submission of its Plan, as proposed. Specifically, FHFA will provide the proposed Evaluation Guidance to the Enterprises at least 90 days before their proposed Plans are

due to FHFA and will post the proposed Evaluation Guidance on FHFA's website for public input. For the first Plan development cycle, FHFA expects to provide the proposed Evaluation Guidance to the Enterprises within 30 days of the date of the posting of this final rule on FHFA's website.

b. Posting of Proposed Plans and Public Input—§ 1282.32(g)(2), (3)

Section 1282.32(g)(2) of the final rule establishes a process and timeline for public input on the Enterprises' proposed Plans, with some changes to the process and timeline set forth in the proposed rule. Consistent with the proposed approach, the final rule provides that as soon as practical after an Enterprise submits its proposed Plan, FHFA will post a public version of the proposed Plan, with any proprietary and confidential data and information omitted, on FHFA's website for public input. Section 1282.32(g)(3) of the final rule provides that the public input period for the first cycle of proposed Plans will be 60 days, a change from the proposed rule's 45 days.

There was broad support from a wide range of commenters, including policy advocacy organizations, nonprofit intermediaries, trade associations and state housing finance agencies for posting the Enterprises' proposed Plans for public input. Commenters stated that public input would improve the quality of the Plans, add accountability to the Plan review process, and improve FHFA's evaluation of the adequacy of the proposed Plans.

Both Enterprises expressed concerns about posting the proposed Plans for public input, stating that the Plans would contain proprietary and confidential information and that the process of preparing a public version of the proposed Plan could be time intensive. The Enterprises and some commenters also expressed significant concerns

about the proposed rule's timeline for specific actions related to proposing and reviewing the Plans. The primary criticisms from various commenters were that the proposed deadlines would not provide sufficient time for the Enterprises to develop their proposed Plans, for stakeholders to provide input on the proposed Plans, for FHFA to adequately consider the public input, and for the Enterprises to incorporate changes in response to the public input. For example, a policy advocacy organization stated that because of the complexity of the Plans, along with the number of activities they are likely to cover, the public would likely need 60-90 days to provide sufficient input on the proposed Plans.

After considering the comments, FHFA has determined that a public input process for the Enterprises' proposed Plans can be implemented that provides transparency and an opportunity for productive public input, while preserving the proprietary and confidential nature of Enterprise data and information. Public input can provide significant value in assisting the Enterprises to identify the needs of the underserved markets, as well as the specific activities that could help meet those needs. FHFA has also determined that the proposed 45-day public input period should be increased to 60 days. Accordingly, under § 1282.32(g)(3) of the final rule, for the Enterprises' first proposed Plans, the public will have 60 days from the date the proposed Plans are posted on FHFA's website to provide input. The Enterprises' subsequent proposed Plans will be available for public input pursuant to the timeframe and procedures established by FHFA. FHFA envisions that the timeframe and procedures for public input on subsequent proposed Plans will be specified in future Evaluation Guidance.

c. Enterprise Review—§ 1282.32(g)(4)

Consistent with the proposed rule, § 1282.32(g)(4) of the final rule provides that

each Enterprise may, in its discretion, make revisions to its proposed Plan based on public input.

d. FHFA Review—§ 1282.32(g)(5)

Section 1282.32(g)(5) of the final rule provides that for the first Plan development cycle following publication of the final rule, FHFA will review each Enterprise's proposed Plan, and within 60 days or such additional time as may be necessary from the end of the public input period, provide each Enterprise with FHFA's comments on its proposed Plan. FHFA has determined that a 60-day review period generally should provide sufficient time for review of the Enterprises' proposed Plans.

For subsequent Plan development cycles, as opposed to the 45-day review period in the proposed rule, the final rule provides that FHFA will establish a timeframe and procedures for FHFA review, comments, and any required Enterprise revisions for the subsequent proposed Plans. FHFA envisions that the timeframe and procedures for FHFA's review of the subsequent proposed Plans will be specified in future Evaluation Guidance. This will allow the review process for subsequent proposed Plans to remain flexible and aligned with the future timelines for submitting the Enterprises' proposed subsequent Plans and publishing the Evaluation Guidance.

The Enterprises will be required to address FHFA's comments on their proposed Plans, as appropriate, through revisions to their proposed Plans pursuant to the timeframe and procedures established by FHFA.

e. Designation of Statutory or Regulatory Activity for FHFA Consideration in Issuing a Non-Objection—§ 1282.32(g)(5)(iii)

Section 1282.32(g)(5)(iii) of the final rule provides that FHFA may, in its

discretion, designate in the Evaluation Guidance one Statutory Activity or Regulatory Activity in each underserved market that FHFA will significantly consider in determining whether to provide a Non-Objection to that underserved market in an Enterprise's proposed Plan. This provision was not included in the proposed rule.

This provision evolved from comments that FHFA received suggesting that some Statutory and Regulatory Activities are so important that FHFA should require the Enterprises to engage in them. Several commenters recommended a number of specific Statutory or Regulatory Activities that should be mandatory, with residential economic diversity and a chattel manufactured housing pilot being the most frequently cited, on the basis that these activities are the most likely to have an impact on the underserved markets.

After considering the comments, FHFA has determined to maintain the approach in the proposed rule and not make any Statutory or Regulatory Activities mandatory in the final rule. FHFA has concerns that mandating a specific activity, without first considering how the Enterprise would propose conducting an activity to ensure that it would be undertaken in a safe and sound manner, would be inadvisable.

Instead, § 1282.32(g)(5)(iii) of the final rule provides that FHFA may, in its discretion, designate in the Evaluation Guidance one Statutory or Regulatory Activity in each underserved market that FHFA will significantly consider in determining whether to provide a Non-Objection to that underserved market in a proposed Plan. This provision of the final rule provides FHFA with the authority to transparently communicate a priority activity to the Enterprises and puts the Enterprises on notice that FHFA will evaluate their decisions to either include or not include this activity in their Plans. For

example, FHFA might encourage the Enterprises to consider serving challenging regions or populations such as Middle Appalachia, or challenging activities such as shared equity homeownership or agricultural workers' housing, which could require more time and effort to make an impact on the underserved market than other activities. In determining whether to issue a Non-Objection where an Enterprise has chosen not to include the designated Statutory or Regulatory Activity in its Plan, FHFA will consider whether the Enterprise has made a convincing case in its Plan for not including it.

f. FHFA Non-Objections to Underserved Markets in a Plan—§ 1282.32(g)(5)(iv)

This final rule provides that FHFA will issue three Non-Objections for a Plan – one for each underserved market – and not for the Plan as a whole. Section 1282.32(g)(5)(iv) of the final rule provides that after FHFA is satisfied that all of its comments on an individual underserved market section in an Enterprise's proposed Plan have been addressed, FHFA will issue a Non-Objection for that underserved market in the Plan. This is a change from the proposed rule, which would have required FHFA to issue a single Non-Objection for the entire proposed Plan.

Several policy advocacy organizations commented that the proposed rule did not make clear the procedures and consequences FHFA would invoke in the event its issuance of a Non-Objection delayed the start of a Plan. This could occur under the proposed approach where FHFA is not satisfied that its comments on an Enterprise's plans for a particular underserved market have been addressed and FHFA is unable to issue a Non-Objection to the entire Plan, thereby preventing the Enterprise from commencing implementation of its Plan in all of the three underserved markets. Under

the final rule, FHFA will issue a separate Non-Objection for each of the three underserved markets, which will enable the Enterprises to proceed with implementing their plans for a particular underserved market that has received a Non-Objection without having to wait for FHFA's Non-Objection to the other underserved markets. The next section describes the final rule's approach in the event that there is a delay in FHFA's ability to provide a Non-Objection for one or more underserved markets in a Plan.

g. Effective Dates of Underserved Markets in Plans—§ 1282.32(g)(6)

Section 1282.32(g)(6) of the final rule provides that the effective date of an underserved market in a Plan that has received a Non-Objection from FHFA by December 1 of the prior year will be January 1 of the first evaluation year for which the Plan is applicable. Where an underserved market in a Plan does not receive a Non-Objection by December 1 of the prior year, the effective date for that underserved market will be determined by FHFA. This provision is changed from the proposed rule to take into account that the timing of receiving Non-Objections for each of the underserved markets in a proposed Plan may impact the effective dates for those sections of the Plan. Based on the extent of the delay, FHFA will also describe the impact of any delay in a Plan's effective date on the evaluation and rating processes for the affected underserved market.

h. Posting of Underserved Market Sections of Plans—§ 1282.32(g)(7)

Section 1282.32(g)(7) of the final rule provides that as soon as practical after FHFA issues a Non-Objection to an underserved market in an Enterprise's Plan, that section of the Plan will be posted on the Enterprise's and FHFA's respective websites, with any confidential and proprietary data and information omitted. This provision is

revised from the proposed rule to take into account that particular underserved markets in a proposed Plan may receive Non-Objections at different times.

6. Modifying Underserved Markets Plans—§ 1282.32(h)

As proposed, § 1282.32(h) of the final rule provides that at any time after implementation of a Plan, an Enterprise may request to modify its Plan during the three-year term, subject to FHFA Non-Objection of the proposed modifications, and FHFA may require an Enterprise to modify its Plan during the three-year term. FHFA and the Enterprises may seek public input on proposed modifications to a Plan if FHFA determines that public input would assist its consideration of the proposed modifications. If a Plan is modified, the modified Plan, with any confidential and proprietary information and data omitted, will be posted on the Enterprise's and FHFA's respective websites.

Several commenters, including both Enterprises, supported allowing the final Plans to be modified during the three-year term. A number of commenters also recommended that FHFA require the Enterprises to solicit public input on their proposed Plan modifications, with some suggesting between 30 and 90 days for such input. Policy advocacy organizations also recommended that FHFA provide public notice when significant modifications to a final Plan receive a Non-Objection, with the modifications and rationale for FHFA's Non-Objection detailed. Freddie Mac strongly supported allowing Plan modifications, and recommended that FHFA establish a simple notice and review process without public input when modifications merely reflect changes in the market.

After considering the comments, FHFA has determined that Plan modifications generally should be permitted, as set forth in the proposed rule. Because of the detailed level of information that the Enterprises need to include in their Plans, FHFA envisions allowing the Enterprises to annually adjust their Plans to reflect their progress, to incorporate lessons learned from executing their Plans, and to make other appropriate adjustments. Additionally, FHFA envisions utilizing the same annual adjustment to ensure that Plan objectives continue to represent meaningful progress over time. However, to maintain the integrity of the final Plans, ad hoc modifications, occurring outside of the annual adjustment, should occur only in special circumstances and should not be a routine part of the process. Instances in which FHFA might require an Enterprise to modify its Plan include significant changes in market conditions, including obstacles and opportunities, or significant safety and soundness concerns arising during the three-year term of the Plan.

FHFA is more likely to seek public input on a proposed Plan modification where an Enterprise requests to eliminate an activity or objective from its Plan, or make numerous changes to the Plan, as opposed to, for example, a request to modify the measurable quantity of an objective by a modest amount.

7. Enterprise New Products and New Activities

Enterprise new products and new activities are subject to the prior approval and prior notice requirements pursuant to the Safety and Soundness Act.[19] If an Enterprise determines that a new product or new activity would facilitate its Duty to Serve

[19] See 12 U.S.C. 4541.

obligations and would be consistent with safety and soundness, it may propose that new product or new activity for FHFA consideration.

C. Underserved Markets

1. Manufactured Housing Market—§ 1282.33

The below section describes the final rule provisions for the manufactured housing market and explains FHFA's rationale for adopting four Regulatory Activities for this market. The Regulatory Activities are for: (1) manufactured homes titled as real property, (2) manufactured homes titled as personal property, (3) manufactured housing communities owned by government units or instrumentalities, nonprofits, or residents; and (4) manufactured housing communities with specified minimum tenant pad lease protections.

FHFA's final rule does not adopt the small manufactured housing community Regulatory Activity that was included in the proposed rule. The below section also discusses the affordability methodology adopted in the final rule.

a. Eligible Activities—§ 1282.33(b)

Section 1282.33(b) of the final rule provides that Enterprise activities eligible to be included in a Plan for the manufactured housing market are activities that facilitate a secondary market for mortgages on residential properties for very low-, low-, or moderate-income families in the manufactured housing market. The manufactured housing market consists of manufactured homes and manufactured housing communities. As defined in the final rule, manufactured homes include: (i) manufactured homes titled as personal property (also referred to as "chattel"), and (ii) manufactured homes titled as real property. The proposed rule would have included manufactured housing

communities and manufactured homes titled as real property, but not manufactured homes titled as chattel. As further discussed below, after extensive research and consideration of the comments received on chattel lending, FHFA has also included Enterprise support for chattel loans as a Regulatory Activity in the final rule.

Definition of "Manufactured Home"

Consistent with the proposed rule, § 1282.1 of the final rule defines "manufactured home" to mean a home as defined in section 603(6) of the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended (42 U.S.C. 5401 et seq.) (referred to here as the "HUD Code"). As in the proposed rule and because of concerns about the structural integrity of pre-HUD Code homes, activities related to manufactured homes that are not compliant with the HUD Code are excluded from the definition and activities supporting them are not eligible for Duty to Serve credit in the final rule.

Some commenters favored Duty to Serve credit for Enterprise support for financing of pre-HUD Code manufactured homes (i.e., those built prior to June 15, 1976). A nonprofit organization focused on rural housing estimated that one-fifth of rural manufactured homes are pre-HUD Code mobile homes.[20] In joint comment letters, two manufactured housing trade associations noted that in "55 and over" manufactured housing communities, some residents are low-, fixed-income seniors with no source of financing for their pre-HUD Code mobile homes. They further noted that in "all age communities," pre-HUD Code home occupants are often low-income and work "blue collar" jobs or depend on government assistance.

[20] See Housing Assistance Council, "Moving Home – Manufactured Housing in Rural America (Dec. 2005), available at http://www.ruralhome.org/storage/documents/movinghome.pdf.

Pre-HUD Code homes, even those with modifications, do not meet HUD standards and cannot be accepted as compliant with the HUD Code.[21] FHFA acknowledges the financing needs for owners of pre-HUD Code homes and may reconsider the matter in a future rulemaking if appropriate methodologies can be found for assuring the structural integrity of the homes.

b. Regulatory Activities—§ 1282.33(c)

Section 1282.33(c) of the final rule establishes four specific Regulatory Activities under the manufactured housing market. Two of these Regulatory Activities pertain to Enterprise support for financing of single-family manufactured homes titled as real property or chattel, and two pertain to Enterprise support for financing of blanket loans for manufactured housing communities.

(i) Chattel: Loans on Manufactured Homes Titled as Personal Property—§ 1282.33(c)(2)

Section 1282.33(c)(2) of the final rule establishes a Regulatory Activity for Enterprise activities related to facilitating a secondary market for loans on manufactured homes titled as personal property, also referred to as chattel. The proposed rule did not include chattel lending as an eligible activity under the manufactured housing market. The proposed rule discussed issues related to chattel loans and specifically requested comment on whether the Enterprises should receive Duty to Serve credit for purchasing chattel loans, either on a pilot or an ongoing basis.

FHFA received almost 1,400 comment letters on whether Enterprise purchases of

[21] See generally U.S. Department of Housing and Urban Development, "Frequently Asked Questions" (HUD homepage), available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/rmra/mhs/faqs.

chattel loans should be an eligible activity that receives Duty to Serve credit. The vast majority of the letters were form letters signed by individuals and small businesses in the manufactured housing industry recommending Duty to Serve credit for Enterprise support of chattel loans. FHFA also received many individual comment letters from trade associations, consumer advocacy organizations, and manufactured housing community owners and operators supporting Duty to Serve credit for chattel loans. Three Members of Congress also supported Duty to Serve credit for chattel loans.

Several trade associations for the manufactured housing industry favored Duty to Serve credit for chattel loans but acknowledged that modifications such as credit enhancements and greater borrower protections could facilitate secondary market support for these loans. One trade association for the manufactured housing industry had a different view, strongly supporting Duty to Serve credit for chattel loans but opposing any additional credit enhancements or borrower protections for chattel loans. All of these manufactured housing industry commenters advised that manufactured housing is a significant source of unsubsidized affordable housing and manufactured home borrowers have significant needs for financing that are not being met. The commenters further stated that the absence of a secondary market and the lack of available financing for chattel loans have severely impacted the manufactured housing industry, resulting in closures of many factories nationwide. Several trade associations for the manufactured housing industry and a financial marketing corporation commented that much of the pricing disparity between chattel loans and real estate loans results from the absence of a significant secondary market for chattel loans.

In a change from their comments on the 2010 proposed rule, a number of

consumer advocacy organizations and nonprofit organizations favored Duty to Serve credit for chattel loans as long as there are adequate consumer protections. A state housing finance agency similarly supported Duty to Serve credit for a chattel pilot provided there are strong underwriting and tenant protections.

A federal financial regulatory agency did not take a position on Duty to Serve credit for chattel loans but urged FHFA to protect chattel loan borrowers, whom the agency stated are particularly vulnerable to unfair lending practices.

A trade association for community bankers was among the few commenters opposing Duty to Serve credit for chattel loans. The trade association expressed general concern about the Enterprises' safety and soundness, as well as the risks that attend chattel lending, stating that more could be done to support real estate lending for manufactured housing, which the trade association stated is a safer loan product. A joint comment letter signed by several policy advocacy organizations and nonprofit organizations opposed any Duty to Serve credit for chattel loans, noting the abuses and high default rates detailed in the **SUPPLEMENTARY INFORMATION** to the proposed rule.

Freddie Mac opposed Duty to Serve credit for chattel loans, as it did in its comment letter on the 2010 proposed rule, without providing a rationale. Fannie Mae did not address chattel loans, a change from its comment letter on the 2010 proposed rule in which it opposed Duty to Serve credit for chattel loans.

After considering the comments, FHFA has decided to establish a new Regulatory Activity in § 1282.33(c)(2) of the final rule for Enterprise support for chattel loans. While FHFA expects the Enterprises to also serve manufactured homes titled as real

estate, which include borrower protections and is discussed in greater detail in the next section, FHFA has also determined that the pursuing pilot initiatives, in safe and sound manner, that serve very low-, low-, and moderate-income households who live in manufactured homes titled as chattel, should be eligible for Duty to Serve credit.

FHFA makes this change in the final rule having considered the feedback from many commenters in support of providing the Enterprises with Duty to Serve credit for chattel-titled lending. FHFA also makes this change having considered the potential for the Enterprises' to improve liquidity and access to credit in the manufactured housing market generally and for very low-, low-, and moderate-income households.[22] For example the percentage of new manufactured homes titled as chattel has increased from 67 percent in 2009 to 80 percent in 2015.[23] Additionally, efforts to expand the real estate titled share of the market have faced some difficulties.[24] FHFA also makes this change having considered the potential for the Enterprises to improve the chattel lending market through standardization that includes borrower protections.

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[22] One indicator of how little liquidity exists is that over 70 percent of manufactured home loans reported under HMDA are held in portfolio by the lenders, compared with 16 percent for site-built homes. See Consumer Financial Protection Bureau, "Manufactured-housing consumer finance in the United States," p. 37 (Sept. 2014), available at http://files.consumerfinance.gov/f/201409_cfpb_report_manufactured-housing.pdf.

[23] See U.S. Commerce Department, Census Bureau, "Cost & Size Comparisons For New Manufactured Homes and New Single-Family Site-Built Homes" (2007-2015), available at https://www.census.gov/data/tables/2015/econ/mhs/2015-annual-data.html.

[24] One factor inhibiting the potential for market change is that manufactured home dealers and lenders are not legally obligated to explain the titling of homes to buyers or its implications. See generally Ann M. Burkhart, Bringing Manufactured Housing into the Real Estate Finance System, 37 Pepp. L. Rev. 427, 443 (Mar. 2010), available at http://cfed.org/assets/pdfs/manufactured_housing/advocacy_center/mht/Burkhart_MH_Finance.pdf. Another factor is that state laws for converting the titles of manufactured homes from chattel to real property present challenges. For example, some states prohibit converting titles for manufactured homes on leased land. See National Consumer Law Center, "Titling Homes as Real Property" (Oct. 2015), available at https://www.nclc.org/images/pdf/manufactured_housing/titling-homes2.pdf. See also Ann M. Burkhart, Bringing Manufactured Housing into the Real Estate Finance System, 37 Pepp. L. Rev. 427, 443-444 (Mar. 2010), available at http://cfed.org/assets/pdfs/manufactured_housing/advocacy_center/mht/Burkhart_MH_Finance.pdf.

In making this change in the final rule, FHFA is also aware of the challenges and risks, which FHFA discussed in detail in the proposed rule, that the Enterprises would face in exploring the chattel lending market. As is discussed in the following sections, FHFA would require the Enterprises to methodically assess ways to mitigate these challenges and risks before beginning any chattel loan purchases. Additionally, FHFA would also conduct a thorough review and assessment of any chattel loan pilot initiative, both when proposed by the Enterprise and, if approved, throughout its execution by the Enterprise. This review is a core part of FHFA's regulatory responsibilities in overseeing all of the Enterprises' Duty to Serve activities, but FHFA believes it is appropriate to emphasize this point for chattel lending since it would be a new purchase activity for the Enterprises.

Review of Enterprise Chattel Loan Pilot Initiatives. Initially, only approved chattel loan pilot initiatives included in an Enterprise's Plan would be eligible for Duty to Serve credit. Under an Enterprise Plan to pursue such a chattel loan pilot initiative, FHFA review of the pilot initiative would also be required under the new product and activities statute prior to any purchases by the Enterprise of chattel loans.[25] To facilitate a timely new product review, an Enterprise's Plan should indicate when the Enterprise expects to commence purchasing chattel loans as part of a pilot initiative prior to any purchases by the Enterprise of chattel loans.

As described in greater detail below, FHFA will carefully assess a number of factors in reviewing any chattel loan pilot or ongoing initiative included in an Enterprise Plan. While the final rule does not contain pre-determined limitations on pilot chattel

[25] See 12 U.S.C 4541.

loan initiatives, FHFA could include such parameters in the Evaluation Guidance. For example, the final rule does not restrict the location of the manufactured homes (within or outside of a manufactured housing community), the volume of Enterprise chattel loan purchases, the duration of any initiative, or the Enterprises' counterparties. Nor does the final rule restrict the specific terms and features of an acceptable chattel loan product beyond those restrictions applicable to all single-family loan purchases. However, FHFA could address some of these parameters in the Evaluation Guidance, and FHFA will also consider them in determining whether to provide a Non-Objection to an Enterprises Plan for the manufactured housing market and for purposes of the new product review.

FHFA will review the results of a chattel loan pilot initiative conducted by an Enterprise, including an assessment of safety and soundness. If at any time FHFA believes that such a pilot poses a risk to the safety and soundness of the Enterprises, as with any activity under a Duty to Serve Plan, FHFA would require the Enterprise to modify or stop its activities accordingly. If, however, FHFA determines that a pilot initiative has been successful, and the Enterprise wishes to pursue an ongoing initiative for chattel loans, that ongoing initiative would require FHFA approval.

The below sections discuss a number of factors that FHFA will consider in reviewing any Enterprise Plan to pursue pilot chattel loan initiatives, including the financial performance of chattel loans, possible risk mitigants, and borrower and tenant protections.

Financial Performance of Chattel Loans. An important factor in determining the potential success of any chattel pilot would be access to reliable data about chattel loan performance. According to manufactured housing industry representatives, since the

manufactured housing subprime crisis in 1999 to 2000, manufactured home loan underwriting standards and practices have sharply improved.[26] However, little default and foreclosure data for conventional chattel loans are publicly available to determine how well chattel loans have performed.[27]

This limited data about chattel lending has not only been a challenge for FHFA in developing this rule, but FHFA also understands that it will be an ongoing challenge for the Enterprises in developing any chattel loan pilot initiative. Therefore, as part of any Plan that includes chattel loan activities, FHFA expects that the Enterprises would work to develop better financial performance data both in preparation for a chattel loan pilot purchase initiative and through the implementation of the pilot itself.

One source of chattel loan data that, while limited, would be relevant in considering a chattel loan pilot initiative is the Federal Housing Administration's (FHA) Title I manufactured home chattel loans insurance program. Data for the 2010 originations of Title I chattel loans show that as of year-end 2015, claims had been filed with FHA on 218 out of 1,789 loans endorsed (12 percent).[28] Data for Title I chattel loans showing the percentage of delinquencies, however, are not available. Also, credit score data on Title I loans are incomplete due to the lack of credit scores for some borrowers who do not have traditional credit accounts on which scores are generated by

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[26] See Cavco Industries, Inc., "Annual Report on Form 10-K for the Fiscal Year Ended March 28, 2015," pp. 8-9 (Mar. 28, 2015), available at http://investor.cavco.com/public/phhweb/gallery/userupload/ir-doc-386/cvco_2015.3.28_10k.pdf; George Allen, "Manufactured Housing Primer," pp. 2-3 (Franklin Printing, Apr. 2010). See generally Ronald Wirtz, "Home, sweet (manufactured?) home," Fedgazette (Federal Reserve Bank of Minneapolis, July 1, 2005), available at https://www.minneapolisfed.org/publications/fedgazette/home-sweet-manufactured-home.

[27] Regarding the paucity of data on manufactured housing overall, see generally Matthew Furman, "Eradicating Substandard Manufactured Homes: Replacement Programs as a Strategy," p. 4 (Nov. 2014) (A paper submitted to Harvard's Joint Center for Housing Studies and NeighborWorks America), available at http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w15-3_furman.pdf.

[28] This was one of the higher claim rates in recent years.

the national credit agencies. The Office of Management and Budget projects that Title 1 chattel loans for fiscal year 2017 will have a 19 percent recovery rate.[29] FHA data further show that interest rates on Title I chattel loans ranged around 7 to 8 percent in recent years. These rates may appear high in comparison to interest rates for site-built homes with fixed rate, 30-year mortgages. However, the Title I rates are relatively low compared to those for conventional chattel loans, which were reported to be in the 7 to 13 percent range in early 2015.[30]

FHFA expects that the Enterprises, in pursuing a chattel loan pilot initiative, would significantly build on the data available through FHA's Title I program by partnering with manufactured housing lenders to access performance data on chattel loans, including, where possible, for chattel loans currently held in portfolio by lenders that serve this market.

As the Enterprises develop information about chattel loan performance, FHFA expects that this would impact Enterprise decisions on how to appropriately price these loans. On this point, a trade association for the manufactured housing industry suggested charging appropriate loan level price adjustments and guarantee fees as possible conditions for chattel initiatives by the Enterprises. The pricing on the FHA Title I program has resulted in a projected 4 percent surplus over its expected costs.[31] Also, loan

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[29] See Office of Management and Budget, Federal Credit Supplement – Budget of the U.S. Government, Fiscal Year 2017, p. 14 (Table 4) (2016) [hereinafter cited "OMB Forecast"], available at https://www.whitehouse.gov/sites/default/files/omb/budget/fy2017/assets/cr_supp.pdf.

[30] See Paola Iuspa, "Refinancing mobile home loan at lower rate," Bankrate.com (Jan. 23, 2015), available at http://www.bankrate.com/finance/refinance/refinancing-mobile-home-loan.aspx. One researcher found that at the middle of 2012, chattel financing rates were typically at 15 percent. See Darla Hailey, "Mobile Home Decommissioning and Replacement Research in the Pacific Northwest," p. 7 (Sept. 2016), available at https://rtf.nwcouncil.org/subcommittee/small-and-rural-utility-rtf-technical-support-subcommittee.

[31] See OMB Forecast, p. 6 (Table 2) (2016), available at https://www.whitehouse.gov/sites/default/files/omb/budget/fy2017/assets/cr_supp.pdf.

modifications for some borrowers have been one way to allow them to stay in their homes and, at the same time, mitigate losses to lenders. Part of the assessment of the performance of chattel loans would include analysis of available loan modification efforts.

Risk Mitigants. In designing a chattel loan pilot initiative, FHFA would also expect the Enterprises to incorporate appropriate risk mitigants into the pilot design. In addition to limiting the volume or duration of the chattel loan pilot initiative, one type of risk mitigant could be to tighten underwriting requirements for credit scores, down payments, loan-to-value ratios (LTV), debt-to-income ratios, and borrower reserves. Another risk mitigant could be having chattel loans purchased by the Enterprises secured not only by a lien on the title to the home, but also by a lien on the underlying land, as one manufactured housing trade association suggested. Additionally, loan modifications for some borrowers have been one way to allow them to stay in their homes and, at the same time, mitigate losses to lenders.

Credit enhancements that share credit risk with private investors are an additional risk mitigant, although the Enterprises would need to develop counterparty relationships and approaches tailored for these loans. None of the Enterprises' approved mortgage insurer counterparties currently offers mortgage insurance for chattel loans, and bond insurance is also unavailable.

The Enterprises could require loan sellers to repurchase the loan or retain a participation of at least ten percent in the loan to meet the requirements of the

Enterprises' charter acts.[32]

In pursuing such an approach, the Enterprises would need to consider the financial strength of the counterparty, which would be an important factor in assessing the total credit risk of a transaction. Additionally, as the Enterprises work to develop loan performance data, the Enterprises could explore developing credit risk transfer approaches specific to chattel loans, separate from the credit enhancement requirements of the charter acts.

FHFA would assess these and any other risk mitigants included by an Enterprise in a proposed chattel loan pilot before the Enterprise could begin any loan purchases.

Borrower and Tenant Protections. Before approving any chattel loan purchases by the Enterprises, FHFA would also expect the Enterprises to require meaningful borrower and tenant protections beyond those required under current law. As one regulatory agency commented, chattel loan borrowers are subject to increased risks due to the lack of borrower and tenant protections for chattel loans. The relative lack of consumer protections, compared to those households with a manufactured home titled as real estate, was also discussed at length in the proposed rule. The main protections for real estate mortgage borrowers, which chattel loan borrowers lack, are those afforded by the Real Estate Settlement Procedures Act (RESPA), which prohibits inappropriate kickbacks, requires disclosures of settlement costs, and requires proper loan servicing.[33] The proposed rule described potential difficulties in replicating RESPA-like protections

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[32] See generally 12 U.S.C. 1717(b)(1) (Fannie Mae Charter Act); 12 U.S.C. 1454(a)(1) (Freddie Mac Charter Act).

[33] See generally 12 U.S.C. Ch. 27; Consumer Financial Protection Bureau, "CFPB Consumer Laws and Regulations – RESPA" (Apr. 2015), available at http://files.consumerfinance.gov/f/201503_cfpb_regulation-x-real-estate-settlement-procedures-act.pdf.

for chattel loan borrowers.[34] A number of manufactured housing trade associations commented in favor of adding these protections for chattel loan borrowers. Several nonprofit organizations suggested that housing counseling be required for chattel loan borrowers, although another nonprofit organization pointed out that there is a shortage of counselors with training in manufactured housing. FHFA is also concerned about a lack of tenant protections in the pad leases for chattel borrowers whose homes are located on leased land.

FHFA expects that the Enterprises would seek feedback from stakeholder groups about how best to design the borrower and tenant protections for any chattel loan pilot initiative. This approach will provide important input on how the Enterprises should balance providing appropriate borrower and tenant protections with designing the pilot in a way that is operationally feasible for the Enterprises and their counterparties.

Preparations for Loan Purchases. FHFA understands that the Enterprises would need to expend substantial effort and would incur non-trivial costs prior to implementing a chattel loan pilot initiative.[35] As discussed above concerning access to better financial performance data, Enterprise research and development efforts would need to precede any purchases of chattel loans, including developing expertise, designing pilot parameters, reviewing potential counterparties, researching investors and securities structures, and developing appropriate borrower and tenant protections to be integrated as counterparty requirements. Enterprise counterparties would also need to be prepared to accurately report their chattel loan data and to adopt strong compliance and internal

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[34] See 80 FR at 79190 (Dec. 18, 2015).

[35] Regarding the difficulties involved in establishing an Enterprise pilot for chattel loans, see generally Titus Dare, "A Deeper Look at why the GSEs say no to Securitizing Chattel Loans," MHProNews (May 24, 2016), available at http://www.mhmarketingsalesmanagement.com/blogs/industryvoices/tag/titus-dare/.

auditing standards.

The final rule, therefore, allows for a wide range of Enterprise activities supporting chattel loans to be eligible for Duty to Serve credit. For example, Enterprise outreach to potential counterparties could count under the outreach evaluation area, and Enterprise research and development could count under the outreach evaluation area or the loan product evaluation area even where it does not result in actual purchases of chattel loans by the Enterprise. The Enterprises' publication of their research and findings could benefit the entire manufactured housing market, which could also work to further liquidity in this market.

Request for Information (RFI). In light of the many considerations that the Enterprises would need to make in designing and proposing a chattel pilot initiative, FHFA has determined to issue an RFI to the public on what an Enterprise should include in a chattel pilot initiative, if an Enterprise decides to pursue a pilot initiative. FHFA has determined that the RFI will conclude in time for the Enterprises to consider the input from the RFI in any chattel pilot initiative that may be included in an Enterprise's draft Plan.

(ii) Manufactured Homes Titled as Real Property—§ 1282.33(c)(1)

Consistent with the proposed rule, § 1282.33(c)(1) of the final rule establishes a Regulatory Activity for Enterprise support of financing for manufactured homes titled as real property.

A wide range of commenters asserted that there is a need for Enterprise support for this market. Manufactured housing industry commenters stated that while real estate-titled homes are a smaller part of the manufactured housing market than chattel-titled

homes, there are changes the Enterprises could make to assist this market. A manufactured housing trade association suggested that Enterprise guarantee fees for loans on real estate-titled homes be comparable to those for loans on site-built homes. The commenter also recommended that a number of terms and conditions of the Enterprises' mortgage products for real estate-titled homes be modified, such as financing of property damage insurance, liberalizing the LTV requirements, and financing pre-HUD Code homes in some instances.

Except for the general requirements applicable to all single-family loan purchases, the final rule does not incorporate commenters' specific suggestions regarding the terms and conditions for mortgages on real estate-titled homes purchased by the Enterprises. These suggestions are more appropriate to be raised by the commenters directly with the Enterprises during the development and implementation of the Enterprises' Plans.[36]

The proposed rule specifically requested comment on whether Duty to Serve credit for real estate-titled manufactured homes should be limited to certain situations, such as when refinancing borrowers with excessive interest rates.[37] A wide variety of commenters opposed any limitations on Duty to Serve credit for real estate-titled homes because of the shortage of funding for manufactured housing overall and the acute housing needs of lower-income borrowers. FHFA is persuaded by these comments and has not included any such limitations in the final rule.

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[36] Commenters in a number of circumstances addressed individual underwriting recommendations. As noted throughout, FHFA encourages the Enterprises to consider this feedback, although FHFA also notes that this should not be construed as an endorsement by FHFA of those comments and FHFA will review any underwriting guidelines as part of its review of Enterprise Plans for Non-Objection.

[37] See 80 FR at 79190 (Dec. 18, 2015).

FHFA notes that mortgages on real estate-titled manufactured homes generally perform well. The borrowers for these homes are subject to the same consumer protections as borrowers for site-built homes, and the housing is affordable relative to site-built housing. In addition, the Enterprises already have an infrastructure in place for purchasing and servicing mortgages on real estate-titled manufactured homes.

(iii) Manufactured Housing Communities—§ 1282.33(c)(3)

Section 1282.33(c)(3) of the final rule establishes the following Regulatory Activities for Enterprise support for manufactured housing communities, with some modifications from the proposed rule: (1) support for blanket loans on government-, nonprofit-, or resident-owned manufactured housing communities, and (2) support for blanket mortgages on manufactured housing communities with minimum tenant protections in the pad leases. The definition of "manufactured housing community" in § 1282.1 of the final rule remains unchanged from the proposed rule – a tract of land under unified ownership and developed for the purpose of providing individual rental spaces for the placement of manufactured homes for residential purposes within its boundaries.

The final rule does not allow additional Duty to Serve credit where a manufactured housing community qualifies under both Regulatory Activities because government-, nonprofit-, or resident-owned owned communities are likely to already have meaningful tenant pad lease protections.

Freddie Mac supported Duty to Serve credit for activities that generally support affordable manufactured housing communities, without limiting eligibility to the specific Regulatory Activities in the proposed rule, stating that this would be consistent with Congressional intent.

A manufactured housing trade association opposed any Duty to Serve credit for Enterprise support for manufactured housing communities, maintaining that manufactured home communities are not an underserved market and do not address the critical challenge for homeowners, which is affordable financing for chattel-titled manufactured homes facilitated by a strong Enterprise secondary market. Two state trade associations for the manufactured housing industry similarly opposed Duty to Serve credit for manufactured housing community loans and preferred that the Enterprises focus on manufactured home loans.

As further discussed below, the final rule retains two of the proposed Regulatory Activities, with some modifications, but does not include the third proposed Regulatory Activity for Enterprise support for financing small manufactured housing communities.

(a) Small Manufactured Housing Communities

In a change from the proposed rule, the final rule does not include Enterprise support for the financing of blanket loans on small manufactured housing communities (communities with 150 or fewer pads) as a Regulatory Activity. As discussed in the **SUPPLEMENTARY INFORMATION** to the proposed rule, this Regulatory Activity was proposed because the Enterprises' purchases to date had tended to be for loans on larger manufactured housing communities, and existing funding for smaller communities was likely to have variable interest rates and balloon payments at the end of the mortgage term.

Few commenters specifically addressed this proposed Regulatory Activity. A trade association supported the proposed Regulatory Activity because the need for financing in this market is for the older or rural communities that tend to be smaller in

size. The commenter further suggested that the Enterprises develop prudent underwriting standards that would expand Enterprise loan purchases beyond higher-end communities. In addition, the commenter suggested that the Enterprises collect, analyze, and publish data on manufactured housing communities, in order to develop investor interest. The commenter advised that this would improve liquidity and lower the costs to borrowers. A state housing finance agency supported the proposed Regulatory Activity, stating that small communities need the most financing assistance. A manufactured housing community investor and consultant also supported the proposed Regulatory Activity without providing a rationale.

A larger number of commenters opposed the proposed Regulatory Activity. For example, a policy advocacy organization opposed basing a Regulatory Activity on the size of a community, stating that while it is reasonable to assume that smaller manufactured housing communities face greater challenges in attracting capital than larger communities, the Enterprises already support financing of smaller communities. The commenter instead favored Enterprise support for manufactured communities located in geographies with greater needs, such as high-cost areas where manufactured housing community preservation would secure affordable housing for many years. The commenter asserted that of the three proposed Regulatory Activities for manufactured housing communities, the Enterprises would favor serving smaller communities because it would be the easiest Regulatory Activity to pursue.

Most other commenters who addressed the proposed Regulatory Activities for manufactured housing communities also saw no particular need for targeted Enterprise support for the small manufactured community submarket. The commenters said that

there is no correlation between the size of a community and the affordability it provides to residents with limited financial means. A trade association for owners of manufactured homes opposed the proposed Regulatory Activity, commenting that the number of pads in a community is less relevant than the need to provide tenant protections. In addition, a trade association for the manufactured housing industry and a state housing finance agency expressed doubts about conditioning access to Duty to Serve credit on the size of the manufactured housing community. Neither Enterprise supported the proposed Regulatory Activity, although Freddie Mac favored service to this market as an "Additional Activity." Freddie Mac stated that very small manufactured housing communities have a higher chance of being below investment grade and that there are economy of scale difficulties with small communities. Freddie Mac also stated that 25 percent of its blanket loan portfolio is loans on communities with fewer than 150 pads. An academician stated that the proposed Regulatory Activity would encourage service to the least efficient sector of the market. In the **SUPPLEMENTARY INFORMATION** to the proposed rule, FHFA noted that blanket loans for smaller manufactured housing communities are frequently originated by local banks or credit unions and held in portfolio. FHFA did not receive comment letters from community banks or credit unions indicating support for or opposition to this proposed Regulatory Activity.

After considering the comments, it appears that this proposed Regulatory Activity would provide relatively less assistance to the very low-, low-, and moderate-income families targeted for assistance by the Duty to Serve, as compared with the two Regulatory Activities for manufactured housing communities retained in the final rule.

Nevertheless, if an Enterprise proposed support for smaller manufactured housing communities as a qualifying Additional Activity and provided detailed information on a targeted market need, FHFA would consider it in reviewing the Enterprise's Plan.

(b) Manufactured Housing Communities Owned by Government Units or Instrumentalities, Nonprofits, or Residents—§ 1282.33(c)(3)

Consistent with the proposed rule, § 1282.33(c)(3) of the final rule establishes a Regulatory Activity for Enterprise support for mortgages on manufactured housing communities owned by government units or instrumentalities, nonprofits, or residents. The final rule defines "resident-owned manufactured housing community" as a manufactured housing community for which the terms and conditions of residency, policies, operations, and management are controlled by at least 51 percent of the residents, either directly or through an entity formed under the laws of the state. FHFA has changed the percentage of residents in this definition from 50 percent in the proposed rule to 51 percent in the final rule so that control by a majority of the residents would be required for the community to be eligible for credit, as Fannie Mae suggested in its comment letter.

A number of policy advocacy organizations and nonprofit organizations supported this proposed Regulatory Activity because these types of communities play a key role in preserving sustainable manufactured housing communities and also tend to be safer investments. A nonprofit organization stated that lot rents in resident-owned communities remain affordable following the residents' purchase of the communities.

Several manufactured housing trade associations opposed the proposed Regulatory Activity, as well as any other Regulatory Activity for manufactured housing

communities, based on the view that support for manufactured housing communities would not carry out the Duty to Serve mandate. For instance, one commenter objected to the type of ownership of a manufactured housing community affecting access to capital, and stated that government-owned manufactured housing communities should not have easier access to Enterprise support than other types of manufactured housing communities.

FHFA has determined that making Enterprise support for manufactured housing communities owned by government units or instrumentalities, nonprofits, or residents eligible for Duty to Serve credit is consistent with the Enterprises' Duty to Serve responsibilities because these types of communities typically serve lower-income residents, remain residential communities, promote fair treatment of tenants, and help preserve permanent affordability for their residents.[38] One study found that residents of resident-owned communities "have consistent economic advantages over their counterparts in investor-owned communities, as evidenced by lower lot fees, higher average home sales prices, faster home sales, and access to fixed rate home financing."[39] Although government-, nonprofit-, and resident-owned communities currently make up a very small portion of the overall manufactured housing community market, more active support by the Enterprises for communities with these types of ownership structures could encourage more communities to convert to these forms of ownership. Accordingly, consistent with the proposed rule, the final rule establishes a Regulatory Activity for

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[38] See generally Millennium Housing – Mission Statement, available at http://www.millenniumhousing.net/#Mission_Statement

[39] Sally K. Ward, Charlie French & Kelly Giraud, "Resident Ownership in New Hampshire's 'Mobile Home Parks:' A Report on Economic Outcomes" (rev. 2010), available at http://scholars.unh.edu/cgi/viewcontent.cgi?article=1009&context=carsey.

Enterprise support for financing manufactured housing communities owned by government units or instrumentalities, nonprofits, or residents.

(c) Manufactured Housing Communities with Specified Minimum Tenant Pad Lease Protections—§ 1282.33(c)(4)

Section 1282.33(c)(4) of the final rule establishes a Regulatory Activity for Enterprise support for blanket loans on manufactured housing communities that have certain specified minimum pad lease protections for tenants. These protections address renewable lease terms, rent increases and payments, unit sale and sublease rights, and advance notice of a planned sale or closure of the community. The final rule incorporates several modifications to the tenant protections in the proposed rule. By establishing this Regulatory Activity, FHFA seeks to encourage manufactured housing communities to adopt pad lease protections for tenants, or enhance existing pad lease protections. The minimum pad lease protections in the final rule are:

- One-year renewable lease term unless there is good cause for nonrenewal;
- 30-day written notice of rent increases;
- 5-day grace period for rent payments, and the right to cure defaults on rent payments; and
- Right of tenants to:

  (A) Sell the manufactured home without having to first relocate it out of the community;

  (B) Sublease the home or assign the pad lease for the unexpired term to the new buyer of the tenant's manufactured home without any unreasonable restraint;

  (C) Post "For Sale" signs;

(D) Sell the manufactured home in place within a reasonable time period after eviction by the manufactured housing community owner; and

(E) Receive at least 60 days advance notice of a planned sale or closure of the manufactured housing community.

The final rule changes the proposed rule by: (1) clarifying that Enterprise support of financing of manufactured housing communities located in jurisdictions with laws providing tenants with equal or greater protections than those specified in the rule is eligible for Duty to Serve credit; (2) making the pad lease protections available to tenants at all times and not only in cases of default on rent payments; (3) reducing the advance notice period for planned sale or closure of the community from 120 days to 60 days; and (4) not including the proposed provisions on bona fide offers of sale of the community. The changes are discussed further in the sections below.

As discussed in the **SUPPLEMENTARY INFORMATION** to the proposed rule, the final rule does not impose requirements on sellers and servicers to oversee manufactured housing community owners' compliance with the pad lease protections. Also, consistent with the approach in the proposed rule, the final rule does not require that covenants in the blanket loan documents for the manufactured housing community provide that noncompliance by community owners with the pad lease protections constitutes an event of default. Instead, tenants would need to file private lawsuits to remediate any landlord noncompliance with the lease provisions.

Both Enterprises commented that manufactured housing communities that do not have the proposed pad lease protections are able to obtain financing without Enterprise support. This is due to the current strong market for manufactured housing community

financing.[40] A policy advocacy organization that supported having strong tenant protections as a concept also expressed concern that requiring tenant protections could deter community owners from selling their loans to the Enterprises. FHFA notes that this Regulatory Activity would not require the owner of a manufactured housing community to agree to these lease provisions as a condition of selling its loan to an Enterprise. However, if an Enterprise decided to include this Regulatory Activity in its Plan, the Enterprise could receive Duty to Serve credit for those transactions with community owners who did adopt the specified lease provisions. FHFA would take into consideration market competition and the relative difficulty of encouraging community owners to adopt these lease provisions in assessing Duty to Serve credit.

A number of commenters addressed the specific tenant pad lease protections in the proposed rule. Commenters clustered into two groups, with most manufactured housing industry commenters and the Enterprises opposing the proposed pad lease protections, and most consumer advocacy groups favoring even stronger pad lease protections. The manufactured housing industry commenters opposed the pad lease protections because the industry prefers a funding option unconstrained by pad lease protection requirements. The Enterprises also opposed pad lease protections on the grounds that tenant protections are better handled by the state legislatures.

Policy advocacy organizations and nonprofit organizations supported having

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[40] See generally Tony Petosa, Nick Bertino & Erik Edwards, "Wells Fargo Multifamily Capital, Manufactured Home Community Financing Handbook," pp. 5-8 (10th ed., 2d Qtr. 2016). See Peter Grant, "Singapore's Sovereign-Wealth Fund Is in Talks to Buy Manufactured-Home Owner," Wall Street Journal (June 28, 2016) ("Well-capitalized private equity and publicly traded REITs are eager to acquire these properties."), available at http://www.wsj.com/articles/singapores-sovereign-wealth-fund-is-in-talks-to-buy-manufactured-home-owner-1467106203. For a discussion of the high desirability of manufactured housing communities as an investment, see generally Nancy Olmsted, Marcus & Millichap, "Investors Competing for Limited Supply of Manufactured Home Communities," First Half 2015, Manufactured Housing Research Report (2015).

tenant pad lease protections, either as a stand-alone Regulatory Activity, or as an eligibility requirement for all manufactured housing community loans purchased by the Enterprises. One policy advocacy organization supported the Enterprises' developing a standardized lease containing pad lease protections, and urged that it include free speech rights and rights of association.

A manufactured housing tenants' organization recommended that FHFA adopt the pad lease protections contained in the American Association of Retired Persons (AARP) Model Act.[41] The commenter further advised that 14 states lack any pad lease protection laws for manufactured housing community tenants. The commenter expressed concern that states might adopt FHFA's proposed pad lease protections as a ceiling on tenant protections rather than as the minimum baseline that FHFA intended. A policy advocacy organization stated that the Enterprises should use their market influence to support the proposed pad lease protections or those in state or local laws, whichever are more protective.

A state housing finance agency recommended including safeguards in the final rule against large rent increases in manufactured housing communities. In developing this Regulatory Activity, FHFA sought to address the most concerning reported practices in designing the tenant pad lease protections for the proposed and final rule[42] and has determined that wholesale adoption of the AARP Model Act into tenant lease protections in the final rule would not be practical. However, after considering the comments, FHFA

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[41] See generally Carolyn L. Carter, Odette Williamson, Elizabeth DeArmond & Jonathan Sheldon, "Manufactured Housing Community Tenants: Shifting the Balance of Power – A Model State Statute," AARP Public Policy Institute (Rev. Ed. 2004), [hereinafter cited "AARP Model Act"], available at http://assets.aarp.org/rgcenter/consume/d18138_housing.pdf.

[42] See generally Darren Cunningham, "Another Mobile Home Tenant Facing $25k Lawsuit After Selling Her Own Home," Fox17online (Apr. 7, 2014) (website), available at http://fox17online.com/2014/04/07/another-mobile-home-tenant-sued-for-25k-after-selling-her-own-home/.

has determined that certain modifications and clarifications to the proposed tenant lease protections should be made in the final rule, which are discussed below.

Equivalent Pad Lease Protection Laws. The **SUPPLEMENTARY INFORMATION** to the proposed rule stated that where a jurisdiction has laws requiring certain pad lease protections for manufactured housing communities that are equal to or greater than the minimum pad lease protections in the proposed rule, communities in those jurisdictions would be eligible for Duty to Serve credit under the proposed Regulatory Activity. The text of the proposed rule referred to the protections as "minimum" protections. Some commenters apparently misunderstood this reference and stated that there could be conflicts between the proposed pad lease protections and state and local pad lease protection laws. Some manufactured housing community owners expressed concern about the impact of the proposed pad lease protections because they perceived conflicts between these requirements and state and local laws, and stated that it would be inappropriate to condition financing on these requirements.

FHFA did not intend that the minimum pad lease protections in the proposed rule be a suggested ceiling for pad lease protections to be adopted by states or localities. Instead, FHFA intends that the pad lease protections finalized here act as a floor for tenant protections in manufactured housing communities. The final rule clarifies this by stating explicitly that manufactured housing communities in jurisdictions with laws providing tenants with equal or greater pad lease protections than those specified in the Regulatory Activity are eligible for Duty to Serve credit.

Right to Sell Manufactured Homes and Sublease or Assign Pad Leases. The proposed rule would have provided that upon a default by tenants on their rent payments,

the tenants would have the right to: (1) sell their home without having to first relocate it out of the community; (2) post "For Sale" signs; (3) sublease or assign their pad lease for the unexpired term without unreasonable restraint; and (4) sell their home within a reasonable period of time after eviction. The final rule makes these protections available to tenants at all times regardless of whether they have defaulted on their rent payments.

A manufactured housing industry consultant supported the proposed right for tenants to be able to sell their homes in place and advertise the sale. The commenter stated, however, that after eviction of a tenant, the trial court judge usually determines a reasonable period of time for the tenant to sell the home. The commenter further noted that most leases in the Midwest are verbal, month-to-month leases, with most tenants declining a written lease.

Advance Notice Period for Planned Sale or Closure of Community. Under the proposed rule, tenants would have had the right to receive at least 120 days advance notice of a planned sale or closure of the community, within which time the tenants, or an organization acting on behalf of a group of tenants, may match any bona fide offer of sale, and the community owner must consider the tenants' offer and negotiate with them in good faith.

Some manufactured housing trade organizations opposed a right for advance notice to tenants of a planned sale of the community except when the sale involves a change in land use. In their view, the sale of the property does not harm tenants because their leases simply transfer to the new owner.

With one exception, commenters did not specifically address the length of the proposed advance notice period. The exception was a policy advocacy organization that

conducted a review of the manufactured housing community laws in all 50 states. The commenter reported that only Vermont and Connecticut have a 120-day advance notice period, that Florida, Massachusetts, and Rhode Island have a 45-day "purchase opportunity" period, and that Oregon has a 25-day advance notice period. The commenter concluded that the proposed 120-day advance notice to tenants is too long and that the other state advance notice periods are effective.

FHFA also considered the AARP Model Act, which provides for a 90-day advance notice period for the sale of a community.[43] The 90-day period is extended by an additional 180 days where a tenant association provides timely notice to the community owner of its intent to purchase the community.[44] The AARP Model Act provides a two-year advance notice period for a change in use (i.e., closing) of a community.[45]

Based on the commenter's states survey and the AARP Model Act, FHFA is persuaded to change the proposed 120-day advance notice period in the final rule. In view of the wide range of advance notice periods among the states and to balance the needs of tenants with the needs of community owners, the final rule adopts a minimum advance notice period of 60 days. In application, the final rule makes it possible for the 60-day advance notice period and the expiration of the last pad lease term then in effect to expire on the same day.

Tenants' Right of First Refusal. A "right of first refusal" is a right in a contract where the seller must give the other party an opportunity to match the price offer that a

[43] See AARP Model Act, Sec. 113(b).
[44] See id. at Sec. 113(c).
[45] See id. at Sec. 112(b).

third party has made to buy a certain asset.[46] Several manufactured housing trade associations mistakenly believed that the proposed Regulatory Activity included a right of first refusal for the tenants to purchase their manufactured housing communities where the communities are being sold or closed. The proposed rule did not include a right of first refusal for tenants. Rather, the proposed rule stated that the "community owner shall consider the tenants' offer and negotiate with them in good faith."[47] (emphasis added)

Many policy advocacy organizations favored including a tenants' right of first refusal in the Regulatory Activity, stating that the absence of such a right is a fundamental risk to tenants.

In contrast, several manufactured housing trade associations stated that a tenants' right of first refusal would limit community owners' ability to finance and sell their communities and would expose the Enterprises as investors.

After considering the comments, FHFA has determined that incorporating a tenants' right of first refusal in this Regulatory Activity would add an overly expansive role for the Enterprises and potentially involve significant implementation issues.[48] Accordingly, consistent with the proposed rule, the final rule does not include a tenants' right of first refusal in the Regulatory Activity.

Negotiation of Community Sale. Under the proposed rule, as part of the pad leases protections, the tenants, or an organization acting on behalf of a group of tenants,

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[46] See The Law Dictionary (Black's Law Dictionary Free Online Legal Dictionary, 2d Ed.) (website), available at http://thelawdictionary.org/right-of-first-refusal/.

[47] 80 FR at 79217 (2015).

[48] See generally Matthew Silver, "Lawsuit Attempts to Block Sale of Manufactured Home Community," MHProNews (July 5, 2016), available at http://www.mhmarketingsalesmanagement.com/blogs/daily-business-news/lawsuit-attempts-to-block-sale-of-manufactured-home-community/; David I. Walker, "Rethinking Rights of First Refusal," p. 5 Stan. J.L. Bus. & Fin. 1 (1999); Joshua Stein, "Why Rights of First Offer and Rights of First Refusal Don't Work" (Nov. 26, 2013), available at https://commercialobserver.com/2013/11/why-rights-of-first-offer-and-rights-of-first-refusal-dont-work/.

would have the right to match any bona fide offer for sale, and the community owner would be required to consider the tenants' offer and negotiate with them in good faith. FHFA has determined that it is not necessary for the rule to specify a right for the tenants to make an offer to purchase their community, as this right exists irrespective of the Duty to Serve. FHFA also determined that, while state laws and the AARP Model Act[49] may specify tenant purchase rights, it is not feasible to include them in pad leases.

(d) Determining Affordability of Manufactured Housing Communities—§ 1282.38(f)

The Safety and Soundness Act provides that Duty to Serve activities must be for very low-, low-, and moderate-income families. Manufactured housing community owners and loan sellers are unlikely to know the incomes of all of the community residents at the time a blanket loan on the community is sold to an Enterprise. Thus, in order for an Enterprise's purchase of the loan to be eligible to receive Duty to Serve credit, an alternative to requiring the Enterprises to obtain the incomes of the community residents is needed. FHFA has previously established a methodology in 12 CFR 1282.19 for determining affordability under the Enterprises multifamily affordable housing goals that uses the tenants' total monthly housing costs (rent payments plus utility costs, adjusted for number of bedrooms) instead of their incomes.[50] That methodology will also be used generally for determining the affordability of multifamily properties for Duty to Serve purposes. However, the methodology cannot be used where the total monthly housing costs of the residents are not known to the property owners or the loan sellers. For manufactured housing communities, the total monthly housing costs of the residents

[49] See AARP Model Act, sec. 113(b), (e).
[50] See 12 CFR 1282.15(d)(1), 1282.19.

(note payments on manufactured home plus pad rent payments plus utility costs, adjusted for bedroom size) are generally not known to the owners of the community or the loan sellers.

Accordingly, to determine the affordability of manufactured housing communities under the Duty to Serve, § 1282.38(f) of the final rule provides that, unless otherwise determined by FHFA, the affordability of homes in the community shall be determined using one of the two methodologies discussed below, as applicable, as a proxy for the number of homes in the community that are affordable, except that for purposes of determining extra Duty to Serve credit for residential economic diversity activities or objectives, the methodology in paragraph (f)(2) may not be used:

(1) Methodology for government-, nonprofit- or resident-owned manufactured housing communities. Section 1282.38(f)(1) of the final rule provides that, for a manufactured housing community owned by a government unit or instrumentality, a nonprofit organization, or the residents, if laws or regulations governing the affordability of the community, or the community's or ownership entity's founding, chartering, governing, or financing documents, require that a certain number or percentage of the community's homes be affordable consistent with paragraph (d)(1) of § 1282.38, then any homes subject to such affordability restriction are treated as affordable for Duty to Serve purposes.

The proposed rule text did not include this methodology but specifically requested comment on whether governing or financing documents for the community could provide a proxy for resident incomes. For those communities that are owned by government units or instrumentalities, the proposed rule asked whether regulations, handbooks, or

financing documents specifying income criteria for the residents would be an appropriate indicator of tenant incomes. For those communities that are nonprofit-owned and resident-owned communities, the proposed rule asked whether the founding documents for the community, which describe its mission as serving lower-income families, or financing agreements or other documents from funding sources specifying the required income levels of intended beneficiaries, would be appropriate indicators of tenant incomes. The proposed rule also asked whether there is any comparable documentation that could be applicable to communities with for-profit owners (e.g., where they have accepted income restrictions in order to accept Section 8 vouchers).

These questions received few comments. A nonprofit organization stated that governing or financing documents would provide a good proxy for the incomes of residents in limited equity cooperatives (i.e., resident-owned communities) because the land is preserved over the long term for manufactured housing, and home sales prioritize low-income buyers for purchases. An organization that assists in financing resident-owned communities also favored this methodology, although it stated that all resident-owned communities should be deemed income-qualifying under the Duty to Serve regardless of any income documentation. Neither Enterprise commented on the questions.

FHFA has considered the comments and is persuaded that manufactured housing communities owned by government units or instrumentalities, nonprofits, or residents generally are driven by public missions to provide affordable homes to very low-, low-, and moderate-income households, consistent with the purposes of the Duty to Serve. Accordingly, FHFA has determined that it is reasonable to rely on these entities' or

communities' founding, chartering, governing, or financing documents as proxies for affordability of homes in the community where the documents contain restrictions that require affordability of homes to the income groups targeted by the Duty to Serve. A manufactured housing community will also be considered affordable to the income groups targeted by the Duty to Serve if laws or regulations governing the community require that it be affordable to such income groups.

To facilitate Enterprise support for financing for the types of communities discussed above, the final rule provides the Enterprises with the option of using either this methodology or the census tract methodology discussed below.

(2) Census tract methodology for any type of manufactured housing community. Section 1282.38(f)(2) of the final rule provides that for any type of manufactured housing community, except for purposes of determining extra credit for residential economic diversity activities or objectives,[51] the affordability of the homes in the community is determined as follows:

(A) If the median income of the census tract in which the manufactured housing community is located is less than or equal to the area median income, then all homes in the community are treated as affordable;

(B) If the median income of the census tract in which the manufactured housing community is located exceeds the area median income, then the number of homes that are treated as affordable is determined by dividing the area median income by the median income of the census tract in which the community is located and multiplying the

[51] Estimating affordability under § 1282.38(f)(2) assumes that a community's affordability mirrors the income characteristics of the tract in which it is located, which is not useful for determining whether the community contributes to residential economic diversity.

resulting ratio by the total number of homes in the community.

Consistent with the proposed rule, § 1282.38(f)(2) of the final rule includes a methodology that uses the median income of the census tract in which the community is located, as determined by FHFA, to proxy for the incomes of the community's residents. This methodology is available regardless of the type of ownership structure of the community.

As an example of the second scenario, if the area median income is $100,000, the census tract's median income is $125,000, and the number of homes in the community is 100, the number of homes treated as affordable is:

Step 1: $100,000 ÷ $125,000 = 80%

Step 2: 80% x 100 = 80 (number of homes treated as affordable)

The final rule adopts the proposed census tract methodology's first step for determining the appropriate ratio of the area median income to the census tract median income. The second step in the final rule multiplies that ratio by the total number of homes in the community. This is a change from the proposed rule where step 2 would have multiplied the step 1 ratio by the unpaid principal balance of the blanket loan.

Duty to Serve credit under the loan purchase evaluation area is generally measured based on the number of dwelling units affordable to very low-, low-, and moderate-income families. Measuring credit for purchases of blanket loans on manufactured housing communities based on the number of homes in the community rather than on the unpaid principal balance is not a substantive change because it will not affect the proportion of each community that is treated as affordable. Measuring based on the number of homes is more consistent with the evaluation methods for other types of

mortgage purchases, and it will permit easier comparisons of volumes across different mortgage purchases under the Duty to Serve.

Several commenters addressed the proposed census tract methodology. A policy advocacy organization favored the methodology, describing it as simple and reasonable. A trade association also supported the methodology, but preferred that a matrix with parameters tailored to accommodate family stresses like major medical expenses be added.

A manufactured housing tenants' organization opposed the methodology on the basis that it would not work well if the manufactured housing community is located in more affluent areas or in commercial areas. A state housing finance agency stated that the methodology is flawed because census tract, American Community Survey, and HUD area median income data may not be a good proxy for affordability. The commenter recommended that the chosen methodology be based on use of actual data. Neither commenter offered a recommended substitute for the proposed methodology and these standard measures of affordability.

Fannie Mae suggested instead using the affordability estimation methodology for the Enterprises' housing goals in § 1282.15(e), which is available when rental data is missing,[52] but did not elaborate on its reasons for recommending that methodology. Fannie Mae stated that it would need to incur additional expenditures to operationalize the proposed census tract methodology.

Freddie Mac did not address the reasonableness of the proposed methodology directly, but stated that its support for affordable manufactured housing communities is

[52] See 12 CFR 1282.15(e).

confirmed by various measures, including the proposed methodology.

An organization that specializes in supporting resident-owned manufactured housing communities commented that in its many years of training and financing resident-owned communities in numerous states, it has not seen any manufactured housing communities in which fewer than 50 percent of homeowners earn less than 80 percent of area median income. The commenter stated that 86 percent of homeowners in its current manufactured housing community portfolio earn less than 80 percent of area median income. The commenter recommended, therefore, that the final rule treat all manufactured housing communities as serving low- and moderate-income households.

FHFA understands the view that manufactured housing communities overwhelmingly serve lower-income households. However, not all manufactured housing communities can be deemed to meet the Duty to Serve income requirements, as some communities are not affordable to households at the Duty to Serve income levels.[53]

FHFA also appreciates the suggestion that the proxy methodology be tailored more to the individual financial circumstances of the community's residents. However, community owners and loan sellers would not be expected to know or share the personal financial circumstances of each resident, making tailored matrices challenging to develop.

In response to the suggestion that the § 1282.15(e) estimation methodology for

[53] See, e.g., Tom Delavan, "America's Most Glamorous Trailer Park," The New York Times Style Magazine (Nov. 11, 2015), available at http://www.nytimes.com/2015/11/11/t-magazine/paradise-cove-malibu-million-dollar-trailer-parks.html?_r=1; Deborah Jellett, "Ten of the Best Luxury Trailer Parks in the World," The Richest (Website) (Apr. 28, 2014), available at http://www.therichest.com/luxury/celebrity-home/ten-of-the-best-luxury-trailer-parks-in-the-world/.

the housing goals[54] be used for manufactured housing communities under the Duty to Serve, FHFA notes that the housing goals methodology was developed for other types of multifamily rental housing. Accordingly, FHFA has determined that the methodology established in the rule is more appropriate to that task.

FHFA also recognizes that under the census tract methodology, the Enterprises could receive Duty to Serve credit for purchases of blanket loans on manufactured housing communities that may include some residents with incomes exceeding the area median income. The methodology takes this into account through its partial credit calculation for manufactured housing communities in higher income census tracts. FHFA has determined that the census tract methodology is a reasonable approach that will result in Duty to Serve credit being provided for manufactured housing communities that largely serve income-eligible households. In addition, mixed-income communities may contribute significant benefits to the lower-income households in the community and to the success and sustainability of the community.

The final rule also provides that FHFA may approve the use of another methodology for determining the affordability of homes in a manufactured housing community is appropriate. If an Enterprise believes that an alternative methodology would be feasible and preferable to the methodologies in the final rule for a particular type of manufactured housing community transaction, the Enterprise should raise the matter with FHFA for consideration.

2. Affordable Housing Preservation Market—§ 1282.34

The below section describes the final rule provisions for the affordable housing

[54] See generally 12 CFR 1282.15(e).

preservation market. The section discusses the scope of eligible preservation activities for Duty to Serve credit as including both affordable rental housing preservation and affordable homeownership preservation. It also identifies the circumstances under which eligible Duty to Serve activities may involve permanent construction take-out loans. The section further identifies the Statutory Activities enumerated for housing projects under the Safety and Soundness Act.[55] It also discusses the seven Regulatory Activities identified by FHFA, which are: (1) financing of small multifamily rental properties; (2) energy or water efficiency improvements on multifamily rental properties; (3) energy or water efficiency improvements on single-family, first lien properties; (4) shared equity programs for affordable homeownership preservation; (5) HUD Choice Neighborhoods Initiative; (6) HUD Rental Assistance Demonstration program; and (7) purchase and rehabilitation of certain distressed properties. Finally, the section sets out requirements for Additional Activities that the Enterprises may propose in the affordable housing preservation market for Duty to Serve credit.

a. Eligible "Preservation" Activities—§§ 1282.34(b); 1282.37(b)(6), (c)

Consistent with the proposed rule, § 1282.34(b) of the final rule provides that Enterprise activities eligible to be included in a Plan under the affordable housing preservation market are activities that facilitate a secondary market for mortgages on residential properties for very low-, low-, or moderate-income families consisting of affordable rental housing preservation and affordable homeownership preservation.

[55] 12 U.S.C. 4565(a)(1)(B).

Under the final rule, only certain permanent construction take-out loans are eligible for Duty to Serve credit under the affordable housing preservation market.[56] Section 1282.37(c)(1) of the final rule establishes two categories of these loans that are eligible for Duty to Serve credit. The first category is Enterprise activities related to permanent construction take-out loans for replacement properties that preserve existing subsidies on affordable housing for a regulatory period of required affordability. This period must be at least as restrictive as the longest affordability restriction applicable to the subsidy or subsidies being preserved. The second category is Enterprise activities related to permanent construction take-out loans for housing that was developed under state or local inclusionary zoning, real estate tax abatement, or loan programs, where the property owner has agreed to restrict a portion of the units for occupancy by very low-, low-, or moderate-income families, and to restrict the rents that can be charged for those units at affordable rents to those populations, or where the property is developed for a shared equity program that meets the requirements to be eligible for Duty to Serve credit as discussed below and in § 1282.34(d)(4). For these loans to be eligible for Duty to Serve credit, there must be a regulatory agreement, recorded use restriction, or deed restriction in place that maintains affordability for the term defined by the state or local program. These limitations on eligible activities related to permanent construction take-out loans apply to Statutory, Regulatory, and Additional Activities in this market, which are described in detail below.

[56] A permanent construction take-out loan is a long-term mortgage that replaces a short-term construction loan for a new property. The Enterprises currently purchase permanent construction take-out loans but not acquisition/development/construction loans.

Permanent construction take-out loans that do not meet the requirements of either of these two categories are not included in the final rule's interpretation of "preservation" under the affordable housing preservation market. However, such permanent construction take-out loans are eligible for Duty to Serve credit under the manufactured housing and rural markets subject to meeting the eligibility requirements for those markets as provided in the final rule. Additional guidance on preservation activities and affordability periods may be provided in FHFA's Evaluation Guidance as necessary.

A further discussion of the final rule's provisions on permanent construction take-out loans is below.

b. Permanent Construction Take-out Loans

As discussed in the **SUPPLEMENTARY INFORMATION** to the proposed rule, the Safety and Soundness Act enumerates nine statutory programs for Duty to Serve credit under the affordable housing preservation market, which are discussed below, but does not otherwise define the term "preservation" for this market.[57] Preservation strategies for affordable rental housing and homeownership differ. For affordable rental housing, preservation in the affordable housing industry is generally understood to mean preserving the affordability of rents to tenants in existing properties.[58] This includes preventing the conversion of affordable properties to market rate rents at the end of long-term affordability periods, which are typically 15 years, 20 years, or 30 years, at which time major rehabilitation of the properties may be needed. This is consistent with the plain meaning of the term "preservation," which is maintaining something in its existing

[57] 12 U.S.C. 4565(a)(1)(B).
[58] This is the focus of HUD's Office of Affordable Housing Preservation (recently renamed the Office of Recapitalization).

state.[59] The concept of "preservation" in the rental housing context is not generally understood to include new construction of rental properties.

However, in the post-financial crisis years, the number of renters has been expanding while the stock of affordable rental housing has been shrinking. The rate of new construction of affordable rental housing has not kept pace with the demand for such housing. Further, more desirable markets face particular upward rent pressure. One way to preserve affordability is to give Duty to Serve credit for permanent construction take-out loans for rental properties where long-term affordability periods are required by regulatory agreements, which for several federal programs are set at 15 years, 20 years, or 30 years. Some of the specifically enumerated programs under the affordable housing preservation market in the Safety and Soundness Act involve new construction, which could indicate congressional intent to include support for new construction under this market. However, Congress may have instead intended only that support for existing properties under these programs at the point of their expiring regulatory agreements be included in the affordable housing preservation market.

The proposed rule specifically requested comment on whether the term "preservation" should be interpreted to allow Duty to Serve credit to be provided to Enterprise purchases of permanent construction take-out loans on new rental properties with long-term affordability regulatory agreements that restrict incomes and rents, and whether 15 years or some other term would be an appropriate minimum period of long-term affordability. The proposed rule also specifically requested comment on whether the term "preservation" should be interpreted to include Enterprise purchases of refinance

[59] See Cambridge Dictionaries Online, definition of ''preserve.''

mortgages on existing rental properties with long-term affordability, and whether the preservation activities should be required to extend the property's regulatory agreement restricting household incomes and rents for some minimum number of years, such as 10 years, beyond the date of the Enterprises' loan purchases and, if so, what an appropriate minimum period of long-term affordability would be for the extended use regulatory agreement.

FHFA received numerous comments regarding the interpretation of "preservation." Commenters generally agreed that Enterprise support for extending long-term affordability for existing rental properties should be included as "preservation." However, commenters differed on whether and to what extent FHFA should include Enterprise support for permanent construction take-out loans as "preservation." Both Enterprises recommended that FHFA include new construction as "preservation" in order to address the lack of supply of affordable rental housing, which they stated cannot be met by preservation of existing properties alone. Fannie Mae did not specify whether FHFA should limit the types of new construction that should be eligible as "preservation" for Duty to Serve credit. Freddie Mac recommended that new construction for properties with regulatory agreements requiring long-term affordability be considered.

Support for Including New Construction for Replacement Properties that Preserve Existing Subsidies

The majority of commenters who responded to FHFA's questions on the interpretation of "preservation" and on whether FHFA should provide credit for Enterprise support for certain permanent construction take-out loans stated that they only supported new construction that preserves existing subsidy under "preservation" for Duty

to Serve purposes. These commenters included an individual, several nonprofit organizations, policy advocacy organizations, and governmental entities. A nonprofit organization cited the complicated and labor intensive nature of preserving existing properties as a reason for limiting the definition of "preservation" and argued that the Safety and Soundness Act's meaning of "preservation" was well understood as preserving the deep affordability of federally-supported affordable rental housing. The nonprofit organization, along with two policy advocacy organizations, cited transfers of Section 8 subsidy contracts, Rental Assistance Demonstration transactions, and projects that use project-basing of tenant protection vouchers and project-based vouchers as examples that would fit within this category of permanent construction take-out loans. One of these policy advocacy organizations commented that given the difficulty of preserving existing affordable housing stock, the Enterprises would likely choose not to engage in such activities if less difficult options were included as eligible activities under the Duty to Serve. The commenter, along with a nonprofit organization, stated that Enterprise support of new construction with long-term affordability restrictions in high opportunity areas is an important need, but should fall under the Enterprises' housing goals.

A local government entity commented that Duty to Serve credit the Enterprises receive for activities related to Choice Neighborhood Initiative grants should include new construction for replacement housing units, which could help the government entity with the final stages of its project through the program. A nonprofit organization and a coalition of practitioners working with the Rental Assistance Demonstration program stated that much of the existing affordable housing stock, especially public housing, is

very old and beyond the point of upgrades to modernize properties. The commenters noted that new construction would allow these subsidized properties to be replaced with properties that may be less dense, more energy efficient, and more mixed-income. Several policy advocacy organizations and an individual commented that new construction should only be considered "preservation" if Enterprise proposals on new construction encourage residential economic diversity or provide financing for replacement housing that preserves the subsidies on existing affordable units specifically in areas of opportunity. These commenters noted that the new multifamily construction market currently does not appear to need additional liquidity.

Support for Including New Construction with Regulatory Periods of Affordability

Some commenters supported treating new construction with regulatory agreements to maintain affordability as "preservation," though they differed on how long the regulatory periods should be. Freddie Mac and a nonprofit organization recommended that FHFA include as "preservation" new construction with regulatory agreements requiring long-term affordability. A nonprofit organization, a policy advocacy organization, and a trade association supported including permanent construction take-out loans on rental properties with long-term affordability regulatory agreements as "preservation." The policy advocacy organization recommended a minimum affordability period of 15 years, and added that permanent construction take-out loans with longer regulatory periods should be scored higher in FHFA's evaluation process for the Enterprises' Duty to Serve performance. A state housing finance agency suggested a 30-year regulatory affordability period for new construction, noting that the standard for regulatory agreements is considerably higher than 15 years. Another state

government entity recommended new construction developments with perpetual affordability restrictions as the only kind of new construction that should be treated as "preservation," stating that the preservation of existing housing stock should be the focus of the Duty to Serve rule. A trade association recommended that FHFA require 50-year or "life of the building" regulatory affordability periods. The commenter stated that it is inefficient to reinvest public and private funds after a 15-year regulatory term expires in order to recapitalize a property and retain its affordability.

Support for New Construction Under Other Parameters

Several commenters supported some types of new construction under "preservation" for the Duty to Serve subject to certain parameters other than regulatory agreements requiring long-term affordability periods or replacement housing that preserves existing subsidies.

A nonprofit organization, along with one of its nonprofit affiliates, recommended that new construction, if included, be treated as "preservation" only if it is limited to places of targeted need, such as high-needs rural regions. The commenters expressed concern that if new construction without such limitations is included as "preservation," it could distract from the challenging task of preserving existing affordable properties and stray from the statutory intent of the Duty to Serve.

A trade association commented that new construction should be counted under the Duty to Serve with the preservation of affordability assumed through the underwriting of the property, factors in the market, and amenities in the property and its units, rather than through a requirement for long-term regulatory agreements, which the commenter stated could add barriers and compliance burdens.

A policy advocacy organization recommended that Enterprise support of permanent financing for new construction that adds affordable housing in neighborhoods that need more affordable housing should be eligible for Duty to Serve credit. The commenter further suggested that FHFA provide the bulk of the Duty to Serve credit to traditional preservation of existing properties, stating that there is a core mission to preserve existing and largely irreplaceable subsidized housing.

Support for Treating "Preservation" Only as Preserving Existing Properties

A number of commenters recommended that "preservation" be interpreted specifically as preserving existing rental properties. Two individuals, two policy advocacy organizations, and a nonprofit organization commented that "preservation" should include purchasing or refinancing loans on existing rental properties where units are being converted from market rate to affordable. A nonprofit organization noted as reasons for limiting the interpretation of "preservation" that new construction of affordable housing falls under the Enterprises' housing goals and that existing federally supported rental housing properties are often the most affordable properties available in communities. Two state government entities commented that the Enterprises already purchase permanent, multifamily construction take-out loans and, therefore, do not need Duty to Serve credit to encourage such activities. A number of policy advocacy organizations expressed concern that unless new construction that replaces existing affordable housing being demolished is built in gentrifying or high opportunity areas, it could exacerbate segregation. These policy advocacy organizations cited this concern as a reason for opposing new construction being part of FHFA's interpretation of "preservation."

After considering the comments, as discussed above, FHFA has determined in § 1282.37(b)(6) of the final rule that Enterprise activities related to permanent construction take-out loans should be treated as eligible "preservation" activities under the affordable housing preservation market only if such loans meet the requirements of either of two categories. The first category is permanent construction take-out loans for replacement properties that preserve existing subsidies on affordable housing. The permanent construction take-out loan must preserve existing subsidy with a regulatory period of required affordability that is at least as restrictive as the longest affordability restriction applicable to the subsidy or subsidies being preserved.

The second category is permanent construction take-out loans for housing that was developed under state or local inclusionary zoning, real estate tax abatement, or loan programs, where the property owner has agreed to restrict a portion of the units for occupancy by very low-, low-, or moderate-income families, and to restrict the rents that can be charged for those units at affordable rents to those populations, or where the property is developed for a shared equity program that meets the requirements to be eligible for Duty to Serve credit as discussed below and in § 1282.34(d)(4). There must be a regulatory agreement, recorded use restriction, or deed restriction in place that maintains affordability for the term defined by the state or local program.

Including these limited types of permanent construction take-out loans as eligible for Duty to Serve credit could encourage the Enterprises to make a needed impact in the affordable housing preservation market, which would benefit lower-income households. These requirements will tie permanent construction take-out loans under the affordable housing preservation market more closely to preserving the subsidy on existing housing,

which is difficult and complex to preserve, and to preserving long-term affordability of affordable housing developed through state or local inclusionary zoning, real estate tax abatement, or loan programs.

The final rule does not make the above requirements for permanent construction take-out loans under the affordable housing preservation market applicable to permanent construction take-out loans under the manufactured housing and rural markets. This is because the Safety and Soundness Act does not require "preservation" as a component of the activities serving those markets. In addition, the manufactured housing and rural markets may have unique needs for new construction of affordable housing without being tied to replacement of existing housing that preserves subsidy, or to housing developed under state or local inclusionary zoning, real estate tax abatement, or loan programs, where a regulatory agreement, recorded use restriction, or deed restriction maintains affordability of a portion of the property's units for the term defined by the state or local program. For example, rural areas have a specific need for small multifamily properties, given the lower population densities in rural communities. Developers considering financing affordable multifamily housing in rural areas may face challenges with transaction and operational costs, which can be spread more cost-effectively across larger multifamily properties, and they may be reluctant to finance affordable rural multifamily housing if they believe revenues will not cover costs.

c. Statutory Activities—§ 1282.34(c)

The Safety and Soundness Act provides that the Enterprises "shall develop loan products and flexible underwriting guidelines to facilitate a secondary market to preserve

housing affordable to very low-, low-, and moderate-income families, including housing subsidized under the following government programs:

- The project-based and tenant-based rental assistance programs under Section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f);
- The program under Section 236 of the National Housing Act (rental and cooperative housing for lower-income families) (12 U.S.C. 1715z-1);
- The program under Section 221(d)(4) of the National Housing Act (housing for moderate-income and displaced families) (12 U.S.C. 1715l);
- The supportive housing for the elderly program under Section 202 of the Housing Act of 1959 (12 U.S.C. 1701q);
- The supportive housing program for persons with disabilities under Section 811 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 8013);
- The programs under title IV of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11361 et seq.), but only permanent supportive housing projects subsidized under such programs;
- The rural rental housing program under Section 515 of the Housing Act of 1949 (42 U.S.C. 1485);
- The low-income housing tax credit (LIHTC) under Section 42 of the Internal Revenue Code of 1986 (26 U.S.C. 42); and
- Comparable state and local affordable housing programs."[60]

[60] 12 U.S.C. 4565(a)(1)(B).

Under § 1282.34(c) of the final rule, Enterprise activities related to facilitating a secondary market for mortgages on housing under these statutorily enumerated programs are eligible for Duty to Serve credit. Enterprise activities under these statutory programs are referred to as "Statutory Activities" in the final rule. Under § 1282.32(d) of the final rule, FHFA will designate a minimum number of Statutory Activities and Regulatory Activities in the Evaluation Guidance that the Enterprises must consider whether to undertake. The HUD Section 811 program and McKinney-Vento Homeless Assistance programs, do not, at this time, lend themselves to Enterprise support, so FHFA does not expect the Enterprises to address these two programs in their Plans for the reasons discussed below. For each Statutory Activity that is addressed in their Plans under this requirement in § 1282.32(d)**,** the Enterprises must describe how they choose to undertake the activity and related objectives, or the reasons why they will not undertake the activity.

The status of each statutory program, the relevant comments received, and the role that the Enterprises could play in assisting each statutory program, are discussed below. There were relatively few comments on Enterprise support for the statutory programs.

(i) HUD Section 8 Rental Assistance Program

Under HUD's Section 8 rental assistance program, property owners receive rent payment subsidies from HUD covering the difference between the market rent for a unit and the tenant's rent contribution. The proposed rule specifically requested comment on ways, including potential changes to their underwriting and reserve requirements, the Enterprises could extend their support for Section 8-assisted properties consistent with safety and soundness.

Two nonprofit intermediaries and a trade association requested that the Enterprises evaluate their underwriting practices on loans for properties supported by Section 8 subsidies and, in particular, reconsider how they underwrite their reserve requirements. The commenters stated that the Enterprises' reserve requirements, by taking into account the risk that Congress will not appropriate funds for the Section 8 program, make refinancing more difficult or infeasible, or result in smaller loan amounts with less money available for property rehabilitation. One of the nonprofit intermediaries emphasized that Congress has repeatedly renewed funding for Section 8 rental assistance and, thus, the risk of Congress not appropriating Section 8 funding is quite low. Several commenters also recommended that the Enterprises reconsider their underwriting requirements for minimum vacancies in light of the very low historical vacancy rates for the Section 8 program.

The final rule does not dictate specific underwriting requirements for Enterprise engagement with the Section 8 rental assistance program. FHFA encourages the Enterprises to consider, in contemplating whether to make any loan product changes to support the Section 8 rental assistance program, whether the commenters' suggestions on underwriting should be included.[61]

(ii) HUD Section 236 Interest Rate Subsidy Program

Under HUD's Section 236 interest rate subsidy program, HUD subsidizes the interest rate down to one percent on mortgages on multifamily properties, in exchange for restrictions that keep rents at affordable levels for the term of the mortgage, but no fewer

[61] Commenters in a number of circumstances addressed individual underwriting recommendations. As noted throughout, FHFA encourages the Enterprises to consider this feedback, although FHFA also notes that this should not be construed as an endorsement by FHFA of those comments and FHFA will review any underwriting guidelines as part of its review of Enterprise Plans for Non-Objection.

than 20 years. The proposed rule specifically requested comment on ways the Enterprises could extend their support for the Section 236 program.

A nonprofit intermediary requested that the Enterprises evaluate their underwriting standards to recognize the importance of rent restrictions and tenant protection requirements. Additionally, the commenter requested that the Enterprises establish loan purchase guidelines that recognize the importance of rent increase phase-in periods as a way to both protect tenants and maximize the loan proceeds available to recapitalize and preserve the property.

The final rule does not dictate specific underwriting requirements for Enterprise engagement with the Section 236 program. FHFA encourages the Enterprises to consider, in contemplating whether to make any loan product changes to support the Section 236 program, whether the commenters' suggestions on underwriting should be included.

Where an Enterprise is considering whether to include the Section 236 program in its Plan, FHFA encourages the Enterprise to consider loan product changes allowing tenant protection vouchers to preserve the affordability of the Section 236 properties. Tenants in Section 236 properties may be statutorily eligible for Enhanced Vouchers, a type of Tenant Protection Voucher which can be project-based and helps preserve long-term affordability.[62] In addition, FHFA encourages the Enterprises to consider whether a Section 236 property has a Rent Supplement or Rental Assistance Program contract and is, therefore, eligible for conversion under the Rental Assistance Demonstration program (see § 1282.34(d)(6) of the final rule). Finally, the Enterprises are encouraged to

[62] https://www.hudexchange.info/course-content/hud-multifamily-affordable-housing-preservation-clinics/Preservation-Clinic-Tenant-Protection-Vouchers.pdf.

consider refinancing Section 236 properties that are still receiving interest rate reduction payments and are still subject to the original Section 236 Use Restrictions.

(iii) HUD Section 221(d)(4) FHA Insurance Program

HUD's Federal Housing Administration (FHA) insurance program under Section 221(d)(4) provides financing for the new construction or substantial rehabilitation of multifamily properties, and for permanent financing when construction is completed. The proposed rule specifically requested comment on ways the Enterprises could support properties currently funded under the Section 221(d)(4) program. A nonprofit intermediary requested that the Enterprises provide underwriting clarity and flexibility in the treatment of subordinate debt, which the commenter noted is often a feature in refinancing Section 221(d)(4) loans.

The final rule does not dictate specific underwriting requirements for Enterprise purchases of Section 221(d)(4) loans. FHFA encourages the Enterprises to consider, in contemplating whether to make any loan product changes to support the Section 221(d)(4) program, whether the commenter's suggestion should be included.

(iv) HUD Section 202 Housing Program for Elderly Households

HUD's Section 202 program for low-income elderly households is a direct loan and capital advance program under which HUD provides construction or rehabilitation funds and rental subsidies. The proposed rule specifically requested comment on ways the Enterprises could support properties currently funded under the Section 202 program.

A nonprofit intermediary requested that the Enterprises provide underwriting guidance that is consistent with FHA's treatment of Section 202 loans. Specifically, the commenter requested that the Enterprises develop standards that, like FHA's standards,

permit Section 202 refinance loans to be underwritten to the above-market rents that reflect the presence of a long-term Section 8 contract. Additionally, the commenter requested that the Enterprises adopt underwriting standards that, like FHA's standards, adequately account for property tax abatements and exemptions when purchasing a Section 202 loan.

The final rule does not dictate specific underwriting requirements for Enterprise engagement with the Section 202 program. FHFA encourages the Enterprises to consider, in contemplating whether to make any loan product changes to support the Section 202 program, whether the commenter's suggestions should be included.

As described by a nonprofit intermediary, where an Enterprise is considering whether to include the Section 202 program in its Plan, FHFA encourages the Enterprise to consider loan product changes allowing current HUD policies on the prepayment and refinancing of Section 202 Direct Loans.[63] Further, the Enterprises are encouraged to consider the potential eligibility of Section 202 Direct Loan tenants to receive an Enhanced Voucher which, as discussed above, is a type of Tenant Protection Voucher that can be converted to project-based vouchers and preserve long-term eligibility upon mortgage maturity.[64] In addition, the Enterprises are encouraged to consider underwriting the operating costs of providing service coordinators, who are responsible for assuring that elderly residents are linked to the supportive services they need to continue living independently in Section 202 properties.[65]

(v) HUD Section 811 Housing Program for Disabled Households

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[63] http://portal.hud.gov/hudportal/documents/huddoc?id=PIH2015-07.pdf.
[64] Id. at 6.
[65] http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/scp/scphome.

HUD's Section 811 program is a capital advance and rental assistance program for low-income disabled persons, which carries no debt. As discussed in the proposed rule, because of the absence of debt, there is no obvious role for the Enterprises to support projects funded under this program, and FHFA is not aware that the Enterprises have ever supported mortgage financing under this program.

The proposed rule specifically requested comment on ways the Enterprises could support the Section 811 program. Several commenters mentioned this question in their comments, but did not provide specific suggestions for an appropriate role for the Enterprises to support projects funded under this program. FHFA does not expect the Enterprises to be able to address this program in their Plans.

(vi) McKinney-Vento Homeless Assistance Act Programs

McKinney-Vento Homeless Assistance Act programs provide supportive housing grants to help homeless persons, especially homeless families with children, transition to independent living. Because projects under these programs typically do not involve debt financing, there is no obvious role for the Enterprises to support projects funded under these programs, and FHFA is not aware that the Enterprises have ever supported mortgage financing under these programs.

The proposed rule specifically requested comment on ways the Enterprises could support McKinney-Vento Homeless Assistance Act programs. State housing finance agencies and their trade organization mentioned this question in their comments, but did not provide specific suggestions for an appropriate role for the Enterprises to support projects funded under these programs. FHFA does not expect the Enterprises to be able to address these programs in their Plans.

(vii) USDA Section 515 Rural Housing Program

Under the USDA Section 515 program, USDA provides direct loans and rental assistance to develop rental housing for low-income households in rural locations. The proposed rule specifically requested comment on ways the Enterprises could extend their support for the Section 515 program.

Multiple nonprofit organizations, policy advocacy groups, state government entities, and trade associations urged greater Enterprise participation in supporting financing for rehabilitating Section 515 multifamily properties. A state government entity requested that the Enterprises support financing rehabilitation of Section 515 properties that remain subject to the Section 515 use restrictions. A policy advocacy organization requested that the Enterprises consider allowing small Section 515 properties to be bundled and financed together, making use of economies of scale, in order to help preserve the properties' affordability. Several nonprofit intermediaries and a state government entity requested that the Enterprises consider purchasing loans where an existing Section 515 mortgage is being re-amortized in order to maintain the financing when the Section 515 mortgage is subordinated to the new debt.

The final rule does not dictate specific underwriting requirements for Enterprise engagement with the Section 515 program. FHFA encourages the Enterprises to consider, in contemplating whether to make any loan product changes to support the Section 515 program, whether the commenters' suggestions should be included.

(viii) Federal Low-Income Housing Tax Credits (LIHTCs)

Under the LIHTC program, investors provide developers with funds to develop affordable rental housing properties by purchasing the developers' tax credits (LIHTC

equity). LIHTC projects also often have loans (debt) that are eligible for purchase by the Enterprises, like any other multifamily property. LIHTC properties have long-term regulatory use agreements requiring the housing to remain affordable for very low- or low-income households for the specified long-term retention period.

FHFA interprets the Duty to Serve statutory provision for the LIHTCs to apply to debt, as it requires the Enterprises to "develop loan products and flexible underwriting guidelines to facilitate a secondary market" to preserve LIHTC-subsidized properties.[66] Accordingly, Duty to Serve credit under this Statutory Activity is limited to Enterprise support for debt on LIHTC-subsidized properties. The Enterprises offer specialized loan purchase programs to refinance and rehabilitate existing LIHTC properties in conjunction with extending their regulatory use agreements, and are an important source of financing for preservation of older LIHTC projects. Commenters had no specific suggestions on new approaches the Enterprises could take to further support debt on projects that have received LIHTC equity investment.

Pursuant to a different Duty to Serve statutory provision on investments and grants[67] and under § 1282.37(b)(5), LIHTC equity investments by the Enterprises in rural areas are eligible for Duty to Serve credit under certain circumstances. This is discussed further below in the rural markets section.

(ix) Comparable State and Local Affordable Housing Programs

In addition to the specifically-enumerated programs in the Safety and Soundness Act discussed above, the Act provides that the Enterprises shall facilitate a secondary

[66] See 12 U.S.C. 4565(a)(1)(B)(viii).
[67] See 12 U.S.C. 4565(d)(2)(D).

market for "comparable state and local affordable housing programs."[68] Consistent with the proposed rule, the final rule provides that an Enterprise may include such programs in its Plan subject to FHFA determination of whether the programs are eligible for Duty to Serve credit. The proposed rule specifically requested comment on whether there are other state or local affordable housing programs for multifamily or single-family housing the Enterprises could support that should be eligible to receive Duty to Serve credit.

A state government entity and a trade association requested that the Enterprises provide a secondary market for seasoned loans made by state housing trust funds, state housing finance agencies, and other state and local lending programs. The trade association and several civil rights organizations commented that the Enterprises could do more to assist state and local programs that support neighborhood revitalization activities. A nonprofit intermediary and a policy advocacy organization expressed concern that some state and local programs provide very little subsidy, and requested that FHFA set up a review process for determining which programs should qualify under this Statutory Activity. The nonprofit intermediary also requested that FHFA limit Duty to Serve credit to only the portion of a mixed-income multifamily rental property that is deemed affordable to income-eligible households.

Based upon a review of the comments, FHFA encourages the Enterprises to consider including in their Plans state or local programs that provide subsidized housing to very low-, low-, and moderate-income families. If an Enterprise chooses to include a state or local affordable housing program in its Plan, the Enterprise must provide a sufficient explanation of how the program is comparable to one of the other statutory

[68] See 12 U.S.C. 4565(a)(1)(B)(ix).

programs in § 1282.34(c) discussed above in the way it provides subsidy and preserves affordable housing for the income-eligible households. If FHFA determines that the program is not comparable, FHFA will object to including it under this Statutory Activity.

As discussed in the proposed rule, examples of comparable state and local programs for single-family affordable housing that could receive Duty to Serve credit under this Statutory Activity include local neighborhood stabilization programs that enable communities to address problems related to mortgage foreclosure and abandonment through the purchase and redevelopment of foreclosed or abandoned homes for very low-, low-, or moderate-income households. Examples of comparable state and local programs for multifamily affordable housing that could receive Duty to Serve credit include support for state low-income housing tax credit programs, programs for redevelopment of government-owned land or buildings as affordable multifamily housing, and inclusionary zoning requirements for multifamily housing.[69]

For purposes of considering and addressing comparable state and local programs in their Plans, the Enterprises clearly cannot be expected to consider the many state and local affordable housing programs operating throughout the country. However, FHFA encourages the Enterprises to make a reasonable effort to consider a cross-section of programs across the country.

Other Federal Affordable Housing Programs

[69] Inclusionary zoning refers to local government planning ordinances that require a specified portion of the units in newly constructed housing to be reserved for and affordable to very low- to moderate-income households.

The proposed rule specifically requested comment on whether there are other federal affordable housing programs that the Enterprises could support that should receive Duty to Serve credit. Commenters including nonprofit intermediaries, trade associations, policy advocacy organizations, and state government entities provided suggestions about many additional federal programs. The most common federal affordable housing program identified by multiple nonprofit intermediaries, trade associations, and policy advocacy organizations was the USDA Section 538 program. A trade association and a policy advocacy organization identified the USDA Section 514 and 516 programs, and a nonprofit intermediary identified the Section 184 Indian Housing Loan Guarantee Program.

In the rural markets discussion under § 1282.35(c) below, FHFA has specifically identified these programs as examples of programs eligible for Duty to Serve credit under the rural Regulatory Activities where the loans are made to very low-, low-, or moderate-income families as defined under the Duty to Serve.

Several nonprofit organizations and policy advocacy organizations identified the National Housing Trust Fund and Capital Magnet Fund as federal affordable housing programs that should be eligible for Duty to Serve credit. As stated in the Safety and Soundness Act and in § 1282.37(b)(1) of the final rule, and as discussed in the **SUPPLEMENTARY INFORMATION** to the proposed rule, Enterprise grant contributions to the National Housing Trust Fund and the Capital Magnet Fund, as well as Enterprise mortgage purchases funded with such grant amounts, are not eligible activities to receive Duty to Serve credit.[70] The feedback from commenters raised several

[70] See 12 U.S.C. 4565(d)(4).

points of clarification about when FHFA may award Duty to Serve credit for Enterprise mortgage purchases when the underlying property has received Housing Trust Fund or Capital Magnet Fund funding.

FHFA may provide Duty to Serve credit for an eligible activity under this final rule – such as supporting the Regulatory Activity of small multifamily housing – where the property underlying an Enterprise mortgage purchase happens to have received Housing Trust Fund or Capital Magnet Fund funding through a source other than the Enterprise. The Safety and Soundness Act states that FHFA may award Duty to Serve credit "only to the extent that such purchases by the enterprises are funded other than with such grant amounts [Housing Trust Fund and Capital Magnet Fund]." This language prohibits FHFA from providing any Duty to Serve credit if an Enterprise were to use Housing Trust Fund or Capital Magnet Fund grant amounts to fund the Enterprise's mortgage purchase. However, while the Enterprises provide assessments toward the Housing Trust Fund and Capital Magnet Fund, there are no instances where the Enterprises use these grant amounts to fund their own mortgage purchases.

d. Regulatory Activities—§ 1282.34(d)

Consistent with the proposed rule, § 1282.34(d)(1) – (6) of the final rule identifies six specific affordable housing preservation activities as Regulatory Activities. In addition, § 1282.34(d)(7) of the final rule includes a new affordable housing preservation Regulatory Activity for Enterprise support for lending programs for purchase or rehabilitation of certain distressed properties. The seven Regulatory Activities are discussed below.

(i) Small Multifamily Rental Properties—§ 1282.34(d)(1)

Section 1282.34(d)(1) of the final rule establishes a Regulatory Activity for Enterprise support for financing small multifamily rental housing, where the financing is provided by community development financial institutions (CDFIs), insured depository institutions, or federally insured credit unions, each of whose total assets do not exceed $10 billion. This is a change from the proposed Regulatory Activity, which would have required Enterprise purchase and securitization of loan pools backed by existing small multifamily rental properties from CDFIs, community financial institutions, or federally insured credit unions, each of whose total assets are within an inflation-adjusted asset cap of $1.123 billion ($1.128 billion with 2016 inflation adjustment),[71] where the loan pools are backed by existing small multifamily rental properties. Consistent with the proposed rule, § 1282.1 of the final rule defines "small multifamily property" to mean a property with 5 to 50 rental units. The purpose of this Regulatory Activity is to increase the volume of small multifamily lending, and to increase the number of smaller lenders that the Enterprises work with on small multifamily lending.

The proposed rule specifically requested comment on whether Enterprise purchase and securitization of loan pools backed by existing small multifamily properties from small lenders should be a Regulatory Activity. A number of commenters, including affordable housing nonprofit organizations and trade organizations of lenders, generally supported a Regulatory Activity to encourage small multifamily property lending because small multifamily buildings are an important source of affordable housing that is often unsubsidized. Both Enterprises commented that support for small multifamily property lending should be an Additional Activity rather than a Regulatory Activity.

[71] See 81 FR 9196 (Feb. 24, 2016) (FHFA Notice of annual inflation adjustment for community financial institutions).

Asset Cap Level

The proposed rule also specifically requested comment on whether the proposed definitions of "community development financial institution," "community financial institution," and "federally insured credit union" subject to the proposed $1.123 billion asset cap sufficiently capture smaller banks and community-based lenders for Duty to Serve purposes. A number of commenters generally supported the proposed asset cap level.

A nonprofit real estate developer stated that CDFIs should not be subject to any asset cap but did not provide a reason.

Freddie Mac and an unaffiliated individual commenter opposed the proposed asset cap level. The individual stated that the predominant lenders for small multifamily properties are commercial banks and thrifts with assets of $2 billion to $10 billion, that the proposed asset cap level would be impractically small and cost-inefficient, and that it would not significantly increase the Enterprises' purchases of loans on small multifamily properties. Freddie Mac expressed a similar concern, noting that there are over 5,000 banks that would fall within the proposed cap, but that only 19 of those banks have more than $100 million each in multifamily assets, which Freddie Mac identified as the amount of multifamily assets necessary to support sustainable pooling or securitization models. Freddie Mac recommended instead that the final rule use the asset cap level in the Federal Reserve Board's (FRB) definition of "community banking organization," which includes financial institutions with $10 billion or less in total consolidated assets.[72]

[72] See Board of Governors of the Federal Reserve System, Supervisory and Regulation Letter, SR 13-14 (July 8, 2013), available at https://www.federalreserve.gov/bankinforeg/srletters/sr1314.pdf.

FHFA finds compelling the comments that the proposed $1.123 billion asset cap should be increased. Because the goal of this Regulatory Activity is to encourage financing for small multifamily properties, if the asset cap is so low that the entities actually originating loans on small multifamily properties would not be able to qualify, then any impact on the small multifamily market would be de minimis.

In analyzing what an appropriate asset cap level should be for financial institutions in this Regulatory Activity, FHFA considered the definitions of small financial institutions/community banks from the CRA ($304 million), CFPB ($2 billion), FRB ($10 billion), and OCC ($1 billion). Because the feedback about the proposed asset cap level was that it was too low, both the CRA and OCC definitions would also be problematic as $304 million and $1 billion, respectively, are even lower than the proposed $1.123 billion cap. In considering the FHFA, CFPB, and FRB definitions, FHFA analyzed bank call report data to see how many banks would be eligible under each definition. FHFA's analysis validated Freddie Mac's comment that FHFA's proposed $1.123 billion asset cap is likely not high enough to support substantially increasing the volume of small multifamily loan purchases.

The CFPB definition raises the same issue. The CFPB definition of "small creditor" – an institution with less than $2 billion in assets – would add approximately 241 eligible banks and an additional $12 billion in potential multifamily assets. Of these 241 additional banks, only 25 have at least $100 million each in multifamily assets.

In contrast, if the asset cap in the FRB definition of "community banking organization" – an institution with $10 billion or less in total consolidated assets – were used, approximately 6,000 banks would be eligible, and these banks have a combined

$108 billion in multifamily assets. Of these 6,000 banks, approximately 174 have at least $100 million each in multifamily assets.

For these reasons, FHFA is adopting an asset cap of $10 billion in the final rule. The final rule also replaces the reference to "community financial institutions" in the proposed rule with the broader term "insured depository institutions" and includes a definition of the latter in § 1282.1.

FHFA recognizes that this increase in the asset cap for smaller multifamily lenders may create an incentive for the Enterprises to increase their activities with lenders whose assets are closer to the asset cap. To ensure that there are incentives for the Enterprises to increase their activities with smaller lenders, including CDFIs, § 1282.35(c)(3) of the final rule, discussed below, establishes a new Regulatory Activity for Enterprise activities with financial institutions with less than $304 million in assets in rural areas.

Purchase and Securitization of Loan Pools

The final rule does not include the requirement in the proposed Regulatory Activity for purchase and securitization of loan pools backed by existing small multifamily rental properties. FHFA recognizes that purchase and securitization of loan pools is just one means to accomplish Enterprise purchases of small multifamily mortgage loans. The Enterprises have the expertise to determine the best method for purchasing small multifamily mortgage loans. FHFA has determined that it should not dictate to the Enterprises a particular loan purchase channel, but rather has set the overall objective through the Regulatory Activity, leaving the specific process to the discretion of the Enterprises. This is consistent with the treatment of other Regulatory Activities in

the final rule, for which FHFA does not dictate a particular loan purchase channel. Although FHFA expects that the primary way the Enterprises will implement this Regulatory Activity is through purchase and securitization of pools from lenders, FHFA recognizes that there are multiple ways to support small multifamily housing, and that the limitation in the proposed rule is not needed. The higher asset cap will give the Enterprises the flexibility to increase small multifamily lending in whatever way is most efficient for them that broadens the market of small multifamily mortgage loan sellers.

(ii) Energy or Water Efficiency Improvements on Multifamily Properties—§ 1282.34(d)(2)

Section 1282.34(d)(2) of the final rule establishes a Regulatory Activity for Enterprise support for financing of energy or water efficiency improvements on multifamily rental properties, with several modifications from the proposed rule discussed below. Under the revised Regulatory Activity, Enterprise support for financing of energy or water efficiency improvements is eligible for Duty to Serve credit provided there are projections made based on credible and generally accepted standards that (1) the improvements financed by the loan will reduce energy or water consumption by the tenant or the property by at least 15 percent, and (2) the utility savings generated over an improvement's expected life will exceed the cost of installation.

Lowering energy and water use in multifamily rental buildings will reduce the total amount that tenants spend for the energy and water that they use, thus reducing their utility consumption. This can be considered "preservation" under the affordable housing preservation market because housing costs are typically defined as rent plus utility costs.

Thus, savings in utility consumption that reduce utility expenses may help maintain the overall affordability of rental housing for tenants.

The proposed rule specifically requested comment on whether Enterprise support for multifamily properties that include energy efficiency improvements resulting in a reduction in the tenant's energy and water consumption and utility costs should be a Regulatory Activity. A significant number of nonprofit organizations, trade associations, government entities, and affordable housing advocacy organizations supported making Enterprise support for financing of energy improvements on multifamily rental properties a Regulatory Activity because of their experience demonstrating that energy efficiency and water conservation improvements help to preserve affordable housing.

Credible Projections

The final rule provides that under this Regulatory Activity, the projections of energy or water savings must be made based on credible and generally accepted standards that the improvements will reduce energy or water consumption by at least 15 percent. This is a change from the proposed rule, which would have required that there be "verifiable, reliable projections or expectations" of reductions in consumption.

The proposed rule specifically requested comment on whether the Enterprises should require the lender to verify before the closing of an energy improvement loan that there are reliable and verifiable projections or expectations that the proposed energy improvements will likely reduce the tenant's energy and water consumption and utility costs and, if so, what standards of reliability, verifiability and likelihood of reduced consumption and costs should be required. The proposed rule also asked whether the Enterprises should be required to verify, after the closing of an energy improvement loan,

that the energy improvements financed actually reduced the tenant's energy and water consumption and utility costs and, if so, how the Enterprises could verify this.

Although it was not the intent of the proposed Regulatory Activity to require verification of energy or water savings after installation of the improvements, a number of trade associations, policy advocacy organizations, and affordable housing providers stated that the rule should not include such a requirement, citing the practical issues involved. Commenters pointed out that demonstration by a property owner of an immediate reduction in utility consumption was impractical because it requires comparing long-term, weather-normalized, pre-retrofit and post-retrofit usage data. Freddie Mac questioned the availability of the requisite usage data since utility companies generally do not share energy consumption figures, for privacy and operational reasons. Post-retrofit verification is particularly problematic when a property is undergoing major renovations and no baseline usage level is readily available.

Freddie Mac and a trade association pointed out that a post-loan verification requirement would be further complicated by the Enterprises' inability to monitor and adjust for tenant utility usage behavior, resulting in inaccurate comparisons between projected and actual tenant utility consumption. A nonprofit organization with energy expertise asserted that low-income households that are financially constrained to very low utility usage might increase usage to a more normal level once energy or water improvements are installed. In increasing their utility consumption, financially constrained households may enhance their quality of life while maintaining the same level of utility expenses. As the commenter pointed out, because a comparison of utility usages would not account for tenants' reactions to improvements, inspectors might

wrongly assume that the improvements failed to address energy or water inefficiencies when in reality the improvements' effects were offset by tenants' increasing their utility usage to a more normal level.

A nonprofit organization with energy expertise recommended instead that the Enterprises require verification that the energy and water improvements were installed as specified in an energy audit. Other nonprofit organizations and Freddie Mac supported relying on credible projections by third-party certifiers and utilizing accepted industry standards, such as a recognized point value system or a list of acceptable energy improvements. Additionally, both Enterprises advocated for Duty to Serve credit for properties that achieve a green building certification and, therefore, meet a standard for high energy efficiency.

For properties not earning a green certification, nonprofit organizations and policy advocacy organizations generally supported requiring a one-time energy assessment/audit that meets a national certification standard and is conducted by a qualified third-party certifier, utility company, or state/local agency in order to avoid having to conduct a baseline assessment and a follow-up assessment to verify actual savings. A nonprofit organization recommended that the scope of the energy audit vary based on the type and extent of the improvements in order to lower project costs and maintain the cost effectiveness of smaller improvements.

A trade association opposed requiring energy audits and utility benchmarking, claiming that audits or benchmarks would prove challenging and cost prohibitive.

FHFA agrees with the commenters that an after-the-fact verification requirement would be impractical and overly burdensome. As many commenters noted, there are

several practical issues with post-loan verifications of energy and water savings. Immediate verifications would not be possible because the long-term, weather-normalized post-retrofit data needed for comparison with pre-retrofit data will likely not be available for at least one year. Moreover, obtaining the requisite tenant utility usage data would require the property owner to get permission from the utility companies and employ sampling techniques, which is further complicated because utility companies across the country do not consistently capture or store this data. Additionally, the Enterprises have little ability to monitor and adjust for tenant utility usage. As a result, a comparison of projected and actual tenant utility consumption could be inaccurate through no fault of the lender, energy auditor, or Enterprise.

Instead, as recommended by some commenters, FHFA finds that if a multifamily property meets a credible and generally accepted standard, such as the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED), EarthCraft, Greenpoint, the National Green Building Standard (NGBS), or the U.S. Environmental Protection Agency's (EPA's) ENERGY STAR certifications, or other standards that may be developed that are credible and generally accepted, then a projected reduction of at least 15 percent in energy or water consumption can reasonably be assumed under the standard. Additionally, FHFA finds that if a property undergoes an energy audit that meets a credible and generally accepted standard, such as the American Society of Heating, Refrigerating, and Air-Conditioning Engineers ("ASHRAE") Level II Energy Audit, and the audit shows a projection of at least a15 percent reduction in energy or water consumption, then the project will be eligible for Duty to Serve credit.

Accordingly, § 1282.34(d)(2) of the final rule replaces the reference to "verifiable, reliable projections or expectations" in the proposed rule with "projections made based on credible and generally accepted standards."

Utility Savings Exceed Upfront Installation Costs

The final rule provides that under this Regulatory Activity, the reduced utility savings generated over an improvement's expected life must be projected to exceed the upfront costs of its installation. This is a change from the proposed rule, which would have required that the reduced consumption in a project offset the upfront costs of the improvement within a reasonable time period.

The proposed rule specifically requested comment on whether a "reasonable time period" should be defined, and, if so, how. Nonprofit organizations, trade associations, and affordable housing advocacy groups stated that since the payback period for energy efficiency improvements can vary widely depending on the type of improvements and geographic location of the property, requiring a specified payback period could arbitrarily limit what energy efficiency improvements lenders are willing to finance. As a result, cost-effective improvements that would significantly improve property performance over the long term might not be financed because of long payback periods. Other trade associations and nonprofit organizations criticized a specified payback period requirement as potentially eliminating cost-effective long-term improvements because of smaller short-term savings.

Based on these concerns, a number of trade associations and nonprofit organizations recommended instead that the Regulatory Activity require a Savings-to-Investment Ratio (SIR), a common benchmark among energy efficiency programs, which

allows financing as long as the lifetime utility savings exceed or are equal to the installation costs. The commenters pointed out that a SIR equal to or greater than one suggests that the energy efficiency improvements are cost-effective.

FHFA agrees that the improvements should be cost-effective in order to receive Duty to Serve credit. One way to measure this is to use a SIR or other recognized measure to demonstrate whether the energy efficiency improvements can provide value to property owners over the improvement's expected life. This would allow for Duty to Serve credit as long as the savings generated over an improvement's life exceed or are equal to the cost of its installation. A SIR of greater than one ensures that the present value of energy savings exceeds the present value of the cost of installation and, thus, yields a positive return. As a methodology common to energy efficiency programs, the SIR's benefits are well understood among energy efficiency experts.

A key benefit of any cost-benefit analysis such as the SIR is that it avoids arbitrarily defined payback periods, which could eliminate cost-effective energy improvements that take longer to realize the full savings. Decreasing property owners' costs can help preserve affordable housing. It follows that energy efficiency improvements should be assessed on the basis of whether or not they yield a long-run positive return to the property owner, not on the length of their payback periods.

For these reasons, in a change from the proposed rule, the Regulatory Activity in the final rule provides that the reduced utility savings generated over an improvement's expected life must exceed the cost of installation. Demonstrating that an energy improvement is cost-effective will only be required for projects undergoing an energy audit that meets a national standard, because the other methods of credibly demonstrating

reduction in energy and water consumption are presumed to show that the improvements are cost-effective.

Savings Offset by Higher Rents or Other Charges

The final rule does not include the proposed requirement in this Regulatory Activity that the reduced utility costs derived from reduced consumption must not be offset by higher rents or other charges imposed by the property owner.

Several nonprofit organizations, both Enterprises, an organization with energy efficiency expertise, and a trade association raised concerns about the practicality and desirability of the proposed restriction on increases in rents or other charges. Commenters stated that the proposed restriction would likely remove the incentive for property owners to improve their properties, diminishing the number of properties potentially undergoing upgrades. Consequently, rather than helping tenants, the proposed restriction could reduce the potential benefits tenants would receive from living in an upgraded property, such as improved health and savings on their monthly utility bills. FHFA finds these comments persuasive and, therefore, has not included the proposed restriction on increases in rents or other charges in the final rule.

FHFA notes that tenants who are responsible for paying utilities costs could still be subject to an increase in their rents or other charges. FHFA expects the Enterprises to design and implement their energy efficiency improvement loan programs under this Regulatory Activity to ensure the preservation of affordable housing, which includes affordable energy costs. FHFA considered requiring the Enterprises to use their quality control systems to monitor rental properties receiving energy efficiency improvements in order to ensure that the properties' rents remain affordable over time. However, the final

rule does not include such a requirement because there is no practical way for the Enterprises to undertake this responsibility.

Reduction of Energy or Water Consumption by Tenant or Property

The final rule includes in this Regulatory Activity a requirement that the energy efficiency improvements reduce energy or water consumption by the tenant or the property by at least 15 percent. This is a change from the proposed rule, which would have applied the requirement only to reductions in energy and water consumption by the tenant and not by the property as a whole.

Several nonprofit organizations stated that energy efficiency improvements would provide benefits to tenants from living in an upgraded property, such as improved health, savings on monthly utility bills, and increases in the value of the property. Further, the improvements would likely provide greater stability in the affordable housing market and decrease the size of future rent increases resulting from increases in energy or water costs.

Several trade associations, policy advocacy organizations, and nonprofit organizations recommended revising the proposed Regulatory Activity to provide Duty to Serve credit not only for a reduction in energy and water consumption by the tenant, but also by the property as a whole. The commenters stated that measuring a reduction in energy and water consumption only by the tenant could miss energy and water savings in common areas of multifamily buildings and remove the incentive for property owners to improve their properties.

After considering the comments, FHFA finds the arguments compelling that the proposed requirement would likely remove the incentive for property owners to improve

their properties, thereby diminishing the benefits to the tenants and hindering affordable housing preservation. For these reasons, the Regulatory Activity in the final rule includes reductions in energy or water consumption by the tenant or the property as a whole.

When an Enterprise is considering whether to include this Regulatory Activity for energy efficiency improvements on multifamily rental properties in its Plan, FHFA encourages the Enterprise to specifically consider objectives related to collecting utility usage data and utility benchmarking. FHFA finds that utility benchmarking creates a wide variety of benefits for owners, tenants, and the public. Utility benchmarking helps building owners discover billing errors and malfunctioning equipment which, once corrected, can result in immediate financial savings. Collecting utility data can also save tenants money by identifying areas where they can realize savings and enhance comfort. The EPA currently offers free utility benchmarking software – Energy Star Portfolio Manager – to collect and analyze utility data.[73] Additionally, a multifamily Energy Star Score, which compares a multifamily building's energy and water use intensity to like buildings, is available from EPA for buildings with greater than 20 units.

Efficiency Improvements That Reduce Energy or Water Consumption

The final rule includes in this Regulatory Activity a requirement that the energy efficiency improvements reduce energy <u>or</u> water consumption by at least 15 percent. This is a change from wording of the proposed rule, which was interpreted by some commenters to require that the energy efficiency improvements reduce both energy <u>and</u> water consumption by at least 15 percent.

[73] https://www.energystar.gov/buildings/facility-owners-and-managers/existing-buildings/use-portfolio-manager.

Both Enterprises recommended making this change. Fannie Mae stated that many quality projects would not be able to reduce both energy and water consumption at the same time because improvements typically are undertaken addressing only one of these types of consumption at a given time. Freddie Mac stated that energy and water are separate utilities, and their consumption involves distinct behaviors and technology. Freddie Mac further stated a belief that FHFA's intent was to promote both energy and water efficiency improvements, but not to require the achievement of both simultaneously.

FHFA's intent was not to mandate that the improvements address both energy and water consumption at the same time. Instead, any energy or water improvements could be used to project a reduction in the respective utility consumption by at least 15 percent. FHFA recognizes that requiring reductions in both energy and water efficiency might arbitrarily restrict cost-effective improvements that address only energy- or water-related inefficiencies. Accordingly, the reference in the proposed Regulatory Activity to reducing energy <u>and</u> water consumption is changed in the final rule to reducing energy <u>or</u> water consumption.

(iii) Energy or Water Efficiency Improvements in Single-Family, First Lien Properties—§ 1282.34(d)(3)

Section 1282.34(d)(3) of the final rule establishes a Regulatory Activity for Enterprise support for financing energy or water efficiency improvements on single-family, first lien properties, with similar modifications from the proposed rule as made for the Regulatory Activity for energy efficiency improvements on multifamily properties discussed above. Under this revised Regulatory Activity, Enterprise support for

financing of energy or water efficiency improvements is eligible for Duty to Serve credit provided there are projections made based on credible and generally accepted standards that (1) the improvements financed by the loan will reduce energy or water consumption by the homeowner, tenant, or the property by at least 15 percent, and (2) the utility savings generated over an improvement's expected life will exceed the cost of installation.

As with multifamily rental properties, preservation of affordable single-family properties (homeownership or rental) may also encompass lowering home energy and water costs. Lowering energy and water costs can help a homeowner or tenant to continue to afford mortgage or rent payments, as well as other housing costs.

The comments on this Regulatory Activity mirrored the comments that FHFA received on corresponding requirements for the Regulatory Activity for energy efficiency improvements on multifamily rental properties discussed above.

Credible Projections

As addressed above in the discussion of the Regulatory Activity for energy efficiency improvements on multifamily properties, there are two types of credible and generally accepted standards for projecting energy savings of 15 percent or more from energy efficiency improvements on the property – a certification such as LEED or EPA ENERGY STAR, and energy audits.[74]

These certifications and energy audits may also be used to project energy savings under the Regulatory Activity for energy efficiency improvements on single-family

[74] A manufactured home that has met a credible and generally accepted standard for projecting energy savings, such as the Energy Star certification, would be eligible for Duty to Serve credit under this energy efficiency Regulatory Activity.

properties. A credible and generally accepted standard for demonstrating energy improvements on a single-family property is to undergo an energy audit that meets a generally accepted standard, such as the Home Energy Rating System, the Department of Energy's Home Energy Scoring Tool, or an audit conducted by a qualified auditor/assessor trained and certified by the state or the Building Performance Institute.[75] In order to receive Duty to Serve credit through the use of an energy audit, the assessment needs to show a projection of at least a 15 percent reduction in energy or water consumption.

A number of nonprofit, trade association, and state government entities noted, however, that requiring very low-, low-, and moderate-income families to verify savings by paying for an energy audit, which typically costs $300-$600, is likely to inhibit Duty to Serve program participation. Additionally, for households that can afford an energy audit, requiring one in all cases would likely limit Duty to Serve credit to only energy efficiency improvements occurring as part of a major single-family property rehabilitation that would justify the upfront costs of the improvements. Nonprofit organizations recommended allowing homeowners to utilize one of the many successful state, local, tribal, or utility energy savings programs for which they may qualify. A state housing finance agency commented that partnering with state and local programs has the potential to provide additional resources to benefit low-income homeowners while simultaneously reducing risk to the Enterprises. An FHFA analysis of successful state, local, tribal, and utility programs shows that almost all of them have well-established lists of qualifying products or methodologies that generate energy savings and reduce

[75] See, for example, qualified assessors permitted for FHA's Energy Efficient Mortgage Program at http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh/eem/energy-r.

consumption. These lists would streamline the process of demonstrating credible savings and present homeowners with options for implementing improvements that are projected to bring them predictable energy savings.

FHFA finds the comments compelling for including this third option for projecting energy savings in the Regulatory Activity for energy efficiency improvements on single-family properties. This could help expand the availability and use of energy efficiency improvement loan products and, thus, help preserve affordable single-family housing. FHFA expects the Enterprises to use their quality control systems to monitor the quality of state, local, tribal, and utility programs to ensure that these programs effectively encourage cost-effective improvements.

(iv) Preservation of Long-Term Affordable Homeownership Through Shared Equity Programs—§ 1282.34(d)(4)

For affordable homeownership, there are no regulatory agreements similar to those with affordable rental properties that expire after certain regulatory periods, such as 15 years, 20 years, or 30 years. Rather, preservation for affordable homeownership entails ensuring that the price of the home is affordable over a long-term period to initial and subsequent purchasers, whether purchasing a newly constructed home or an existing home. Certain shared equity programs, which offer this type of sustainable affordable homeownership, fit within the final rule's interpretation of "preservation."

Consistent with the proposed rule, § 1282.34(d)(4) of the final rule establishes a Regulatory Activity for Enterprise activities related to affordable homeownership preservation through shared equity programs. The approach to shared equity in the final rule closely tracks the proposed rule approach, with certain modifications based on the

comments received.[76] The purpose of this Regulatory Activity is to help income-eligible families build wealth through sustainable homeownership.

Shared equity programs are divided into: (i) resale restriction programs, where the resale price is explicitly limited, and (ii) shared appreciation loan programs, where second mortgage loans are due upon sale and typically – but not necessarily – structured with zero percent interest. While the shared appreciation subsidy retention vehicle is technically a second mortgage, it does not have many of the features commonly associated with mortgage debt. Shared appreciation second mortgage loans that function as subsidy retention vehicles and do not expose borrowers or the Enterprises to the risks associated with typical second mortgage loans are eligible for Duty to Serve credit.

Properties that were purchased with shared appreciation loans sell at market value, but the homeowner repays the loan amount and a portion of the appreciation to the nonprofit organization or state or local government entity administering the program. The program administrator uses its share of the appreciation to make the same home affordable to a subsequent income-eligible homebuyer. In the shared appreciation model, the administering entity may form a partnership with a for-profit lender that provides shared appreciation loans if the nonprofit organization or state or local government entity does not itself make qualifying loans.

Resale restriction programs and shared appreciation programs have the following common characteristics specified in the final rule:

(1) Provide homeownership opportunities to very low-, low-, or moderate-income

[76] A detailed discussion of the various models and operation of shared equity homeownership programs and further rationale for establishing a Regulatory Activity for affordable homeownership preservation are in the **SUPPLEMENTARY INFORMATION** for the proposed rule, 80 FR at 79182, 79202-79204 (Dec. 18, 2015).

families;

(2) Utilize a ground lease, deed restriction, subordinate loan or similar legal mechanism that includes a provision that the program will keep the home affordable for subsequent very low-, low-, or moderate-income families, an affordability term of at least 30 years after recordation, a resale formula that limits the homeowner's proceeds upon resale, and a preemptive option for the program administrator or its assignee to purchase the homeownership unit from the homeowner at resale; and

(3) Support the homeowners to promote sustainable homeownership for very low-, low-, or moderate-income families, including reviewing and pre-approving refinances or home equity lines of credit.

Over 30 comment letters addressed the proposed shared equity homeownership provisions. Commenters included both Enterprises, a local government, local and national nonprofit organizations including some that are engaged in shared equity programs and some that specialize in multifamily rental housing, a state housing finance agency, an academician, and others. Most of the commenters supported the proposed Regulatory Activity because they said this model is the way to most efficiently help as many families as possible build wealth through sustainable homeownership.

A nonprofit affordable multifamily rental housing developer and a trade organization representing nonprofit affordable multifamily rental housing providers opposed the proposed Regulatory Activity. The commenters stated that the Duty to Serve should focus on affordable housing preservation for multifamily rental housing rather than for homeownership based on their interpretation of the statute as applying only to

rental housing preservation and because they believe renters' needs are more acute than homebuyers' needs.

FHFA has considered these comments and has decided to adopt the Regulatory Activity in the final rule for shared equity homeownership. While multifamily rental housing is an essential part of affordable housing preservation, FHFA does not interpret the statute as being limited to preservation of affordable rental housing. In addition, the multifamily and single-family business units in both Enterprises are sufficiently distinct from each other that establishing a Regulatory Activity for affordable homeownership preservation should not materially detract from Enterprise efforts to preserve the affordability of multifamily rental housing.

The academician commented that Duty to Serve credit should be based on successful homeownership rather than homeownership creation. Among the main reasons that FHFA has chosen to encourage shared equity models in the Duty to Serve is that risk mitigation, sustainability, and affordability for the new homebuyer are built into the shared equity product design.

Several commenters urged FHFA to include an explicit homeownership counseling requirement in the Regulatory Activity to ensure successful homeownership. The final rule does not include a counseling requirement because almost all shared equity programs already include effective homeownership counseling, and it could result in shared equity programs having to meet differing counseling requirements from each Enterprise and from lenders. Instead, FHFA has added in the final rule a specific requirement that the shared equity program administrators review and pre-approve refinances or home equity lines of credit, which require a greater ongoing role to support

homeowners. This requirement also gives the Enterprises a specific way to determine whether the program administrators are promoting successful homeownership.

Fannie Mae endorsed including Enterprise support of shared equity homeownership programs in the final rule, and made several specific suggestions to facilitate smoother mortgage loan purchases which have been carefully considered in the modifications made in the final rule.

Consistent with Freddie Mac's overall comment favoring Additional Activities over Regulatory Activities, Freddie Mac suggested that Enterprise support for shared equity programs be an Additional Activity or extra credit activity, rather than a Regulatory Activity, on the basis that the Enterprises should not be required to consider any activities.

A trade association of shared equity providers suggested that the proposed preemptive purchase option requirement, discussed above, is sufficient to ensure the long-term affordability of an ownership unit, without the need for the additional proposed requirement that the unit be preserved for a longer period when state law permits a longer period than 30 years. Freddie Mac favored state or local law determining the periods of affordability on the basis that using state law definitions of affordability might expand the shared equity market.

Eliminating the proposed requirement that the affordability period exceed 30 years when permitted by state law would reduce complexity in the loan origination process, and avoid the potential problem of a preservation period being longer than the loan term. FHFA is persuaded by these comments. Accordingly, the final rule omits the

requirement in the proposed rule that a unit be preserved for a longer period when state law permits a longer period than 30 years.

The trade association also suggested clarifying how nonprofit and for-profit organizations, which administer the shared appreciation programs, could collaborate under the Regulatory Activity. The commenter noted that the shared equity market is small, and most nonprofit organizations and state and local governments do not originate mortgage loans. FHFA finds that partnerships between nonprofit organizations or state or local governments and for-profit lenders could help achieve the scale that would make the shared appreciation market more viable. Because shared appreciation loans must be underwritten, the Enterprises could develop shared appreciation loan products that they would be willing to purchase from private mortgage lenders partnering with the nonprofit organizations or state or local governments, who would monitor resales and support homeowners. Freddie Mac also requested clarification that the shared appreciation programs could be administered by for-profit entities so long as a nonprofit entity participates in the program.

FHFA is persuaded by these comments. Accordingly, in a change from the proposed rule, the final rule provides that shared appreciation programs administered by nonprofit organizations or state or local governments that enter into partnerships with for-profit lenders who provide the shared appreciation loans, are included in this Regulatory Activity.

The provision in the proposed rule that would have required the Enterprises to monitor homeownership units to ensure affordability is preserved over resales is not included in the final rule. FHFA has determined that this provision is not specific enough

to facilitate Enterprise monitoring to ensure preservation of affordability over resales. Instead, the proposed 30-year affordability term requirement, the proposed preemptive option to purchase requirement, and a new requirement limiting proceeds at resale, all of which are included in the final rule, should ensure that affordability is preserved at resales without the Enterprises having to actively monitor the resales. FHFA expects that the Enterprises will document, at the time they purchase shared equity loans, that the loans are part of a structure meeting the above requirements.

(v) Preservation of Affordable Housing through the Choice Neighborhoods Initiative—§ 1282.34(d)(5)

Consistent with the proposed rule, § 1282.34(d)(5) of the final rule establishes a Regulatory Activity for Enterprise activities supporting financing for HUD's Choice Neighborhoods Initiative (CNI). Created after the enactment of HERA, CNI seeks to preserve and transform distressed, HUD-supported affordable housing. CNI focuses on creating mixed-income housing and investing in neighborhood improvements and upgrades.

The proposed rule specifically requested comment on whether Enterprise activities supporting CNI should be considered a "residential economic diversity" activity, rather than a Regulatory Activity under the affordable housing preservation market.

Several nonprofit organizations favored making Enterprise activities supporting CNI a Regulatory Activity under the affordable housing preservation market, rather than under residential economic diversity. Another commenter recommended making CNI activities both a Regulatory Activity under the affordable housing preservation market

and a residential economic diversity activity, given the large need for Enterprise support of neighborhood revitalization efforts.

FHFA has determined that establishing a Regulatory Activity for Enterprise activities supporting CNI will sufficiently encourage the Enterprises to consider such activities. Separately, FHFA has decided not to add a neighborhood revitalization component under residential economic diversity activities (see Section IV. Extra Credit-Eligible Activities—§ 1282.36(c)(3)). Accordingly, the final rule retains the proposed rule's approach.

(vi) Preservation of Affordable Housing Through the Rental Assistance Demonstration Program—§ 1282.34(d)(6)

Consistent with the proposed rule, § 1282.34(d)(6) of the final rule establishes a Regulatory Activity for Enterprise activities supporting financing for HUD's Rental Assistance Demonstration (RAD). RAD seeks to improve and preserve distressed, HUD-supported affordable housing by allowing public housing authorities to access outside sources of capital for renovation and preservation.

A number of nonprofit organizations and one Enterprise favored establishing a Regulatory Activity for Enterprise activities supporting RAD, arguing that Enterprise support for RAD is consistent with other activities in the affordable housing preservation market.

A trade organization stated that the RAD program was too small to warrant inclusion as a Regulatory Activity, and that the Enterprises should instead be encouraged to creatively and innovatively support the underserved markets.

FHFA has determined that financing debt associated with RAD is an important way that the Enterprises can support affordable housing preservation. RAD has already supported conversions of more than 30,000 units and resulted in over $2 billion in needed rehabilitation.[77] The program also appears likely to support preservation of additional units into future. Accordingly, consistent with the proposed rule, the final rule establishes a Regulatory Activity for Enterprise activities supporting RAD. Additionally, FHFA clarifies that both RAD Component 1 (applicable to public housing) and Component 2 conversions (applicable to Rent Supplement, Rental Assistance Payments, and Mod Rehab contracts) are eligible under this Regulatory Activity.

(vii) Purchase or Rehabilitation of Certain Distressed Properties—§ 1282.34(d)(7)

Section 1282.34(d)(7) of the final rule establishes a Regulatory Activity for Enterprise activities that facilitate financing the purchase or rehabilitation by very low-, low-, or moderate-income families or by nonprofit organizations or local or tribal governments serving such income-qualifying families, of homes eligible for a short sale, homes eligible for a foreclosure sale, or a property that a lender acquires as the result of foreclosure (sometimes referred to as "Real Estate Owned" or "REO"). This Regulatory Activity was not included in the proposed rule.

In response to a question FHFA asked in the proposed rule on how to interpret "preservation," some nonprofit organizations and policy advocacy organizations commented together that FHFA include in its interpretation of preservation activities that literally preserve the physical integrity, habitability, and functionality of properties

[77] http://portal.hud.gov/hudportal/documents/huddoc?id=RAD_Newsltr_Summer2016.pdf.

located in neighborhoods with naturally occurring affordable housing. FHFA finds that financing to address blighted properties is critical to preserve the affordability of those properties as well as naturally occurring affordability in their surrounding neighborhoods. Accordingly, FHFA's interpretation of "preservation" includes the Regulatory Activity established in § 1282.34(d)(7). FHFA will provide additional guidance on such purchase and rehabilitation in the Evaluation Guidance.

The proposed rule discussed the important role the Enterprises can play in stabilizing neighborhoods but did not include purchasing and rehabilitating distressed properties as a specific Regulatory Activity. Local neighborhood stabilization programs were discussed in the proposed rule, and are discussed under § 1282.34(c)(9) above, as examples of "comparable state and local affordable housing programs" that an Enterprise could include in its Plan to address foreclosure and abandonment prevention programs benefiting Duty to Serve income-eligible households. A number of commenters, primarily organizations that advocate for stabilizing disinvested neighborhoods, recommended providing Duty to Serve credit for Enterprise activities that support local neighborhood stabilization programs to combat the deterioration of foreclosed and abandoned homes and the destabilizing effect those properties have on low-income neighborhoods. The commenters urged FHFA to be more aggressive in overseeing the Enterprises' management of their foreclosed properties and urged FHFA to ensure that the Enterprises have effective policies and practices to preserve foreclosed properties in the best possible condition. Some of the commenters recommended giving the

Enterprises Duty to Serve credit for responsible disposition of REO stock, such as under FHFA's Neighborhood Stabilization Initiative (NSI).[78]

FHFA agrees that problems related to foreclosed and abandoned properties can create blight and other negative economic, social, and health outcomes for neighborhoods. Distressed properties threaten the values of surrounding properties and ultimately the stability of neighborhoods. Many of these properties require extensive repairs, but homeowners in the Duty to Serve income-qualifying range often face difficulties obtaining financing to make those repairs. Potential homebuyers in this income-qualifying range also often face difficulties obtaining financing to purchase distressed properties. Establishing a Regulatory Activity in the final rule for Enterprise support for such financing could help address the credit gap for these homeowners, potential homebuyers, and nonprofit organizations.

While both Enterprises already offer purchase money mortgage products targeting lower-income families, in the neighborhood stabilization context there is a need not only for purchase money mortgages, but also for loan products that support repairs, rehabilitation, and demolition work. Several commenters also cited a need for loan products that address the breakdowns in markets that occur when appropriate comparison data is not available to support home appraisals. The Duty to Serve presents an opportunity to complement existing neighborhood stabilization programs and efforts, such as the NSI, with financing tools that could jump-start neighborhood stabilization

[78] See NSI Fact Sheet 11/10/2015, available at http://www.fhfa.gov/PolicyProgramsResearch/Programs/Pages/Neighborhood-Stabilization-Initiative.aspx. The NSI was launched as a pilot to facilitate the disposition of REO properties in ways that will stabilize neighborhoods. Id. The NSI leverages the National Community Stabilization Trust, a national nonprofit organization that works closely with local governments and other community resources to make informed decisions on treatment of individual properties. Id.

efforts. Some economists suggest that homeowners are more likely than other buyers to invest in their homes, neighborhoods and local economies.[79]

Investors often profit from the lack of credit availability for repair and rehabilitation of vacant and abandoned homes because investors have credit access that individual homeowners and nonprofit organizations operating in distressed communities often lack. An Enterprise loan product for purchase or rehabilitation of distressed properties could enable income-qualifying homeowners, as well as nonprofit organizations or local or tribal governments acting on behalf of homeowners and renters, to obtain rehabilitation financing without involving for-profit investors, thereby ensuring that more of the benefits of financing flow to homeowners.

FHFA finds the commenters' arguments and the need for financing for distressed properties compelling. Accordingly, the final rule establishes a Regulatory Activity for Enterprise support of financing for certain distressed properties.

FHFA considered limiting this Regulatory Activity to homes located only in blighted neighborhoods, where most vacant and abandoned homes are found. However, FHFA determined that very low-, low-, and moderate-income families also should have the opportunity to purchase vacant and abandoned homes in other areas. Accordingly, the final rule sets no geographic limits on this Regulatory Activity.

There are key differences between this Regulatory Activity and the NSI, which is not part of the Duty to Serve. First, this Regulatory Activity targets all homes eligible for a short sale, eligible for a foreclosure sale, or REO, rather than just homes owned by the

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[79] See generally Atif Mian and Amir Sufi, "House of Debt: How They (and You) Caused the Great Recession, and How We Can Prevent It from Happening Again" (consumers underwater on their mortgages – even those who are current on payments – consume less, thereby weakening local economies), available at http://press.uchicago.edu/ucp/books/book/chicago/H/bo20832545.html.

Enterprises. Second, this Regulatory Activity supports the financing of repairs, rehabilitations, and demolitions, in addition to simply purchase money mortgages. Third, this Regulatory Activity targets the purchase or rehabilitation of vacant and in default or abandoned homes, rather than the sale or disposition of those homes.

The Duty to Serve is limited under the statute to support for financing products that promote affordable housing or neighborhood stabilization.[80] Therefore, Duty to Serve credit is not available for Enterprise activities under the NSI or for any neighborhood stabilization efforts other than stabilization efforts directly related to creating Enterprise loan purchase products.

Enterprise loan purchase products that could receive Duty to Serve credit under this Regulatory Activity include those that support purchases, repairs, rehabilitations, or demolition work on homes eligible for short sale, homes eligible for foreclosure sale, or REO, including rental homes. Loan products that reach Duty to Serve income-eligible families through nonprofit organizations or local or tribal governments are also included in the Regulatory Activity. This Regulatory Activity extends to purchase loans and rehabilitation loans regardless of who owns the loan or the home, or the neighborhood in which the home is located, as long as the loan product includes Enterprise control of the resulting first mortgage loan.

(e) Additional Activities

Section 1282.37(c)(2) of the final rule also sets out requirements for eligible Additional Activities in the affordable housing preservation market, specifying that these activities must preserve affordability of existing affordable housing. Preservation can

[80] See 12 U.S.C. 4565(a)(1).

include Additional Activities that involve preserving existing subsidy where the term of affordability required for the subsidy is followed, or where there is a deed restriction for the life of the loan. It may also involve preserving the affordability of properties in conjunction with state or local inclusionary zoning, real estate tax abatement, or loan programs, where a regulatory agreement, recorded use restriction, or deed restriction maintains affordability of a portion of the property's units for the term defined by the state or local program.

3. Rural Markets—§ 1282.35

The below section describes the final rule provisions for the rural market and explains FHFA's rationale for adopting four Regulatory Activities for this market. The four Regulatory Activities are: (1) high-needs rural regions; (2) high-needs rural populations; (3) financing by small financial institutions of rural housing; and (4) small multifamily rental properties in rural areas. The below section also explains FHFA's definitions of "rural area," "high-needs rural areas," and "high-needs rural populations," which have been expanded from those in the proposed rule.

a. Regulatory Activities

Section 1282.35(c)(1) - (4) of the final rule identifies four specific types of activities as Regulatory Activities under the rural markets. Two of these Regulatory Activities – Enterprise activities supporting high-needs rural regions and Enterprise activities supporting high-needs rural populations – were included in the proposed rule under one Regulatory Activity. The other two Regulatory Activities – Enterprise activities related to the financing of housing by rural small financial institutions and Enterprise activities related to the financing of small multifamily rental properties in rural

areas – are new. The Regulatory Activities and definition of "rural area" are discussed below.

Definition of "Rural Area"—§ 1282.1

Section 1282.1 of the final rule defines "rural area" as: (1) a census tract outside of a metropolitan statistical area (MSA) as designated by the Office of Management and Budget (OMB); or (2) a census tract in an MSA but outside of the MSA's Urbanized Areas as designated by the U.S. Department of Agriculture's (USDA) Rural-Urban Commuting Area (RUCA) Code #1,[81] and outside of tracts with a housing density of more than 64 housing units per square mile in USDA's RUCA Code #2.[82] This is a change from the proposed rule, which also relied on USDA RUCA codes. The proposed rule's definition included the first prong in the final rule's definition of "rural area" – a census tract outside of an MSA as designated by OMB. However, the proposed rule's definition excluded all Urbanized Areas and Urban Clusters – RUCA Codes 1, 4, and 7 – within an MSA from being considered rural.

There is no single, universally accepted definition of "rural area" because varying definitions achieve different policy objectives.[83] FHFA developed its definition of "rural area" for the Duty to Serve based on three primary criteria: (1) the definition should be broad enough to include rural residents living in outlying counties of metropolitan areas; (2) the definition should remain stable over time to support the Enterprises' Plans; and (3)

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[81] RUCA Code #1 is a tract that is in an urbanized area within a metropolitan area (a town with over 50,000 people).

[82] RUCA Code #2 describes a tract where 30 percent or more of the population commutes to a town with 50,000 people or more.

[83] See generally David A. Fahrenthold, "What does rural mean? Uncle Sam has more than a dozen answers," Washington Post (June 8, 2013), available at http://www.washingtonpost.com/politics/what-does-rural-mean-uncle-sam-has-more-than-a-dozen-answers/2013/06/08/377469e8-ca26-11e2-9c79-a0917ed76189_story.html.

the definition should remain easy to implement and operationalize by the Enterprises. As discussed in the **SUPPLEMENTARY INFORMATION** to the proposed rule, FHFA considered the U.S. Census Bureau, CFPB, and USDA definitions of "rural" but determined that the definition it proposed would better serve the Duty to Serve policy objectives under these three criteria.

The USDA definition of "rural" is based on the Housing Act of 1949 and defines "rural" areas generally as those that are not part of or associated with an urban area and that meet certain population thresholds, along with requirements associated with those thresholds.[84] The CFPB definition defines "rural" as counties that are outside of MSAs and outside of micropolitan statistical areas adjacent to MSAs, as well as census blocks designated as "rural" by the U.S. Census Bureau.[85] The U.S. Census Bureau designates rural areas as those outside of Urban Areas and Urban Clusters based on the decennial Census.[86] FHFA developed its proposed definition by considering its criteria for a definition of "rural area," the USDA, CFPB, and U.S. Census Bureau definitions of "rural," and comments on the 2010 Duty to Serve proposed rule.

Both Enterprises supported the proposed definition of "rural area" but did not expound on their rationale. A trade association similarly supported FHFA's proposed definition but did not elaborate on why it preferred the definition.

A nonprofit organization, a state housing finance agency, and several policy advocacy organizations preferred the USDA definition of "rural," stating that it is well

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[84] 42 U.S.C. 1490.

[85] See 80 FR 59944, 59968 (Oct. 2, 2015), to be codified at 12 CFR 1026.35(b)(2)(iv)(A), effective January 1, 2016.

[86] See United States Census Bureau, ''Urban and Rural Classification,'' Web. 20 (Feb. 2015), available at https://www.census.gov/geo/reference/ua/urban-rural-2010.html.

understood and its limitations are already accepted by the market. However, FHFA has determined that the commenters did not provide any compelling evidence addressing how the USDA definition meets FHFA's primary criteria discussed above for a definition of "rural area."

Several commenters, including nonprofit organizations, policy advocacy organizations, and a state housing finance agency, recommended modification of the proposed definition of "rural area." The commenters stated that the proposed definition is overly inclusive within metropolitan areas by including suburban/exurban communities that are not truly rural in character, and overly restrictive within metropolitan areas by excluding certain small towns, particularly in the Western U.S., that are truly rural in character.

FHFA has decided to modify the proposed definition of "rural area" in the final rule in accordance with these comments to more accurately target areas that are truly rural in character and exclude those that are more realistically classified as suburban/exurban communities, which do not share the challenges to accessing credit that rural markets face. FHFA has determined that the revised definition will best serve the policy objectives of the Duty to Serve.

The modified definition in the final rule maintains the first part of the definition of "rural area" from the proposed rule – a census tract outside of an MSA as designated by OMB. The final rule's definition allows micropolitan areas and small towns to be considered rural. These tracts, described by RUCA Codes #4[87] and #7,[88] were excluded

[87] RUCA Code #4 describes a tract that is in a micropolitan area with a primary commuting flow within a large urban cluster of 10,000 to 49,999 people.

in the proposed rule's definition. In addition, the final rule eliminates tracts described by RUCA Code #2[89] that have a housing density threshold of more than 64 units per square mile from being considered rural. Such tracts would have been classified as rural areas under the proposed rule's definition. FHFA added the threshold of more than 64 units per square mile in order to differentiate suburban/exurban tracts from rural tracts within RUCA Code #2.

FHFA modeled the final rule's definition of "rural area" on the definition proposed by a national nonprofit organization, the Housing Assistance Council, which was echoed by several other commenters. The threshold measure of housing density of 64 units per square mile, also recommended by the Housing Assistance Council and other commenters, was chosen because it is an accepted methodology.[90] For example, the USDA Forest Service classifies private forest lands as exurban/urban if they have more than 64 housing units per square mile.[91] These modifications, while adding minor complexity to the definition, meet FHFA's criteria and objectives for the definition of "rural area." The modifications result in a definition that targets areas that are truly rural in character while excluding areas that are suburban/exurban and already well served by the Enterprises. In order to make the definition easy to implement and operationalize, FHFA will provide to the Enterprises, and post on FHFA's website, a data file that lists all of the census tracts that are eligible under the final rule's definition of "rural area."

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[88] RUCA Code #7 describes a tract that is in a small town with a primary commuting flow within a small urban cluster of 2,500 to 9,999 people.
[89] RUCA Code #2 describes a tract where 30 percent or more of the population commutes to a town with 50,000 people or more.
[90] David M. Theobold, "Land-Use Dynamics beyond the American Urban Fringe," Geographical Review, Vol. 91, No.3 (July 2001), pp. 544-564.
[91] "Forests on the Edge–Housing Development of America's Private Forests," U.S. Department of Agriculture, Forest Service (May 2005).

The Enterprises are encouraged to incorporate the data file into mapping and other tools that can further facilitate use of the final rule's definition.

(i) Housing in High-Needs Rural Regions—§ 1282.35(c)(1)

Section 1282.35(c)(1) of the final rule establishes a Regulatory Activity for Enterprise support for financing of housing located in high-needs rural regions. Section 1282.1 of the final rule defines a "high-needs rural region" as any of the following regions located in a rural area: (i) Middle Appalachia; (ii) the Lower Mississippi Delta; (iii) a colonia; or (iv) a tract located in a persistent poverty county and not included in Middle Appalachia, the Lower Mississippi Delta, or a colonia. This definition is similar to the definition in the proposed rule, with the addition of rural tracts located in persistent poverty counties as provided in (iv) above. The final rule also makes a change to the definition of "colonia." Changes from the proposed rule are discussed below.

FHFA chose the proposed rural regions for a Regulatory Activity because they are characterized by a high concentration of poverty and substandard housing conditions. The proposed rule specifically requested comment on whether Enterprise support for housing for high-needs rural regions and high-needs rural populations should be a Regulatory Activity. A number of policy advocacy organizations, nonprofit organizations, government entities, and a trade association supported including the proposed high-needs rural regions and rural populations as a Regulatory Activity, stating that there are extensive challenges to serving these regions and populations, and that these regions and populations have historically lacked necessary investment. Additionally, in FHFA's discussions with both Enterprises, the Enterprises highlighted certain regions and populations, such as colonias and members of a Federally recognized

Indian tribe in an Indian area, as unique areas and populations that will likely take significant time and resources in order to make a meaningful difference to improve housing conditions.

To create an incentive for the Enterprises to serve both high-needs rural regions and high-needs rural populations, the final rule splits this category into two separate Regulatory Activities. FHFA concludes that this change could lead the Enterprises to devise more narrowly tailored and responsive strategies to target the unique challenges in these high-needs rural regions and populations.

Significant data gaps exist in rural areas in part because under the Home Mortgage Disclosure Act, financial institutions with $44 million or less in assets or that do not have a branch in a metropolitan area are not required to collect and publicly disclose data on loans for home purchases and home improvements, or data on refinancings.[92] FHFA has determined that more granular data on rural areas could help the Enterprises, researchers, housing providers, and mortgage lenders better understand the characteristics and housing and credit needs of these areas, including high-needs rural regions and high-needs rural populations, and how best to serve them. To address these data gaps, FHFA encourages the Enterprises to collect and share granular data with researchers, lenders, and housing providers.

The final rule makes several changes or clarifications to the definitions of the specific high-needs rural regions from those in the proposed rule, as discussed below.

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[92] See Federal Financial Institutions Examination Council, "A Guide to HMDA Reporting: Getting It Right!" (2013); Consumer Financial Protection Bureau, "2016 Informational Guide Letter" (2015), available at https://www.ffiec.gov/hmda/pdf/2016letter.pdf.

a. Middle Appalachia. Consistent with the proposed rule, the final rule includes Middle Appalachia as a high-needs rural region. There was widespread support from commenters, including several nonprofit organizations and policy advocacy organizations, for including Middle Appalachia in the specific high-needs rural regions identified by FHFA in the proposed rule, due to the neglect and persistent poverty the region faces. Neither Enterprise took a position on including Middle Appalachia as a high-needs rural region. The proposed rule discussed generally the Appalachian Regional Commission's (ARC) definition of "Middle Appalachia" as a sub-region of Appalachia consisting of 230 ARC-designated counties in Kentucky, North Carolina, Ohio, Tennessee, Virginia, and West Virginia. The ARC definition of "Middle Appalachia" was not specifically included in the proposed §1282.1. Commenters did not recommend changes to the ARC definition for purposes of this Regulatory Activity, but Fannie Mae requested that FHFA incorporate a specific definition of "Middle Appalachia" in the final rule text.

FHFA has determined that incorporating a specific definition of "Middle Appalachia" in the final rule text can assist the Enterprises in proposing their activities under the Duty to Serve. Accordingly, § 1282.1 of the final rule defines "Middle Appalachia" as the "central" sub-region of Appalachia under the Appalachian Regional Commission's subregional classification of Appalachia. In order to make the definition easy to implement and operationalize, FHFA will provide to the Enterprises, and post on FHFA's website, a data file that lists all of the census tracts that are eligible under the final rule's definition of "Middle Appalachia."

b. The Lower Mississippi Delta. Consistent with the proposed rule, the final rule includes the Lower Mississippi Delta as a high-needs rural region. There was widespread support from commenters for including the Lower Mississippi Delta as a high-needs rural region because of its unique challenges and housing conditions, as with the other high-needs rural regions identified in the proposed rule. Neither Enterprise took a position on including the Lower Mississippi Delta as a high-needs rural region.

The proposed rule discussed generally the Lower Mississippi Delta Development Act's and former Lower Mississippi Delta Development Commission's definition of "Lower Mississippi Delta" as the counties and parishes in portions of Arkansas, Louisiana, Mississippi, Missouri, Illinois, Tennessee, Kentucky, and Alabama. This definition of "Lower Mississippi Delta" was not specifically included in proposed §1282.1. Commenters did not recommend changes to this definition for purposes of this Regulatory Activity or request clarification of the scope of the definition. Fannie Mae requested that FHFA add a specific definition of "Lower Mississippi Delta" in the final rule text.

As with the "Middle Appalachia" high-needs rural region, FHFA has determined that incorporating a specific definition of "Lower Mississippi Delta" in the final rule text can assist the Enterprises in proposing their activities under the Duty to Serve. The Rural Development, Agriculture, and Related Agencies Appropriations Act for FY 1989, Public Law 100-460, included the Lower Mississippi Delta Act, which authorized the Lower Mississippi Delta Development Commission and identified counties in the Lower Mississippi Delta. The Consolidated Appropriations Act of 2001, Public Law 106-554, and the Farm Security and Rural Investment Act of 2002, Public Law 107-171, added

counties to the definition. Accordingly, § 1282.1 of the final rule defines "Lower Mississippi Delta" as the counties identified by these laws, along with any future updates Congress may make to the definition of the region. In order to make the definition easy to implement and operationalize, FHFA will provide to the Enterprises, and post on FHFA's website, a data file that lists all of the census tracts that are eligible under the final rule's definition of "Lower Mississippi Delta."

c. Colonias. Consistent with the proposed rule, the final rule includes colonias as high-needs rural regions but revises the definition of "colonia" from that in the proposed rule, as discussed below. A number of commenters supported including colonias as high-needs rural regions because of their economic distress and persistent poverty. Neither Enterprise took a position on including colonias as high-needs rural regions.

Section 1282.1 of the final rule defines a "colonia" as an identifiable community that meets the definition of a colonia under a federal, state, tribal, or local program. This is a change from the proposed rule, which would have defined a "colonia" as any identifiable community that (i) is designated as a colonia by the state or county in which it is located; (ii) is located in Arizona, California, New Mexico, or Texas; and (iii) is located in a U.S. census tract with some portion of the tract being within 150 miles of the U.S.-Mexico border. FHFA chose this proposed definition in order to incorporate certain elements of the definition used by the Cranston-Gonzales National Affordable Housing Act, discussed below, while also providing a broad scope for Enterprise activities, including the purchase of mortgage loans, in colonias.

The proposed rule specifically requested comment on how FHFA should define a "colonia" for Duty to Serve purposes. Few commenters made recommendations on the

proposed definition, and no commenters specifically supported it. Fannie Mae recommended that FHFA modify the proposed definition to include the entire county in which a colonia is located, due to the impact that a colonia may have on the economy and housing needs of the county as a whole. A state housing finance agency expressed concern about the potential for confusion and operational difficulties that could arise from the many conflicting definitions of colonia. The commenter recommended that FHFA define "colonias" as the eligible communities under the commonly used HUD and USDA programs, as well as any federally established definition used by state and local programs.

FHFA finds that definitions used by HUD and USDA would pose challenges under the Duty to Serve because they include a requirement that to be considered a "colonia," the community must lack a potable water supply and adequate sewage systems.[93] As noted in the **SUPPLEMENTARY INFORMATION** to the proposed rule, if such requirements were applied for Duty to Serve purposes, the Enterprises would likely be able to receive little or no Duty to Serve credit for activities in colonias because the Enterprises' property eligibility requirements would not permit them to purchase mortgages on properties that lack potable water supplies and adequate sewage systems.

[93] The Cranston-Gonzalez National Affordable Housing Act defines a "colonia" as an identifiable community that (A) is in the State of Arizona, California, New Mexico, or Texas; (B) is in the area of the United States within 150 miles of the U.S.-Mexico border (not including any standard MSA with a population exceeding 1 million), or is in the United States-Mexico border region (the applicable criterion depends on the particular housing program); (C) is determined to be a colonia on the basis of objective criteria, including lack of potable water supply, lack of adequate sewage systems, and lack of decent, safe and sanitary housing; and (D) was in existence as a colonia before November 28, 1990. See 42 U.S.C. 1479(f)(8); 42 U.S.C. 5306 note. Previous statutory definitions included the criteria that a state or county in which a community is located designate a particular community as a "colonia." See Public Law 101–625, 104 Stat. 4290, 4396 (1990). HUD and USDA definitions of "colonia" rely on previous and current statutory definitions of "colonia," based on the specific housing program. See 7 CFR 1777.4; 24 CFR 570.411.

In addition, FHFA has determined that the geographic limitation in HUD and USDA definitions of "colonia" that was included in FHFA's proposed definition could discourage the Enterprises from serving communities designated as colonias by state, tribal or local programs that have similar indicia of poverty and needs, but do not meet the geographic requirement. Both the HUD and USDA definitions require that to be considered a colonia, the community must be located in an area within 150 miles of the U.S.-Mexico border. FHFA's proposed definition of "colonia" would have included a requirement that the community be located in a U.S. census tract with some portion of the tract within 150 miles of the U.S.-Mexico border. FHFA notes that, for example, several counties in Texas with communities designated as colonias by the state are not within 150 miles of the U.S.-Mexico border, as the State of Texas includes a category of "non-border colonias" in its water code. These colonias do not meet the 150-mile requirement, yet share similar indicia of poverty and needs as other colonias in Texas that meet the 150-mile requirement. The Texas Secretary of State identifies Marion, Newton, Red River, and Sabine Counties, which are located more than 150 miles from the Texas-Mexico border, as counties that include colonias.

FHFA notes that in many cases, state and local governments play an important role in the level of public controls related to factors such as the initial designation of colonias, their ongoing conditions, and local initiatives to improve their conditions. Some colonias are incorporated communities under the control of a city, some are unincorporated and under the control of a county, and some may be under the control of both a city and a county if they are located in extra-jurisdictional territories of a city that shares some level of control with the county. The motivation to improve conditions for

residents of colonias has led to a variety of projects that combine funding from multiple federal and non-federal sources.

After considering the comments and the varying definitions of "colonia," FHFA has determined that broadening the proposed definition of "colonia" could encourage Enterprise support for colonias, as defined by federal, state, tribal, or local programs. Accordingly, § 1282.1 of the final rule defines a "colonia" as an identifiable community that meets the definition of a colonia under a federal, state, tribal, or local program. Since FHFA is adopting a broad definition of "colonia," it will be unable to provide the Enterprises a data file that lists all of the census tracts that are eligible under the final rule's definition of "colonia," as it plans to do for the other high-needs rural regions. To address the data challenges that exist in specifically identifying the census tracts that contain "colonias," FHFA encourages the Enterprises to collect and share granular data with researchers, lenders, and housing providers.

Enterprise purchases of loans that are made under any HUD or USDA programs that serve a "colonia," are eligible for Duty to Serve credit under this Regulatory Activity, provided they are located in a "rural area" as defined in the final rule and are for very low-, low, or moderate-income households as defined under the Duty to Serve.

d. Tracts in Persistent Poverty Counties. Section 1282.1 of the final rule includes rural tracts that are located in "persistent poverty counties," and that are not located in Middle Appalachia, the Lower Mississippi Delta, or colonias, in the definition of "high-needs rural regions." This is a change from the proposed rule, which would not have included rural tracts located in persistent poverty counties in the definition.

The proposed rule specifically requested comment on whether there are high-needs rural regions or high-needs rural populations in addition to those identified that should be included and, if so, how they should be defined in order to receive Duty to Serve credit. A number of commenters, including several nonprofit organizations and policy advocacy organizations, pointed out that certain regions similar in nature to the high-needs rural regions in the proposed rule were omitted from the proposed rule's definition of "high-needs rural region." The regions identified by the commenters include: rural areas of Puerto Rico; much of mainland Alaska; the central valley of California; and the region described by commenters as the "Southern Black Belt" in Alabama, Georgia, and the Carolinas. Of these regions, the one most frequently cited by commenters as a high-needs rural region was the "Southern Black Belt."

The most common recommendation from commenters who supported changes to the definition of "high-needs rural region" was to include areas struggling with "persistent poverty" as high-needs rural regions, which would capture rural regions struggling with the same types of challenges as the specific high-needs rural regions identified in the proposed rule. Commenters supporting this approach included several nonprofit organizations and policy advocacy organizations.

Some commenters either referenced or recommended a particular definition for "persistent poverty" areas. A nonprofit organization recommended that FHFA use the definition of "persistent poverty county" used by the U.S. Department of Treasury's CDFI Fund, which defines a "persistent poverty county" as a county that had poverty rates of 20 percent or more over the past 30 years, as measured by the 1990, 2000, and 2010 decennial censuses. A policy advocacy organization recommended the same

definition without naming the CDFI Fund. Another policy advocacy organization recommended the definition of "persistent poverty county" used by the USDA Economic Research Service, which defines a "persistent poverty county" as one with poverty rates of 20 percent or more over the past 30 years, as measured by the 1980, 1990, and 2000 decennial censuses and the 2007-2011 American Community Survey. Some nonprofit organizations used the USDA Economic Research Service's definition in describing what a "persistent poverty county" means, but did not explicitly recommend that FHFA use that definition. Several other policy advocacy organizations recommended that FHFA add persistent poverty counties located in the rural Southeast's "Black Belt" as a fourth high-needs rural region, but they did not propose a specific definition of "persistent poverty county."

FHFA finds compelling the comments that tracts in rural areas that are located in persistent poverty counties should be included as high-needs rural regions in the final rule because, as the commenters noted, this would capture many of the regions which commenters identified as high-needs that were omitted from the proposed rule's definition of "high-needs rural region." In choosing a measure for persistent poverty areas, FHFA analyzed both the CDFI Fund definition and the USDA Economic Research Service definition. The CDFI fund identified 384 counties with persistent poverty under its definition, using data from the 1990 census, the 2000 census, and the 2006-2010 American Community Survey.[94] Under its methodology, the USDA Economic Research Service identified 353 counties with persistent poverty. FHFA has selected the CDFI Fund's definition for the final rule because it includes both 31 more counties and 286

[94] Consolidated Appropriations Act, 2012, Public Law 112-74, 125 Stat. 887 (2011).

additional rural area tracts than the USDA Economic Research Service definition along with having a greater level of support from commenters.

The persistent poverty counties identified by the CDFI Fund capture regions, such as the "Southern Black Belt" and parts of Alaska, that were omitted from the proposed rule's definition of a "high-needs rural region." The CDFI Fund definition of "persistent poverty counties" does overlap to a large extent with the other high-needs rural regions and populations identified in the final rule, such as Middle Appalachia, the Lower Mississippi Delta, colonias, and Indian areas. Accordingly, to prevent double-counting for Duty to Serve purposes, tracts in "persistent poverty counties" considered "high-needs rural regions" will be limited to those places that are not already included in Middle Appalachia, the Lower Mississippi Delta, or colonias.

The CDFI Fund definition of "persistent poverty counties" does not distinguish between rural poverty counties and urban poverty counties. For example, the CDFI Fund definition includes Kings County, N.Y. and Bronx County, N.Y., located in New York City, which are not rural by any definition. Since the CDFI Fund definition is not limited to rural areas, the final rule provides that the tracts in persistent poverty counties must be located in "rural areas," as defined in the final rule, in order to be considered "high-needs rural regions." In the 384 counties identified by the CDFI Fund as persistent poverty counties, FHFA has identified 2,127 tracts that are located in such "rural areas."

In short, § 1282.1 of the final rule defines "high-needs rural region" to include a rural tract in a "persistent poverty county" that is not located in Middle Appalachia, the Lower Mississippi Delta, or a colonia. Section 1282.1 defines a "persistent poverty county" as a county that has had 20 percent or more of its population living in poverty

over the past 30 years, as measured by the most recent successive decennial censuses. For the first Duty to Serve Plan evaluation cycle, the counties identified by the CDFI Fund as "persistent poverty counties" will be used. In order to make the definition easy to implement and operationalize, FHFA will provide to the Enterprises, and post on FHFA's website, a data file that lists all of the census tracts that are eligible under the final rule's definition of "persistent poverty counties."

(ii) Housing for High-Needs Rural Populations—§ 1282.35(c)(2)

Section 1282.1 of the final rule defines "high-needs rural population" as any of the following populations located in a rural area: (i) members of a Federally recognized Indian tribe located in an Indian area; or (ii) agricultural workers. This definition is the same as the definition in the proposed rule except that the final rule includes all agricultural workers instead of only migrant and seasonal agricultural workers. FHFA chose these specific rural populations for a Regulatory Activity because they experience a high concentration of poverty and live in substandard housing conditions. A discussion of comments on whether Enterprise support for high-needs rural populations should be a Regulatory Activity is included under the "high-needs rural regions" discussion above.

a. Members of a Federally Recognized Indian Tribe Located in an Indian Area. Section 1282.1 of the final rule defines "Federally recognized Indian tribe" and "Indian area" consistent with the definitions in the proposed rule. Several nonprofit organizations and policy advocacy organizations supported providing Duty to Serve credit for this population because of its unique needs and the historical lack of mortgage lending that has been available to it.

Both Enterprises proposed an alternative approach that would target geographical

areas as a way to assist this population. The Enterprises stated that this change would achieve operational efficiencies by providing Duty to Serve credit for loan purchases in "Indian areas" without requiring that a borrower actually be a member of a Federally recognized Indian tribe. FHFA considered this recommendation, but finds that the Enterprises' suggested geographical areas would be over-inclusive and would direct support away from the targeted population. The Enterprises' suggested changes would potentially drive lending to areas where it is far less challenging to finance housing and where the needs of this population are much less severe, such as housing within the bounds of an Indian area that is titled as fee simple property, or housing that is not owned by a member of a Federally recognized Indian tribe. Accordingly, the final rule does not adopt this recommendation.

Loans made under the HUD Section 184 and Title VI programs serve members of a Federally recognized Indian tribe in Indian areas consistent with the final rule's definition of this high-needs rural population. Enterprise purchases of loans that are made through these programs and that are provided to a Federally recognized Indian tribe or its members, located in an Indian area, are eligible for Duty to Serve credit under this Regulatory Activity, provided they are located in a "rural area" as defined in the final rule and are for very low-, low, or moderate-income households as defined under the Duty to Serve.

b. Agricultural Workers. Section 1282.1 of the final rule also includes agricultural workers within the definition of "high-needs rural population." Section 1282.1 defines "agricultural worker" to mean any person that meets the definition of an agricultural worker under a federal, state, tribal, or local program. This is a change from

the proposed rule, which would have included only migrant and seasonal agricultural workers, as defined by the U.S. Department of Labor.

The proposed rule specifically requested comment on whether FHFA should define "high-needs rural population" to include other categories of agricultural workers with high-needs housing issues in addition to seasonal and migrant agricultural workers, and whether agricultural workers with permanent annual employment should be included.

Several policy advocacy organizations and nonprofit organizations supported including seasonal or migrant workers as a high-needs rural population due to their significant housing needs, and some expressed optimism about how the Enterprises could do more to interact with these communities.

A nonprofit organization recommended that other categories of migrant workers, such as those employed in commercial agricultural production centers like saw mills, be included in this high-needs rural population, but did not provide reasons for expanding the definition.

A state housing finance agency noted that housing finance agencies and other state, local, and nonprofit organizations currently serve migrant and seasonal agricultural workers through a variety of federal programs, and advocated for Enterprise support for successful existing programs and for the development of new programs for Duty to Serve credit.

Both Enterprises expressed concerns about limiting the Duty to Serve rule to seasonal and migrant agricultural workers, and Freddie Mac specifically recommended that annual farmworkers be considered a high-needs rural population. Fannie Mae opposed applying the U.S. Department of Labor's definition of "migrant and seasonal

agricultural workers," citing a potential operational burden that the definition could impose because: (1) Fannie Mae does not collect the data needed for the definition, and (2) people may not accurately self-identify as beneficiaries. Both Enterprises proposed an alternative approach that would target geographical areas as a way to assist agricultural workers. Fannie Mae provided a more detailed explanation of this methodology, suggesting that FHFA consider using USDA data to identify areas that include a certain threshold percentage of migrant agricultural workers. FHFA considered this recommendation, but finds that the Enterprises' suggested geographical areas would be over-inclusive and would direct support away from the agricultural worker population.

FHFA has considered the comments and finds the arguments compelling that the final rule should not be limited to migrant and seasonal agricultural workers, which would exclude people working on dairy farms, animal processing plants, or fisheries, as well as those who work on a farm year-round engaged in activities such as irrigation work. FHFA finds no evidence that annual agricultural workers have lesser housing needs than migrant and seasonal agricultural workers. In fact, some data shows that agricultural workers as a whole are among the poorest populations, with families living in poverty at twice the national rate.

Accordingly, § 1282.1 of the final rule includes agricultural workers rather than only migrant and seasonal workers as a "high-needs rural population." Section 1282.1 defines "agricultural worker" as any person that meets the definition of an agricultural worker under a federal, state, tribal, or local program. FHFA has determined that this definition of "agricultural worker" could include farmworkers who have significant housing needs but may not migrate or work in seasonal patterns, and broadens the types

of farmworker programs across states, localities, and tribal jurisdictions that the Enterprises could support for Duty to Serve credit.

The USDA 514 and 516 programs provide loans or grants for properties with affordable housing for agricultural workers. Because the final rule's definition of "agricultural worker" allows for use of the definition of "agricultural worker" by another federal program, such as a USDA program, Enterprise purchases of loans associated with USDA Section 514 and 516 properties are eligible for Duty to Serve credit under this Regulatory Activity, provided the properties are located in a "rural area" as defined in the final rule and support affordable housing for very low-, low, or moderate income households as defined under the Duty to Serve.

(iii) Financing by Small Financial Institutions of Rural Housing—§ 1282.35(c)(3)

The final rule establishes a new Regulatory Activity for Enterprise activities related to the financing by small financial institutions of owner-occupied or multifamily rental housing in rural areas. This is a change from the proposed rule, which would not have included this as a Regulatory Activity.

The proposed rule specifically requested comment on what types of barriers exist to rural lending for housing and how the Enterprises could best address them. The proposed rule also asked what types of Enterprise activities could help build institutional capacity and expertise among market participants serving rural areas. A number of commenters identified barriers to rural lending and discussed how the Enterprises could address these challenges. A nonprofit organization that specializes in rural housing

identified bank consolidation as a barrier to rural lending for housing, citing Home Mortgage Disclosure Act data showing that nearly 30 percent of all reported rural and small town home purchase loans were made by just ten banks. Additionally, the commenter stated that large banks serving communities far from their headquarters may not be as attached to the communities in comparison to smaller community banks based in those communities. The commenter asserted that this has resulted in large banks not fully knowing their customer base, being less involved in the community, and potentially making fewer loans in the community.

To help address this issue, the commenter recommended encouraging the Enterprises to work with community-based lenders in rural areas by giving Duty to Serve credit for Enterprise purchases of rural mortgage loans generated by small bank lenders. The commenter recommended defining "small bank lenders" using the Community Reinvestment Act's (CRA) classification of small financial institutions under the CRA threshold for "intermediate small institutions," which is currently $304 million in assets.[95]

Identifying a different concern, a state-based rural advocacy organization suggested that small financial institutions in rural areas may lack the experience necessary to address rural lending challenges. The commenter stated that the Enterprises can help address these capacity shortcomings by providing technical and product-related support to small lenders. A state housing finance agency commented that current Enterprise requirements for small financial institutions to become seller/servicers can be onerous and expensive. A nonprofit organization specializing in rural housing

[95] See 80 FR 81162 (Dec. 29, 2015) (as adjusted annually for inflation).

development commented that small financial institutions, particularly CDFIs, have been focused on serving rural areas for many years and are well positioned to work with the Enterprises to help address barriers to rural lending.

FHFA finds the comments compelling that the rural market would benefit from adding a Regulatory Activity in the final rule that specifically encourages Enterprise activities related to lending in rural areas by small financial institutions. This is an area where the Enterprises have the capacity to make an immediate difference by providing technical assistance and working with small financial institutions to help them become approved seller/servicers.

Consolidation of the financial services industry has hit rural areas particularly hard. The number of banks headquartered in farm-dependent rural areas declined from about 1,500 in 1995 to less than 600 in 2015.[96] Overall, the number of banks with less than $1 billion in assets has decreased dramatically over the last 30 years. In 1985, there were 17,467 FDIC-insured institutions with less than $1 billion in assets; by 2010, this number had declined to 6,992.[97] With mergers, consolidations, and acquisitions dramatically reducing the number of community banks,[98] opportunities for the Enterprises to support affordable housing through small financial institutions have diminished.

FHFA considered the definitions of small financial institutions/community banks

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[96] Julie Stackhouse, Federal Reserve Bank of St. Louis, Presentation at the Federal Reserve Board Conference, "The Future of Rural Communities: Implication for Housing" (May 10, 2016).

[97] FDIC Community Banking Research Project, "Community Banking by the Numbers – Federal Deposit Insurance Corporation," p. 3 (February 16, 2012) (PowerPoint Presentation), available at <https://www.fdic.gov/news/conferences/communitybanking/community_banking_by_the_numbers_clean.pdf>.

[98] Federal Deposit Insurance Corporation, "Community Banking Study" (December 2012), available at https://www.fdic.gov/regulations/resources/cbi/report/cbi-full.pdf.

from the CRA, CFPB, FRB, and OCC, and found that there are no operational impediments that would make any of those definitions impractical for the Enterprises. The Enterprises currently have a variety of programs, such as the cash window delivery process, that make it possible for even very small lenders to engage in business with the Enterprises, as long as they meet the Enterprises' minimum net worth requirements.

FHFA analyzed the rationales for the CRA, CFPB, FRB, and OCC definitions, and finds that the purpose of the CRA definition aligns most closely with FHFA's policy goal for including support for small financial institutions in the final rule. Under the CRA, a small bank is defined as a financial institution with assets of less than $1.216 billion. A small bank becomes an "intermediate small bank" when it has assets of at least $304 million and less than $1.216 billion.[99] Small lenders play an important role in providing affordable housing, but face certain operational challenges that put them at a disadvantage in relation to larger financial institutions. Because the asset size of small financial institutions is a barrier to lending in the rural market and there are limited opportunities for the Enterprises to more robustly engage these institutions, especially those with less than $304 million in assets, FHFA finds that the CRA definition of small banks below the "intermediate small bank" threshold can serve as a reasonable asset cap to define "small financial institution."

Accordingly, § 1282.35(c)(3) of the final rule establishes a Regulatory Activity for Enterprise activities related to financing by small financial institutions of housing in rural areas. Section 1282.1 defines "small financial institution" consistent with CRA's

[99] Board of Governors of the Federal Reserve System, "Agencies Release Annual CRA Asset-Size Threshold Adjustments for Small and Intermediate Small Institutions," Press release, December 22, 2015, available at http://www.federalreserve.gov/newsevents/press/bcreg/20151222a.htm.

classification of small banks below the threshold for "intermediate small banks" (i.e., those financial institutions with less than $304 million in assets).

Enterprise purchases of loans made by small financial institutions and that support housing under the USDA Section 502, 504, 514, 515, 516, and 538 programs would be eligible for Duty to Serve credit under this Regulatory Activity, provided the housing is located in a "rural area" as defined in the final rule, and serves very low-, low, or moderate-income families as defined under the Duty to Serve. The Enterprises may consider working with aggregators that facilitate such lending from small financial institutions in rural areas for Duty to Serve credit.

(iv) Small Multifamily Rental Properties in Rural Areas—§ 1282.35(c)(4)

Section 1282.35(c)(4) of the final rule establishes a new Regulatory Activity for Enterprise support for financing of small multifamily rental properties in rural areas. Section 1282.1 defines "small multifamily rental property" as a property with 5 to 50 rental units. This Regulatory Activity was not included in the proposed rule.

The proposed rule specifically requested comment on what types of barriers exist to rural lending for housing and how the Enterprises can best address them. The proposed rule also asked what types of Enterprise activities could help build institutional capacity and expertise among market participants serving rural areas. A number of commenters identified barriers to rural lending and discussed what the Enterprises could do about these challenges. One nonprofit organization that specializes in rural housing responded that there is a great need for financing to preserve rural small multifamily properties. The commenter and a policy advocacy organization stated that multifamily properties in rural areas tend to be small. The commenter noted that there are very few

multifamily properties with more than 30 units and that two of the largest rural multifamily financing programs, the USDA Section 514 and 515 programs, average just 30 units per project. Given the smaller scale of these properties, developers may encounter challenges with transaction and operational costs, which can be spread across large properties in a more cost-effective way. A rural housing trade association labelled the challenges of refinancing Section 515 small multifamily properties a crisis, and identified data showing that a significant share of Section 515 multifamily units will be paid off by 2024 and will require refinancing to maintain their affordability.[100]

Financing of small multifamily housing faces unique challenges compared to financing of larger multifamily developments. Many properties in the unsubsidized small multifamily market suffer from deferred maintenance, energy inefficiency, and faulty plumbing, which make it difficult for the rents to cover operating costs.[101] Financial institutions and developers may be reluctant to finance rural housing if they believe their revenues will not cover costs. Data from the Residential Finance Survey indicate that in 2001, 12 percent of low-cost rental properties with average monthly rents of $400 or less reported negative net operating income, an unsustainable condition that could lead to accelerating losses of these units in the future.[102] Almost two-thirds of the nation's nearly 26 million unsubsidized rental units were owned by individuals or couples in

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[100] FHFA recognizes that new data was recently released by the USDA suggesting that the spike in maturing Section 515 mortgages may be later than was anticipated when this comment letter was submitted. The latest data released by USDA on this topic is at: http://www.sc.egov.usda.gov/data/data_files.html.

[101] William Apgar & Shekar Narasimhan, Joint Center for Housing Studies, "Enhancing Access to Capital for Smaller Unsubsidized Multifamily Rental Properties," p. 6 (RR07-8) (Harvard University, March 2007), available at http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/rr07-8_apgar.pdf.

[102] Id. at 11.

2001.[103] Small-scale multifamily properties often are not well-capitalized, and their owners may struggle with the costs and processes that are critical when managing tenants and properties.[104]

FHFA is persuaded by the comments and its research that rural markets could benefit from adding a Regulatory Activity in the final rule that specifically encourages Enterprise support for financing of small multifamily rental properties in rural areas, including Enterprise technical assistance to rural lenders for such properties. Due to the significant need for small multifamily rental housing in rural areas, the Regulatory Activity is not limited to support for rural lenders of a specific size, as under the Regulatory Activity in § 1282.34(d)(1) for small multifamily rental properties under the affordable housing preservation market. An Enterprise purchase of a loan on small multifamily rental housing in a rural area is eligible for Duty to Serve credit under both the affordable housing preservation market and the rural market, provided the activity complies with both §§ 1282.34(d)(1) and 1282.35(c)(4).

Examples of channels that the Enterprises could use to help address the need for financing of small multifamily rental housing in rural areas include: (1) purchasing loans that support properties financed through the USDA Section 514, 515, and 538 programs; (2) purchasing loans originated under the HUD Small Building Risk Sharing Initiative; (3) purchasing loans originated under the USDA 538 program; and (4) providing technical assistance to lenders serving rural areas, as long as the housing being supported through the Enterprises' activities is located in a "rural area" as defined in the final rule, and serves very low-, low-, or moderate-income households as defined under the Duty to

[103] Id. at 13.
[104] Id. at 11, 15.

Serve.

(v) Low-Income Housing Tax Credit Equity Investments—§ 1282.37(b)(5)

The Safety and Soundness Act requires FHFA to consider the amount of an Enterprise's investments and grants in projects that assist in meeting the needs of the underserved markets in evaluating the Enterprise's Duty to Serve performance.[105] Low-Income Housing Tax Credit (LIHTC) equity investments by the Enterprises would fall within this investments category but FHFA, to date, has not permitted the Enterprises to make LIHTC equity investments during their conservatorships.

The proposed rule did not include any specific provisions on Enterprise LIHTC equity investments, but requested comment on a number of related issues. Numerous commenters provided responses to FHFA's questions, with the views expressed generally falling into three broad categories: (i) Duty to Serve credit should be permitted only for targeted or limited Enterprise LIHTC equity investments; (ii) Duty to Serve credit should be permitted for Enterprise LIHTC equity investments with few or no restrictions; and (iii) FHFA should maintain its prohibition on all LIHTC-related activities by the Enterprises.

After considering the comments, under § 1282.37(b)(5) of the final rule, Enterprise LIHTC equity investments will be eligible for Duty to Serve credit in rural areas only. FHFA will consider the extent to which an Enterprise's LIHTC equity investments serve high-needs rural regions and populations during the evaluation process and may provide greater Duty to Serve credit for such investments. Any Enterprise LIHTC equity investments are conditioned on receiving a separate approval of the

[105] See 12 U.S.C. 4565(d)(2)(D).

investments by FHFA as conservator. The comments received and the final rule provision concerning LIHTC equity investments are discussed below.

A majority of the commenters, consisting primarily of nonprofit organizations and policy advocacy organizations, fell into the first group, favoring providing Duty to Serve credit only for targeted or limited Enterprise re-entry into the LIHTC equity investment market. Many of these commenters favored targeting any LIHTC equity investments made by the Enterprises to certain geographic areas or limited by other specific criteria, with some commenters favoring volume caps. Several policy advocacy organizations, a nonprofit organization, and a banking trade association recommended that if the Enterprises are allowed to re-enter the LIHTC equity investment market, FHFA should require targeting of the investments to underserved areas where Enterprise support is most needed, including rural markets and high-needs rural regions such as Indian Country. A nonprofit organization commented that Enterprise LIHTC equity investment in rural areas is needed because rural projects cannot offer the economies of scale or the profit potential needed to attract financing or LIHTC equity investment from large commercial lenders. A nonprofit intermediary favored Duty to Serve credit for LIHTC equity investments in properties assisted under the statutorily-enumerated affordable housing preservation programs and in rural areas with persistent poverty. Commenters stated that restricting the Enterprises to LIHTC equity investments in limited areas would prevent the distortion of LIHTC equity prices and the pricing out of private investors, while giving the Enterprises flexibility to respond to underserved market needs.

Among this first group, a housing advocacy organization recommended providing Duty to Serve credit based on the condition and long-term affordability of the project at

the end of the LIHTC compliance period, rather than by geographic targeting. A nonprofit organization involved in lending, developing, and managing affordable properties highlighted several specific markets needing LIHTC equity investment: (1) long-term Section 8 properties; (2) 4 percent LIHTC preservation projects; (3) rural housing; (4) Native American housing; (5) assisted living housing for low-income elderly households; and (6) supportive housing with intensive supportive services.

The second group of commenters, including both Enterprises, a trade organization, and a nonprofit housing developer, preferred that Duty to Serve credit be available for Enterprise LIHTC equity investments with few or no restrictions. The commenters stated that there is an ongoing need for unrestricted Enterprise support, especially for projects outside of major banks' Community Reinvestment Act (CRA) assessment areas. Fannie Mae and a private nonprofit investor and lender specializing in financing affordable housing and community development specifically objected to limiting Enterprise LIHTC equity investments to pre-determined geographic areas, arguing that this would preclude the Enterprises from investing in multi-investor funds.

Commenters in this group also recommended that the Enterprises be positioned to serve as "investors of last resort" should the LIHTC equity market soften. They stated that in order to be able to respond quickly and effectively to changing market conditions, the Enterprises must have organizational structures and staff in place with expertise in LIHTC equity investments.

A smaller third group of commenters, which included a banking trade association, an organization for LIHTC investors, and several housing advocacy organizations, favored prohibiting all LIHTC-related activities by the Enterprises. Their general view

was that the demand for LIHTCs is extremely high and that Enterprise re-entry into the LIHTC equity investment market would drive prices higher, drive private investors out of the market, and obstruct banks' CRA compliance. A nonprofit housing organization stated that Enterprise LIHTC equity investments should not be allowed because the Treasury Department sweeps the Enterprises' profits.

After considering the comments, FHFA is persuaded that despite a vibrant LIHTC equity investment market in some areas of the country, other limited areas have significant LIHTC equity needs that the Enterprises could safely assist. The financial crisis did not affect all regions of the country equally. Certain parts of the country, including cities such as New York and San Francisco, have avoided the sharp decrease in LIHTC demand and prices, and affordable housing construction in these areas has continued on pace. In fact, the demand for LIHTC equity investments in affluent urban markets has escalated, with prices reaching as high as $1.17 per $1.00 of LIHTCs. It would not currently serve the purposes of the Duty to Serve for the Enterprises to re-enter these markets because the Enterprises could displace private investors, as pointed out by some commenters.

Other areas of the country, notably certain rural regions, have seen the demand for LIHTC equity investments disappear, with fewer LIHTC projects being completed during and following the financial crisis. A 2014 report found that the proportion of LIHTC-financed housing units developed in rural communities fell by 69 percent between 1987 and 2010.[106] More specifically, in 1987, 24 percent of all LIHTC-financed housing was

[106] See National Rural Housing Coalition, "Rural America's Rental Housing Crisis – Federal Strategies to Preserve Access to Affordable Rental Housing in Rural Communities," 17-18 (2014) [hereinafter cited

developed in rural areas,[107] but in 2010, this percentage had dropped to 7.5 percent.[108] The report determined that this decline resulted in large part from a 97 percent reduction in funding for the Section 515 Rural Rental Housing Loan program, which many LIHTC projects had used to keep rents low enough to serve the most vulnerable populations in rural areas.[109] This has had a material impact as the absence of LIHTC funding has translated into less money being available for projects serving very low-, low-, and moderate-income families in certain areas, primarily rural areas.

After considering the comments and available data, FHFA has determined that, under the final rule, Enterprise LIHTC equity investments in rural areas will be eligible for Duty to Serve credit, subject to approval of such investments by FHFA as conservator. In addition, for the reasons discussed below, FHFA has determined that it may provide greater Duty to Serve credit for LIHTC equity investments that support properties located in high-needs rural areas or that serve high-needs rural populations. While the final rule does not designate Enterprise LIHTC equity investments as a stand-alone Regulatory Activity, an Enterprise Plan could have LIHTC equity investment as an objective within a Regulatory Activity or within an Additional Activity for the rural market. For example, an Enterprise could include LIHTC equity investment in a small Section 515 project as an objective under the Regulatory Activity for supporting small multifamily properties in rural areas.

FHFA considered limiting Duty to Serve credit to Enterprise LIHTC equity

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"Coalition Study"], available at http://ruralhousingcoalition.org/wp-content/uploads/2014/07/NRHC-Rural-America-Rental-Housing-Crisis_FINALV3.compressed.pdf.

[107] See Coalition Study, 17.

[108] See id.

[109] See Coalition Study, 16-17.

investments in rural areas outside of CRA assessment areas but determined that this was not operationally feasible, despite the needs of these areas. One study found that LIHTC projects in non-CRA assessment areas garnered between $0.10 and $0.24 less per $1.00 in LIHTCs than projects in CRA assessment areas.[110] In fact, some non-CRA projects received as much as $0.35 less per LIHTC project.[111] Lower pricing means less equity and a higher debt burden for projects, which makes them less affordable to low- and moderate-income tenants.[112]

These pricing disparities may be affected by incentives that banks have under the CRA. CRA ratings are principally driven by the location of banks' deposits, with the result that the largest, most densely populated cities and money centers attract the most CRA investment from the largest banks.[113] At the same time, community banks face less encompassing CRA oversight than large banks and, therefore, generally lack the same CRA incentives to invest in LIHTC projects.[114] Community banks also have simpler

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[110] CohnReznick, "The Community Reinvestment Act and Its Effect on Housing Tax Credit Pricing," pp. 7-8, 45 (2013), available at https://www.cohnreznick.com/sites/default/files/CohnReznick_CRAStudy.pdf.

[111] Id. at 45.

[112] See generally Patrick Barbolla, "Prepared Testimony for a Hearing on the Low-Income Housing Tax Credit in front of the U.S. Senate Banking, Housing and Urban Affairs Committee's Subcommittee on Housing and Transportation" (May 12, 1999), available at http://www.banking.senate.gov/99_05hrg/051299/barbolla.htm.

[113] CohnReznick, "The Community Reinvestment Act and Its Effect on Housing Tax Credit Pricing," p. 17 (2013), available at https://www.cohnreznick.com/sites/default/files/CohnReznick_CRAStudy.pdf. In addition, federal regulations specify that assessment areas may not extend substantially beyond a metropolitan statistical area boundary. See 12 CFR 25.41(e)(4). See generally Joint Center for Housing Studies of Harvard University, "The Disruption of the Low-Income Housing Tax Credit Program: Causes, Consequences, Responses, and Proposed Correctives," pp. 4-5 (Dec. 2009), available at http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/disruption_of_the_lihtc_program_2009_0.pdf; Buzz Roberts, "Modifying CRA to Attract LIHTC Investments," 13 (Federal Reserve Bank of St. Louis, CAO 925 11/09) [hereinafter cited "Roberts Article"], available at https://www.stlouisfed.org/~/media/Files/PDFs/Community%20Development/LIHTC.pdf.

[114] See generally 12 CFR Part 228, Subpart B, available at http://www.ecfr.gov/cgi-bin/text-idx?SID=f07982420e6efaeb841c66f8580b323e&mc=true&node=pt12.3.228&rgn=div5#se12.3.228_121. National Community Reinvestment Coalition, "A Brief Description of CRA," available at http://www.ncrc.org/programs-a-services-mainmenu-109/policy-and-legislation-mainmenu-110/the-community-reinvestment-act-mainmenu-80/a-brief-description-of-cra-mainmenu-136. A bank unfamiliar

means available to comply with their CRA requirements than investing in LIHTC projects.[115]

While targeting Duty to Serve assistance to areas outside of CRA assessment areas could be an effective approach in theory, this would be operationally difficult and burdensome in practice. The federal banking regulators responsible for CRA compliance (FDIC, FRB, and OCC) permit each bank to define its own CRA assessment area according to a set of guidelines, and the banks' lists of CRA assessment areas are not readily publicly available. In addition, the banks' CRA assessment areas may fluctuate on a yearly basis.[116] FHFA has determined that it would be impractical for the Enterprises to maintain locale-by-locale information on banks' individual CRA assessment areas. No commenter identified a method for consistently defining and identifying non-CRA assessment areas.[117]

High-needs rural regions largely overlap with areas outside of the banks' CRA assessment areas,[118] and FHFA considered limiting Duty to Serve credit for Enterprise

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with LIHTCs usually requires 6 to 12 months to make an LIHTC equity investment decision after a CRA-relevant project receives an LIHTC allocation. Roberts Article, p. 14.

[115] National Community Reinvestment Coalition, "A Brief Description of CRA," available at http://www.ncrc.org/programs-a-services-mainmenu-109/policy-and-legislation-mainmenu-110/the-community-reinvestment-act-mainmenu-80/a-brief-description-of-cra-mainmenu-136. Smaller community banks also face minimum investment requirements for multi-investor funds, which often start at around $1 million per investor. See generally Roberts Article, p. 14. Direct investment minimums can be even higher. See id.

[116] See generally Kenneth Benton & Donna Harris, "Understanding the Community Reinvestment Act's Assessment Area Requirements," Consumer Compliance Outlook (First Qtr. 2014), available at https://consumercomplianceoutlook.org/2014/first-quarter/understanding-cras-assessment-area-requirements/.

[117] The CohnReznick study referred to previously that discussed the effects of CRA on LIHTC pricing was not based upon a comprehensive listing of geographies not covered by CRA assessment areas, but instead relied on data for only 20 of the largest banks, and then used branch locations to proxy for assessment areas. See CohnReznick, "The Community Reinvestment Act and Its Effect on Housing Tax Credit Pricing," p. 21 (2013), available at https://www.cohnreznick.com/sites/default/files/CohnReznick_CRAStudy.pdf.

[118] See generally Housing Assistance Council, "The Community Reinvestment Act and Mortgage Lending in Rural Communities," pp. 25-26 (Jan. 2015), available at

LIHTC equity investments to high-needs rural regions and populations. Several nonprofit organizations and policy advocacy organizations advised that Middle Appalachia, the Lower Mississippi Delta, colonias, and persistent poverty counties all share high incidences of poverty and housing problems, and likewise that Native Americans on Tribal Lands and agricultural workers experience a disproportionate amount of inadequate housing. A nonprofit organization stated that projects in these specific high-needs rural regions lie in "lending deserts" and face significant hurdles in acquiring the equity needed to finance affordable housing.[119] A policy advocacy organization and a nonprofit organization specializing in rural markets recommended that all Enterprise LIHTC investments be limited to high-needs rural regions and populations.

After considering the comments and needs in the overall rural market, FHFA is striking a balance by making LIHTC equity investments in all rural areas eligible for Duty to Serve credit under the final rule, and by indicating that FHFA may choose to provide greater Duty to Serve credit for LIHTC equity investments in high-needs rural areas or that serve high-needs rural populations in the Evaluation Guidance. FHFA acknowledges that serving rural areas through LIHTC equity investments – and high-needs rural regions and populations in particular – will present considerable challenges.

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http://www.ruralhome.org/storage/documents/publications/rrreports/rrr-cra-in-rural-america.pdf); Charles Wehrwein, NeighborWorks America, "Community Reinvestment Act: Interagency Questions and Answers Regarding Community Reinvestment" p. 1 (Nov. 3, 2014) (comment letter), available at http://www.neighborworks.org/Documents/AboutUs_Docs/PublicPolicy_Docs/CommentLetters_Docs/NeighborWorks-America-Comment-Letter-Community-Rei.aspx.

[119] See Charles Wehrwein, NeighborWorks America, "Community Reinvestment Act: Interagency Questions and Answers Regarding Community Reinvestment" p. 1 (Nov. 3, 2014) (comment letter), available at http://www.neighborworks.org/Documents/AboutUs_Docs/PublicPolicy_Docs/CommentLetters_Docs/NeighborWorks-America-Comment-Letter-Community-Rei.aspx.

High-needs rural regions and populations not only have significant needs, but also face greater barriers to investment, even compared to other rural regions. For instance, according to comments from Fannie Mae and a private nonprofit investor and lender, multi-investor funds are typically structured to include a cross-section of properties, and investors in these funds generally lack control over the selection of the underlying projects. Instead, they rely on general underwriting and investment criteria to control risk. In response to Enterprise demand for LIHTC equity investments in these rural markets, however, syndicators could develop multi-investor funds targeting rural regions, including funds targeting high-needs rural regions and populations. The intent of the Duty to Serve rule is to create incentives for the Enterprises to engage in eligible transactions, and by limiting the Enterprises' eligible LIHTC equity investments, FHFA intends to drive Enterprise innovation in rural markets.

FHFA also considered the safety and soundness of LIHTC equity investments in rural areas, including in high-needs rural regions and populations, and found that they would not expose the Enterprises to inappropriate risk, as some commenters suggested. Historically, foreclosure rates on LIHTC properties have fallen below 1 percent,[120] and few LIHTCs are recaptured.[121] In addition, Fannie Mae advised that while non-CRA LIHTC projects and those in challenging submarkets are often viewed as more risky to investors, they typically perform as well as conventional LIHTC projects and are consistent with the Enterprises' conservative risk management structures. Historic

[120] See CohnReznick, "The Low-Income Housing Tax Credit at Year 30: Recent Investment Performance (2013-2014)," pp. 228-229 (Dec. 2015), available at https://www.cohnreznick.com/sites/default/files/pdfs/CR_LIHTC_DEC2015.pdf.
[121] See Letter of US Bank to OCC, Federal Reserve & Security and Exchanged Commission, p. 3 (Feb. 10, 2012), available at https://www.sec.gov/comments/s7-41-11/s74111-195.pdf.

returns on investments and loans in LIHTC projects have been competitive with similar alternative investment opportunities.[122]

III. Evaluations, Ratings, and Evaluation Guidance—§ 1282.36

Under the Safety and Soundness Act, FHFA is required to conduct an annual evaluation of the Enterprises' activities to fulfill their Duty to Serve obligations and to assign an annual rating for their performance under each of the underserved markets.[123] The final rule establishes a framework for the evaluation and ratings process that FHFA will use to assess each Enterprise's Duty to Serve performance based on the Enterprise's implementation of its Plan during the relevant evaluation year. As part of this process, FHFA will publish its annual Duty to Serve evaluation and rating for each Enterprise, which will provide the public with a transparent description of the Enterprises' performance and FHFA's assessment of that performance.

After considering the comments received and further consideration of the evaluation and ratings process in the proposed rule, the final rule makes a number of significant changes to the proposed evaluation and ratings process. The final rule modifies the proposed process for evaluating Enterprise performance to use a three-step process as follows: (1) a quantitative assessment; (2) a qualitative assessment; and (3) an assessment of any extra credit-eligible activities, including residential economic diversity activities, for extra Duty to Serve credit. Each of these steps will assess the Enterprise's accomplishment of the objectives for the activities under each underserved market in its

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[122] Office of the Comptroller of the Currency, Community Affairs Department, "Low-Income Housing Tax Credits: Affordable Housing Investment Opportunities for Banks," Community Development Insights, p. 7 (Mar. 2014), available at http://www.occ.gov/topics/community-affairs/publications/insights/insights-low-income-housing-tax-credits.pdf.

[123] See 12 U.S.C. 4565(d)(1), (2).

Plan. As part of the qualitative assessment, FHFA's evaluation will incorporate an assessment of each Enterprise's performance of its Plan objectives under one the following four evaluation areas – outreach, loan product, loan purchase, and investments and grants – as required by the statute.

At the end of each evaluation year, based on this three-step process, FHFA will assign one of the following five ratings for each underserved market in a Plan: Exceeds, High Satisfactory, Low Satisfactory, Minimally Passing, or Fails. This is a change from the four-level rating scale in the proposed rule. A rating of Exceeds, High Satisfactory, Low Satisfactory, or Minimally Passing will constitute compliance with the Duty to Serve each underserved market. A rating of Fails will constitute noncompliance with the Duty to Serve the underserved market. The final rule also provides that on an ongoing basis FHFA will make such determinations as appropriate based on evaluation of the program's parameters and operation, pursuant to the Evaluation Guidance, regarding implementation of the evaluation and rating process.

As in the proposed rule, FHFA will prepare Evaluation Guidance for the Enterprises. However, the final rule adjusts the nature of the Evaluation Guidance to better fit the three-step evaluation process, which is further described below. FHFA will prepare one Evaluation Guidance to be used by both Enterprises for their three-year Plans. The Evaluation Guidance will provide additional guidance on the Plans, how FHFA will conduct the quantitative, qualitative, and extra credit assessments, how final ratings will be determined, and other matters as appropriate. FHFA will provide the Enterprises with proposed Evaluation Guidance for the first Plan within 30 days after the posting of this final rule on FHFA's website. The proposed Evaluation Guidance will

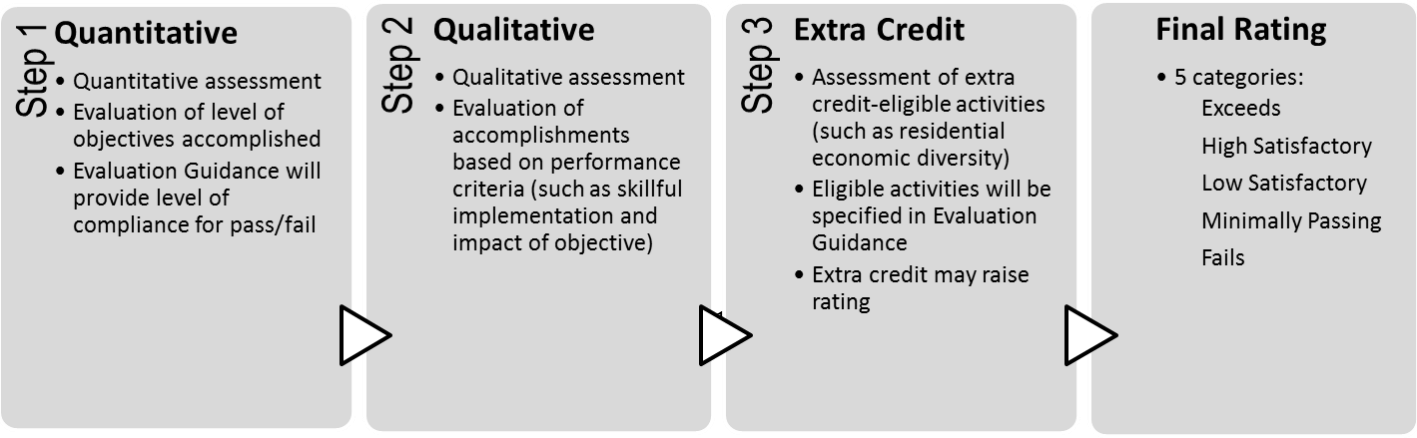
also be posted to FHFA's website, and the public will have 120 days to provide input on the proposed Evaluation Guidance after its posting on the website. For the first Plan, FHFA will publish the final Evaluation Guidance no later than the time FHFA delivers comments to each Enterprise on its proposed Plan. FHFA may modify the Evaluation Guidance prior to or during the course of the three-year period for the Evaluation Guidance, and the modified Evaluation Guidance will be effective for the following Plan year.

The section below describes the final rule provisions for the evaluation process and ratings applicable to each Enterprise's Duty to Serve performance. These provisions are presented under subsections for: (a) Evaluation process; (b) Determination of overall rating and compliance; and (c) Evaluation Guidance.

A. Evaluation process

Consistent with the proposed rule, § 1282.36(b) of the final rule provides that FHFA will evaluate an Enterprise's performance of its Plan objectives, as designated by the Enterprise in its Plan pursuant to § 1282.32(f), under one of the following four evaluation areas: outreach; loan product; loan purchase; and investments and grants. These four evaluation areas, and the comments received, are discussed above under § 1282.32, which addresses the Underserved Markets Plans.

Additionally, FHFA made substantive changes to the proposed evaluation



process set forth in § 1282.36(c). The final rule authorizes FHFA to evaluate Enterprise performance using a three-step process: (1) a quantitative assessment; (2) a qualitative assessment; and (3) an assessment of extra credit-eligible activities, including residential economic diversity activities.

This evaluation process is a change from the approach in the proposed rule, which would have established a scoring framework allocating points that the Enterprises could earn for specific Duty to Serve activities performed under their Plans. FHFA would have allocated 100 potential scoring points that an Enterprise could potentially earn in each underserved market, with extra credit for residential economic diversity activities as long as the score for the market did not exceed 100 points.

Although a few trade associations and policy advocacy organizations appreciated the transparency of the proposed approach, the majority of commenters – including several policy advocacy organizations, nonprofit organizations, governmental entities, trade associations, and both Enterprises – found the proposed process and scoring framework highly prescriptive and overly complex.

Fannie Mae commented that managing to the proposed point system might create an incentive for the Enterprises to take actions that optimize scores rather than responding to the needs and opportunities in the underserved markets. Among its suggested improvements, Fannie Mae recommended that FHFA consider adapting FHFA's annual Enterprise conservatorship scorecard approach for the Duty to Serve evaluation process. Freddie Mac stated that the evaluation and rating process should not be mechanical or based on rigid criteria. Referencing the Community Reinvestment Act

evaluation framework, Freddie Mac suggested FHFA consider permitting "substantial compliance" with its objectives as sufficient to be considered in compliance with the Duty to Serve.

Commenters made numerous suggestions for the evaluation process, many of which FHFA has determined to adopt in the final rule. These suggestions included: simplifying the numeric scoring; more closely aligning the evaluation with the objectives detailed in the Plans; clarifying the criteria used to assess Enterprise performance; improving how the evaluation process captures objectives that may not be inherently numeric or yield results in the short-term; modifying the scoring framework to encourage the Enterprises to undertake more challenging activities; and adding flexibility in the evaluation process to accommodate shifts in the market, innovation, and the degree to which the Enterprises are responsive to underserved market needs.

Section 1282.36(c) of the final rule specifies that the evaluation process will comprise a three-step process. The first step will evaluate the level of accomplishment of the objectives in each underserved market in an Enterprise's Plan (quantitative assessment). The second step will evaluate how well the Enterprise performed the objectives and their impact (qualitative assessment). The third step will evaluate each Enterprise's achievement of any extra credit-eligible activities, based on the qualitative assessment factors, for which the Enterprise could receive Duty to Serve extra credit.

In the quantitative assessment, FHFA will evaluate the level of an Enterprise's accomplishment of each objective in an underserved market in its Plan. In the Evaluation Guidance, FHFA will provide the method and level of accomplishment needed for the objectives to receive a passing rating for compliance with the Duty to Serve an

underserved market in a Plan. At the conclusion of the quantitative assessment for an underserved market in a Plan, FHFA will determine whether the Enterprise receives one of the passing ratings, or a rating of Fails.

In the qualitative assessment, FHFA will evaluate the Enterprise's accomplishment of each objective for each activity in an underserved market in its Plan, based on the method and criteria that FHFA will establish in the Evaluation Guidance, such as how skillfully an objective was implemented, the impact of the objective, and such other criteria as FHFA may set forth in the Evaluation Guidance.

Based on the outcome of the quantitative and qualitative assessments, FHFA will assign a rating for the Enterprise's performance for each underserved market. If an Enterprise's rating is not changed due to the awarding of extra credit as described below, this rating will be the final rating for the Enterprise's performance for an underserved market in its Plan. The Evaluation Guidance will describe how the ratings are determined.

In the third step of the evaluation process, FHFA will assess the Enterprise's performance of any extra credit-eligible activities, including residential economic diversity activities and objectives that have been included in the Enterprise's Plan. The assessment will be based on the method and criteria that FHFA will establish in the Evaluation Guidance, such as how skillfully the Enterprise implemented the objective, the impact of the objective, and such other criteria as FHFA may set forth in the Evaluation Guidance. Depending upon the outcome of FHFA's assessment, extra credit could increase an Enterprise's rating. Rating levels are described in detail below. Since an Enterprise cannot receive a rating higher than Exceeds, extra credit cannot increase an

Exceeds rating. Nevertheless, FHFA will recognize these achievements of the Enterprise in FHFA's written evaluation of the Enterprise's performance for the year. Extra credit may not be awarded where an Enterprise has received a rating of Fails for an underserved market in a Plan. Residential economic diversity activities are further discussed below in Section IV.

B. Determination of overall rating and compliance

At the end of the evaluation year, FHFA will award a separate rating for each underserved market based on the quantitative, qualitative, and extra credit-eligible activities assessments. Section 1282.36(c)(4) of the final rule provides that an Enterprise will receive one of five ratings: Exceeds, High Satisfactory, Low Satisfactory, Minimally Passing, or Fails. The final rule revises the proposed rule process by eliminating the conversion of a 100 point numeric scale specific to an Enterprises' Plan into a final rating. In addition, the final rule includes Minimally Passing as a fifth rating category, which was not included in the proposed rule Commenters generally supported the proposed approach of using rating categories to evaluate an Enterprise's performance under its Plan, with some suggesting FHFA consider a rating structure with more tiers. A trade association, for example, commented that the proposed rule's increase in the number of ratings categories from the pass/fail ratings in the 2010 Duty to Serve proposed rule would provide greater incentives for the Enterprises and help stakeholders identify areas for improvement in the Enterprises' activities under the Duty to Serve. Several policy advocacy organizations and one governmental entity recommended expanding the proposed four rating categories to five to enable FHFA to provide more meaningful distinctions in evaluations and ratings.

FHFA finds the comments compelling that the final rule should add a fifth rating category of Minimally Passing. The Minimally Passing rating will fall above the Fails rating and below the Low Satisfactory rating. The Minimally Passing rating will convey that an Enterprise has met a minimally compliant level of its Plan objectives but could better use its resources to fulfill the intentions of the Duty to Serve statute and regulation. Adding this fifth rating category will allow FHFA to apply more meaningful distinctions to its evaluation of an Enterprise's performance of its Plan objectives.

C. Ongoing Assessment of Evaluation and Rating Process

Because the process by which FHFA will evaluate and rate the Enterprises' compliance with the final rule is new and in an effort to consider the appropriate balance between compliance and regulatory burden, FHFA considers it appropriate to do ongoing assessments of the operational or other practical implications of the rating process. This will allow both FHFA and the Enterprises to begin fulfilling the intent of the Duty to Serve statute, while also recognizing that FHFA may wish to adjust the implementation of the evaluation and rating process over time. For this reason, § 1282.36(c)(4)(ii) of the final rule provides that FHFA will make such determinations as appropriate based on evaluation of the program's parameters and operation, pursuant to the Evaluation Guidance, regarding implementation of the rating process.

D. Evaluation Guidance

Section 1282.36(d) of the final rule requires that FHFA prepare Evaluation Guidance – a change in name from the proposed rule which used the term "Evaluation Guide." The final rule's description of the content of the Evaluation Guidance is different from that of the proposed rule because, as discussed above, the evaluation

process and scoring system are changed from the proposed rule. The final rule states that the Evaluation Guidance will provide additional guidance on the Plans, how the quantitative, qualitative, and extra credit assessments will be conducted, how final ratings will be determined, and such other matters as may be appropriate.

The final rule revises the process outlined in the proposed rule, which stated that FHFA would issue to each Enterprise an Evaluation Guide specifically tailored to its Plan after the Enterprises delivered their final Plans to FHFA. Commenters, including a governmental entity, a trade organization, several nonprofit lenders, several policy advocacy organizations, and both Enterprises, supported the proposed requirement that FHFA provide guidance on how it will evaluate Enterprise compliance. Several policy advocacy organizations, a governmental entity, and a trade organization also recommended that FHFA seek public input on the Evaluation Guides.

Commenters, including several policy advocacy organizations, a trade association, and both Enterprises, also provided feedback on the appropriate timing for the Evaluation Guide. Both Enterprises expressed concerns with the proposed timing and sequencing of the Evaluation Guide. Freddie Mac recommended that guidance be made available to the Enterprises substantially in advance of the required submission of the Plans to FHFA. Fannie Mae stated that being advised of FHFA's scoring methodology just 30 days before implementing a Plan could require mid-course corrections and potentially disrupt planned activities. Under the proposed rule process, FHFA would have developed the Evaluation Guide for each Enterprise after the Enterprises' Plans were finalized, based on the Enterprises' Plans and public input received on the proposed Plans.

FHFA finds the commenters' arguments persuasive and has revised the nature and timing of the Evaluation Guidance. Section 1282.36(d)(1) of the final rule provides that FHFA will prepare one Evaluation Guidance for both Enterprises, on a three-year cycle. This revises the approach in the proposed rule, which would have provided an annual Evaluation Guide to each Enterprise specifically tailored to its Plan. This change is based on the change in the nature of the Evaluation Guidance in the final rule, which will be applicable to both Enterprises and not specifically tailored to an individual Plan. The change also aligns the timing of the Evaluation Guidance with the Plan cycle. In addition, as described below, the final rule allows for modification of the Evaluation Guidance, which can address changes in circumstances, markets, or updates to the Enterprises' Plans.

In order to provide the Enterprises with sufficient time to develop quality draft Plans that are responsive to FHFA's expectations and public input, § 1282.36(d)(3) of the final rule provides that the first proposed Evaluation Guidance will be provided to the Enterprises within 30 days after the posting of the final rule on FHFA's website, and posted to FHFA's website as soon as practical thereafter. FHFA will provide timelines for the Evaluation Guidance for subsequent Plans after the first Plan, including public input periods, 300 days before the termination date of the Plan in effect, or a later date if additional time is necessary.

In discussing the importance of clearly defining evaluation criteria through guidance, one policy advocacy organization suggested that FHFA be permitted to adjust its evaluation criteria during a Plan cycle as the results of initial efforts reveal new information. FHFA finds that providing Evaluation Guidance for a three-year period,

which can remain the same over time where appropriate, but which can also be modified when there are lessons learned and best practices are developed, is appropriate. For this reason, the final rule provides that FHFA may modify the Evaluation Guidance prior to or during the three-year cycle and may obtain additional public input on the Evaluation Guidance. The modified Evaluation Guidance would be effective for the subsequent evaluation year.

FHFA agrees with the commenters' common theme that the Evaluation Guidance should help provide accountability for Duty to Serve implementation. Accordingly, § 1282.36(d)(3) of the final rule requires the Evaluation Guidance to be issued first as proposed Evaluation Guidance, with a 120-day period for the public to provide input on the proposed Evaluation Guidance to FHFA and the Enterprises. However, in order to implement the Plans in a timely fashion and retain operational flexibility, FHFA may revise the length of time the public will have to provide input on proposed Evaluation Guidance for subsequent Plans.

IV. Extra Credit-Eligible Activities, Including Residential Economic Diversity Activities—§ 1282.36(c)(3)

As the third step of the evaluation and rating process, the final rule designates two categories of extra credit-eligible activities: (1) residential economic diversity activities, and (2) other activities that may be identified by FHFA as eligible for extra credit in the Evaluation Guidance. FHFA will establish the method and criteria for evaluating these extra credit-eligible activities in the Evaluation Guidance.

A. Residential Economic Diversity Activities

Consistent with the proposed rule, § 1282.36(c)(3) of the final rule provides that the Enterprises may receive Duty to Serve extra credit, which may be factored into their evaluation ratings, if their qualifying activities within an underserved market in their Plans contribute to residential economic diversity. FHFA will evaluate an Enterprise's performance of qualifying residential economic diversity activities using the qualitative assessment factors. As proposed, the final rule defines a "residential economic diversity activity" as an Enterprise activity in connection with mortgages on: (1) affordable housing in a high opportunity area; or (2) mixed-income housing in an area of concentrated poverty. Definitions of these terms are discussed below.

Qualifying Activities for Residential Economic Diversity

Section 1282.1 of the final rule defines qualifying "residential economic diversity activities" to mean all eligible activities in the underserved markets except energy or water efficiency improvement activities and any additional activities determined by FHFA to be ineligible. The proposed rule would have excluded Enterprise support for energy or water efficient improvement activities from receiving residential economic diversity extra credit because they typically do not relate to the location of housing and, thus, do not appear to further residential economic diversity. The proposed rule also would have excluded Enterprise support for financing of manufactured housing communities from receiving residential economic diversity extra credit because the Enterprises generally do not have complete information on residents' monthly housing costs, which is necessary to determine the affordability of the community. The rule's census tract proxy methodology for determining the affordability of a community (the income level of the census tract) assumes that a community's affordability matches the

incomes of nearby residents, which means it is not useful for determining whether a community contributes to residential economic diversity. The proposed rule specifically requested comment on whether this was the appropriate scope for the proposed extra credit.

A number of policy advocacy and governmental organizations recommended that FHFA treat Enterprise manufactured housing community activities as eligible for extra credit under residential economic diversity, and some noted that outside data can in some cases substantiate whether these activities contribute to residential economic diversity. Some nonprofit and governmental organizations also recommended that energy efficiency improvement activities be eligible for extra credit, as they may contribute to residential stability.

After considering the comments, FHFA agrees that manufactured housing communities may contribute to residential economic diversity. Accordingly, the final rule allows Enterprise manufactured housing community activities to qualify for residential economic diversity extra credit, but only if the Enterprise is able to substantiate the affordability of homes in the manufactured housing community to very-low, low-, or moderate-income households through use of the methodology in § 1282.38(f)(1) or another methodology FHFA has approved.

Consistent with the proposed rule, the final rule excludes Enterprise support for energy or water efficiency improvement activities from qualifying for extra credit, as FHFA continues to view these activities as insufficiently related to residential economic diversity.

Definition of "High Opportunity Areas"

Section 1282.1 of the final rule defines "high opportunity area" primarily to mean an area designated by HUD as a Difficult-to-Develop Area (DDA) during any year covered by a Plan or in the year prior to a Plan's effective date, whose poverty rate is lower than the rate specified by FHFA in the Evaluation Guidance. DDAs are areas where it is difficult to create affordable housing due to high rents relative to area median income, and they are generally considered to be a proxy for higher opportunity areas. HUD is required to identify DDAs by the LIHTC statute and does so annually.[124] The definition in the final rule also allows the Enterprises to utilize certain state or local definitions of high opportunity areas from a geographically-applicable LIHTC Qualified Allocation Plan (QAP).[125]

The proposed rule would have defined "high opportunity areas" only as DDAs. The proposed rule specifically requested comment on whether the proposed definition is the most appropriate, whether the definition should use DDAs to define high opportunity areas outside of metropolitan areas, and whether there is a factor-based definition that would be preferable. The proposed rule also asked whether state-defined high opportunity areas (or similar terms) should be incorporated in the definition, and if so, how this could be implemented by the Enterprises.

Several policy advocacy and nonprofit organizations directly supported the proposed definition due to its empirical and straightforward nature. Freddie Mac commented that FHFA should clarify how to address annual changes in the areas HUD identifies as DDAs because the Enterprises are being asked to plan their Duty to Serve

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[124] 26 U.S.C. 42(d)(5)(B)(iii).
[125] LIHTC Qualified Allocation Plans govern the allocation of 9 percent LIHTCs. See 26 U.S.C. 42(m)(B).

activities for three years at a time. Neither Freddie Mac nor Fannie Mae commented in favor of or in opposition to the proposed definition.

Critics of using DDAs exclusively as a proxy for high opportunity areas noted that because HUD's DDA calculation methodology is used as an allocation mechanism for limited tax credits under the LIHTC program, it has a 20 percent nationwide population cut-off (applied separately to metropolitan and non-metropolitan areas). As a result of this limit, many high opportunity areas are not designated as DDAs. Other commenters noted that four states have no DDAs in 2016. Because of these reasons, multiple nonprofit and governmental organizations recommended use of a modified version of HUD's methodology without the national population cut-off. A policy advocacy organization suggested that FHFA pair HUD's DDA designations with a poverty indicator in order to ensure that areas designated as high opportunity do not have disproportionately high poverty rates. Some nonprofit organizations recommended that FHFA employ an opportunity index developed by an outside party. A larger number of nonprofit and governmental organizations suggested that FHFA defer to or incorporate state or local definitions of high opportunity areas, such as those put forth in an LIHTC QAP. Additionally, some nonprofit organizations stated that FHFA should continue working to develop an ideal definition of a high opportunity area, potentially by opening a separate comment period on definitions related to residential economic diversity.

After considering the comments, FHFA has determined that it should rely on a pre-existing government definition or index to measure high opportunity areas. Neither FHFA nor the Enterprises provide affordable housing subsidies, which can play a more direct role in driving the location of affordable housing than the activities the Enterprises

will undertake in support of the Duty to Serve. As a result, FHFA wishes to align its residential economic diversity policy with other federal policy efforts. Additionally, creating an opportunity index would be highly labor intensive. While DDAs have limits as a proxy for high opportunity areas, they are widely understood by the affordable housing community and play a central role in the LIHTC market. While a variety of opportunity indices could in fact be useful, no commenters suggested how FHFA should choose among the many indices that outside parties have created, none of which is federally sanctioned. Further, FHFA believes that the Enterprises could easily operationalize the DDA-based definition and incorporate it into their systems.

However, FHFA agrees that DDAs are not a perfect proxy for high opportunity areas. In addition, promoting residential economic diversity is subject to much experimentation. FHFA is addressing these concerns in the final rule in two ways. First, the final rule requires a maximum poverty level for a HUD-designated DDA to qualify as a high opportunity area. As one commenter suggested, this will eliminate higher-poverty areas that are unlikely to be areas of opportunity. FHFA will establish this poverty rate threshold for each Plan period in the Evaluation Guidance. In setting this poverty rate threshold, FHFA will balance its desire to exclude high-poverty DDAs from its definition of high opportunity areas with its desire to ensure that its definition covers a reasonable segment of the population. To address Freddie Mac's concern about annual changes in the areas HUD designates as DDAs, the final rule allows any area meeting the poverty threshold and designated as a DDA by HUD in the year before the Plan takes effect or during any of the three years of the Plan to qualify as a high opportunity area.

Second, the final rule allows state and local definitions of high opportunity areas in LIHTC QAPs to qualify where they meet certain criteria. State and local definitions of high opportunity areas can be tailored to a locale's unique circumstances and may change over time. Many states in recent years have experimented with new definitions of, and means of encouraging activity in, high opportunity areas in their QAPs. From 2013 to 2015, 19 states added language to their QAPs related to high opportunity areas.[126] For a definition of a high opportunity area in a QAP to qualify as a high opportunity area under the final rule, it will have to be specifically identified by FHFA in the final Evaluation Guidance.

There are considerable operational barriers to allowing the Enterprises to utilize all state and local QAP definitions of high opportunity areas for Duty to Serve purposes. States and localities may attempt to promote development in higher opportunity areas without explicitly defining or using the terminology "high opportunity areas," which means FHFA cannot always determine whether a QAP offers a usable definition for Duty to Serve purposes. States and localities also may encourage activities in high opportunity areas using methods that do not allow FHFA to reach a firm conclusion on whether an area is definitively a high opportunity area or not. At the same time, states and localities employ different indicators for high opportunity areas.

As a result of these challenges, the final rule utilizes DDAs, with a poverty level threshold, as the primary definition of high opportunity areas. However, the rule also permits the Enterprises to use approved state and local definitions of high opportunity

[126] These definitions are explored and catalogued in National Housing Trust, "Preservation and Opportunity Neighborhoods in the Low Income Housing Tax Credit Program" (2015), available at http://prezcat.org/related-catalog-content/preservation-and-opportunity-neighborhoods-low-income-housing-tax-credit (last accessed July 28, 2016).

areas in geographically-applicable QAPs that meet specific criteria. The specific criteria FHFA will use to allow state and local definitions will be described in the proposed Evaluation Guidance, which will be subject to public input. The final Evaluation Guidance will consider submissions received during the public input period and identify the state and local definitions of high opportunity areas that FHFA will accept for the duration of the Plan period. If states and localities continue to refine their definitions of high opportunity areas and expand the use of tools allowing stakeholders to clearly identify those areas, FHFA envisions utilizing state and local definitions to a greater degree in subsequent Plan periods.

Definition of "Area of Concentrated Poverty"

The final rule considers activities in areas of concentrated poverty that facilitate financing of mixed-income housing as promoting residential economic diversity. Section 1282.1 of the final rule defines an "area of concentrated poverty" as a census tract designated by HUD as a "Qualified Census Tract" (QCT) or a "Racially- or Ethnically-Concentrated Area of Poverty" (R/ECAP) in the year before the Plan takes effect or during any of the three years of the Plan. The proposed rule would have defined "area of concentrated poverty" only as HUD-designated QCTs.

QCTs are generally census tracts where 50 percent of households have incomes below 60 percent of the area median income or that have a poverty rate of 25 percent or more.[127] HUD is required by the LIHTC statute to identify QCTs, and does so annually.[128] R/ECAPs are generally census tracts with (i) a non-white population of 50

[127] For the 2016 QCTs, see 80 FR 73201 (Nov. 24, 2015).
[128] 26 U.S.C. 42(d)(5)(B)(ii).

percent or more and (ii) a poverty rate of 40 percent or more, or that is three or more times the average tract poverty rate for the metro/micro area, whichever is lower.[129]

The proposed rule specifically requested comment on whether FHFA should consider other or additional definitions of "area of concentrated poverty," such as a definition similar to HUD-designated R/ECAPs. Some nonprofit and governmental organizations explicitly supported FHFA's proposed definition because QCTs cover a wider band of lower-income neighborhoods than R/ECAPs. Some nonprofit organizations favored defining "areas of concentrated poverty" as HUD-designated R/ECAPs without elaborating on their rationale. Other nonprofit and governmental organizations recommended that FHFA consider an area to qualify if it is designated as either a QCT or an R/ECAP because this would encompass a larger number of low-income areas than utilizing either designation by itself.

There are considerably more QCTs (13,619 census tracts) than R/ECAPs (4,161 census tracts). Additionally, QCTs and R/ECAPs generally overlap; only 600 R/ECAPs (14 percent) are not also QCTs. These 600 census tracts, however, contain 2.3 million residents.[130] Therefore, using R/ECAPs in addition to QCTs helps to identify additional underserved areas with higher poverty levels that would benefit from Enterprise activities under the Duty to Serve. For these reasons, the final rule includes R/ECAPs in the definition of "area of concentrated poverty."

Revitalization in Areas of Concentrated Poverty

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[129] HUD's approach is described in U.S. Department of Housing and Urban Development, "AFFH Data Documentation," (2016), available at https://www.hudexchange.info/resources/documents/AFFH-Data-Documentation.docx (last accessed July 28, 2016). Outside of Core-Based Statistical Areas (CBSAs), the racial/ethnic concentration threshold is set at 20 percent.

[130] Analysis based on 2016 DDA and 2013 R/ECAP data from HUD.

In the proposed rulemaking, FHFA considered but did not provide that the Enterprises may receive extra credit when their activities are part of or contribute to revitalization plans in areas of concentrated poverty. FHFA also did not set forth criteria for identifying such plans. The proposed rule specifically requested comment on whether CNI and HUD/USDA-designated Promise Zones would be useful for purposes of denoting areas of concentrated poverty subject to revitalization plans. The proposed rule also asked whether other consistent criteria could be applied for this purpose.

Commenters were divided on this topic. A number of nonprofit organizations supported using CNI, Promise Zones, or other federal designations for purposes of determining whether Enterprise activities are part of or contribute to a revitalization plan in an area of concentrated poverty, while several other nonprofit and governmental organizations opposed it, partially because revitalization plans are more typically led by states or localities. Among those who were supportive, some offered tepid support for utilizing CNI or Promise Zones, noting that there are a limited number of these areas. One commenter suggested that FHFA also allow state and local definitions of revitalization plans to qualify, while another commenter suggested FHFA hold a separate comment period on utilizable definitions.

FHFA continues to find that it cannot adequately identify revitalization plans or implement in the Duty to Serve process the diverse definitions set out for these plans by states and localities. Accordingly, the final rule does not add a revitalization component to residential economic diversity.

Definition of "Mixed-Income Housing"

Section 1282.1 of the final rule defines "mixed-income housing" as a multifamily property or development – which may include or comprise single-family units – that serves very low-, low-, or moderate-income families, where: (i) a minimum percentage of units as specified in the Evaluation Guide are unaffordable to low-income families, or to families at higher income levels as specified therein; and (ii) a minimum percentage of units as specified in the Evaluation Guide are affordable to low-income families, or to families at lower income levels as specified therein. The proposed rule would have defined "mixed-income housing" to require that at least 25 percent of the units are affordable only to households with incomes above moderate-income levels.

FHFA specifically requested comment on whether the proposed definition is appropriate, including whether minimum thresholds for the percentage of units affordable to very low-, low, or moderate-income households should be included. A number of nonprofit organizations suggested that the definition should contain a minimum percentage of units that are affordable to very low-, low-, or moderate-income households. Setting a minimum threshold would ensure that the mixed-income housing the Enterprises are encouraged to support serves a wide diversity of income levels. While one nonprofit organization noted that there is inadequate research to empirically guide setting unit and income thresholds for mixed-income housing, a state housing finance agency suggested that FHFA consider the standards set out in the LIHTC program.

A nonprofit organization recommended that FHFA allow developments with a significant share of unrestricted units (available to households of any income) to be eligible for extra credit, regardless of whether the area's current market rent is

unaffordable to households at or below moderate-income levels. This commenter argued that generally market rents in areas of concentrated poverty are relatively affordable, at least in the near term.

FHFA agrees that the proposed definition of "mixed-income housing" could be strengthened to ensure the Enterprises are encouraged to support sustainable mixed-income housing that serves a diversity of income levels. However, given that an appropriate standard may differ between markets and may change over time, the definition will be spelled out in the Evaluation Guidance, rather than in the final rule. FHFA plans to specify in its proposed Evaluation Guidance that mixed-income housing must contain a minimum share of affordable units that mirrors the requirements set out in the LIHTC program (20 percent of units must be affordable for households with incomes at or below 50 percent of area median income, or 40 percent of units must be affordable to households with incomes at or below 60 percent of area median income).[131] FHFA finds that this well-known metric of affordability is the best standard available at this time.

FHFA also recognizes that, in areas of concentrated poverty, market rents may be relatively affordable, which means developers may face difficultly at least initially in attracting higher-income households to these developments. This could make it difficult to finance properties that meet the requirement for a certain percentage of units that are unaffordable to moderate-income households specified in the proposed rule. However, FHFA still finds that a minimum threshold of units for higher-income households is important in order to ensure that mixed-income housing is not solely occupied by very

[131] 26 U.S.C. 42(g)(1).

low- or low- income households. The threshold of units that must be unaffordable to low-income households, or to households at higher income levels, will also be specified in the Evaluation Guide. At this time, FHFA plans to specify that mixed-income housing must include at least 20 percent of units that are affordable only to households with incomes above low-income levels.

B. Other Activities Identified in the Evaluation Guidance as Eligible for Extra Credit

Under the final rule, FHFA may also designate in the Evaluation Guidance other activities as extra credit-eligible activities. This would not require the Enterprises to undertake any activity designated as eligible for extra credit. Instead, it would provide an incentive for the Enterprises to include those designated activities in their Plans. In determining whether to designate an activity as eligible for extra credit, FHFA will consider whether the activity could be considered more challenging, or whether it serves a part of an underserved market that is relatively less well-served. For example, activities such as serving high-needs rural populations or manufactured housing communities with tenant pad lease protections could foreseeably be designated as eligible for extra credit due to their challenging nature. This approach also responds to commenters, as described above, who encouraged FHFA to modify the proposed evaluation and ratings approach to encourage the Enterprises to undertake more challenging activities.

V. General Requirements for Credit—§ 1282.37

Section 1282.37 of the final rule sets forth general counting requirements for whether and how activities or objectives may receive Duty to Serve credit. With some exceptions, the counting rules and other requirements are similar to those in the proposed

rule and FHFA's housing goals regulation. FHFA received few comments on these provisions.

A. No Credit Under Any Evaluation Area—§ 1282.37(b)

Section 1282.37(b) of the final rule identifies specific Enterprise activities that are not eligible to receive Duty to Serve credit under any evaluation area, as discussed below.

Housing Trust Fund and Capital Magnet Fund contributions. Consistent with the proposed rule, and in accordance with the statutory provisions, § 1282.37(b)(1) of the final rule provides that contributions to the Housing Trust Fund[132] and the Capital Magnet Fund,[133] and Enterprise mortgage purchases funded with such grant amounts, are ineligible for Duty to Serve credit. This prohibition is discussed further above in the discussion on Other Federal Affordable Housing Programs.

HOEPA mortgages. As proposed, § 1282.37(b)(2) of the final rule prohibits Duty to Serve credit for HOEPA mortgages.[134] A federal regulator commented that loans for manufactured homes are more likely to be classified as "high-cost" loans under HOEPA, and a policy advocacy organization supported excluding HOEPA mortgages from receiving Duty to Serve credit because they do not adequately protect consumers. A manufactured housing trade association suggested that FHFA lacks the legal authority to require consumer protections on manufactured home loans as a condition of eligibility to received Duty to Serve credit. FHFA has determined that it possesses such authority, and that Enterprise support for HOEPA mortgages, whether for manufactured home loans or for mortgages for site-built homes, would not fulfill the purposes of the Duty to Serve.

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[132] See 12 U.S.C. 4565(d)(4).
[133] See 12 U.S.C. 4569(h)(7).
[134] See 15 U.S.C. 1602(bb).

Subordinate liens on multifamily properties. As proposed, § 1282.37(b)(3) of the final rule prohibits Duty to Serve credit for subordinate liens on multifamily properties, except for subordinate liens originated for energy or water efficiency improvements on multifamily rental properties that meet the requirements in § 1282.34(d)(2). Fannie Mae commented that subordinate loans for capital improvements to expand the useful life or significantly improve the condition or quality of a property and that result in preserving affordability should receive Duty to Serve creditable. Given the regulatory and statutory restrictions on most affordable properties, FHFA had determined that subordinated loans for capital improvements are not an effective tool to preserve affordability at this time. In addition, it is not a standard practice in the industry to allow subordinate loans for preserving affordability, as these could present excessive risk to investors in the subordinate loan.

Under the final rule, subordinate liens for energy or water efficiency improvements on existing multifamily rental properties meeting the requirements in §1282.34(d)(2) are eligible for Duty to Serve credit. These subordinate liens extend the useful life of the property and also enhance the overall value of the property by reducing operating expenses.

Subordinate liens on single-family properties. As proposed, § 1282.37(b)(4) of the final rule excludes subordinate liens on most single-family properties from receiving Duty to Serve credit, including subordinate liens for energy efficiency improvements on single-family properties. However, in a change from the proposed rule, subordinate liens on shared appreciation loans that meet all of the requirements in § 1282.34(d)(4) are eligible for Duty to Serve credit. As one nonprofit organization commented, these liens

are unlike standard second lien mortgages. They are due upon the sale of the property and typically have no interest. Moreover, the borrower does not make monthly payments on these second liens, except where there is a modest interest rate payment that covers the cost of program implementation, asset management, and ongoing monitoring. In effect, these second liens are vehicles for maintaining the subsidy with the property when the property is sold.

Under the final rule, not all shared appreciation loans are eligible for Duty to Serve credit. Those not eligible are proprietary shared appreciation loans, where an investor receives part of the equity in exchange for making the home affordable for a single buyer only. Such loans do not preserve the affordability of the unit for subsequent buyers.

LIHTC equity investments. Section 1282.37(b)(5) of the final rule prohibits Duty to Serve credit for LIHTC equity investments in a property, except where the property is located in a rural area. LIHTC equity investments are discussed above under the rural markets under § 1282.35.

Permanent construction take-out loans and Additional Activities under the affordable housing preservation market. Section 1282.37(b)(6) of the final rule provides that Duty to Serve credit will not be provided for permanent construction take-out loans and Additional Activities under the affordable housing preservation market, except as provided in § 1282.37(c). The exceptions are discussed above under the affordable housing preservation market under § 1282.34.

B. No Credit Under Loan Purchase Evaluation Area—§ 1282.37(d)

Consistent with the proposed rule, § 1282.37(d) of the final rule sets forth activities that are not eligible to receive Duty to Serve credit under the loan purchase evaluation area, even if the activity would otherwise receive credit under § 1282.38. These include generally: mortgage purchases on secondary residences; single-family refinancing mortgages resulting from conversion of balloon notes to fully amortizing notes if the Enterprise already owns the balloon note at the time conversion occurs; purchases of mortgages that previously received Duty to Serve credit within the immediately preceding five years; mortgage purchases where the property or any units therein have not been approved for occupancy; any interests in mortgages that FHFA determines will not be treated as interests in mortgages; and purchases of state and local government housing bonds except as provided in § 1282.39(h).

C. FHFA Review of Activities or Objectives—§ 1282.37(e)

Consistent with the proposed rule, § 1282.37(e) of the final rule provides that FHFA may determine whether and how any activity or objective will receive Duty to Serve credit under an underserved market in a Plan, including treatment of missing data, and FHFA will notify each Enterprise in writing of any determination regarding the treatment of any activity or objective. Section 1282.37(e) also adds a provision that was not included in the proposed rule which requires FHFA to make any such determinations available to the public on FHFA's website.

D. Year in Which Activity or Objective Will Receive Credit—§ 1282.37(f)

As proposed, § 1282.37(f) of the final rule provides that an activity or objective eligible for Duty to Serve credit will receive such credit in the year in which it is completed. FHFA may determine that credit is appropriate for an activity or objective in

which an Enterprise engages, but does not complete in a particular year, except that activities or objectives under the loan purchase evaluation area will receive credit in the year in which the Enterprise purchased the mortgage.

E. Credit Under One Evaluation Area—§ 1282.37(g)

As proposed, § 1282.37(g) of the final rule provides that an activity or objective eligible for Duty to Serve credit will receive such credit under only one evaluation area in a particular underserved market. The rationale for this provision is discussed above under the Plan objectives under § 1282.32(f).

F. Credit Under Multiple Underserved Markets—§ 1282.37(h)

As proposed, § 1282.37(h) of the final rule provides that an activity or objective, including financing of dwelling units by an Enterprise's mortgage purchase, that is eligible for Duty to Serve credit will receive such credit under each underserved market for which the activity or objective qualifies in that year. For example, if a borrower uses a Section 8 voucher[135] to help buy a manufactured home in the Lower Mississippi Delta, and if an Enterprise subsequently purchases that loan, the purchase would receive Duty to Serve credit under the manufactured housing, affordable housing preservation, and rural markets.

VI. General Requirements for Loan Purchases—§ 1282.38

In order to be eligible to receive Duty to Serve credit for loan purchases, a loan must be on housing affordable to very low-, low-, or moderate income families,

[135] The Housing Opportunity through Modernization Act of 2016 provides that Section 8 vouchers may be used for payment of notes on manufactured homes. See Housing Opportunity through Modernization Act of 2016, sec. 112, Public Law 114-201, 130 Stat. 782 (July 29, 2016), available at https://www.gpo.gov/fdsys/pkg/PLAW-114publ201/pdf/PLAW-114publ201.pdf. The provision on Section 8 vouchers for manufactured homes has not been implemented as of the time of this rule.

regardless of whether the property is owner-occupied or rental. Sections 1282.17, 1282.18, and 1282.19 of part 1282 define "affordability" for owner-occupied and rental units. The tables in these sections adjust the maximum percentage of area median income based on family size and the size of the dwelling unit, as measured by the number of bedrooms.

A. Counting Dwelling Units—§ 1282.38(b)

Consistent with the proposed rule, §1282.38(b) of the final rule provides that performance under the loan purchase evaluation area will be measured by counting dwelling units affordable to very low-, low-, and moderate-income families.

B. Credit for Owner-Occupied Units–§ 1282.38(c)

As proposed, § 1282.38(c) of the final rule provides that mortgage purchases financing owner-occupied single-family properties will be evaluated based on a comparison of the income of the mortgagor(s) to the area median income at the time the mortgage was originated, using the appropriate percentage factor in § 1282.17. If the income of the mortgagor(s) is not available, no Duty to Serve credit will be provided under the loan purchase evaluation area.

C. Credit for Rental Units – Use of Rent—§ 1282.38(d)(1)

As proposed, § 1282.38(d)(1) of the final rule provides that for Enterprise mortgage purchases financing single-family rental units and multifamily rental units, affordability is determined based on rent and whether the rent is affordable to the income groups targeted by the Duty to Serve. A rent is affordable if the rent does not exceed the maximum levels as provided in § 1282.19.

D. Credit for Rental Units – Affordability of Rents Based on Housing Program Requirements—§ 1282.38(d)(2)

Consistent with the proposed rule, § 1282.38(d)(2) of the final rule provides that where a multifamily property is subject to an affordability restriction under a housing program that establishes the maximum permitted income level of a tenant or a prospective tenant or the maximum permitted rent, the affordability of units in the property may be determined based on the maximum permitted income level or maximum permitted rent established under such housing program for those units, subject to certain restrictions set forth in the rule.

E. Missing Data or Information For Rental Units—1282.38(e)(2)

Under § 1282.38(e)(2) of the final rule, when an Enterprise lacks sufficient information on the rents, the Enterprise's performance regarding the rental units may be evaluated using estimated affordability information, except that an Enterprise may not estimate affordability of rental units for purposes of receiving extra credit for residential economic diversity activities. As proposed, the final rule provides that estimated affordability information is calculated by multiplying the number of rental units with missing affordability information in properties securing the mortgages purchased by the Enterprise in each census tract by the percentage of all moderate-income rental dwelling units in the respective tracts, as determined by FHFA.

The housing goals regulation[136] applies a 5 percent limit on the number of rental units with missing rent data for which an Enterprise may estimate affordability of rents. The proposed rule specifically requested comment on whether there are better methods

[136] 12 CFR 1282.15(e)(3).

than the proposed methodology to estimate affordability when rent information is missing, and whether the Duty to Serve rule should cap the number of units with missing data for which an Enterprise could estimate affordability.

No commenters addressed these questions. In FHFA's experience with the housing goals, the Enterprises have not come close to reaching the 5 percent limit. Because the rent rolls determine the viability of a property as an investment, the Enterprises generally obtain this information and use it as part of their underwriting. Accordingly, consistent with the proposed rule, § 1282.38(e)(2) of the final rule does not include a limit on the number of rental units for which an Enterprise may estimate affordability each year.

In a change from the proposed rule, § 1282.38(e)(2) of the final rule does not permit the Enterprises to estimate affordability of rental units when rent data are missing for purposes of receiving extra credit for residential economic diversity activities. Estimating affordability under the methodology discussed above would assume that a multifamily development's affordability mirrors the income characteristics of the tract in which it is located, which is not useful for determining whether the development contributes to residential economic diversity as defined in the final rule.

F. Credit for Blanket Loans on Manufactured Housing Communities—§ 1282.38(f)

Section 1238(f) of the final rule sets forth how determinations of affordability of manufactured housing communities will be made. These determinations are discussed above in the manufactured housing market section.

G. Application of Median Income—§ 1282.38(g)

Consistent with the proposed rule, § 1282.38(g) of the final rule includes provisions on determining an area's median income.

H. Newly Available Data—1282.38(h)

As proposed, § 1282.38(h) of the final rule provides that when data is used to determine whether a dwelling unit receives Duty to Serve credit under the loan purchase evaluation area and new data is released after the start of a calendar quarter, the new data need not be used until the start of the following quarter.

VII. Special Requirements for Loan Purchases—§ 1282.39

Section 1282.39 of the final rule provides that the activities identified in this section will be treated as mortgage purchases and are eligible to receive Duty to Serve credit under the loan purchase evaluation area.

A. Credit Enhancements—§ 1282.39(b)

Consistent with the proposed rule, § 1282.39(b) of the final rule identifies the specific circumstances under which dwelling units financed under a credit enhancement entered into by an Enterprise will be treated as mortgage purchases.

B. Risk-Sharing—§ 1282.39(c)

Consistent with the proposed rule, § 1282.39(c) of the final rule provides that mortgages purchased under risk-sharing arrangements between an Enterprise and any federal agency under which the Enterprise is responsible for a substantial amount of the risk will be treated as mortgage purchases. Fannie Mae commented that this provision would have the effect of excluding loans under a number of FHA, USDA, and Veterans Administration programs from receiving Duty to Serve credit.

The Duty to Serve counting rules are structured such that unless a particular loan

type is specifically identified as being ineligible to receive Duty to Serve credit, it is eligible to receive credit provided the borrower income and other requirements in the rule are satisfied. Thus, § 1282.39(c) does not exclude from receiving credit Enterprise purchases of Title 1 loans, USDA Section 502 and 538 loans, Section 184 Indian Home Loan Guarantee Program loans, Section 542(b) loans, or other similar types of loans. The only loans that § 1282.39(c) specifically excludes from receiving credit are mortgages purchased under risk-sharing arrangements between an Enterprise and a federal agency where the Enterprise is not responsible for a substantial amount of the risk.

C. Participations—§ 1282.39(d)

As proposed, § 1282.39(d) of the final rule provides that participations purchased by an Enterprise will be treated as mortgage purchases only when the Enterprise's participation in the mortgage is 50 percent of more.

D. Cooperative Housing and Condominiums—§ 1282.39(e)

As proposed, § 1282.39(e) of the final rule provides that the purchase of a mortgage on a cooperative housing unit (share loan) or on a condominium unit will be treated as a mortgage purchase, with affordability determined based on the income of the mortgagor(s). The final rule also provides that the purchase of a blanket mortgage on a cooperative building or on a condominium project will be treated as a mortgage purchase.

E. Seasoned Mortgages—§ 1282.39(f)

Consistent with the proposed rule, § 1282.39(f) of the final rule provides that an Enterprise's purchase of a seasoned mortgage will be treated as a mortgage purchase.

F. Purchase of Refinancing Mortgages—§ 1282.39(g)

As proposed, § 1282.39(g) of the final rule provides that an Enterprise's purchase of a refinancing mortgage will be treated as a mortgage purchase only if the refinancing is an arms-length transaction that is borrower-driven.

G. Mortgage Revenue Bonds—§ 1282.39(h)

Consistent with the proposed rule, § 1282.39(h) of the final rule provides that the purchase or guarantee by an Enterprise of a mortgage revenue bond issued by a state or local housing finance agency will be treated as a purchase of the underlying mortgages only to the extent the Enterprise has sufficient information to determine whether the underlying mortgages or mortgage-backed securities serve the income groups targeted by the duty to serve.

H. Seller Dissolution Option—§ 1282.39(i)

As proposed, § 1282.39(i) of the final rule sets forth the specific circumstances under which mortgages acquired by an Enterprise through transactions involving seller dissolution options will be treated as mortgage purchases.

VIII. Failure to Comply; Housing Plans—§§ 1282.40, 1282.41

The Safety and Soundness Act provides that the Duty to Serve underserved markets is enforceable to the same extent and under the same enforcement provisions as are applicable to the Enterprise housing goals, except as otherwise provided.[137] Accordingly, under § 1282.40 of the final rule, if an Enterprise has not complied with, or there is a substantial probability that an Enterprise will not comply with, the Duty to Serve a particular underserved market in a given year, FHFA will determine whether compliance by the Enterprise with the activities and objectives in its Plan is or was

[137] 12 U.S.C. 4566(a)(4).

feasible. In determining feasibility, FHFA will consider factors such as market and economic conditions and the financial condition of the Enterprise. If FHFA determines that compliance is or was feasible, FHFA will follow the procedures in 12 U.S.C. 4566(b).

A determination of a failure to comply means that an Enterprise has received a rating of Fails under its Plan for a particular underserved market in a given year. A determination of a substantial probability that an Enterprise will fail to comply means that there is a substantial probability that the Enterprise will receive a rating of Fails under its Plan for a particular underserved market in a given year.

Consistent with the proposed rule, § 1282.41 of the final rule includes requirements for an Enterprise to submit to FHFA a housing plan, in the Director's discretion, if the Director determines that the Enterprise did not comply with, or there is a substantial probability that an Enterprise will not comply with, the Duty to Serve a particular underserved market. There were no comments specifically addressing enforcement.

IX. Enterprise Duty to Serve Reporting to FHFA—§ 1282.66

Consistent with the proposed rule, § 1282.66 of the final rule requires the Enterprises to submit to FHFA quarterly reports on the activities and objectives in their Plans for each underserved market. The fourth quarterly report will serve as and be termed the annual report.

As proposed, § 1282.66(a) of the final rule provides that the first and third quarter reports must include detailed year-to-date information on the Enterprise's progress toward meeting the activities and objectives in its Plan only for the loan purchase

evaluation area for each underserved market. Section 1282.66(a) of the final rule provides that the first and third quarter reports are due to FHFA within 60 days after the end of the quarter.

As proposed, § 1282.66(b) of the final rule provides that the second quarter report must include detailed year-to-date information on the Enterprise's progress toward meeting all of the activities and objectives in its Plan for each underserved market. Section 1282.66(b) also requires that the second quarter report contain narrative and summary statistical information for the Plan objectives, supported by appropriate transaction-level data (which was discussed in the proposed rule). Section 1282.66(b) provides that the second quarter report is due to FHFA within 60 days after the end of the second quarter. In the proposed rule, FHFA referred to this report as the "semi-annual" report. FHFA has changed the name of this report to the "second quarter" report in the final rule but has retained the requirements of the "semi-annual" report from the proposed rule. FHFA changed the name of this report in order to more closely follow the naming convention for reports under the housing goals, and because the name "semi-annual report" may imply that the report is due twice a year, though the final rule states that the report is due only once a year after the second quarter. When discussing comments below that referenced this report, FHFA refers to it as the "semi-annual" report for ease of reference because that is the terminology used by the commenters and in the proposed rule.

As proposed, § 1282.66(c) of the final rule provides that the annual report must include information on the Enterprise's performance on all of the activities and objectives in its Plan for each underserved market during the evaluation year. At a minimum, the

annual report must include: narrative and summary statistical information for the Plan objectives over the evaluation year, supported by appropriate transaction-level data (which was discussed in the proposed rule); a description of the Enterprise's market opportunities for purchasing loans during the evaluation year, to the extent data is available; the volume of qualifying loans purchased by the Enterprise during the evaluation year; a comparison of the Enterprise's loan purchases with those in prior years; and a comparison of market opportunities with the size of the relevant markets in the past, to the extent data is available. Market opportunities for purchasing loans could include market or regulatory factors that may affect lenders' decisions to retain loans in portfolio or sell them, the availability and pricing of credit enhancements from third parties, and competition from other secondary market participants. Section 1282.66(c) provides that the annual report is due to FHFA within 75 days after the end of each calendar year.

Section 1282.66(d) of the final rule provides that FHFA will make public information from the first quarter, second quarter, and third quarter reports within a reasonable time after the end of the calendar year for which they apply. FHFA will make public information from the annual report within a reasonable time after its receipt. FHFA will omit any confidential and proprietary information from the information it provides to the public from the Enterprises' reports. During the final year of the three-year period covered by a Plan, FHFA will also make public certain narrative information from each Enterprise's second quarter report for that year, omitting data on loan purchases and any additional confidential or proprietary information, within a reasonable time after receiving the second quarter report. The proposed rule did not specifically

address public disclosure of the reports or how any confidential or proprietary data or information in the reports would be treated.

Several policy advocacy organizations supported the proposed reporting requirements, and no commenters specifically opposed the proposed requirements. As further discussed below, two policy advocacy organizations suggested FHFA consider having the Enterprises report on all activities and objectives quarterly and provide that information to the public. The commenters proposed this as one way to allow the public to weigh in on the next cycle's Plans with information on Enterprises' performance in the final year of the current Plan cycle. Several policy advocacy organizations noted that a significant amount of time could elapse between when the Enterprises submit their annual reports to FHFA and when FHFA finalizes its evaluation for the Enterprises' Duty to Serve compliance. Given this timeline in FHFA's proposed reporting requirements, these commenters stated that FHFA should meet with market participants in order to learn from them how the Plans are operating and the challenges the Enterprises may face in accomplishing their objectives.

FHFA has determined that the reports as detailed in § 1282.66 will provide FHFA with information necessary to monitor and evaluate Enterprise compliance with their Plans. FHFA has also determined that the reporting requirements are not likely to create operational concerns for the Enterprises, given their experience with FHFA's reporting requirements for the housing goals.

Although FHFA did not specifically request comment on whether the Enterprises' reports should be made public, both Enterprises and several policy advocacy organizations and nonprofit organizations provided comments on the extent to which the

reports should be made public. Fannie Mae requested that FHFA make the annual report public but not the first quarter, semi-annual, and third quarter reports because these reports will contain information on its progress toward meeting the activities and objectives in its Plan and include confidential and proprietary data. Freddie Mac recommended that none of the reports be publicly disclosed because they would disclose information that would reveal Freddie Mac's progress and that would influence the Enterprises' development of additional initiatives. Freddie Mac recommended that, at the very least, parts of each report should be considered confidential, in order to allow for even competition between the Enterprises and among other market participants.

In contrast, a policy advocacy organization recommended that all of the reports be made public so that the public could review the reports and play a role in holding the Enterprises accountable and in helping develop their subsequent Plans. A nonprofit organization echoed this recommendation without providing a reason, and commented that the public versions should include protections for proprietary information and sensitive content. Another nonprofit organization stated that the annual report should be made public in order to make the Duty to Serve process transparent.

After considering the comments, FHFA is persuaded that public input on certain information in the Enterprises' reports can provide valuable information for FHFA's evaluation process and the development of the subsequent Plans. At the same time, FHFA is mindful that public access to information in the Enterprise's reports should not compromise the Enterprises' progress in meeting their Plan activities and objectives during the evaluation year, especially where the reports contain confidential or proprietary data or information. In considering the Enterprises' concern about revealing

their progress under their Plans, FHFA has determined that public release of data under the loan purchase evaluation area during the evaluation year could impair the Enterprises' activity in the underserved market. Accordingly, § 1282.66(d) of the final rule provides that FHFA will make public information derived from the Enterprises' first quarter, second quarter, and third quarter reports, omitting any confidential and proprietary information and data, at a reasonable time after the end of the calendar year for which they apply. This will mitigate the concerns the Enterprises expressed about revealing their progress under their Plans. FHFA will make public information derived from the Enterprises' annual reports, omitting any confidential and proprietary data, within a reasonable time after receiving them.

A policy advocacy organization noted that the Enterprises will submit their proposed new Plans to FHFA in the third year of their current three-year Plans. The commenter pointed out that without public access to information on the Enterprises' performance on their current Plans during the third year, the public would have to review and provide input on the Enterprises' proposed new Plans without complete information on the Enterprises' performance to date. Because information on Enterprise progress on all of their Plan activities and objectives will be included in their semi-annual reports, the commenter recommended that FHFA disclose and invite public input on the semi-annual reports in considering the Enterprises' proposed new Plans. Alternatively, the commenter proposed requiring the Enterprises to report on all of their Plan activities and objectives quarterly, at least in the final year of the three-year Plan, so that FHFA could receive more robust information from the public as it considers the Enterprises' proposed

new Plans. Another policy advocacy organization that advocated for all of the reports to be made public echoed this recommendation.

After considering the comments, FHFA has concluded that it would be beneficial for the public to have greater information about Enterprise performance during the third year of the Enterprises' Plans in order to be able to provide more informed input to FHFA on the Enterprises' subsequent proposed Plans. Accordingly, § 1282.66(d) of the final rule provides that FHFA will make public certain narrative information derived from the Enterprises' second quarter reports, omitting loan purchase data as well as any confidential and proprietary data or information, at a reasonable time after receiving the second quarter reports in the third year of the Plans. Although this approach would reveal some information about the Enterprises' progress on their Plans during that evaluation year, FHFA has determined that risk to the Enterprises would be mitigated by omitting data under the loan purchase evaluation area. Providing the public with some information derived from the second quarter reports could facilitate stronger public input that could sharpen the Plans that will cover the next three years.

X. Paperwork Reduction Act

The final rule does not contain any information collection requirement that would require the approval of OMB under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.). Therefore, FHFA has not submitted any information to OMB for review.

XI. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis

describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. (5 U.S.C. 605(b)). FHFA has considered the impact of this rule under the Regulatory Flexibility Act. The General Counsel of FHFA certifies that this rule will not have a significant economic impact on a substantial number of small entities because the rule applies to the Enterprises, which are not small entities for purposes of the Regulatory Flexibility Act.

List of Subjects in 12 CFR Part 1282

Mortgages, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons stated in the preamble, under the authority of 12 U.S.C. 4501, 4502, 4511, 4513, 4526, and 4561-4566, FHFA amends part 1282 of subchapter E of 12 CFR chapter XII, as follows**:**

PART 1282—ENTERPRISE HOUSING GOALS AND MISSION

1. The authority citation for part 1282 continues to read as follows:

Authority: 12 U.S.C. 4501, 4502, 4511, 4513, 4526, 4561-4566.

2. In § 1282.1(b), add the definitions of "Additional Activity", "Agricultural worker", "Area of concentrated poverty", "Colonia", "Community development financial institution", "Evaluation Guidance", "Federally insured credit union", "Federally recognized Indian tribe", "High-needs rural population", "High-needs rural region", "High opportunity area", "Indian area", "Insured depository institution", "Lower Mississippi Delta", "Manufactured home", "Manufactured housing community", "Middle Appalachia", "Mixed-income housing", "Persistent poverty county", "Regulatory

Activity", "Resident-owned manufactured housing community", "Residential economic diversity activity", "Rural area", "Small financial institution", "Small multifamily rental property", "Statutory Activity", and "Underserved Markets Plan", in alphabetical order to read as follows:

§ 1282. 1 Definitions.

*** * * * ***

(b) *** * ***

Additional Activity, for purposes of subpart C of this part, means an activity in an Enterprise's Underserved Markets Plan that is not a Statutory Activity or Regulatory Activity.

Agricultural worker, for purposes of subpart C of this part, means any person that meets the definition of an agricultural worker under a federal, state, tribal or local program.

*** * * * ***

Area of concentrated poverty, for purposes of subpart C of this part, means a census tract designated by HUD as a Qualified Census Tract, pursuant to 26 U.S.C. 42(d)(5)(B)(ii), or as a Racially- or Ethnically-Concentrated Area of Poverty, pursuant to 24 CFR 5.152, during any year covered by an Underserved Markets Plan or in the year prior to a Plan's effective date.

*** * * * ***

Colonia, for purposes of subpart C of this part, means an identifiable community that meets the definition of a colonia under a federal, State, tribal, or local program.

Community development financial institution, for purposes of subpart C of this part, has the meaning in 12 CFR 1263.1.

* * * * *

Evaluation Guidance, for purposes of subpart C of this part, means separate FHFA-prepared guidance that includes the information required under this subpart, as well as additional guidance on the Underserved Markets Plans, how the quantitative and qualitative assessments will be conducted, the role of extra credit for extra-credit eligible activities such as residential economic diversity, how final ratings will be determined, and other matters as may be appropriate.

* * * * *

Federally insured credit union, for purposes of subpart C of this part, has the meaning in 12 U.S.C. 1752(7).

Federally recognized Indian tribe, for purposes of subpart C of this part, has the meaning in 25 CFR 83.1.

* * * * *

High-needs rural population, for purposes of subpart C of this part, means any of the following populations provided the population is located in a rural area:

(i) Members of a Federally recognized Indian tribe located in an Indian area; or

(ii) Agricultural workers.

High-needs rural region, for purposes of subpart C of this part, means any of the following regions provided the region is located in a rural area:

(i) Middle Appalachia;

(ii) The Lower Mississippi Delta;

(iii) A colonia; or

(iv) A tract located in a persistent poverty county and not included in Middle Appalachia, the Lower Mississippi Delta, or a colonia.

High opportunity area, for purposes of subpart C of this part, means:

(i) An area designated by HUD as a "Difficult Development Area," pursuant to 26 U.S.C. 42(d)(5)(B)(iii), during any year covered by an Underserved Markets Plan or in the year prior to an Underserved Markets Plan's effective date, whose poverty rate is lower than the rate specified by FHFA in the Evaluation Guidance; or

(ii) An area designated by a state or local Qualified Allocation Plan as a high opportunity area and which meets a definition FHFA has identified as eligible for duty to serve credit in the Evaluation Guidance.

* * * * *

Indian area, for purposes of subpart C of this part, has the meaning in 24 CFR 1000.10.

Insured depository institution, for purposes of subpart C of this part, means an institution whose deposits are insured under the Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.).

* * * * *

Lower Mississippi Delta, for purposes of subpart C of this part, means the Lower Mississippi Delta counties designated by Public Laws 100-460, 106-554, and 107-171, along with any future updates made by Congress.

Manufactured home, for purposes of subpart C of this part, means a manufactured home as defined in section 603(6) of the National Manufactured Housing Construction

and Safety Standards Act of 1974, as amended, 42 U.S.C. 5401 et seq., and implementing regulations.

Manufactured housing community, for purposes of subpart C of this part, means a tract of land under unified ownership and developed for the purposes of providing individual rental spaces for the placement of manufactured homes for residential purposes within its boundaries.

* * * * *

Middle Appalachia, for purposes of subpart C of this part, means the "central" Appalachian subregion under the Appalachian Regional Commission's subregional classification of Appalachia.

* * * * *

Mixed-income housing, for purposes of subpart C of this part, means a multifamily property or development that may include or comprise single-family units that serves very low-, low-, or moderate-income families where:

(i) A minimum percentage of the units are unaffordable to low-income families, or to families at higher income levels, as specified in the Evaluation Guide; and

(ii) A minimum percentage of the units are affordable to low-income families, or to families at lower income levels, as specified in the Evaluation Guide.

* * * * *

Persistent poverty county, for purposes of subpart C of this part, means a county in a rural area that has had 20 percent or more of its population living in poverty over the past 30 years, as measured by the most recent successive decennial censuses.

* * * * *

Regulatory Activity, for purposes of subpart C of this part, means an activity in an Enterprise's Underserved Markets Plan that is designated as a Regulatory Activity in §§ 1282.33(c), 1282.34(d), or 1282.35(c).

* * * * *

Resident-owned manufactured housing community, for purposes of subpart C of this part, means a manufactured housing community for which the terms and conditions of residency, policies, operations and management are controlled by at least 51 percent of the residents, either directly or through an entity formed under the laws of the state.

Residential economic diversity activity, for purposes of subpart C of this part, means an eligible Enterprise activity, other than an energy or water efficiency improvement activity or other activity that FHFA determines to be ineligible, in connection with mortgages on:

(i) Affordable housing in a high opportunity area; or

(ii) Mixed-income housing in an area of concentrated poverty.

* * * * *

Rural area, for purposes of subpart C of this part, means:

(i) A census tract outside of a metropolitan statistical area as designated by the Office of Management and Budget; or

(ii) A census tract in a metropolitan statistical area as designated by the Office of Management and Budget that is outside of the metropolitan statistical area's Urbanized Areas as designated by the U.S. Department of Agriculture's (USDA) Rural-Urban Commuting Area (RUCA) Code #1, and outside of tracts with a housing density of over 64 housing units per square mile for USDA's RUCA Code #2.

* * * * *

Small financial institution, for purposes of subpart C of this part, means a financial institution with less than $304 million in assets.

* * * * *

Small multifamily rental property, for purposes of subpart C of this part, means any property of 5 to 50 rental units.

Statutory Activity, for purposes of subpart C of this part, means an Enterprise activity relating to housing projects under the programs set forth in 12 U.S.C. 4565(a)(1)(B) and § 1282.34(c).

Underserved Markets Plan, for purposes of subpart C of this part, means a plan prepared by an Enterprise describing the activities and objectives it will undertake to meet its duty to serve each of the three underserved markets.

* * * * *

3. Add subpart C to read as follows:

Subpart C—Duty to Serve Underserved Markets

Sec.

1282.31 General.
1282.32 Underserved Markets Plan.
1282.33 Manufactured housing market.
1282.34 Affordable housing preservation market.
1282.35 Rural markets.
1282.36 Evaluations, ratings, and Evaluation Guidance.
1282.37 General requirements for credit.
1282.38 General requirements for loan purchases.
1282.39 Special requirements for loan purchases.
1282.40 Failure to comply.
1282.41 Housing plans.

§ 1282.31 General.

(a) This subpart sets forth the Enterprise duty to serve three underserved markets as required by section 1335 of the Safety and Soundness Act (12 U.S.C. 4565). This subpart also establishes standards and procedures for annually evaluating and rating Enterprise compliance with the duty to serve underserved markets.

(b) Nothing in this subpart permits or requires an Enterprise to engage in any activity that would otherwise be inconsistent with its Charter Act or the Safety and Soundness Act.

§ 1282.32 Underserved Markets Plan.

(a) General. Each Enterprise must submit to FHFA an Underserved Markets Plan describing the activities and objectives it will undertake to meet its duty to serve each of the three underserved markets. Plan activities and objectives may cover a single year or multiple years.

(b) Term of Plan. Each Enterprise's Plan must cover a period of three years.

(c) Effective date of Plans. Where an underserved market in a Plan receives a Non-Objection from FHFA by December 1 of the prior year, the effective date for that underserved market in the Plan will be January 1 of the first evaluation year for which the Plan is applicable. Where an underserved market in a Plan does not receive a Non-Objection from FHFA by December 1 of the prior year, the effective date for that underserved market in the Plan will be as determined by FHFA.

(d) Plan content.—(1) Consideration of minimum number of activities. The Enterprises must consider and address in their Plans a minimum number of Statutory Activities or Regulatory Activities for each underserved market. The minimum number will be determined by FHFA and stated in the Evaluation Guidance as provided for in §

1282.36(d). An Enterprise will select the specific Statutory Activities or Regulatory Activities to address in its Plan under this requirement. For the activities selected by the Enterprise, the Enterprise must address in its Plan either how it will undertake the activities and related objectives, or the reasons why it will not undertake the activities. The statutory programs in § 1282.34(c)(5) and (c)(6) are excluded for this purpose.

(2) Additional Activities. An Enterprise may also include in its Plan Additional Activities eligible to serve an underserved market. For the Additional Activities included by the Enterprise, the Enterprise must address in its Plan how it will undertake the activities and related objectives.

(3) Residential economic diversity activities. If an Enterprises chooses to undertake a residential economic diversity activity for extra credit under § 1282.36(c)(3), the Enterprise must describe the activity and related objectives in its Plan.

(e) Objectives. Each Statutory Activity, Regulatory Activity, and Additional Activity in an Enterprise's Plan must comprise one or more objectives, which are the specific action items that the Enterprises will identify for each activity. Each objective must meet all of the following requirements:

(1) Strategic. Directly or indirectly maintain or increase liquidity to an underserved market;

(2) Measurable. Provide measurable benchmarks, which may include numerical targets, that enable FHFA to determine whether the Enterprise has achieved the objective;

(3) Realistic. Be calibrated so that the Enterprise has a reasonable chance of meeting the objective with appropriate effort;

(4) Time-bound. Be subject to a specific timeframe for completion by being tied to Plan calendar year evaluation periods; and

(5) Tied to analysis of market opportunities. Be based on assessments and analyses of market opportunities in each underserved market, taking into account safety and soundness considerations.

(f) Evaluation areas. Each Plan objective must meet at least one of the evaluation areas set forth in § 1282.36(b). An Enterprise must designate in its Plan the one evaluation area under which each Plan objective will be evaluated.

(g) Plan procedures.—(1) Submission of proposed Plans.—(i) First proposed Plan. An Enterprise's first proposed Plan must be submitted to FHFA within 90 days after FHFA posts the proposed Evaluation Guidance on FHFA's website pursuant to § 1282.36(d)(3).

(ii) Subsequent proposed Plans. For subsequent proposed Plans after the first Plan, FHFA will provide timelines 300 days before the termination date of the Plan in effect, or a later date if additional time is necessary, for proposed Plan submission, public input periods, and Non-Objection to an underserved market in a Plan. Unless otherwise directed by FHFA, each Enterprise must submit a proposed Plan to FHFA at least 210 days before the termination date of the Enterprise's Plan in effect.

(2) Posting of proposed Plans. As soon as practical after an Enterprise submits its proposed Plan to FHFA for review, FHFA will post the proposed Plan on FHFA's website, with any confidential and proprietary data and information omitted.

(3) Public input.—(i) For the first proposed Plans, the public will have 60 days from the date the proposed Plans are posted on FHFA's website to provide input on the

proposed Plans.

(ii) The Enterprises' subsequent proposed Plans will be available for public input pursuant to the timeframe and procedures established by FHFA.

(4) Enterprise review. Each Enterprise may, in its discretion, make revisions to its proposed Plan based on the public input.

(5) FHFA review.—(i) FHFA review of first proposed Plans. FHFA will review each Enterprise's first proposed Plan and inform the Enterprise of any FHFA comments on the proposed Plan within 60 days from the end of the public input period on the proposed Plan, or such additional time as may be necessary. The Enterprise must address FHFA's comments, as appropriate, through revisions to its proposed Plan pursuant to the timeframe and procedures established by FHFA.

(ii) FHFA review of subsequent proposed Plans. For subsequent proposed Plans after the first proposed Plans, FHFA will establish a timeframe and procedures for FHFA review, comments, and any required Enterprise revisions.

(iii) Designation of Statutory Activity or Regulatory Activity. FHFA may, in its discretion, designate in the Evaluation Guidance one Statutory Activity or Regulatory Activity in each underserved market that FHFA will significantly consider in determining whether to provide a Non-Objection to that underserved market in a proposed Plan.

(iv) FHFA Non-Objections to underserved markets in a proposed Plan. After FHFA is satisfied that all of its comments on an underserved market in a proposed Plan have been addressed, FHFA will issue a Non-Objection for that underserved market in the Plan.

(6) Effective date of an underserved market in a Plan. Where an underserved

market in a Plan receives a Non-Objection from FHFA by December 1 of the prior year, the effective date for that underserved market in the Plan will be January 1 of the first evaluation year for which the Plan is applicable. Where an underserved market in a Plan does not receive a Non-Objection from FHFA by December 1 of the prior year, the effective date for that underserved market in the Plan will be as determined by FHFA.

(7) Posting of an underserved market section in a Plan. As soon as practicable after FHFA issues a Non-Objection to an underserved market in a Plan, that section of the Plan will be posted on the Enterprise's and FHFA's respective websites, with any confidential and proprietary data and information omitted.

(h) Modification of a Plan. At any time after implementation of a Plan, an Enterprise may request to modify its Plan during the three-year term, subject to FHFA Non-Objection of the proposed modifications. FHFA may also require an Enterprise to modify its Plan during the three-year term. FHFA and the Enterprise may seek public input on proposed modifications to a Plan if FHFA determines that public input would assist its consideration of the proposed modifications. If a Plan is modified, the modified Plan, with any confidential and proprietary information and data omitted, will be posted on the Enterprise's and FHFA's respective websites.

§ 1282.33 Manufactured housing market.

(a) Duty in general. Each Enterprise must develop loan products and flexible underwriting guidelines to facilitate a secondary market for eligible mortgages on manufactured homes for very low-, low-, and moderate-income families. Enterprise activities under this section must serve each such income group in the year for which the Enterprise is evaluated and rated.

(b) Eligible activities. Enterprise activities eligible to be included in an Underserved Markets Plan for the manufactured housing market are activities that facilitate a secondary market for mortgages on residential properties for very low-, low-, or moderate-income families consisting of manufactured homes titled as real property or personal property; and manufactured housing communities.

(c) Regulatory Activities. Enterprise activities related to the following are eligible to receive duty to serve credit under the manufactured housing market:

(1) Manufactured homes titled as real property. Mortgages on manufactured homes titled as real property;

(2) Chattel. Loans on manufactured homes titled as personal property, including both pilot and ongoing initiatives;

(3) Manufactured housing communities owned by a governmental entity, nonprofit organization, or residents. Mortgages on manufactured housing communities that are owned by a governmental unit or instrumentality, a nonprofit organization, or residents; and

(4) Manufactured housing communities with certain pad lease protections. Manufactured housing communities with pad leases that have the following pad lease protections at a minimum, or manufactured housing communities that are subject to state or local laws requiring pad lease protections that equal or exceed the following pad lease protections:

(i) One-year renewable lease term unless there is good cause for nonrenewal;

(ii) Thirty-day written notice of rent increases;

(iii) Five-day grace period for rent payments and right to cure defaults on rent

payments;

(iv) Tenant has the right to sell the manufactured home without having to first relocate it out of the community;

(v) Tenant has the right to sublease or assign the pad lease for the unexpired term to the new buyer of the tenant's manufactured home without any unreasonable restraint;

(vi) Tenant has the right to post "For Sale" signs;

(vii) Tenant has the right to sell the manufactured home in place within a reasonable time period after eviction by the manufactured housing community owner; and

(viii) Tenant has the right to receive at least 60 days advance notice of a planned sale or closure of the manufactured housing community.

(d) Additional Activities. An Enterprise may include in its Plan other activities to serve very low-, low-, or moderate-income families in the manufactured housing market consistent with paragraph (b) of this section, subject to FHFA determination of whether the Additional Activity is eligible to receive duty to serve credit.

§ 1282.34 Affordable housing preservation market.

(a) Duty in general. Each Enterprise must develop loan products and flexible underwriting guidelines to facilitate a secondary market to preserve housing affordable to very low-, low-, and moderate-income families under eligible housing programs or activities. Enterprise activities under this section must serve each such income group in the year for which the Enterprise is evaluated and rated.

(b) Eligible activities. Enterprise activities eligible to be included in an Underserved Markets Plan for the affordable housing preservation market are activities

that facilitate a secondary market for mortgages on residential properties for very low-, low-, or moderate-income families consisting of affordable rental housing preservation and affordable homeownership preservation.

(c) Statutory Activities. Enterprise activities related to housing projects under the following programs in the Safety and Soundness Act (12 U.S.C. 4565(a)(1)(B)) are eligible to receive duty to serve credit under the affordable housing preservation market:

(1) Section 8. The project-based and tenant-based rental assistance housing programs under section 8 of the U.S. Housing Act of 1937, 42 U.S.C. 1437f;

(2) Section 236. The rental and cooperative housing program for lower income families under section 236 of the National Housing Act, 12 U.S.C. 1715z-1;

(3) Section 221(d)(4). The housing program for moderate-income and displaced families under section 221(d)(4) of the National Housing Act, 12 U.S.C. 1715l;

(4) Section 202. The supportive housing program for the elderly under section 202 of the Housing Act of 1959, 12 U.S.C. 1701q;

(5) Section 811. The supportive housing program for persons with disabilities under section 811 of the Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. 8013;

(6) McKinney-Vento Homeless Assistance. Permanent supportive housing projects subsidized under Title IV of the McKinney-Vento Homeless Assistance Act, 42 U.S.C. 11361, et seq.;

(7) Section 515. The rural rental housing program under section 515 of the Housing Act of 1949, 42 U.S.C. 1485;

(8) Low-income housing tax credits. Low-income housing tax credits under

section 42 of the Internal Revenue Code of 1986, 26 U.S.C. 42; and

(9) Other comparable state or local affordable housing programs. Other comparable affordable housing programs administered by a state or local government that preserve housing affordable to very low-, low-, and moderate-income families. An Enterprise may include in its Plan statutory programs pursuant to this paragraph (c)(9), subject to FHFA determination that the program is comparable to one of the statutory programs in this paragraph (c) in the way it provides subsidy and preserves affordable housing for the income-eligible households.

(d) Regulatory Activities. Enterprise activities related to the following are eligible to receive duty to serve credit under the affordable housing preservation market:

(1) Financing of small multifamily rental properties. Financing of small multifamily rental properties by a community development financial institution, insured depository institution, or federally insured credit union, where the entity's total assets are $10 billion or less;

(2) Energy or water efficiency improvements on multifamily rental properties. Energy or water efficiency improvements on multifamily rental properties provided there are projections made based on credible and generally accepted standards that the improvements financed by the loan will reduce energy or water consumption by the tenant or the property by at least 15 percent, and the energy or water savings generated over an improvement's expected life will exceed the cost of installation;

(3) Energy or water efficiency improvements on single-family, first lien properties. Energy or water efficiency improvements on single-family, first-lien properties, provided there are projections made based on credible and generally accepted

standards that the improvements financed by the loan will reduce energy or water consumption by the homeowner, the tenant, or the property by at least 15 percent, and the utility savings generated over an improvement's expected life will exceed the cost of installation;

(4) Shared equity programs for affordable homeownership preservation.—(i) Affordable homeownership preservation through one of the following shared equity homeownership programs:

(A) Resale restriction programs administered by community land trusts, other nonprofit organizations, or state or local governments or instrumentalities; or

(B) Shared appreciation loan programs administered by community land trusts, other nonprofit organizations, or state or local governments or instrumentalities that may or may not partner with a for-profit institution to invest in, originate, sell, or service shared appreciation loans.

(ii) A program in paragraph (d)(4)(i) must:

(A) Provide homeownership opportunities to very low-, low-, or moderate-income households;

(B) Utilize a ground lease, deed restriction, subordinate loan, or similar legal mechanism that includes provisions stating that the program will keep the home affordable for subsequent very low-, low-, or moderate-income families, the affordability term is at least 30 years after recordation, a resale formula applies that limits the homeowner's proceeds upon resale, and the program administrator or its assignee has a preemptive option to purchase the homeownership unit from the homeowner at resale; and

(C) Support homebuyers and homeowners to promote sustainable homeownership, including reviewing and pre-approving refinances and home equity lines of credit.

(5) HUD Choice Neighborhoods Initiative. The HUD Choice Neighborhoods Initiative, as authorized by 42 U.S.C. 1437v;

(6) HUD Rental Assistance Demonstration program. The HUD Rental Assistance Demonstration program, as authorized by 42 U.S.C.1437f note; and

(7) Purchase or rehabilitation of certain distressed properties. Lending programs for the purchase or rehabilitation by very low-, low-, or moderate-income families, or by nonprofit organizations or local or tribal governments serving such families, of homes eligible for short sale, homes eligible for foreclosure sale, or properties that a lender acquires as a result of foreclosure.

(e) Additional Activities. An Enterprise may include in its Plan other activities to serve very low-, low-, or moderate-income families in the affordable housing preservation market consistent with paragraph (b) of this section, subject to FHFA determination of whether the activities are eligible to receive duty to serve credit.

§ 1282.35 Rural markets.

(a) Duty in general. Each Enterprise must develop loan products and flexible underwriting guidelines to facilitate a secondary market for eligible mortgages on housing for very low-, low-, and moderate-income families in rural areas. Enterprise activities under this section must serve each such income group in the year for which the Enterprise is evaluated and rated.

(b) Eligible activities. Enterprise activities eligible to be included in an

Underserved Markets Plan for the rural market are activities that facilitate a secondary market for mortgages on residential properties for very low-, low-, or moderate-income families in rural areas.

(c) Regulatory Activities. Enterprise activities related to the following are eligible to receive duty to serve credit under the rural market:

(1) High-needs rural regions. Housing in high-needs rural regions;

(2) High-needs rural populations. Housing for high-needs rural populations;

(3) Financing by small financial institutions of rural housing. Financing by a small financial institution of housing in a rural area; and

(4) Small multifamily rental properties in rural areas. Small multifamily rental properties that are located in a rural area.

(d) Additional Activities. An Enterprise may include in its Plan other activities to serve very low-, low-, or moderate-income families in rural areas consistent with paragraph (b) of this section, subject to FHFA determination of whether the activities are eligible to receive duty to serve credit.

§ 1282.36 Evaluations, ratings, and Evaluation Guidance.

(a) Evaluation of compliance. In determining whether an Enterprise has complied with the duty to serve each underserved market, FHFA will annually evaluate and rate the Enterprise's duty to serve performance based on the Enterprise's implementation of its Underserved Markets Plan during the relevant evaluation year. FHFA's evaluation will be in accordance with separate, FHFA-prepared Evaluation Guidance as provided for in paragraph (d) of this section.

(b) Evaluation areas. As provided in § 1282.32(f), an Enterprise must specify in

its Plan the evaluation area under which each Plan objective will be evaluated. FHFA will evaluate an Enterprise's performance of each of its Plan objectives under one of the following four evaluation areas, as designated by the Enterprise in its Plan:

(1) Outreach. The extent of the Enterprise's outreach to qualified loan sellers and other market participants in each underserved market;

(2) Loan product. The Enterprise's development of loan products, more flexible underwriting guidelines, and other innovative approaches to providing financing in each underserved market;

(3) Loan purchase. The volume of loan purchases by the Enterprise in each underserved market relative to the market opportunities available to the Enterprise; and

(4) Investments and grants. The amount of the Enterprise's investments and grants in projects that assist in meeting the needs of each underserved market.

(c) Evaluation process. At the end of each evaluation year, FHFA will evaluate each Enterprise's performance under its Plan based on quantitative and qualitative assessments of the Enterprise's accomplishment of the objectives for the activities under each underserved market in its Plan. Following the quantitative and qualitative assessments, FHFA may provide extra credit for extra credit-eligible residential economic diversity activities in an underserved market in a Plan, and for other extra credit-eligible activities in an underserved market in a Plan as may be designated by FHFA in the Evaluation Guidance.

(1) Quantitative assessment. FHFA will conduct a quantitative assessment which will evaluate the level of an Enterprise's accomplishment of each objective for each activity in an underserved market in its Plan, based on the level of accomplishment

needed for the objectives in order to receive a passing rating for compliance with the Duty to Serve an underserved market in a Plan, as established by FHFA in the Evaluation Guidance. At the conclusion of the quantitative assessment for an underserved market in a Plan, FHFA will determine whether an Enterprise has passed or failed the required level of accomplishment.

(2) Qualitative assessment. FHFA will conduct a qualitative assessment which will evaluate the Enterprise's accomplishment of each objective for each activity in an underserved market in its Plan, based on the method and criteria established by FHFA in the Evaluation Guidance, such as how skillfully an objective was implemented, the impact of the objective, and such other criteria as FHFA may set forth in the Evaluation Guidance.

(3) Extra credit-eligible activities. FHFA may provide extra credit for extra credit-eligible residential economic diversity activities included in an underserved market in a Plan, and for other extra credit-eligible activities included in an underserved market in a Plan, where such other activities are designated by FHFA in the Evaluation Guidance. FHFA will conduct its assessment of an Enterprise's accomplishment of activities that are eligible for extra credit based on the method and criteria established by FHFA in the Evaluation Guidance, such as how skillfully an objective was implemented, the impact of the objective, and such other criteria as FHFA may set forth in the Evaluation Guidance.

(4) Ratings.—(i) Assignment of ratings. Based on the quantitative, qualitative and extra credit assessments, FHFA will assign a rating of Exceeds, High Satisfactory, Low Satisfactory, Minimally Passing, or Fails to the Enterprise's performance for each

underserved market in its Plan. A rating of Exceeds, High Satisfactory, Low Satisfactory, or Minimally Passing will constitute compliance by the Enterprise with the duty to serve that underserved market. A rating of Fails will constitute noncompliance by the Enterprise with the duty to serve that underserved market.

(ii) Ongoing Assessment of Evaluation and Rating Process. FHFA will make such determinations as appropriate based on evaluation of the program's parameters and operation, pursuant to the Evaluation Guidance, regarding implementation of the evaluation and rating process.

(d) Evaluation Guidance.—(1) Three-year term. FHFA will prepare Evaluation Guidance for use by both Enterprises for a three-year term.

(2) Contents. The Evaluation Guidance will include the information required under this subpart, as well as additional guidance on Enterprise Plans, how the quantitative and qualitative assessments will be conducted, the role of extra credit, how final ratings will be determined, and other matters as may be appropriate.

(3) Timelines for Evaluation Guidance.—(i) For the first Plan.—(A) FHFA will provide to the Enterprises the proposed Evaluation Guidance for the first Plan within 30 days after the posting of this subpart on FHFA's website. FHFA will post the proposed Evaluation Guidance on FHFA's website as soon as practicable after providing it to the Enterprises.

(B) The proposed Evaluation Guidance will be available for public input for a period of 120 days following its posting on FHFA's website.

(C) FHFA will provide the Evaluation Guidance to the Enterprises no later than the time FHFA provides comments to the Enterprises on their proposed Plans.

(ii) For subsequent Plans. FHFA will provide timelines for the Evaluation Guidance for subsequent Plans after the first Plan, including public input periods, 300 days before the termination date of the Plan in effect, or a later date if additional time is necessary.

(4) Posting of Evaluation Guidance. The final Evaluation Guidance will be posted on the Enterprises' and FHFA's respective websites as soon as practicable after the Evaluation Guidance is finalized.

(5) Modification of Evaluation Guidance. From time to time, FHFA may modify the Evaluation Guidance prior to or during the Evaluation Guidance's three-year term. FHFA may seek public input on proposed modifications to the Evaluation Guidance if FHFA determines that public input would assist its consideration of the proposed modifications. Modified Evaluation Guidance will be effective on January 1 of the year after the modified Evaluation Guidance is posted. FHFA will post the modified Evaluation Guidance on FHFA's website as soon as practicable after modified.

§ 1282.37 General requirements for credit.

(a) General. FHFA will determine whether an activity included in an Enterprise's Underserved Markets Plan will receive duty to serve credit or extra credit under an underserved market in the Plan. In this determination, FHFA will consider whether the activity facilitates a secondary market for financing mortgages: on manufactured homes for very low-, low-, and moderate-income families; to preserve housing affordable to very low-, low-, and moderate-income families; and on housing for very low-, low-, and moderate-income families in rural areas. If FHFA determines that an activity will receive duty to serve credit or extra credit under an underserved market in the Plan, the activity

will receive such credit under the relevant evaluation area for each underserved market it serves.

(b) No credit under any evaluation area. Enterprise activities related to the following are not eligible to receive duty to serve credit under any evaluation area under an underserved market, even if the activity otherwise would receive credit under any other section of this subpart, except as provided in this section:

(1) Contributions to the Housing Trust Fund (12 U.S.C. 4568) and the Capital Magnet Fund (12 U.S.C. 4569), and mortgage purchases funded with such grant amounts;

(2) HOEPA mortgages;

(3) Subordinate liens on multifamily properties**,** except for subordinate liens originated for energy or water efficiency improvements on multifamily rental properties that meet the requirements in § 1282.34(d)(2);

(4) Subordinate liens on single-family properties, except for shared appreciation loans that satisfy all of the requirements in § 1282.34(d)(4) of this part;

(5) Low-Income Housing Tax Credit equity investments in a property, except where the property is located in a rural area;

(6) Permanent construction take-out loans and Additional Activities under the affordable housing preservation market, except as provided in paragraph (c) of this section; and

(7) Any combination of factors in paragraphs (b)(1) through (b)(6) of this section.

(c) Credit for certain permanent construction take-out loans and Additional Activities under the affordable housing preservation market. Enterprise activities related to permanent construction take-out loans and Additional Activities under the affordable

housing preservation market are eligible for duty to serve credit, provided the following requirements are met, as applicable:

(1) Permanent construction take-out loans.—(i) The permanent construction take-out loans preserve existing subsidies on affordable housing with regulatory periods of required affordability that are at least as restrictive as the longest affordability restriction applicable to the subsidy or subsidies being preserved; or

(ii) The permanent construction take-out loans are for housing developed under state or local inclusionary zoning, real estate tax abatement, or loan programs, where the property owner has agreed to restrict a portion of the units for occupancy by very low-, low-, or moderate-income families, and to restrict the rents that can be charged for those units at affordable rents to those populations, or where the property is developed for a shared equity program that meets the requirements under § 1282.34(d)(4), and where there is a regulatory agreement, recorded use restriction, or deed restriction in place that maintains affordability for the term defined by the state or local program.

(2) Additional Activities. Additional Activities that either:

(i) Involve preserving existing subsidy where the term of affordability required for the subsidy is followed, or where there is a deed restriction for affordability for the life of the loan; or

(ii) Involve preserving the affordability of properties in conjunction with state or local inclusionary zoning, real estate tax abatement, or loan programs, where a regulatory agreement, recorded use restriction, or deed restriction maintains affordability of a portion of the property's units for the term defined by the state or local program.

(d) No credit under loan purchase evaluation area. The following activities are not eligible to receive duty to serve credit under the loan purchase evaluation area, even if the activity otherwise would receive duty to serve credit under § 1282.38:

(1) Purchases of mortgages to the extent they finance any dwelling units that are secondary residences;

(2) Single-family refinancing mortgages that result from conversion of balloon notes to fully amortizing notes, if the Enterprise already owns or has an interest in the balloon note at the time conversion occurs;

(3) Purchases of mortgages or interests in mortgages that previously received credit under any underserved market within the five years immediately preceding the current performance year;

(4) Purchases of mortgages where the property or any units within the property have not been approved for occupancy;

(5) Any interests in mortgages that FHFA determines will not be treated as interests in mortgages;

(6) Purchases of state and local government housing bonds except as provided in § 1282.39(h); and

(7) Any combination of factors in paragraphs (d)(1) through (d)(6) of this section.

(e) FHFA review of activities or objectives. FHFA may determine whether and how any activity or objective will receive duty to serve credit under an underserved market in a Plan, including treatment of missing data. FHFA will notify each Enterprise in writing of any determination regarding the treatment of any activity or objective. FHFA will make any such determinations available to the public on FHFA's website.

(f) The year in which an activity or objective will receive credit. An activity or objective that FHFA determines will receive duty to serve credit under an underserved market in a Plan will receive such credit in the year in which the activity or objective is completed. FHFA may determine that credit is appropriate for an activity or objective in which an Enterprise engages, but does not complete, in a particular year, except that activities or objectives under the loan purchase evaluation area will receive credit in the year in which the Enterprise purchased the mortgage.

(g) Credit under one evaluation area. An activity or objective will receive duty to serve credit under only one evaluation area in a particular underserved market.

(h) Credit under multiple underserved markets. An activity or objective, including financing of dwelling units by an Enterprise's mortgage purchase, will receive duty to serve credit under each underserved market for which the activity or objective qualifies in that year.

§ 1282.38 General requirements for loan purchases.

(a) General. This section applies to Enterprise mortgage purchases that may receive duty to serve credit under the loan purchase evaluation area for a particular underserved market in a Plan. Only dwelling units securing a mortgage purchased by the Enterprise in that year and not specifically excluded under § 1282.37(b) and (d) may receive credit.

(b) Counting dwelling units. Performance under the loan purchase evaluation area will be measured by counting dwelling units affordable to very low-, low-, and moderate-income families.

(c) Credit for owner-occupied units.—(1) Mortgage purchases financing owner-occupied single-family properties will be evaluated based on the income of the mortgagor(s) and the area median income at the time the mortgage was originated. To determine whether mortgages may receive duty to serve credit under a particular family income level, i.e., very low-, low-, or moderate-income, the income of the mortgagor(s) is compared to the median income for the area at the time the mortgage was originated, using the appropriate percentage factor provided under § 1282.17.

(2) Mortgage purchases financing owner-occupied single-family properties for which the income of the mortgagor(s) is not available will not receive duty to serve credit under the loan purchase evaluation area.

(d) Credit for rental units.—(1) Use of rent. For Enterprise mortgage purchases financing single-family rental units and multifamily rental units, affordability is determined based on rent and whether the rent is affordable to the income groups targeted by the duty to serve. A rent is affordable if the rent does not exceed the maximum levels as provided in § 1282.19.

(2) Affordability of rents based on housing program requirements. Where a multifamily property is subject to an affordability restriction under a housing program that establishes the maximum permitted income level for a tenant or a prospective tenant or the maximum permitted rent, the affordability of units in the property may be determined based on the maximum permitted income level or maximum permitted rent established under such housing program for those units. If using income, the maximum income level must be no greater than the maximum income level for each income group targeted by the duty to serve, adjusted for family or unit size as provided in § 1282.17 or

§ 1282.18, as appropriate. If using rent, the maximum rent level must be no greater than the maximum rent level for each income group targeted by the duty to serve, adjusted for unit size as provided in § 1282.19.

(3) Unoccupied units. Anticipated rent for unoccupied units may be the market rent for similar units in the neighborhood as determined by the lender or appraiser for underwriting purposes. A unit in a multifamily property that is unoccupied because it is being used as a model unit or rental office may receive duty to serve credit only if the Enterprise determines that the number of such units is reasonable and minimal considering the size of the multifamily property.

(4) Timeliness of information. In evaluating affordability for single-family rental properties, an Enterprise must use tenant income and area median income available at the time the mortgage was originated. For multifamily rental properties, the Enterprise must use tenant income and area median income available at the time the mortgage was acquired.

(e) Missing data or information for rental units.—(1) When calculating unit affordability, rental units for which bedroom data are missing will be considered efficiencies.

(2) When an Enterprise lacks sufficient information to determine whether a rental unit in a single-family or multifamily property securing a mortgage purchased by the Enterprise receives duty to serve credit under the loan purchase evaluation area because rental data are not available, the Enterprise's performance with respect to such unit may be evaluated using estimated affordability information, except that an Enterprise may not estimate affordability of rental units for purposes of receiving extra credit for residential

economic diversity activities. The estimated affordability information is calculated by multiplying the number of rental units with missing affordability information in properties securing the mortgages purchased by the Enterprise in each census tract by the percentage of all moderate-income rental dwelling units in the respective tracts, as determined by FHFA.

(f) Affordability of manufactured housing communities. For an Enterprise purchase of a blanket loan on a manufactured housing community, unless otherwise determined by FHFA, the affordability of the homes in the community shall be determined using one of the methodologies in paragraphs (f)(1) or (f)(2) of this section, as applicable, except that for purposes of determining extra credit for residential economic diversity activities or objectives, the methodology in paragraph (f)(2) of this section may not be used.

(1) Methodology for government-, nonprofit- or resident-owned manufactured housing communities. For a manufactured housing community owned by a government unit or instrumentality, a nonprofit organization, or the residents, if laws or regulations governing the affordability of the community, or the community's or ownership entity's founding, chartering, governing, or financing documents, require that a certain number or percentage of the community's homes be affordable consistent with paragraph (d)(1) of this section, then any homes subject to such affordability restriction are treated as affordable.

(2) Census tract methodology for any type of manufactured housing community. For any type of manufactured housing community, except for purposes of determining

extra credit for residential economic diversity activities or objectives, the affordability of the homes in the community is determined as follows:

(i) If the median income of the census tract in which the manufactured housing community is located is less than or equal to the area median income, then all homes in the community are treated as affordable;

(ii) If the median income of the census tract in which the manufactured housing community is located exceeds the area median income, then the number of homes that are treated as affordable is determined by dividing the area median income by the median income of the census tract in which the community is located and multiplying the resulting ratio by the total number of homes in the community.

(g) Application of median income.—(1) To determine an area's median income under §§ 1282.17 through 1282.19 and the definitions in § 1282.1, the area is:

(i) The metropolitan area, if the property which is the subject of the mortgage is in a metropolitan area; and

(ii) In all other areas, the county in which the property is located, except that where the State non-metropolitan median income is higher than the county's median income, the area is the State non-metropolitan area.

(2) When an Enterprise cannot precisely determine whether a mortgage is on dwelling unit(s) located in one area, the Enterprise must determine the median income for the split area in the manner prescribed by the Federal Financial Institutions Examination Council for reporting under the Home Mortgage Disclosure Act (12 U.S.C. 2801 et seq.), if the Enterprise can determine that the mortgage is on dwelling unit(s) located in:

(i) A census tract; or

(ii) A census place code.

(h) Newly available data. When an Enterprise uses data to determine whether a dwelling unit may receive duty to serve credit under the loan purchase evaluation area and new data is released after the start of a calendar quarter, the Enterprise need not use the new data until the start of the following quarter.

§ 1282.39 Special requirements for loan purchases.

(a) General. Subject to FHFA's determination of whether an activity or objective will receive duty to serve credit under a particular underserved market, the activities or objectives identified in this section will be treated as mortgage purchases as described and receive credit under the loan purchase evaluation area. An activity or objective that is covered by more than one paragraph below must satisfy the requirements of each such paragraph.

(b) Credit enhancements.—(1) Dwelling units financed under a credit enhancement entered into by an Enterprise will be treated as mortgage purchases only when:

(i) The Enterprise provides a specific contractual obligation to ensure timely payment of amounts due under a mortgage or mortgages financed by the issuance of housing bonds (such bonds may be issued by any entity, including a State or local housing finance agency); and

(ii) The Enterprise assumes a credit risk in the transaction substantially equivalent to the risk that would have been assumed by the Enterprise if it had securitized the mortgages financed by such bonds.

(2) When an Enterprise provides a specific contractual obligation to ensure timely payment of amounts due under any mortgage originally insured by a public purpose mortgage insurance entity or fund, the Enterprise may, on a case-by-case basis, seek approval from the Director for such transactions to receive credit under the loan purchase evaluation area for a particular underserved market.

(c) Risk-sharing. Mortgages purchased under risk-sharing arrangements between an Enterprise and any federal agency under which the Enterprise is responsible for a substantial amount of the risk will be treated as mortgage purchases.

(d) Participations. Participations purchased by an Enterprise will be treated as mortgage purchases only when the Enterprise's participation in the mortgage is 50 percent or more.

(e) Cooperative housing and condominiums.—(1) The purchase of a mortgage on a cooperative housing unit ("a share loan") or a mortgage on a condominium unit will be treated as a mortgage purchase. Such a purchase will receive duty to serve credit in the same manner as a mortgage purchase of single-family owner-occupied units, i.e., affordability is based on the income of the mortgagor(s).

(2) The purchase of a blanket mortgage on a cooperative building or a mortgage on a condominium project will be treated as a mortgage purchase. The purchase of a blanket mortgage on a cooperative building will receive duty to serve credit in the same manner as a mortgage purchase of a multifamily rental property, except that affordability must be determined based solely on the comparable market rents used in underwriting the blanket loan. If the underwriting rents are not available, the loan will not be treated as a mortgage purchase. The purchase of a mortgage on a condominium project will receive

duty to serve credit in the same manner as a mortgage purchase of a multifamily rental property.

(3) Where an Enterprise purchases both a blanket mortgage on a cooperative building and share loans for units in the same building, both the mortgage on the cooperative building and the share loans will be treated as mortgage purchases. Where an Enterprise purchases both a mortgage on a condominium project and mortgages on individual dwelling units in the same project, both the mortgage on the condominium project and the mortgages on individual dwelling units will be treated as mortgage purchases.

(f) Seasoned mortgages. An Enterprise's purchase of a seasoned mortgage will be treated as a mortgage purchase.

(g) Purchase of refinancing mortgages. The purchase of a refinancing mortgage by an Enterprise will be treated as a mortgage purchase only if the refinancing is an arms-length transaction that is borrower-driven.

(h) Mortgage revenue bonds. The purchase or guarantee by an Enterprise of a mortgage revenue bond issued by a state or local housing finance agency will be treated as a purchase of the underlying mortgages only to the extent the Enterprise has sufficient information to determine whether the underlying mortgages or mortgage-backed securities serve the income groups targeted by the duty to serve.

(i) Seller dissolution option.—(1) Mortgages acquired through transactions involving seller dissolution options will be treated as mortgage purchases only when:

(i) The terms of the transaction provide for a lockout period that prohibits the exercise of the dissolution option for at least one year from the date on which the transaction was entered into by the Enterprise and the seller of the mortgages; and

(ii) The transaction is not dissolved during the one-year minimum lockout period.

(2) FHFA may grant an exception to the one-year minimum lockout period described in paragraphs (i)(1)(i) and (i)(1)(ii) of this section, in response to a written request from an Enterprise, if FHFA determines that the transaction furthers the purposes of the Enterprise's Charter Act and the Safety and Soundness Act.

(3) For purposes of paragraph (i) of this section, "seller dissolution option" means an option for a seller of mortgages to the Enterprises to dissolve or otherwise cancel a mortgage purchase agreement or loan sale.

§ 1282.40 Failure to comply.

If the Director determines that an Enterprise has not complied with, or there is a substantial probability that an Enterprise will not comply with, the duty to serve a particular underserved market in a given year and the Director determines that such compliance is or was feasible, the Director will follow the procedures in 12 U.S.C. 4566(b).

§ 1282.41 Housing plans.

(a) General. If the Director determines that an Enterprise did not comply with, or there is a substantial probability that an Enterprise will not comply with, the duty to serve a particular underserved market in a given year, the Director may require the Enterprise to submit a housing plan for approval by the Director.

(b) Nature of housing plan. If the Director requires a housing plan, the housing plan must:

(1) Be feasible;

(2) Be sufficiently specific to enable the Director to monitor compliance periodically;

(3) Describe the specific actions that the Enterprise will take:

(i) To comply with the duty to serve a particular underserved market for the next calendar year; or

(ii) To make such improvements and changes in its operations as are reasonable in the remainder of the year, if the Director determines that there is a substantial probability that the Enterprise will fail to comply with the duty to serve a particular underserved market in such year; and

(4) Address any additional matters relevant to the housing plan as required, in writing, by the Director.

(c) Deadline for submission. The Enterprise must submit the housing plan to the Director within 45 days after issuance of a notice requiring the Enterprise to submit a housing plan. The Director may extend the deadline for submission of a housing plan, in writing and for a time certain, to the extent the Director determines an extension is necessary.

(d) Review of housing plans. The Director will review and approve or disapprove housing plans in accordance with 12 U.S.C. 4566(c)(4) and (c)(5).

(e) Resubmission. If the Director disapproves an initial housing plan submitted by an Enterprise, the Enterprise must submit an amended housing plan acceptable to the

Director not later than 15 days after the Director's disapproval of the initial housing plan. The Director may extend the deadline if the Director determines that an extension is in the public interest. If the amended housing plan is not acceptable to the Director, the Director may afford the Enterprise 15 days to submit a new housing plan.

4. Add § 1282.66 to subpart D to read as follows:

§ 1282.66 Enterprise reports on duty to serve.

(a) First and third quarter reports. Each Enterprise must submit to FHFA a first and third quarter report on its activities and objectives under each underserved market in its Underserved Markets Plan for the loan purchase evaluation area. The report must include detailed year-to-date information on the Enterprise's progress towards meeting the activities and objectives in its Plan. The Enterprise must submit the first and third quarter reports to FHFA within 60 days of the end of the respective quarter.

(b) Second quarter report. Each Enterprise must submit to FHFA a second quarter report on all of the activities and objectives under each underserved market in its Underserved Markets Plan. The report must include detailed year-to-date information on the Enterprise's progress towards meeting the activities and objectives under each underserved market in its Plan, and contain narrative and summary statistical information for the Plan objectives, supported by appropriate transaction level detail. The Enterprise must submit the second quarter report to FHFA within 60 days of the end of the second quarter.

(c) Annual report. To comply with the requirements in sections 309(n) of the Fannie Mae Charter Act and 307(f) of the Freddie Mac Act and for purposes of FHFA's Annual Housing Report to Congress, each Enterprise must submit to FHFA an annual

report on all of the activities and objectives under each underserved market in its Underserved Markets Plan no later than 75 days after the end of each calendar year. For each underserved market, the Enterprise's annual report must include, at a minimum: a description of the Enterprise's market opportunities for loan purchases during the evaluation year to the extent data is available; the volume of qualifying loans purchased by the Enterprise during the evaluation year; a comparison of the Enterprise's loan purchases with its loan purchases in prior years; a comparison of market opportunities with the size of the relevant markets in the past, to the extent data is available; and narrative and summary statistical information for the Plan objectives, supported by appropriate transaction level data.

(d) Public disclosure of information from reports. FHFA will make public certain information from the first, second, and third quarter reports at a reasonable time after the end of the calendar year for which they apply, with any confidential and proprietary information and data omitted. FHFA will make public certain information from the annual reports at a reasonable time after receiving them from the Enterprises, with any confidential and proprietary information and data omitted. In the third year of the Underserved Markets Plans, FHFA will make public certain narrative information from the year's second quarter report, excluding data under the loan purchase evaluation area and any confidential and proprietary information and data, at a reasonable time after receiving it within the calendar year.

Dated: December 12, 2016.

Melvin L. Watt,
Director, Federal Housing Finance Agency.

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