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FEDERAL HOUSING FINANCE AGENCY

12 CFR Parts 1290 and 1291

RIN 2590-AA83

Affordable Housing Program Amendments

AGENCY: Federal Housing Finance Agency.

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Agency (FHFA or Agency) is amending its regulation addressing requirements for the Federal Home Loan Banks' (Banks) Affordable Housing Program (AHP or Program). The final rule amends the regulation to: provide the Banks additional authority to allocate their AHP funds; authorize the Banks to establish separate competitive funds that target specific affordable housing needs in their districts; provide the Banks additional flexibility in designing their project selection scoring systems to address affordable housing needs in their districts; remove the requirement for retention agreements for owner-occupied units where the AHP subsidy is used solely for rehabilitation; provide for a calculation of household subsidy repayment amount that prioritizes return of the household's investment in the housing to the household; reduce administrative burdens related to calculating and obtaining household subsidy repayments based on net proceeds of the sale of a home; further align certain project monitoring requirements with those of other federal government funding programs; clarify the requirements for remediating AHP noncompliance; clarify certain operational requirements; and streamline and reorganize the regulation.

DATES: *Effective date:* This final rule is effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN FEDERAL REGISTER]**.

Compliance dates: For applicable compliance dates, see the discussions under §§ 1290.8 and 1291.2 in Section I. of the **SUPPLEMENTARY INFORMATION** below.

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SUPPLEMENTARY INFORMATION:

I. Sections 1291.2 and 1290.8--Compliance Dates

Section 1291.2 of the final rule provides generally, that through December 31, 2020, a Bank may comply with either the AHP regulation in effect immediately prior to this final rule's effective date, or this final rule. On and after January 1, 2021, a Bank must comply with this final rule. However, for the owner-occupied retention agreement requirements in § 1291.15(a)(7), the final rule provides that through December 31, 2019, a Bank may comply with either § 1291.9(a)(7) of the AHP regulation in effect immediately prior to this final rule's effective date, or § 1291.15(a)(7) of this final rule.

On and after January 1, 2020, a Bank must comply with § 1291.15(a)(7) of the final rule. Regarding proxies for determining a subsequent purchaser's income, the final rule provides that a Bank shall comply with § 1291.15(a)(7)(ii)(B) of the final rule on the date set forth in the FHFA guidance on proxies referenced therein.

Similarly, § 1290.8 of the final rule provides that through December 31, 2020, a Bank must comply with either prior part 1290 (Community Support Requirements regulation) or this part 1290. On and after January 1, 2021, a Bank must comply with this part 1290.

The proposed rule did not address effective or compliance dates. The Banks requested that the final rule not become effective for at least two years. They stressed that the proposed substantive changes to the regulation, especially the proposed outcome-based scoring framework, would require extensive changes to their existing scoring, information and reporting systems, as well as education and training of Bank staff, members, and potential project sponsors. Bank staff indicated that they would need to consult with their Bank Advisory Councils, boards of directors, and board committees on changes to their Program, including systems and procedures. They would need to seek approval by their boards of changes to their policies for their General Funds and Homeownership Set-Aside Programs, and for establishment of Targeted Funds, along with related changes to their AHP Implementation Plans and Targeted Community Lending Plans (TCLPs). The Banks typically hold their AHP funding rounds in the spring or summer of each year, and would need sufficient time to publish their revised AHP Implementation Plans and TCLPs, and announce their AHP funding allocations, well in advance of the start of that calendar year.

In view of the publication of the final rule late in 2018, FHFA recognizes that it may not feasible for the Banks to complete all of the above actions in time for implementation of revised Programs for 2019 or 2020, even though the final rule does not adopt the proposed outcome-based scoring framework and instead adopts a scoring framework more similar to the existing scoring requirements of the Competitive Application Program. A January 1, 2021 compliance date for the final rule, thus, is warranted. However, there are certain changes in the final rule that will benefit households without requiring significant changes to the Banks' information systems and, therefore, can be implemented more quickly. In particular, the final rule establishes a compliance date of January 1, 2020 by which the Banks must implement the new owner-occupied retention agreement provisions in § 1291.15(a)(7), including the requirement to calculate AHP subsidy repayment based on net proceeds and household's investment (§ 1291.15(a)(7)(v)), the *de minimis* subsidy repayment exception of $2,500 or less (§ 1291.15(a)(7)(ii)(C)), and the elimination of the requirement for owner-occupied retention agreements for rehabilitation (§ 1291.15(a)(7)). Prior to January 1, 2020, or such earlier compliance date as the Bank elects, a Bank must continue to comply with the current regulation, including its requirement that subsidy be recovered only from "net gain," a concept that in many respects resembles the more clearly articulated standards of "net proceeds" and "household's investment" in the final rule.

Because some Banks may find it feasible to implement certain provisions of the final rule before the applicable compliance dates, such as the provisions benefiting households, provisions easing operational burdens, or provisions for the establishment of Targeted Funds, the final rule provides that a Bank may choose to comply with any

provision of the final rule before the applicable compliance date. A Bank that chooses to comply with a specific provision before the applicable compliance date must also comply with all other provisions related to that specific provision in part 1291 and § 1290.6. For example, if a Bank decides to establish a Targeted Fund before January 1, 2021 pursuant to § 1291.20(b), the Bank must also comply with the funding allocation and phase-in requirements for Targeted Funds in §§ 1291.20(b)(1) and 1291.12(c)(1), respectively, must amend its AHP Implementation Plan to include its requirements for the Targeted Fund pursuant to § 1291.13(b)(3), and must amend its Targeted Community Lending Plan to include the specific housing needs to be addressed by the Targeted Fund pursuant to § 1290.6(a)(5)(vi).

II. Background

A. Overview of Current Program

The Federal Home Loan Bank Act (Bank Act) requires each Bank to establish a Program to provide subsidies for long-term, low- and moderate-income, owner-occupied and affordable rental housing. Each Bank is required to allocate annually 10 percent of its prior year's net income to fund its Program to help subsidize the purchase, construction, and rehabilitation of affordable rental and owner-occupied housing. Homeowners and homebuyers receiving AHP subsidies must be low- or moderate-income (incomes at or below 80 percent of area median income (AMI)). For rental housing, at least 20 percent of the units must be occupied by very low-income households (incomes at or below 50 percent of AMI) and must be affordable (rents charged do not exceed 30 percent of income).[1]

[1] *See* 12 U.S.C. 1430(j).

The current AHP regulation authorizes the Banks to establish and administer two programs for awarding AHP subsidies: a mandatory Competitive Application Program (referred to in the proposed and final rules as the "General Fund"); and an optional Homeownership Set-Aside Program.[2] Each Bank must allocate annually at least 65 percent of its required annual AHP contribution to its Competitive Application Program, and may allocate annually up to the greater of $4.5 million or 35 percent of its required annual AHP contribution to its Homeownership Set-Aside Program.[3]

Under the Competitive Application Program, members apply to the Banks for AHP subsidies on behalf of project sponsors, which are typically nonprofit affordable housing developers, but may include for-profit organizations. The Banks are required to develop and implement a scoring system subject to requirements in the regulation, which serves as a mechanism for evaluating and selecting the project applications to receive AHP subsidies. Under the Homeownership Set-Aside Program, members apply to the Banks for grants, which are provided to low- or moderate-income homebuyers or homeowners for purchasing or rehabilitating homes.

The AHP has played an important role in facilitating the Banks' support of their members' efforts to meet the affordable housing needs of their communities. Between 1990 and 2017, the Banks awarded approximately $5.8 billion in AHP subsidies to assist the financing of over 865,000 affordable housing units. AHP subsidies have proven particularly effective in leveraging additional public and private resources for funding affordable housing projects that present underwriting challenges, such as projects for

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[2] *See* 12 CFR part 1291.

[3] Where a Bank allocates the alternative maximum amount of $4.5 million to its Homeownership Set-Aside Program, the Bank may allocate less than 65 percent of its total AHP funds to its Competitive Application Program.

homeless households and special needs populations. For example, project sponsors have used AHP funds in conjunction with a number of different federal and state funding sources, including Low-Income Housing Tax Credits (LIHTC or tax credits), to develop rental housing for very low-income households. For 2018, the Banks' combined required annual AHP contribution is approximately $384,310,000.

B. AHP Regulatory History

FHFA and one of its predecessor agencies, the Federal Housing Finance Board (Finance Board), have engaged in numerous rulemakings over the years to revise, clarify, and streamline the AHP requirements as the Program has evolved and housing markets have changed. Successive rulemakings progressively devolved specific AHP application approval and governance authorities from the Finance Board to the Banks in order to enhance the ability of the Banks to address specific affordable housing needs in their respective districts.

The genesis of the current AHP rulemaking was the Notice of Regulatory Review published in the *Federal Register* in 2013 requesting comment on FHFA's existing regulations for purposes of improving their effectiveness and reducing their burden. In response, the Banks jointly submitted a letter to FHFA commenting on the AHP and other FHFA regulations. The letter contended that prescriptive, outdated, or ambiguous provisions of the AHP regulation created inefficiencies and uncertain risk exposures, and recommended that FHFA review the regulation and consider clarifications and enhancements to further empower the Banks in the management of their Programs.

In response to the Banks' recommendations, FHFA undertook a comprehensive review of the AHP regulation, including AHP issues on which FHFA had provided

regulatory guidance. To further inform the review, FHFA conducted outreach with the Banks and a wide range of AHP stakeholders. The Banks and stakeholders uniformly expressed support for the AHP, and noted the critical role it plays in affordable housing initiatives throughout the country and its longstanding reputation as a well-managed program. At the same time, the Banks and stakeholders offered a number of specific recommendations to improve the operation of the AHP. The recommendations were directed largely at: (1) expanding the Banks' authority to allocate their AHP funds; (2) providing the Banks authority to devise their own project selection methods, including the use of non-competitive processes; (3) clarifying the requirements for determining a project's need for AHP subsidy; (4) aligning the project monitoring requirements with those of other major funding sources; (5) clarifying the Banks' authorities to resolve project noncompliance; (6) clarifying certain operational requirements; and (7) codifying FHFA regulatory guidance in the regulation. Based on FHFA's analyses of the recommendations and its review of the Program, FHFA published a proposed rule to amend the AHP regulation, which is discussed below.

C. Proposed Rule

On March 14, 2018, FHFA published a Notice of Proposed Rulemaking (NPRM or proposed rule) in the *Federal Register* to amend the AHP regulation.[4] Taking into account the Banks' and stakeholders' input and recommendations discussed above, the proposed rule would have significantly altered how the Banks approach and implement their AHP project selection responsibilities. The proposed rule would have replaced the current project selection scoring process, a front-end process that requires the Banks to

[4] *See* 83 FR 11344 (Mar. 14, 2018).

allocate at least 50 percent of the total points for scoring applications to specific statutory and regulatory priorities set forth in the regulation, with a back-end process using a scoring process and ‘‘outcome-based approach’’ for project selection. Under the proposal, each Bank would have been required to establish its own scoring system containing Bank-identified district housing needs priorities for awarding AHP subsidies, subject to meeting certain FHFA-prescribed outcome requirements for statutory and regulatory priorities set forth in the proposed rule. Each Bank would have been evaluated according to whether a certain percentage of its total AHP funds was awarded to projects or households that met the applicable priorities. The NPRM stated that the proposal would address many of the Banks’ and stakeholders’ concerns by providing the Banks greater flexibility to design their competitive application programs while continuing to ensure the programs fulfilled the statutory requirements.

The NPRM also proposed additional options for the Banks to allocate their total annual AHP contributions. Each Bank would have been required to allocate at least 50 percent of its total annual AHP contribution to its General Fund, down from the current 65 percent. Each Bank also would have been authorized to allocate up to 40 percent of its required annual AHP contribution to a maximum of three “Targeted Funds,” a new type of competitive application fund under the AHP, to address specific affordable housing needs within its district, subject to a phase-in period. In addition, the proposed rule would have increased the maximum percentage of a Bank’s total annual AHP contribution that could be allocated to its Homeownership Set-Aside Program from 35 to 40 percent, with the existing alternate threshold of $4.5 million retained.

The proposed rule also would have eliminated the current requirement for an owner-occupied unit retention agreement, under which AHP-assisted households must repay AHP subsidy to the Bank under certain circumstances if they sell or refinance their homes during the AHP five-year retention period. The NPRM discussed that this would ease the administrative burdens on the Banks of recovering subsidy repayments from households, and enhance households' ability to build wealth, which appear to outweigh the retention agreements' potential to deter rare instances of flipping.

In addition, the proposed rule would streamline the responsibilities of the parties involved in monitoring projects for compliance with AHP income targeting and rent requirements by aligning the AHP project monitoring requirements with those of certain other government funding programs. For example, the proposal would remove certain back-up documentation requirements for the initial monitoring of AHP projects that have received LIHTC, and for initial and long-term monitoring of AHP projects that have received funding from certain other federal government programs.

In addition, the proposed rule would clarify a number of operational responsibilities. For example, the proposed rule would clarify the process and responsibilities of the various parties for remediating AHP noncompliance. The proposed rule also would have clarified the process for determining a project's need for AHP subsidy.

Finally, the proposed rule would streamline and reorganize the regulation to enhance its utility and readability.

D. Overview of Comments Received on the Proposed Rule

The NPRM initially provided the public 60 days to submit comments on the proposed rule. The Agency received numerous requests from commenters to extend the comment period by an additional 30 days. FHFA also identified an error in the calculation of the outcome requirement in the proposed rule text and related preamble discussion. In response to the requests for an extension of the comment period and to correct the error in the outcome calculation and encourage comments on the corrected calculation, FHFA published a notice in the *Federal Register* containing the corrected calculation and extending the comment period by an additional 30 days.[5] The extended comment period ended on June 12, 2018.

FHFA received 394 comment letters in response to the proposed rule. Of those letters, 251 expressed unique comments and recommendations, with the remaining 143 being form letters or requests to extend the original 60-day comment period. The Presidents of the eleven Banks submitted a joint comment letter. Nine Banks also submitted individual comment letters. FHFA received 16 comment letters from the Banks' boards of directors, Affordable Housing Advisory Councils (Bank Advisory Councils), and Community Investment Officers (CIOs). Eighteen members of Congress representing the states of Arkansas, Louisiana, Mississippi, New Mexico, and Texas co-signed a comment letter. A member of Congress representing the state of New Jersey also submitted a comment letter. FHFA received 99 letters from trade associations, nonprofit organizations, and state and local government organizations. Lenders such as banks, credit unions, and Community Development Financial Institutions (CDFIs)

[5] *See* 83 FR 19188 (May 2, 2018).

submitted 50 comment letters. Nonprofit and for-profit developers submitted 204 comment letters. Individuals submitted the remaining 13 comment letters.

FHFA also held a number of webinars and meetings with Bank representatives and stakeholders to describe the content of the proposed rule, discuss issues raised by the proposed rule, and obtain clarifications of specific comments made in the letters.[6]

Six proposals received the most comments: the outcome-based approach for project selection; the authority for the Banks to establish Targeted Funds; the increase in the maximum permissible annual funding allocation to a Bank's Homeownership Set-Aside Program from 35 to 40 percent; the removal of the requirement for owner-occupied retention agreements; a clarification of the "cure-first" requirement for project noncompliance; and the responsibility of the full board of directors to approve strategic AHP decisions. The comments on these six proposals and FHFA's decisions in the final rule are discussed in Section III., below. Comments on other provisions of the proposed rule are discussed under each applicable provision in the Section-by-Section Analysis in Section IV., below.

III. Discussion of Comments on Key Proposals and Decisions in the Final Rule

A. Proposed Outcome-Based Approach for Project Selection

Final rule. The final rule does not adopt the proposal for an outcome-based framework for project selection. Instead, the final rule amends the current regulatory scoring framework for project selection to provide the Banks with additional flexibility in designing their project selection scoring systems to address affordable housing needs in

[6] Summaries of each of these meetings are available on FHFA's website at: https://www.fhfa.gov/SupervisionRegulation/Rules/Pages/Comment-List.aspx?RuleID=612.

their districts, similar to the recommendations made by the Banks in their joint comment letter, but with certain changes to reflect particular policy objectives.

Current regulation. The current AHP regulation prescribes a scoring-based project selection system based on a 100-point scale, under which each Bank must allocate:

- At least 5 points each to two priorities derived from the statute (combined 10 points minimum);
- At least 5 points each to four regulatory priorities addressing specific housing needs set forth in the regulation, and at least 20 points for the regulatory priority for income targeting (a combined 40 points minimum for the five regulatory priorities).
- The remaining maximum of 50 points to one or more housing needs specified under the first Bank district priority (from 12 eligible housing needs specified in the regulation, and to one or more housing needs in the Banks' districts selected by the Banks under the second Bank district priority (with at least 5 points allocated to each Priority).

Proposed rule. The proposed rule would have authorized the Banks to design their own scoring systems, subject to an outcome-based framework under which a specified percentage of each Bank's total annual AHP funds would be required to be awarded to projects meeting specific outcome requirements established by FHFA in the proposed rule. As discussed in Section II.B. and C. above, the proposal was intended to address the Banks' and stakeholders' input on the AHP by providing the Banks greater flexibility to design their competitive application programs to meet their district housing

needs while continuing to ensure the Programs fulfill the statutory requirements. The proposed outcome requirements would have included the three statutory priorities for: (1) projects sponsored by a government or nonprofit entity; (2) use of donated or conveyed government property; and (3) purchase of homes by low- or moderate-income households. Each Bank would have been required to award at least 55 percent of its total AHP funds to projects meeting the donated or conveyed government properties priority or government or nonprofit sponsorship priority, and to award at least 10 percent of its total AHP funds to households or projects meeting the priority for purchase of homes by low- or moderate-income households.

In addition, the proposed outcome requirements would have included four regulatory priorities, with specified eligible housing needs included under each of the regulatory priorities, for: (1) very low-income targeting for rental units; (2) underserved communities and populations; (3) creating economic opportunity; and (4) affordable housing preservation. Each Bank would have been required to ensure that at least 55 percent of all rental units in rental projects receiving AHP awards were targeted to very low-income households (households with incomes at or below 50 percent AMI). In addition, each Bank would have been required to award at least 55 percent of its total AHP funds to projects, in the aggregate, meeting at least two of the three other regulatory priorities.

The proposed rule would have permitted the Banks to re-rank the order of applications, by replacing a higher scoring application that does not contribute to meeting the outcome requirements with a lower scoring project that does, in order to enable the Banks to meet the outcome requirements. If a Bank failed to fulfill the outcome

requirements, FHFA would have the authority to require the Bank to develop and implement a housing plan for addressing the Bank's noncompliance, or to order the Bank to reimburse its AHP Fund in the amount of funds necessary to address the dollar shortfall.

Comments. A large majority of commenters addressed the proposed outcome-based framework for project selection. Most commenters, including several Banks, several trade associations, numerous lenders, many nonprofit and for-profit developers, and some members of Congress, expressed reservations about, or opposition to, the proposed approach. Many of these commenters asserted that the proposal was too prescriptive and complicated, and would result in unintended consequences, such as increased Program complexity, preferences for certain types of projects, and reduced transparency of the AHP. While not explicitly expressing support for the proposal, several commenters acknowledged the potential benefits of the proposed outcome-based approach. For example, a nonprofit intermediary recognized that the approach may facilitate the Banks' ability to increase the diversity of populations receiving AHP funds, as well as fulfill a broader range of district affordable housing needs. Several commenters, including a number of Banks, also acknowledged that the proposed regulatory priorities under the outcome-based approach were germane to the affordable housing needs of their districts.

However, most of the commenters expressed concern that the proposal would or might restrict the Banks' and members' ability to address the particular housing needs of local communities, which some of these commenters described as a "hallmark" of the AHP, in favor of a national housing needs focus. Some Bank Advisory Councils also

expressed concern that the proposal would diminish the role of the Bank Advisory Councils in identifying the affordable housing needs of the districts. Several commenters focused on the proposed percentages that the Banks would be required to meet under the outcome requirements, raising concerns that requiring mathematical calculations of dollar amounts and numbers of rental units would increase the Program's complexity. Many commenters, including the Banks, a Bank Advisory Council, and a trade association, strongly objected to the proposal to permit the Banks to re-rank the order of scored applications as a way to meet the proposed outcome requirements. Commenters expressed concern that the ability to re-rank scored applications would undermine the integrity, predictability, simplicity, and transparency of the AHP, and deter project sponsors from submitting applications to the Program.

Numerous commenters, including the Banks, a trade association, and lenders, strongly opposed the proposed enforcement provisions for Bank noncompliance with the proposed outcome requirements. Commenters stated that requiring a Bank to reimburse its AHP Fund in the amount of any dollar shortfall would impose a "penalty" and "undue and severe punishment" on the Bank. A Bank noted that requiring such reimbursement would result in a Bank contributing annually more than the statutorily required 10 percent of its net income to its AHP for the particular year. Commenters also suggested that a reimbursement requirement would lead to reductions in the diversity of the projects awarded AHP funds, as the Banks would select conventional and unchallenging housing needs as part of their scoring systems in order to ensure fulfillment of the proposed outcome requirements and avoid having to reimburse their AHP Funds.

The eleven Banks jointly submitted a proposal for project selection based on the current regulatory scoring system, with certain changes to the regulatory priorities and required minimum allocations of scoring points. The Banks' proposal is discussed further below under § 1291.26 (Scoring Criteria for the General Fund) in Section IV.

Decision in the final rule. The final rule does not adopt the proposed outcome-based framework. Instead, the final rule amends the current regulatory scoring framework to provide the Banks with additional flexibility in designing their project selection scoring systems to address affordable housing needs in their districts, similar to the recommendations made by the Banks in their joint comment letter but with certain changes to reflect particular policy objectives. Revisions to the existing regulatory scoring system include broader regulatory priorities encompassing more housing needs and additional discretion in allocating scoring points under the Bank district priority.

FHFA's analyses of the Banks' awards in recent years indicate that most, if not all, of the Banks would have readily met the proposed outcome requirements, especially with the correction to the calculation of the proposed outcome requirement for the three regulatory priorities, while having increased flexibility to target district housing needs. However, the Banks and other commenters expressed concern about the proposed outcome requirements, especially the prospect of accountability for noncompliance with the outcome requirements and the potential to have to reimburse their AHP Funds for any dollar shortfall. Because FHFA has decided not to implement the proposed outcome-based approach, the proposed enforcement provisions for Bank noncompliance with the outcome requirements (proposed §§ 1291.48 and 1291.49) are moot and, therefore, not adopted in the final rule.

The Agency finds the Banks' proposal for project selection, which is based on both the current scoring system and specific regulatory priorities in the proposed rule, to be a reasonable approach, subject to certain changes to achieve specific policy objectives. The revised scoring-based framework in the final rule is discussed in Section IV. below, under § 1291.25 (Scoring Methodologies), and § 1291.26 (Scoring Criteria for the General Fund).

B. Authority for the Banks to Establish Targeted Funds

Final rule. Consistent with the proposed rule, the final rule authorizes the Banks to establish funds targeted to address specific affordable housing needs within their districts that are either unmet, have proven difficult to address through the Bank's General Fund, or align with objectives identified in their strategic plans (referred to as "Targeted Funds").

The final rule requires the Banks to adopt and implement parameters to ensure that each Targeted Fund is designed to receive a sufficient number of applicants for the amount of AHP funds allocated to the Targeted Fund such that administration of each Targeted Fund results in a robust competitive scoring process. These parameters include requirements that a Bank must specify the particular type of affordable housing needs the Bank plans to address through any Targeted Funds in its TCLP, and that a Bank must publish its TCLP at least 90 days before the first day that applications may be submitted for that Targeted Fund (unless the Targeted Fund is specifically targeted to address a federal or state-declared disaster). Further, the final rule requires a Bank to establish a minimum of three scoring criteria for each Targeted Fund that assist the Bank in selecting the projects that meet the specified affordable housing needs to be addressed by the

Targeted Fund. In addition, the final rule provides that a Bank may not allocate more than 50 points to any one scoring criterion. The final rule also implements a phase-in period for establishing Targeted Funds. A Bank would be limited initially to establishing one Targeted Fund to which it could allocate up to 20 percent of its total annual AHP funds. In the second year, the Bank could establish two Targeted Funds with a maximum allocation of 30 percent, and in the third year three Targeted Funds with a maximum allocation of 40 percent.

Current regulation. The current regulation does not authorize a Bank to establish Targeted Funds.

Proposed rule. The proposed rule would authorize the Banks to establish up to three competitive Targeted Funds, and to allocate a maximum of 40 percent of their total annual AHP funds to establish such Targeted Funds, subject to the phase-in requirements described above. The Banks would use these funds to address specific affordable housing needs within their districts that are unmet, have proven difficult to address through the existing General Fund, or align with objectives identified in their strategic plans. FHFA's intent in proposing this authority was to help address challenges the Banks experience when trying to target specific affordable housing needs within their districts, especially in a single AHP funding round. Banks report that the existing regulatory scoring requirements can affect their efforts to fully address affordable housing needs within their districts. Establishing a Targeted Fund with a dedicated funding allocation to a particular housing need would enable competitive projects serving that housing need to receive awards pursuant to the competitive process under that Targeted Fund, while other projects would receive awards under the General Fund,

thereby serving multiple housing needs in the same AHP funding round. The Banks would be required to adopt and implement controls to ensure that each Targeted Fund is designed to receive sufficient numbers of applicants for the amount of AHP funds allocated to the Targeted Fund to enable the Bank to facilitate a genuinely competitive scoring process.

Comments. FHFA received a mix of comments in support of and opposition to the proposal to authorize Targeted Funds. A nonprofit organization commented that Targeted Funds would enhance the interaction between a Bank's board of directors and its Bank Advisory Council. The commenter also noted that Targeted Funds would provide each Bank greater opportunities to address varying market needs, reach more underserved communities, and possibly expand the geographical footprint of its AHP. The Banks and several Bank Advisory Councils stated that Targeted Funds would prove beneficial by providing the Banks with the ability to target specific affordable housing needs within their districts. The Banks also commented that the use of Targeted Funds would provide additional flexibility and responsiveness to changing housing needs by permitting the Banks to establish and tailor separate scoring priorities. The Banks and Bank Advisory Councils stated, however, that implementation of the proposed outcome-based framework would undermine the potential benefits of Targeted Funds. They also asserted that FHFA's proposed regulatory priorities under the outcome-based framework would drive the scoring process and overshadow the local needs of each district.

Several commenters, including the Banks, Bank Advisory Councils, a trade association, and a policy organization, supported the proposed maximum 40 percent funding allocation for Targeted Funds. In contrast, a nonprofit advocacy organization

and a government entity expressed concern that the proposal would lead to a decrease in funding for affordable rental housing. A nonprofit intermediary supported Targeted Funds, but recommended that the Banks be permitted to allocate an unspecified percentage that is less than 40 percent to their Targeted Funds to ensure that a majority of the Banks' AHP subsidies remain available under the General Fund to address a broad spectrum of affordable housing needs within each district. A nonprofit developer asserted that Targeted Funds would compel project sponsors to apply for AHP subsidy under both the General Fund and the Targeted Fund, resulting in costly compliance and administration expenses for the Banks, members, and project sponsors.

The Banks expressed concern that the proposed regulatory language requiring each Bank to adopt and implement controls to ensure that each Targeted Fund receives sufficient numbers of applicants for the amount of AHP funds allocated to the Targeted Fund is vague, complex, and undefined.

Decision in the final rule. FHFA has considered the comments received on the proposal for Targeted Funds and continues to be persuaded that Targeted Funds may increase the flexibility of the Banks to emphasize multiple housing needs in a given year, thereby enhancing their ability to address specific affordable housing needs in their districts. The Agency also continues to be persuaded that the Banks should be permitted to allocate up to 40 percent of their total annual AHP funds to Targeted Funds. Although a number of commenters expressed concern that allocation of AHP funds to Targeted Funds would potentially reduce the total amount of AHP funds available for affordable rental housing, they offered no support to substantiate their concerns that the Banks would target their Targeted Funds for owner-occupied housing. The 40 percent limit

would provide the Banks significant flexibility to allocate AHP subsidy to Targeted Funds, which could include Targeted Funds for owner-occupied housing or rental housing. In fact, the Banks indicated that they would likely use Targeted Funds for rental housing. The final rule requires that the Banks allocate at least 50 percent of their total annual AHP funds to the competitive General Fund. The final rule also allows a Bank to allocate up to 35 percent of its total annual AHP funds to optional, noncompetitive Homeownership Set-Aside Programs, which are discussed further under § 1291.12 (Allocation of Required Annual AHP Contribution) below. Thus, the final rule ensures that the Banks award a majority of their AHP funds through competitive processes (for example, 50 percent for the General Fund plus 15 percent for Targeted Funds, or 65 percent for the General Fund).

FHFA also considered the Banks' concerns about the proposed language that each Targeted Fund have controls for ensuring that it is designed to receive sufficient numbers of applicants for the amount of AHP funds allocated to the Targeted Fund. The requirement that the Targeted Fund be *designed* to receive sufficient numbers of applicants pertains to the scope and scoring methodology of the Targeted Fund, and is not a guarantee of the actual number of applicants received.

FHFA also acknowledges the commenter's concern that project sponsors may feel compelled to submit applications for the same project to both the General Fund and any applicable Targeted Fund at a Bank. While the final rule does not prohibit applicants from applying to both Funds in the same year, FHFA does not anticipate this becoming a significant problem for the Banks and project sponsors due to the limited scope of Targeted Funds, and the time involved in completing multiple applications. The specific

requirements in the final rule for establishing and administering Targeted Funds are discussed under § 1291.20(b)(1) in Section IV., below.

C. Proposed Increase in the Maximum Permissible Annual Funding Allocation for Homeownership Set-Aside Programs

Final rule. In a change from the proposed rule, the final rule retains the current maximum permissible annual funding allocation of 35 percent for Homeownership Set-Aside Programs. The final rule also retains the current alternate maximum permissible annual funding allocation of $4.5 million for such Programs.

Current regulation. The current regulation authorizes each Bank, in its discretion, to allocate annually up to the greater of $4.5 million or 35 percent of the Bank's annual required AHP contribution for Homeownership Set-Aside Programs.

Proposed rule. The proposed rule would have increased the current maximum permissible annual funding allocation for Homeownership Set-Aside Programs from 35 to 40 percent, and would have retained the current alternate maximum permissible annual funding allocation of $4.5 million. The NPRM noted that the current regulation allows the Banks to establish more than one Homeownership Set-Aside Program to address the homeownership needs of different populations, such as military veterans or disaster victims. FHFA stated that the increase in the maximum percentage allocation amount would enhance the ability of the Banks and their members to meet the demand for set-aside funds and provide more assistance to low- or moderate-income homebuyers and homeowners, including first-time homebuyers. FHFA also noted that the increase would assist Bank members by enhancing their ability to access a wider customer base, originate new mortgages for low- and moderate-income households, and fulfill their obligations

under the federal Community Reinvestment Act.

FHFA acknowledged that the increase could result in a smaller amount of funds allocated by the Banks to their competitive application programs, which could result in reduced funding for rental projects. However, FHFA considered the proposal to be reasonable given the significant demand for set-aside funds and stakeholder requests that the Agency provide the Banks additional flexibility to target specific housing needs in their districts.

Comments. The commenters were divided over the proposal. The Banks, Bank Advisory Councils, several nonprofit organizations, and trade associations supported the proposal. Some nonprofit organizations and trade associations expressed support for the proposed amendments that would expand and enhance the reach of the Homeownership Set-Aside Programs. One trade association supported the proposed increase, expressing the hope that it would help increase the supply of entry-level homes, as well as improve the affordability of the homes. A nonprofit organization stated that the proposal would increase the number of low- and moderate-income homebuyers or homeowners that would be able to purchase or rehabilitate their homes. A trade association suggested that FHFA index the dollar cap for the $4.5 million alternate maximum allocation to address further erosion of the funds' purchasing power as mortgage rates and home prices rise.

Numerous nonprofit organizations opposed the proposed increase on the basis that it would effectively reduce AHP funding for rental housing. Commenters noted the important role the AHP plays in supporting the preservation and expansion of rental properties for very low-income and extremely low-income households. A nonprofit organization cited data derived from the American Community Survey describing the

Nation's significant shortage of affordable rental housing, including for extremely low-income households (incomes of less than 30 percent of AMI or less than the federal poverty line). Another nonprofit organization acknowledged the importance of promoting homeownership for lower income households, but opposed the proposed increase without an offsetting increase in funding for affordable rental projects, to help address the significant need for such housing nationwide. Several nonprofit organizations that advocate for the development of multifamily housing also opposed the proposal on the basis that a reduction in the amount the Banks must allocate to their General Funds would run counter to the promotion, development, and preservation of rental housing. One of the nonprofit organizations urged FHFA to maintain the existing funding allocation cap of 35 percent because it ensures that a minimum 65 percent of each Bank's total annual AHP contribution is available to fund rental projects. The commenter also implied that funding for the General Fund should have priority over funding for Homeownership Set-Aside Programs because rental housing projects must address the accessibility needs of future residents, while single-family homeownership programs do not.

Decision in the final rule. In response to the commenters' concerns and the continued need for affordable rental housing, FHFA has decided to retain the existing maximum permissible funding allocation of 35 percent of a Bank's required annual AHP contribution for Homeownership Set-Aside Programs. The final rule also retains the alternate $4.5 million threshold.

The continued need for affordable rental housing is supported by the Joint Center for Housing Studies of Harvard University in its annual overview of the housing

conditions in the United States. The organization's report, *The State of the Nation's Housing 2018*, examined and assessed the Nation's progress in producing decent and affordable homes for all households.[7] The report found that more than 38 million households in the U.S. have housing cost burdens that leave little income to pay for food, healthcare, and other basic necessities. The report determined that more than 11 million renters are severely cost burdened because they pay more than half their incomes for housing. The report also found that for every 100 extremely low-income renters, only 35 rental units were affordable and available in 2016 – a nationwide shortfall of more than 7.2 million units. Very low-income renter households also faced a shortfall of 56 affordable and available rental units per 100 households. The report concluded that conditions at the low end of the affordable housing rental market would probably remain exceptionally tight over the long term in the face of strong demand and diminishing supply.[8]

In addition, under the new authority for the Banks to establish Targeted Funds for homeownership or rental projects, the Banks may increase their focus on homeownership needs by establishing Targeted Funds for homeownership. This mitigates the need to increase the maximum permissible annual funding allocation for Homeownership Set-Aside Programs.

The final rule does not adopt the commenter's recommendation to index the alternate $4.5 million maximum threshold. FHFA has analyzed whether revisions to the

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[7] *See* Joint Center for Housing Studies of Harvard University, State of the Nation's Housing 2018 (2018), *available at* http://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2018.pdf (last accessed 11/15/2018).
[8] *Id*.

$4.5 million limit would be necessary and concluded that the Banks' need for, or use of, the $4.5 million maximum is unlikely to change.

The specific requirements for establishing, funding, and administering Homeownership Set-Aside Programs are discussed below in §§ 1291.12 and 1291.40 through 1291.44 of Section IV.

D. Proposed Elimination of the Requirement for Owner-Occupied Retention Agreements

Final rule. In a change from the proposed rule, the final rule eliminates the current requirement for owner-occupied retention agreements where households use the AHP subsidy solely for rehabilitation of a unit, but retains it in other circumstances.

Current regulation. The current regulation requires owner-occupied retention agreements where a household uses the AHP subsidy for purchase, for purchase in conjunction with rehabilitation, or solely for rehabilitation of a unit. Members must ensure that the AHP-assisted owner-occupied unit is subject to a five-year deed restriction or other legally enforceable retention agreement or mechanism requiring that, in the case of a sale or refinancing of the unit prior to the end of the retention period, the household repays the Bank an amount equal to a pro rata share of the AHP subsidy that financed the purchase, construction, or rehabilitation of the unit, reduced for every year the household owned the unit, from any net gain realized upon the sale or refinancing, unless either the unit is purchased by a very low-, or low- or moderate-income household or, following a refinancing, the unit remains subject to a retention agreement or other appropriate mechanism as described in the regulation.

Proposed rule. The proposed rule would have eliminated the retention agreement requirement for all owner-occupied units, regardless of how the subsidy was used by the household. The NPRM did not specifically address or request comment on whether the elimination of owner-occupied retention agreements should apply only where the AHP subsidy is used for rehabilitation without an accompanying purchase of the unit.

FHFA noted in the NPRM that the purpose of retention agreements is to deter flipping of homes, and also discussed the moral hazard risk that may be associated with the use of subsidy intended to provide housing to low- or moderate-income households to flip properties. However, as also noted in the NPRM, homes purchased by AHP-assisted households are not typically located in neighborhoods with rapidly appreciating house prices that would encourage flipping, and most AHP-assisted households do not sell their homes during the five-year retention period. Moreover, the NPRM indicated that the underlying policy of the AHP is to enable low- and moderate-income households to receive the benefits of homeownership, including appreciation in the value of their homes, which would weigh in favor of a reduction in the amount of subsidy repaid by the household when selling or refinancing the unit.

Comments. The NPRM specifically requested comments on the advantages and disadvantages of the AHP owner-occupied retention agreement, whether eliminating it would impact FHFA's ability to ensure that AHP funds are being used for the statutorily intended purposes, whether there are ways to deter flipping other than a retention agreement, and whether the proposed increase in the maximum permissible grant to households from $15,000 to $22,000 under the Homeownership Set-Aside Program should impact the decision on whether to eliminate retention agreements.

The majority of commenters who addressed the proposal to eliminate the requirement for owner-occupied retention agreements generally opposed it. A number of nonprofit advocacy organizations asserted that elimination of owner-occupied retention agreements would, by increasing homeowner equity, expose subsidy recipients to greater risks of fraud and abuse by predatory lenders and unscrupulous investors. These commenters also stated that the use of owner-occupied retention agreements has played an important role in preventing waste and abuse of AHP subsidies for homeownership.

Several nonprofit organizations asserted that retention agreements play an important role in deterring property flipping. These commenters noted that organizations that provide access for homeownership opportunities to lower-income families frequently employ retention agreements, often in the form of subordinate liens. They stated that this strategy has proven extremely effective in protecting homeowners from predatory lenders and preventing the loss of homeowner equity and subsidies through flipping. They suggested that FHFA provide the Banks with discretion on whether to use retention agreements as the Banks deem appropriate, to ensure protection of homeowner equity and AHP subsidies. A state housing agency emphasized the benefits of having owner-occupied retention agreements when recipients receive substantial amounts of grant funds. Although one of the Banks discounted property flipping as a substantial risk, the Bank stated that predatory lending does pose risks for AHP-assisted households.

A nonprofit organization commented that while flipping in the AHP may be rare, it is rare precisely because of the retention agreement and not because homes purchased by AHP-assisted households are not typically located in neighborhoods with rapidly appreciating housing prices, as FHFA indicated in the NPRM. The commenter stated

that it has seen evidence of flipping and other forms of fraud (specifically, the use of "straw buyers"), and that these material risks are largely unrecognized because of the effectiveness of retention agreements like those in the AHP.

Several commenters, including all of the Banks and a number of nonprofit organizations, recommended that FHFA authorize the Banks to use retention agreements in their discretion, based on criteria determined by each Bank, which would enable the Banks to address the different housing markets both across and within their districts, differences in eligible uses of AHP grants (e.g., down payment, closing costs, rehabilitation), and grant amounts among the Banks' General Funds and Homeownership Set-Aside Programs. The Banks stated that their Bank Advisory Councils and boards of directors have the necessary experience, knowledge, and familiarity with local real estate markets to determine whether the need for retention agreements exists in each market. Several of the Banks indicated that, if given the discretion, they would choose not to use retention agreements.

One Bank and a commercial lender specifically opposed requiring retention agreements where AHP subsidies are used for rehabilitation of units for elderly households and special needs households, such as persons with disabilities. The Bank noted that changes in circumstances related to households' ages or health could affect their need to sell their homes, and retention agreements requiring repayment of AHP subsidy upon sale would unduly burden these households.

Decision in the final rule. In a significant change from the proposed rule, the final rule retains the current requirement for owner-occupied retention agreements where a household uses the AHP subsidy for purchase, or for purchase in conjunction with

rehabilitation, of a unit, but eliminates the requirement for an owner-occupied retention agreement where a household uses the AHP subsidy for rehabilitation without an accompanying purchase.

Many of the commenters tied their strong support for owner-occupied retention agreements to their view that the agreements help deter flipping or other types of fraud, although neither supporting data nor studies were provided to support those views. Due to the volume of comments FHFA received, particularly from organizations with extensive experience with the AHP and similar programs that offer comparable homeownership assistance, FHFA is persuaded that retention agreements may play a relevant role in deterring abuse and flipping, as well as protecting homeowners from predatory schemes. The use of retention agreements in connection with AHP subsidies provided for home purchase, and rehabilitation with an accompanying purchase, aligns with approaches of other down payment assistance providers that require retention agreements for purchase of homes, including the U.S. Department of Housing and Urban Development's (HUD) HOME Investment Partnerships Program (HOME), certain private lenders, and state and local agencies. However, as further discussed below under § 1291.15(a)(7) in Section IV., the final rule adopts several requirements for owner-occupied retention agreements that are intended to ease the operational burdens on the Banks and members, and reduce the financial burden on AHP-assisted households, by minimizing the frequency and amount of AHP subsidy repayments by such households.

In contrast, where the AHP subsidy is used solely for rehabilitation of homes, with no accompanying purchase, flipping of the homes is unlikely. Many of the recipients of AHP subsidy for rehabilitation are long-term homeowners, typically elderly

households or persons with disabilities. These homeowners often need AHP funds for rehabilitation of their homes, such as installing a wheelchair ramp or repairing a leaky roof, to enable them to remain in their homes and, therefore, are less likely to move from their homes within a five-year period. In addition, the requirement to repay AHP subsidy may impose a financial burden on such households in the event that they are required to sell their homes to pay expenses associated with a change in life circumstances, such as the need to move to an assisted living facility or nursing home.

E. Clarification of the "Cure-First" Requirement for Project Noncompliance

Final rule. The final rule adopts the sequence of remedial steps in the event of project noncompliance set forth in the proposed rule, with clarification of the "cure-first" step to indicate that a project sponsor or owner must make a reasonable effort to cure the noncompliance, and if the noncompliance cannot be cured within a reasonable period of time, the Bank must proceed to the next step of evaluating the project for a modification.

Current regulation. The current regulation specifies three types of remedial actions to address AHP project noncompliance resulting from the actions or omissions of a project sponsor or project owner, but does not specify the order in which a Bank must pursue these remedies. The remedial actions are: (1) cure by the project sponsor or owner of the noncompliance within a reasonable period of time; (2) modification of the terms of the approved AHP application; or (3) recovery of the AHP subsidy or settlement for less than the full amount of subsidy due. FHFA may require the Bank to reimburse its AHP Fund in the amount of the shortfall, unless: (1) the Bank has sufficient documentation showing that the sum agreed to be repaid under the settlement is reasonably justified, based on the facts and circumstances of the noncompliance; or (2)

the Bank obtains a determination from FHFA that the sum agreed to be repaid under the settlement is reasonably justified, based on the facts and circumstances of the noncompliance

Proposed rule. The proposed rule would require the following sequence of remedial steps in the event of project noncompliance: (1) the project sponsor or owner must cure the noncompliance within a reasonable period of time; (2) if the project sponsor or owner cannot cure the noncompliance within a reasonable period of time, the Bank must determine whether the circumstances of the noncompliance can be eliminated through a modification of the terms of the approved application under proposed § 1291.27; and (3) if the circumstances of the noncompliance cannot be eliminated through a cure or modification, the Bank (or member if so delegated) shall make a demand on the project sponsor or owner for repayment of the full amount of the AHP not used in compliance with the AHP application commitments, and if that demand is unsuccessful, the member, in consultation with the Bank, shall make reasonable efforts to collect the AHP subsidy from the project sponsor or owner, which may include settlement for less than the full amount due. The NPRM emphasized the importance of first requiring the project sponsor or owner to cure project noncompliance within a reasonable timeframe, stating that the objective of the AHP is to provide affordable housing for eligible households for the duration of the AHP retention period, so recovery of AHP subsidy should be the last resort. Cure of noncompliance is preferable to modification of the commitments in the AHP application or recovery of AHP subsidy as it holds the project sponsor to its AHP application commitments, which result in greater benefits to eligible

households than if the commitments are reduced through modification or eliminated by recovery of the subsidy.

The proposed rule also would have added a new section addressing remedial actions that FHFA could take if a Bank failed to comply with the proposed outcome requirements and FHFA determined that compliance was feasible. The proposed remedial authority would have included: requiring the Bank to develop and implement a housing plan approved by FHFA; describing the specific actions the Bank will take to comply with the outcome requirements for the next calendar year; or requiring the Bank to reimburse its AHP Fund for the difference in the amount of AHP funds required to meet the outcome requirements and the amount the Bank actually awarded.

Comments. The Agency received numerous comments expressing concern about the proposed "cure-first" requirement for addressing project noncompliance. Commenters asserted that the Banks can address compliance issues more effectively and efficiently through modification of the project's application commitments. The Banks and a nonprofit homeless services agency stated that the "cure-first" requirement might increase costs and delay disbursement of funds, and the nonprofit organization indicated that it could result in termination of a project in a tight housing market like Boston. Other commenters expressed concern that a "cure-first" requirement would force developers to make "feigned attempts" to cure unresolvable issues. A nonprofit developer asserted that the proposal for subsidy repayment would not take into account the cause of the failure of a project, including fires or earthquakes. The Bank Advisory Councils commented that some projects naturally meet the "good cause" requirement for

modification because the project sponsors, owners, or members have no control over the noncompliance.

A trade association stated that a "cure-first" requirement could cause problems for members that provide equity for projects or that have committed construction or permanent financing. A nonprofit organization commented that focusing on curing noncompliance first might result in displacement of residents from the project.

Decision in the final rule. Modification of a project's AHP application commitments should not be the first option for a Bank to address project noncompliance. Inherent in a competitive application program is an award recipient's responsibility to fulfill the commitments in its application. A Bank should expect and require project sponsors or owners to make a reasonable effort to comply with their AHP application commitments before agreeing to modify a project. It is also preferable that recovery of AHP subsidy be the last option for curing noncompliance because the objective of the AHP is to provide affordable housing for eligible households for the duration of the AHP retention period. If subsidy is repaid for noncompliant units for the remainder of the AHP retention period, those units would no longer be subject to AHP income targeting and rent restrictions.

Commenters described, and FHFA acknowledges, that there are cases where sound reasons exist for why a project sponsor or owner may be unable to meet its AHP application commitments. Further, there may be cases where project sponsors or owners cannot cure noncompliance because it is beyond their control to cure. However, commenters appeared to misread the language of the proposed "cure-first" provision to require project sponsors or owners to cure noncompliance regardless of the causes of the

noncompliance, including noncompliance beyond their control to cure, thereby preventing the Banks from moving to modifications as a remedy for the noncompliance. This was not the intent of the proposed "cure-first" provision, as indicated by the language in the following paragraph of the proposed rule stating that "[i]f the project sponsor or project owner cannot cure the noncompliance within a reasonable period of time, the Bank shall determine whether the circumstances of the noncompliance can be eliminated through a modification . . . ." If cure of the noncompliance is beyond the control of the project sponsor or owner, they may be unable to cure the noncompliance within a reasonable period of time. The project sponsor or owner does not have to try to cure noncompliance that is incurable; it would simply provide a reasonable written justification to the Bank indicating why it could not cure the noncompliance. If the justification is reasonable, the Bank would then evaluate whether it could approve a modification under the rule's modification requirements.

In view of the apparent misunderstanding of the "cure-first" provision, FHFA has clarified the language in §§ 1291.29(a)(1) and 1291.60(b)(1) of the final rule by adding that project sponsors or owners must "make a reasonable effort" to cure the noncompliance, and adding a statement immediately following that one that if the noncompliance cannot be cured within a reasonable period of time, the requirements for a modification in the next paragraph shall apply.

Because the final rule does not adopt the proposed outcome-based scoring framework, the proposed remedial actions for failure to meet the outcome requirements are moot and, thus, not adopted in the final rule. Other remedies provisions related to

AHP noncompliance are discussed below under §§ 1291.60 through 1291.65 in Section IV.

F. Responsibility of Full Board of Directors for Strategic AHP Decisions

Final rule. In a change from the proposed rule, the final rule retains the current authority for a Bank's board of directors to delegate to a board committee the responsibility to meet quarterly with the Bank Advisory Council, and to approve or disapprove applications for AHP subsidies and alternates. Consistent with the proposed rule, the final rule adopts the proposed prohibition on a Bank's board delegating to a board committee the responsibility to approve General Fund, Targeted Fund, and Homeownership Set-Aside Program policies, the AHP Implementation Plan, and the TCLP.

Current regulation. The current regulation provides that a Bank's Advisory Council shall meet with representatives of the Bank's board of directors at least quarterly to provide advice on ways in which the Bank can better carry out its housing finance and community lending mission, and permits that responsibility to be delegated to a committee of the board but not to Bank officers or other Bank employees. The requirement for board representatives to meet quarterly with the Bank Advisory Council is a Bank Act requirement.[9] The current regulation also permits the board to delegate to a committee of the board, but not to Bank officers or other Bank employees, the responsibility to appoint the Bank Advisory Council members. In addition, the current regulation permits the board to delegate the responsibility for approving or disapproving AHP applications and alternates, and for adopting its AHP Implementation Plan,

[9] *See* 12 U.S.C. 1430(j)(11).

Homeownership Set-Aside Program, and conflict of interest policies, to a committee of the board, but not to Bank officers or other Bank employees.

Proposed rule. The proposed rule would have extended the existing prohibition on the board delegating certain AHP responsibilities to Bank officers and other Bank employees to include a prohibition on delegating such responsibilities to board committees. Specifically, the full board, instead of a board committee, would have been required to meet quarterly with the Bank Advisory Council, to approve General Fund, Targeted Fund, and Homeownership Set-Aside Program policies, to approve and amend the AHP Implementation Plan and the TCLP, and to approve or disapprove applications for AHP subsidies and alternates. As stated in the NPRM, the goal of the proposed non-delegation provisions was to engage the full board in developing and adopting strategic decisions for the AHP, as part of the overall strategic planning of the Bank. FHFA noted that while it anticipated that the AHP responsibilities currently assigned to the board committees would remain largely unchanged in response to the proposal, the full board would have more engagement with board committee recommendations and decisions.

Comments. A number of commenters disagreed with the Agency's rationale for encouraging full board engagement in AHP strategic responsibilities. They stated that involving more board members in the intricacies of AHP organizational planning and reporting would dilute the influence and housing expertise of the board committees tasked with AHP responsibilities. They stated that the proposal would create inefficiencies and could result in less integration of the board committees' contributions into the board's decisions on Bank housing activities than the existing practices employed by the Banks. One Bank stated that a board's ability to use board committees effectively,

including the ability to delegate AHP responsibilities to a board committee, is a fundamental component of board governance best practices, and the proposal would be an unnecessary encroachment on the boards' ability to oversee Bank operations.

Several Banks and their Bank Advisory Councils described the Banks' board committee structures and corporate governance principles to demonstrate that their full boards are fully engaged and aware of all AHP responsibilities and initiatives. A number of commenters stated that the Banks' AHP governance structures and processes work effectively, with the board housing committees providing reports to the full board. A Bank cited FHFA's regulation at 12 CFR 1239.3, which authorizes the Banks to model their corporate governance and indemnification practices on the Revised Model Business Corporation Act (RMBCA), as support for maintaining the existing AHP regulatory requirements concerning board delegations. The Bank also referred to FHFA's regulation at 12 CFR 1239.5, which permits the boards to appoint board committees to carry out much of the board's responsibilities. The Bank stated that under the RMBCA, the full board must consider only those activities that "so substantially affect the rights of the shareholders or are so fundamental to the governance of the corporation." The Bank further stated that delegation is a fundamental concept of efficient and competent corporate governance.

Numerous commenters opposed requiring a Bank's full board, rather than a committee of the board, to meet with the Bank's Advisory Council each quarter. The Banks focused on the challenges and inconveniences of requiring quarterly meetings of the full boards and Bank Advisory Councils. Some commenters stated that quarterly meetings with the full boards would be inefficient and unnecessarily costly, requiring

Bank Advisory Council members to spend additional time away from their primary jobs in affordable housing and economic development.

Commenters also expressed concern that the proposal would reduce the influence and expertise of the Bank Advisory Councils. They pointed out that the board members who are not on the board housing committees possess different areas of expertise and, as a result, may not have the backgrounds necessary to engage fully in housing policy discussions with the Bank Advisory Councils. Commenters noted that some Banks hold annual meetings of the full board and Bank Advisory Council members, and their board housing committees meet quarterly with the Bank Advisory Councils and provide reports on the meetings to the full board. Commenters also stated that the proposed approach would be more restrictive than the governing statutory provision, which requires each Bank's Advisory Council to meet quarterly with "representatives of" the board of directors.

Decisions in the final rule. After considering the comments, FHFA has decided to retain in the final rule the current authority for the Bank's board to delegate to a board committee the responsibility to meet quarterly with the Bank's Advisory Council. FHFA is persuaded by the comments about the costs, inconveniences, and inefficiencies of holding the quarterly meetings with the full board, the value of quarterly off-site meetings with board committees, and the language in the statute referencing "representatives of" the board. The final rule also retains the authority for the Bank's board to delegate to a board committee the responsibility to approve or disapprove applications for AHP subsidies and alternates. Approval or disapproval of AHP applications is based on scoring rankings under the Bank's scoring system and not on strategic policy decisions.

However, the Banks' full boards should be responsible for approving all strategic AHP policy decisions. Consistent with 12 CFR 1239.5, the board may rely on reports from board committees, but under the final rule, the authority to approve strategic policy decisions resides with the full board. As noted by commenters, the board committees, whose members have special housing expertise, perform an important role in the AHP strategic policymaking process by evaluating and developing policy recommendations, and FHFA expects their involvement in this process to continue. However, instead of the board committees approving strategic policy decisions on behalf of the full board, the board committees will need to report their policy recommendations to the full board for its approval or disapproval. The specific AHP strategic policy decisions that will need to be approved by the full board are approval of General Fund, Targeted Fund and Homeownership Set-Aside Program policies, and approval and amendment of the AHP Implementation Plan and the TCLP.

IV. Section-by-Section Analysis

Community Support Requirements Regulation

This section discusses the final rule's changes to the current Community Support Requirements regulation.

§ 1290.6 Bank Community Support Programs

Final rule. The final rule requires the Banks to identify in their TCLPs the housing needs the Banks plan to address in their AHPs, including the particular housing needs they plan to address through any Targeted Funds. The Banks must publish their TCLPs at least 90 days before the initial date for submission of applications for the application funding round for the specific Targeted Fund. Targeted Funds addressing

federal- or state-declared disasters are exempt from the 90-day requirement.

Current regulation. FHFA's current Community Support Requirements regulation requires the Banks to adopt annual TCLPs in conjunction with their responsibility to establish and maintain community support programs.[10] The Banks' TCLPs must describe how each Bank plans to address identified credit needs and market opportunities in its district. The Banks are required to consult with their Bank Advisory Councils, members, housing associates, and public and private economic development organizations when developing and implementing their TCLPs. Although the Banks are required to provide an annual notice to their members about their community support programs, they are not required to make their TCLPs available to their members or to the public.

Proposed rule. The proposed rule would amend § 1290.6(a)(5) to enhance the function and usefulness of the TCLPs, as well as improve the TCLPs' connection to the Banks' strategies for implementing their AHPs. The proposal would require the Banks to identify and assess in their TCLPs the significant affordable housing needs in their districts, reflecting market research and supported by empirical data, and would have required the Banks to specify, from among those housing needs, the specific housing needs the Banks would address through their funding allocations and scoring criteria under their General Funds and any Targeted Funds and Homeownership Set-Aside Programs, as set forth in their AHP Implementation Plans. The Banks would continue to be required to develop their TCLPs in conjunction with the stakeholders referenced above. The Banks would also be required to publish their TCLPs on their public websites

[10] 12 CFR 1290.6(b).

within 30 days of approval by the Bank's board of directors, and at least six months before the beginning of the Plan year. Proposed § 1291.20(b)(1) would have prohibited a Bank from establishing or administering a Targeted Fund unless at least 12 months had passed since publication of its TCLP. The purpose of the 12-month notice requirement was to provide potential project sponsor applicants with ample notice of the Banks' plans to target AHP awards to a narrower pool of potential applicants so that the project sponsors could prepare applications for submission to the Targeted Fund, with the goal being to generate sufficient numbers of applications for the Bank to be able to conduct a robust competitive scoring process for the Targeted Fund. The proposed rule would also prohibit a Bank's board of directors from delegating the responsibility for adopting or amending the TCLP to a committee of the board.

Comments. FHFA specifically requested comments on the benefits of the proposed expansion of the contents of the TCLPs and their linkage to the AHP Implementation Plans. FHFA also requested comments on whether the proposed expansion would impede the Banks' ability to respond to disasters through the AHP. The commenters who responded to the proposal generally opposed it, stating that the proposed requirements would be overly prescriptive and burdensome. The Banks, a state government entity, and a nonprofit developer particularly criticized the seeming disconnect between the timing requirements for the TCLP and those of other sources of funding, such as housing finance agencies. Several commenters advised that the proposed 12-month and 6-month notice periods would conflict with the Banks' need for flexibility in responding to disasters. One Bank calculated that it would take approximately one to two years of advance work to meet the required lead time in the

proposed rule when factoring in time for conducting research, obtaining the necessary internal Bank approvals, and publishing the TCLP.

The Banks commented that FHFA's proposed outcomes requirements for project selection would effectively establish each Bank's housing needs priorities, obviating any need to conduct market research, obtain empirical data, and expand the content of the TCLPs. Several Banks and a Bank Advisory Council expressed concern that the proposal could diminish the role of the Bank Advisory Councils, but indicated that it may add value to the process if FHFA abandoned the proposed outcomes requirements for project selection. The Banks and the Bank Advisory Councils also expressed concerns about the proposed requirement to obtain empirical data about the housing needs in the districts, which they viewed as diminishing the Bank Advisory Councils role in advising the Banks' boards of directors. Two Banks opposed the proposed notification requirement to obtain empirical data because gathering and assessing the data would prevent the Bank from responding quickly to use the AHP for disaster relief. A nonprofit affordable housing intermediary opposed the proposed requirement to obtain empirical data on the grounds that the requirement would add a burden to the Banks and would not prove useful in making decisions about how to direct AHP funding because of the extent of housing needs throughout districts. A national affordable housing policy and advocacy organization recommended that the Banks be required to consult with state housing finance agencies in developing their TCLPs.

Decisions in the final rule. FHFA has considered the comments and remains of the opinion that the Banks's TCLPs should identify and assess the significant affordable housing needs in their districts. The changes to the current requirements for developing

the TCLPs will help to ensure that the Banks identify such housing needs and guide the Banks in deciding how to design their AHPs.

The final rule requires the Banks to identify, from among the affordable housing needs addressed in their TCLPs, the housing needs they plan to address through the Banks' AHP, and including the specific needs to be addressed by any Targeted Funds. This differs from the proposed rule, which would have required each Bank to identify in its TCLP the specific housing needs it planned to address through the Bank's funding allocations and scoring criteria under its General Fund and any Targeted Funds and Homeownership Set-Aside Programs in its AHP Implementation Plan. FHFA had proposed that the Banks expand the scope and specificity of their TCLPs in conjunction with the outcome-based approach for project selection. Because the final rule does not adopt the outcome-based approach, there is no longer a need to require the Banks to include detailed information about their General Funds and Homeownership Set-Aside Programs in their TCLPs.

In addition, the final rule removes the proposed requirement that the Banks support the identification and assessment of significant affordable housing needs with empirical data, in response to commenters' concerns that this would be burdensome for Banks to implement. Many of the Banks were concerned that the word "empirical" implied that the Banks would be required to commission third-party studies to determine district affordable housing needs. However, the final rule continues to require that the Banks assess market research they conduct or obtain in order to identify significant affordable housing needs in their districts. Banks can also obtain information from their Advisory Councils to support their market research.

The final rule continues to require the Banks to consult with their Bank Advisory Councils, members, housing associates, and public and private economic development organizations in developing their TCLPs, which should ensure a robust process for obtaining input on the TCLPs. In response to the comment that the Banks should also consult with state housing finance agencies in developing their TCLPs, those entities likely are housing associates, as defined under FHFA's General Definitions regulation,[11] so the final rule makes no change to this language in the Community Support Requirements regulation. A Bank may also choose to consult with other parties not referenced in the regulation as appropriate.

However, FHFA agrees with commenters' concerns about the proposed six-month requirement for publishing the TCLPs. The commenters stated that the proposed six-month requirement would inhibit the Banks' abilities to respond to district affordable housing needs, including disasters, in a timely manner. The six-month requirement was proposed in conjunction with the Agency's proposal for an outcome-based framework for project selection. Under the proposed outcome-based approach, a Bank would have been required to identify in its TCLP the specific housing needs the Bank intended to address through its funding allocations and scoring criteria under its General Fund and any Targeted Funds and Homeownership Set-Aside Programs, as set forth in its AHP Implementation Plan. FHFA presumed that the Banks and other stakeholders would need additional time between the publication of the TCLPs and the beginning of the AHP application funding round to develop or revise AHP policies and procedures for inclusion in their AHP Implementation Plans, and conduct outreach to educate members, potential

[11] 12 CFR part 1201.

project sponsor applicants, and other AHP stakeholders about the Bank's revised scoring system. However, as discussed under Section III.A. above, the final rule does not adopt the proposed outcome-based approach. Therefore, there is no need to require the Banks to publish their TCLPs 12 months before the beginning of the TCLP year. Instead, the final rule requires the Banks to publish their TCLPs no later than the publication date of their AHP Implementation Plans. This should provide the Banks sufficient time to develop and publish their TCLPs, while underscoring the linkage between the TCLPs and the AHP Implementation Plans.

As noted above, the proposed rule would have required a Bank planning to establish a Targeted Fund to publish its TCLP at least 12 months before establishing and administering the Targeted Fund. FHFA finds commenters' concerns persuasive that this proposed timeframe would impede the Banks' ability to address pressing affordable housing needs, including natural disasters. Accordingly, the final rule sets the time period for publishing a TCLP that addresses the use of Targeted Funds as 90 days before the opening of the AHP application funding round, with an exemption for Targeted Funds addressing federal- or state-declared disasters, as they require expedited assistance. Because most Banks' TCLP years typically begin on January 1, the final rule does not tie the 90-day timeframe to January 1, which would result in the Banks having to publish their TCLPs by September 30 each year. Instead, the final rule ties the 90-day timeframe to the first day AHP applications can be submitted for the funding rounds for the Targeted Funds, which may be different dates throughout the year and be open for different lengths of time. This will provide the Banks more flexibility in administering their Targeted Funds. While significantly shorter than 12 months, the 90-day timeframe

should still provide potential applicants with sufficient notice of the Banks' plans for their Targeted Funds so that applicants can prepare applications for submission to the Targeted Funds, with the goal being to produce sufficient numbers of applications for the Banks to be able to conduct robust competitive scoring processes for their Targeted Funds.

As discussed under Section III.F. above, the final rule adopts the proposal prohibiting a Bank's board of directors from delegating the responsibility for adopting or amending the TCLP to a committee of the board.

§ 1290.8 Compliance dates

The dates by which the Banks must comply with these revised provisions are discussed above in Section I.

Affordable Housing Program Regulation

Reorganization of the Current AHP Regulation

The final rule adopts the proposed reorganization of the current AHP regulation, with some modifications to take into account certain changes from provisions in the proposed rule. The reorganization is intended to provide greater clarity for users of the AHP regulation. Current and new regulatory sections are grouped under new Subpart headings according to similar subject matter, resulting in renumbering of most sections of the current regulation. The numbering of the sections is not consecutive from Subpart to Subpart in order to reserve room within Subparts for the addition of new sections in the future, as necessary. FHFA received no comments on the proposed reorganization of the regulation.

The following discusses each section of the final rule amending the current AHP regulation in the order the sections appear in the final rule.

Subpart A–General

§ 1291.1 Definitions

As proposed, the final rule retains most of the definitions currently in § 1291.1. The final rule revises some of the current definitions and adds definitions, which are discussed below in the context of the related regulatory amendments.

In addition, as proposed, the final rule makes the following technical changes to certain definitions, which did not receive any comments:

- A definition of ''AHP'' is added, which means the Affordable Housing Program required to be established by the Banks pursuant to 12 U.S.C. 1430(j) and this part 1291.
- The definition of ''Homeownership Set-Aside Program'' indicates that establishment of such a program is in the Bank's discretion and is a noncompetitive program.
- The definition of ''net earnings of a Bank'' is revised by removing the requirement to deduct the Bank's annual contribution to the Resolution Funding Corporation, as the Banks are no longer required to make annual contributions to the Resolution Funding Corporation.
- In the definition of ''rental project,'' the term ''manufactured housing'' is changed to ''manufactured housing communities,'' which more accurately describes this type of housing in the context of rental projects.

- References to the "competitive application program" are changed to the General Fund and any Targeted Funds. References to "homeownership set-aside programs" are capitalized.

The final rule also makes the following technical revisions and an addition to the definitions for greater clarity, which were not included in the proposed rule:

- Changes "funding period" to "funding round" to reflect the terminology commonly used by the Banks and AHP stakeholders. Adds a definition of "LIHTC" to mean Low-Income Housing Tax Credits under section 42 of the Internal Revenue Code (26 U.S.C. 42).
- In the definition of "visitable," the reference to "2 feet, 10 inches" is changed to the equivalent "34 inches," consistent with the use of "inches" later in the definition.

§ 1291.2 Compliance dates

The dates by which the Banks must comply with the revised AHP regulatory provisions are discussed above in Section I.

Subpart B—Program Administration and Governance

§ 1291.10 Required annual AHP contribution

Consistent with the proposed rule, the final rule relocates current § 1291.2(a) to § 1291.10. Section 1291.10 contains the Bank Act requirement stating that each Bank shall contribute annually to its AHP 10 percent of its net income for the preceding year, subject to a minimum annual combined contribution by all of the Banks of $100 million.[12]

§ 1291.11 Temporary suspension of AHP contributions

[12] *See* 12 U.S.C. 1430(j)(5)(C).

Consistent with the proposed rule, the final rule retains current § 1291.11 on the temporary suspension of AHP contributions without change. FHFA did not receive any comments on this provision.

§ 1291.12 Allocation of required annual AHP contribution

Allocation of AHP funds. Consistent with the proposed rule, § 1291.12(a) of the final rule requires each Bank to allocate annually at least 50 percent of its required annual AHP contribution to its General Fund, and § 1291.12(c) permits each Bank to allocate up to 40 percent, in the aggregate, of its required annual AHP contribution to up to three Targeted Funds. The current regulation requires that at least 65 percent of each Bank's required annual AHP contribution be allocated to its Competitive Application Program. As noted in Section III.B. above, the current regulation does not authorize the establishment of Targeted Funds.

For the reasons identified above in Section III.C., § 1291.12(b) of the final rule retains the current limit that a Bank may allocate to its Homeownership Set-Aside Programs up to the greater of $4.5 million or 35 percent of its annual required AHP contribution. The proposed rule would have increased the 35 percent limit to 40 percent.

As discussed in the NPRM, the proposed rule would reduce the current annual required allocation to a Bank's General Fund (*i.e.*, Competitive Application Program) from 65 percent to 50 percent, but noted that the 50 percent threshold would still ensure that the Banks make at least half of their AHP funds available to address a broad spectrum of affordable housing needs within their districts through their General Funds. FHFA also stated in the NPRM that it is extremely important that a substantial portion of AHP funds continue to assist in the development of rental housing for lower income

households given the need for more affordable rental housing throughout the Nation. The vast majority of awards under the Competitive Application Program serve rental housing. In 2017, the Banks awarded 90 percent of competitive funds to rental housing. The proposal would enable the Banks to target simultaneously additional specific affordable housing needs in their districts through the allocation of the remaining total AHP funds to Targeted Funds, as well as the optional Homeownership Set-Aside Programs.

Two nonprofit organizations that advocate for the development of affordable multifamily housing opposed any reduction in the minimum funding allocation to the General Fund because it would result in less funding for affordable rental projects. One of those commenters supported this position by referencing the NPRM discussion about the Banks' requests for additional funding allocation authority for Homeownership Set-Aside Programs, which the Banks find easier to administer than the General Funds.

After considering the comments, FHFA has decided to adopt the proposed minimum 50 percent funding allocation requirement for the General Fund in the final rule. FHFA's decision not to increase the maximum percentage allocation for the optional Homeownership Set-Aside Programs from 35 to 40 percent will continue to ensure that each Bank generally allocates a minimum of 65 percent of its total AHP funds to competitive application programs via the mandatory General Fund and any optional Targeted Funds.[13] Overall, FHFA intends the final rule to provide the Banks greater flexibility to allocate their total annual AHP funds to address the affordable rental and homeownership needs within their districts.

[13] When a Bank allocates the alternate maximum amount of $4.5 million to its Homeownership Set-Aside Programs, the Bank may allocate, in the aggregate, less than 65 percent of its total AHP funds to its General Fund and any Targeted Funds.

Homeownership Set-Aside Programs

One-third funding allocation requirement for first-time homebuyers or owner-occupied rehabilitation, or a combination of both.

Consistent with the proposed rule, § 1291.12(b) of the final rule requires that at least one-third of a Bank's aggregate annual funding allocation to its Homeownership Set-Aside Programs be allocated to assist first-time homebuyers or households for owner-occupied rehabilitation, or a combination of both. The current regulation applies the one-third funding allocation requirement only to first-time homebuyers. In support of the proposal, FHFA noted in the NPRM that a substantial need for owner-occupied rehabilitation funds exists in many Bank districts, and the demand for such funds is likely to increase as the country's population ages.[14] FHFA reasoned that expanding the scope of the one-third funding allocation requirement to include owner-occupied rehabilitation could facilitate additional funding for home repairs and accessibility modifications for households including the elderly, persons with disabilities, and military veterans.

The Banks, Bank Advisory Councils, and an advocacy organization supported the proposal, stating that it would encourage the use of more Homeownership Set-Aside Program funds for owner-occupied rehabilitation at a time when the Banks have identified a substantial need for these funds.

Two nonprofit organizations opposed the proposal, emphasizing the scarcity of resources for low- and moderate-income first-time homebuyers and noting that alternatives to AHP funding exist for rehabilitation. One of these commenters

[14] 83 FR at 11348, citing Harvard Joint Center for Housing Studies, *Housing America's Older Adults* (Sept. 2, 2014), *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs-housing_americas_older_adults_2014-ch4.pdf (last accessed on 11/15/2018).

recommended that FHFA establish a separate funding allocation requirement for owner-occupied rehabilitation to ensure that a portion of Homeownership Set-Aside Program funds are provided for this purpose, while allowing the Banks to continue to fulfill the one-third allocation requirement by providing set-aside funds to first-time homebuyers.

Assisting first-time homebuyers is an important priority for the AHP, and the Banks' support for such homebuyers has greatly exceeded the required one-third funding allocation requirement. Since the inception of Homeownership Set-Aside Programs in 1995, over 80 percent of set-aside households have been first-time homebuyers. At the same time, a substantial need for owner-occupied rehabilitation funds exists in many Bank districts and the demand will likely increase over time. Expanding the scope of the one-third funding allocation requirement in the final rule to permit owner-occupied rehabilitation may help address this need by encouraging the Banks to increase their set-aside funding allocations for this purpose, while continuing to support the needs of first-time homebuyers. FHFA is not adopting the commenter's recommendation to establish a separate funding allocation requirement for owner-occupied rehabilitation, as this could limit the Banks' flexibility to determine how best to use their set-aside funds to meet the first-time homebuyer and owner-occupied rehabilitation needs within their districts.

The final rule also adopts a proposed technical revision to clarify that the one-third funding allocation requirement applies to the amount of set-aside funds "allocated" by the Bank to such households, not to the amount of set-aside funds actually used by them, because the Bank cannot control whether sufficient numbers of such households ultimately request set-aside funds in a given year. If an insufficient number of such households request set-aside subsidies, any unused funds would be provided to non-first-

time homebuyers, and a Bank will not be considered in violation of the funding allocation requirement as long as it allocated the required amount. FHFA received no comments on this proposed technical change.

Phase-in funding allocation requirements for Targeted Funds. As proposed, § 1291.12(c) of the final rule adopts a phase-in process for the allocation of funds to Targeted Funds in order to address the risks of Targeted Funds given their targeted nature. A Bank initially will be permitted to allocate up to 20 percent of its required annual AHP contribution to one Targeted Fund. This percentage limit increases to 30 and 40 percent in subsequent years, depending on the number of additional Targeted Funds established, up to a maximum of three Targeted Funds. The final rule makes a technical change to the references to the Targeted Funds being administered concurrently to refer to their administration in the same year instead. This change recognizes that the Banks may choose to administer their Targeted Funds at different times during the year. FHFA did not receive any comments on the proposed phase-in requirements for funding Targeted Funds. The phase-in requirements governing the number of Targeted Funds that a Bank may establish in any given year are discussed below under § 1291.20.

Transfer of uncommitted Targeted Funds amounts. Proposed § 1291.12(c)(2) would have required a Bank to transfer any uncommitted Targeted Fund amounts to its General Fund for awards to alternates in the same calendar year. Section 1291.28(b) of the final rule makes approval of alternates under the General Fund and any Targeted Funds optional for a Bank pursuant to adoption of a Bank policy on approving alternates, and requires funding of the alternates if the Bank has such a policy and sufficient previously committed AHP subsidies become available within one year of application

approval. Section 1291.70(b) of the final rule provides flexibility for the Banks to determine how to commit any uncommitted Targeted Fund amounts where the Bank does not have a policy to approve alternates under its General Fund or Targeted Funds.

Acceleration of funding. Consistent with the proposed rule, the final rule relocates current § 1291.2(b)(3), which contains the discretionary authority for a Bank to accelerate future required annual AHP contributions to its current year's Program, to § 1291.12(d), with certain clarifying technical edits. FHFA did not receive any comments on the technical revisions.

No delegation. As discussed in Section III.F. above and consistent with the proposed rule, § 1291.12(e) of the final rule prohibits a Bank's board of directors from delegating to a committee of the board, Bank officers, or other Bank employees the responsibility for adopting the policies for its General Fund and any Targeted Funds and Homeownership Set-Aside Programs. The prohibition on delegating to a committee of the board is an expansion of the current prohibition on delegating to Bank officers or other Bank employees.

§ 1291.13 Targeted Community Lending Plan; AHP Implementation Plan

Targeted Community Lending Plan. As discussed in § 1290.6 above and as proposed, the final rule amends § 1290.6(a)(5) of the current Community Support Requirements regulation to require each Bank to identify and assess in its annual TCLP the significant affordable housing needs in its district that it plans to address through its AHP, as well as any specific affordable housing needs it plans to address through any Targeted Funds. In a change from the proposed rule, §§ 1290.6(c) and 1291.13(a)(2) of the final rule require that if a Bank plans to establish a Targeted Fund, it must publish its

TCLP at least 90 days prior to the opening of the application funding round for the Targeted Fund, unless the Targeted Fund addresses federal- or state-declared disasters. The final rule also provides that a Bank's TCLP must be published on or before the date of publication of its annual AHP Implementation Plan. A Bank is required to notify FHFA of any amendments to its TCLP within 30 days after their adoption by the Bank's board.

AHP Implementation Plan. As proposed, the final rule relocates current § 1291.3, which contains the requirements for the Banks' AHP Implementation Plans, to § 1291.13(b), with changes to reflect the inclusion of new policies required under the final rule. The prohibition on delegating certain strategic responsibilities to a committee of the board is discussed below, as are certain requirements for the Plan meriting particular discussion.

No delegation. As discussed in Section III.F. above and consistent with the proposed rule, § 1291.13(b) of the final rule prohibits a Bank's board of directors from delegating to a committee of the board, Bank officers, or other Bank employees, the responsibility to adopt, and make any amendments to, its AHP Implementation Plan. This is an expansion of the current prohibition on delegating such strategic responsibilities to Bank officers or other Bank employees.

Requirements for each Fund (§ 1291.13(b)(2), (b)(3), (b)(5)). In the current regulation, each Bank must include in its AHP Implementation Plan its requirements for its Competitive Application Program, including its scoring guidelines, and any Homeownership Set-Aside Programs. Consistent with the proposed rule, the final rule requires a Bank to include those requirements in its AHP Implementation Plan for its

General Fund and any Targeted Funds and Homeownership Set-Aside Programs. The final rule also requires a Bank to include in its AHP Implementation Plan, the Bank's application scoring tie-breaker policy, and any policies adopted by the Bank, in its discretion, for approving AHP application alternates for funding under its General Fund and any Targeted Funds.

For any Targeted Funds, a Bank is required to include specific parameters that ensure that the Targeted Fund is designed to receive sufficient numbers of applicants for the amount of AHP funds allocated to the Fund to facilitate a robust competitive scoring process, as required in § 1291.20(b)(2)(i). In a change from the proposed rule, the final rule does not require a Bank to include in its AHP Implementation Plan the specific funding allocation amounts for its General Fund and any Targeted Funds and Homeownership Set-Aside Programs, including how the Bank will apportion the one-third funding allocation under its Homeownership Set-Aside Programs. This will accommodate any potential timing issues a Bank may encounter that could delay its ability to identify the specific amounts of its funding allocations.

Applications to multiple Funds (§ 1291.13(b)(4)). Consistent with the proposed rule, the final rule requires a Bank to include in its AHP Implementation Plan the Bank's policy on how it will determine under which Fund to approve a project that applies to more than one Fund and scores high enough to be approved under each of the Funds.

Retention agreements (§ 1291.13(b)(6)). The final rule retains the current requirement that a Bank include its rental retention agreement requirements in its AHP Implementation Plan, and requires inclusion of the Bank's owner-occupied retention agreement requirements for households who use the AHP subsidy for purchase, or for

purchase in conjunction with rehabilitation. Because the final rule eliminates the requirement for an owner-occupied retention agreement where the household uses the AHP subsidy solely for rehabilitation, nothing is required to be included in the AHP Implementation Plan regarding such agreements. This is a change from the proposed rule, which would have eliminated all owner-occupied retention agreements and, therefore, the requirement to address the agreements in the AHP Implementation Plan.

Relocation plans for current occupants of rental projects (§ 1291.13(b)(7)). The final rule includes a requirement that a Bank include in its AHP Implementation Plan the Bank's standards for approving a relocation plan for current occupants of rental projects pursuant to § 1291.23(a)(2)(ii)(B).

Optional Bank district eligibility requirements (§ 1291.13(b)(8)). Consistent with the current requirement in § 1291.5(c)(15) and the proposed rule, the final rule requires a Bank to include in its AHP Implementation Plan any optional Bank district eligibility requirements adopted by the Bank pursuant to § 1291.24(c).

Re-use of repaid AHP direct subsidy in same project (§ 1291.13(b)(12)). In a change from the proposed rule, the final rule retains current § 1291.3(a)(7), which requires a Bank to include its requirements for re-use of repaid AHP direct subsidy in its AHP Implementation Plan, if the requirements are adopted by the Bank pursuant to current § 1291.8(f)(2), which is now § 1291.64(b). The proposed rule would have deleted § 1291.3(a)(7) because the requirements for owner-occupied retention agreements would have been eliminated in all cases, meaning there would be no repayments of AHP subsidy by households that could then be re-used under § 1291.8(f)(2). The final rule retains the current requirement for owner-occupied retention agreements where the

household uses the AHP subsidy for purchase, or purchase in conjunction with rehabilitation, but not where the household uses the subsidy solely for rehabilitation. A household that uses the subsidy for purchase, or purchase in conjunction with rehabilitation, may be required to repay subsidy if the household sells or refinances the home within the AHP five-year retention period and none of the regulatory exceptions to subsidy repayment applies. Since the possibility of such subsidy repayments remains under the final rule, a Bank could adopt a subsidy re-use program under § 1291.64(b). Accordingly, the Bank's requirements for re-use of repaid AHP subsidy under any Bank subsidy re-use program adopted pursuant to § 1291.64(b) must be included in its AHP Implementation Plan.

§ 1291.14 Advisory Councils

Consistent with the proposed rule, the final rule relocates current § 1291.4, which addresses the membership requirements and duties of the Banks' Advisory Councils, to § 1291.14, with the clarifications and change discussed below.

Representatives of for-profit organizations. The Bank Act requires that each Bank appoint a Bank Advisory Council of persons drawn from "community and not-for-profit organizations" actively involved in providing or promoting low- and moderate-income housing in its district.[15] As proposed, § 1291.14(a)(1) of the final rule clarifies that "community organizations" include for-profit organizations, which is consistent with existing Agency guidance.

An organization that advocates on behalf of multifamily housing providers strongly endorsed including representatives of for-profit organizations on the Bank

[15] *See* 12 U.S.C. 1430(j)(11).

Advisory Councils, noting that such representation adds the voices of developers and owners with experience in affordable multifamily housing and increases the pool of applicants for the AHP.

In contrast, several nonprofit organizations expressed concern that for-profit organization representation on the Bank Advisory Councils could dilute the representation and importance of nonprofit or mission-driven organizations on the Bank Advisory Councils. The commenters urged FHFA to ensure that the Bank Advisory Councils are populated predominantly by nonprofit and public sector representatives, who have mission-driven commitments to serving the community.

FHFA acknowledges the important role that nonprofit organizations play in addressing the housing needs of low- and moderate-income households throughout the country. Nonprofit, as well as for-profit and public sector, organizations all bring important affordable housing perspectives to the Bank Advisory Councils. In 2018, 56 percent of the total membership of all eleven Bank Advisory Councils represented nonprofit organizations, and 15 percent represented for-profit organizations. The rest of the membership represented consulting firms and government entities. For-profit organization representation is consistent with § 1291.14(a)(3) of the final rule, which retains the current requirement in § 1291.4(a)(3) for a diverse range of membership on the Bank Advisory Council such that representatives of no one group constitute an undue proportion of the membership, giving consideration to the size of the Bank's district and the diversity of low- and moderate-income housing and community lending needs and activities within the district.

Recommendations on Bank Targeted Community Lending Plans. FHFA's

Community Support Requirements regulation[16] requires the Banks to consult with their Bank Advisory Councils and other groups in developing and implementing their TCLPs. As proposed, § 1291.14(d)(1)(ii)(A) of the final rule includes the parallel requirement for the Bank Advisory Councils to provide recommendations to the Banks on their TCLPs, and any amendments thereto.

No delegation. For the reasons discussed in Section III.F. above, the final rule does not adopt the proposed amendment requiring a Bank's full board of directors to meet quarterly with its Bank Advisory Council.

§ 1291.15 Agreements

As proposed, the final rule relocates current § 1291.9, which governs the AHP contractual agreements that must be in place between the Banks and members, and between the members and project sponsors or owners, to § 1291.15. The final rule makes a number of changes and clarifications to the provisions in this section from those in the proposed rule, as discussed below.

Notice to Bank of LIHTC project noncompliance (§ 1291.15(a)(5)(ii)). Consistent with the proposed rule, § 1291.15(a)(5)(ii) of the final rule adds a monitoring agreement requirement for notices of LIHTC project noncompliance that is not contained in the current regulation. The Banks' AHP agreements with their members must require the members' monitoring agreements with project owners to include a provision requiring the latter to agree to provide prompt written notice to the Bank if an LIHTC project is in noncompliance with the LIHTC income targeting or rent requirements during the AHP 15-year retention period. However, in a change from the proposed rule, the

[16] 12 CFR 1290.6(a)(5)(iii).

final rule only requires that such notice be provided where the LIHTC noncompliance is material and unresolved, which may trigger a tax benefit recapture event and repayment of some of the AHP subsidy. If tax benefits are recaptured from a project, it may impact the project's financial viability. A corresponding monitoring requirement that the Banks review the LIHTC noncompliance notices received from project owners during the AHP retention period is included in § 1291.50(c)(1)(ii) of the final rule, as proposed.

Consistent with the current regulation and proposed rule, the final rule does not require the Banks to conduct long-term monitoring of AHP projects that received LIHTCs during the AHP 15-year retention period. Noncompliance with LIHTC income-targeting and rent requirements has been the same as or substantially equivalent to noncompliance with AHP income-targeting and rent requirements. Although LIHTC project noncompliance is rare, instances of noncompliance with LIHTC income targeting or rent requirements can occur during the AHP retention period, which would mean that the projects' incomes or rents likely are also in noncompliance with similar AHP requirements. However, the noncompliance generally would not come to the attention of a Bank during the AHP retention period because the Banks do not monitor LIHTC projects.

FHFA specifically requested comments on the practicality of the proposed notice requirement, and whether it should also be required in the event of noncompliance by projects with the income-targeting or rent requirements of the government housing programs discussed under § 1291.50(c)(1)(ii) below.

Several nonprofit intermediaries and an advocacy organization supported the proposed notice requirement as reasonable. A number of other commenters, including

developers, a nonprofit affordable rental housing trade association, and an affordable housing developer, recommended that notice to the Banks only be required where the noncompliance is "unresolved." The commenters noted that the Internal Revenue Service (IRS) requirements for notification of noncompliance result in the issuance of many notices for small, easily resolved operating issues, and only a small fraction of those notices remain unresolved for a substantial period of time. The notices that remain unresolved may involve projects with material noncompliance issues that could have an impact on the projects' financial viability. Commenters stated that the Banks should only be made aware of such material and unresolved problems.

In contrast, the Banks opposed the proposal. One Bank stated that implementation of the proposal would be impracticable because the Banks must defer to the state housing finance agency or the IRS in cases of noncompliance. A trade association and a developer of housing with supportive services suggested that the proposal would have limited effect because LIHTC projects rarely become noncompliant due to the nature of the private equity investments. Another Bank and a nonprofit developer stated that project owners may not remember their obligation to report LIHTC noncompliance to the Bank under their AHP monitoring agreements. Finally, several commenters stated that the proposal would place an additional 15-year regulatory burden to monitor the projects on members and the original project sponsors even if they had transferred ownership of the project after project development.

FHFA finds the comments about the infrequent instances of LIHTC project noncompliance and the minor nature of some of the noncompliance persuasive. The Banks do not need to receive notices of LIHTC noncompliance that will be easily

resolved because these types of noncompliance will be cured within a reasonable period of time and do not jeopardize the long-term financial viability of the project. However, the Banks should be notified in the event of any material and unresolved noncompliance during the AHP 15-year retention period, which may trigger a tax benefit recapture event, so that the Bank can monitor the project's status and take remedial action as required by the AHP regulation. As noted above, the Banks likely would not become aware of material and unresolved noncompliance without notification because they do not monitor LIHTC projects during the retention period.

Concerning the comments asserting that the proposal would impose an additional 15-year regulatory monitoring burden on members, FHFA notes that only project owners would be required to report noncompliance to the Bank.

The final rule does not include a requirement that project sponsors or owners send notices to the Banks of noncompliance by projects with the requirements of the other specified government housing programs because a separate monitoring provision in the final rule addresses such noncompliance. Specifically, § 1291.50(c)(1)(i) and (ii) requires the Banks to obtain information annually from project sponsors or owners on their projects' compliance with other government funding sources, as well as the projects' on-going financial viability, as part of "enhanced certifications" to the Banks.

Owner-occupied retention agreements for purchase, or for purchase in conjunction with rehabilitation (§ 1291.15(a)(7)). For the reasons discussed in Section III.D. above, § 1291.15(a)(7) of the final rule retains the current requirement for an owner-occupied retention agreement where the household uses the AHP subsidy for purchase of a home, or for purchase of a home in conjunction with its rehabilitation, but

eliminates the current requirement for an owner-occupied retention agreement where the household uses the AHP subsidy solely for rehabilitation of a home. The final rule makes accompanying conforming changes to various references to owner-occupied retention agreements throughout the final rule.

Notice to Bank or Bank designee. Section 1291.15(a)(7)(i) of the final rule provides that the Bank, and in its discretion any designee of the Bank, shall be given notice of any sale, transfer, assignment of title or deed, or refinancing of an AHP-assisted unit during the AHP five-year retention period. This is a change from the current regulation, which requires notice to the Bank or its designee.

FHFA requested comments in the proposed rule on whether owner-occupied retention agreements, if retained in the final rule, should require that such notice be provided to both the Bank and its designee (typically the member), rather than to one or the other. FHFA indicated that such a requirement would facilitate Program operations by giving the Bank simultaneous notice with the Bank's designee (if the Bank has one), and could facilitate repayment of AHP subsidy to the Bank in cases where a member subsequently fails and is subject to receivership actions by other federal agencies.

One Bank favored requiring notice to both parties, noting that it includes this requirement in its standard retention agreements as it is beneficial to the Bank to know that a sale or refinancing of the property has occurred. A nonprofit organization also favored requiring notice to both parties, stating that the minimal cost of the extra notice is worth the additional layer of oversight. Another Bank indicated that it includes a requirement for notice to the Bank in its retention agreements, but opposed requiring

notice to a Bank designee, stating that this requirement might cause confusion as to who is responsible for calculating and providing a payoff in the event of a sale of the property.

As the comments indicate, requiring notice to the Bank is sound practice to ensure that the Bank is aware of events that might trigger an obligation to recover AHP subsidy. Therefore, the final rule requires that the Banks receive such notice. However, FHFA is persuaded by the comments that requiring notice to both the Bank and a Bank designee could be disruptive to the Bank's established processes. Each Bank should have the discretion to determine whether to require notice to a designee as may be appropriate for that Bank's operations. Accordingly, the final rule allows a Bank to determine, in its discretion, whether to require notice to a designee of the Bank.

Sale, transfer, or assignment. The final rule provides that the retention agreement applies not only to a sale of an owner-occupied unit, but also to a transfer or assignment of title or deed, during the retention period, as these forms of conveyance are the functional equivalent of sales.

Calculation of AHP subsidy repayment based on net proceeds and household's investment. Consistent with § 1291.9(a)(7) of the current regulation, § 1291.15(a)(7) of the final rule requires an AHP-assisted household to repay a pro rata portion of the AHP subsidy if the unit is sold or refinanced during the five-year retention period, subject to certain exceptions. However, the final rule prescribes a "net proceeds" calculation for determining the amount of subsidy subject to recovery. This is a change from the current regulation, which requires repayment of a portion of AHP subsidy from any *net gain* realized upon sale or refinancing. The subsidy repayment calculation in the final rule also prioritizes return of the AHP-assisted household's investment in the home to the

household. The pro rata subsidy amount subject to repayment cannot exceed what is available from the net proceeds of the sale or refinancing.

Although the current regulation does not define "net gain," as FHFA noted in the proposed rule, a majority of the Banks calculate the net gain as the sales price minus the original purchase price, purchaser and seller paid closing costs, and capital improvement costs, and then apply the pro rata repayment requirement. Some of these Banks have also deducted the AHP subsidy amount from the original purchase price. Other Banks have calculated the subsidy repayment amount using net proceeds identified on the Closing Disclosure, by deducting the senior mortgage debt from the sales price and, depending on the Bank, crediting or not crediting the household with its investments in the home. Some of these Banks have also added the AHP subsidy amount to the total proceeds.

Because the proposed rule would have eliminated the requirement for owner-occupied retention agreements in all cases, it did not propose a specific method in the rule text for calculating the repayment of AHP subsidy. However, the NPRM noted that FHFA reviewed the subsidy repayment requirements of other government housing programs, and in particular, HUD's HOME Program. The NPRM discussed the Owner Investment Returned First approach under the HOME Program which, if applicable to the AHP, would calculate net proceeds available for recapture as the sales price minus outstanding superior debt and seller paid costs, with the seller recovering its entire investment first from the net proceeds, the Bank then recovering the AHP subsidy on a pro rata basis, and any remaining net proceeds returned to the seller. FHFA requested comments on the merits and disadvantages of this approach and the net gain approach from the standpoint of the AHP-assisted households and the Banks, and whether there are

other subsidy repayment approaches FHFA should consider if a retention agreement requirement were retained in the final rule.

FHFA received a number of comments on whether it should require a net gain or net proceeds calculation for determining the AHP subsidy repayment amount. One Bank supported the use of the net gain calculation discussed in the NPRM as the appropriate basis for calculating a pro rata repayment. In support of this recommendation, however, the Bank cited the benefits of coordinating the AHP calculation methodology with those in other government programs, such as those used by HUD, without specifying these HUD programs. Because the NPRM specifically described only one HUD program – the HOME Program – in the context of the owner-occupied retention agreement repayment calculation, and the version of the HOME Program calculation described in the NPRM is more similar to the net proceeds approach than the net gain approach, this commenter appears to have mistaken the net proceeds and net gain calculations. Another Bank stated that the net gain calculation has been effective for AHP-assisted home sales, but noted that the calculation does not work effectively for AHP rehabilitation grants because the AHP-assisted homeowners are frequently elderly or disabled, have lived in their houses for decades, and generally are unable to recall or do not have documentation of the original purchase price of their homes, a necessary component of the net gain calculation. Several Banks indicated support for an approach that would minimize the need to obtain information from the AHP-assisted households or third parties, noting that they have experienced frequent difficulty obtaining original purchase prices of the homes.

A nonprofit organization expressed support for using the net proceeds recapture approaches as prescribed under the HOME Program. The commenter characterized the

HOME Program approach as fair, and emphasized the value of promoting alignment between multiple government subsidy sources often used together in projects. A nonprofit economic research organization supported using a net proceeds approach, with AHP-assisted households able to recover their capital improvement costs, noting that this could help incentivize such households to maintain their properties. A Bank similarly commented that a repayment calculation that allows for recovery by households of their capital improvement costs would incentivize households in distressed areas to invest in such improvements.

The final rule eliminates the requirement for retention agreements for AHP subsidies used solely for rehabilitation. This change will eliminate the administrative burden on Banks and members of attempting to obtain subsidy repayments from households and also relieve a financial burden on those households. For owner-occupied retention agreements where the household used the AHP subsidy for purchase, or for purchase in conjunction with rehabilitation, the final rule establishes a net proceeds calculation that addresses the above-described concerns with the net gain approach.

The subsidy repayment calculation in the final rule also prioritizes return of the AHP-assisted household's investment in the home to the household. Specifically, § 1291.15(a)(7)(v) provides that the household shall repay the Bank the lesser of: (i) the AHP subsidy, reduced on a pro rata basis per month until the unit is sold, transferred, or its title or deed transferred, or is refinanced, during the AHP five-year retention period; or (ii) any net proceeds from the sale, transfer, or assignment of title or deed of the unit, or the refinancing, as applicable, minus the AHP-assisted household's investment. Section 1291.1 of the final rule defines "net proceeds" as the sales price minus reasonable and

customary costs paid by the household and outstanding superior debt, or, in the case of a refinancing, the principal amount of the new mortgage minus reasonable and customary costs paid by the household and the principal amount of the refinanced mortgage. This calculation uses only information that is available from the settlement documents. The calculation also does not incorporate the subsidy originally provided to the AHP-assisted household, *i.e.*, the subsidy is not added to the net proceeds or subtracted from any of the components of the net proceeds calculation. No AHP subsidy may be recovered by the Bank unless the net proceeds exceed the AHP-assisted household's investment.

FHFA is persuaded by the commenters that the subsidy recovery calculation should account for the AHP-assisted household's investment in the home. Households invest resources in their homes in the form of down payments, transaction costs (such as broker's commission and title search fees), capital improvement costs, and repayment of senior mortgage principal. The household's investment should be retained and prioritized in light of the purpose of AHP subsidies to provide households with the benefits of homeownership. The "household's investment" is defined in § 1291.1 to mean reasonable and customary transaction costs paid in connection with the purchase of the unit, down payment, cost of capital improvements made, and any mortgage principal repaid since the purchase of the unit until the time of sale or refinancing during the AHP five-year retention period where the household documents these costs to the Bank or its designee. For example, a household could produce documentation of its expenditures associated with the installation of a new roof.

Consistent with § 1291.9(a)(7)(ii) of the current regulation, the final rule requires that the AHP subsidy be reduced on a pro rata basis for the time that the household

owned the unit until its sale or refinancing. However, whereas the current regulation provides generally for this reduction each year, the final rule requires a reduction each month, consistent with current Bank practice, as provided below:

$$\left(1 - \frac{\#\ of\ months\ homeowner\ occupied\ home}{Retention\ Period\ (60\ months)}\right) X\ Original\ AHP\ Subsidy$$
$$= Pro\ Rata\ Subsidy\ Amount$$

The final rule provides that the Bank shall recover the lesser of: (i) the pro rata subsidy amount; or (ii) the net proceeds minus the household's investment.

Exception where the subsequent purchaser is low- or moderate-income. Consistent with § 1291.9(a)(7)(ii) of the current regulation, § 1291.15(a)(7)(ii)(B) of the final rule provides an exception to the AHP subsidy repayment requirement if the AHP-assisted unit is sold to a low- or moderate-income household. However, in contrast to the current regulation, the final rule provides methods of evaluating the subsequent purchaser's income in the absence of actual documentation. In such cases, the Bank or its designee shall determine the subsequent purchaser's income using one or more proxies that are reliable indicators of the subsequent purchaser's income, which may be selected by the Bank pursuant to guidance that FHFA will issue on proxies and which must be included in the Bank's AHP Implementation Plan. The requirement will become effective upon issuance of the guidance.

Neither the Bank nor its designee is required to request or obtain the subsequent purchaser's income, but must evaluate any income documentation if made available. As noted in the proposed rule, the subsequent purchaser of an AHP-assisted unit is under no

obligation to provide income documentation to the Bank or member. This has made it difficult for the Banks and their members to determine subsequent purchasers' incomes in order to determine whether the subsidy repayment exception applies. The current regulation is silent on the use of proxies in evaluating a subsequent purchaser's income. At least one Bank, however, has applied a proxy, under limited circumstances, to evaluate subsequent purchasers' incomes, in light of these operational constraints.

FHFA requested comments on what approaches should be specified in the retention agreement, if retained in the final rule, that would provide a reasonable basis to assume that the subsequent purchaser of an AHP-assisted unit is likely to be low- or moderate-income, including proxies that could serve this purpose such as the following: certification from the subsequent purchaser or a third party that the subsequent purchaser's income is at or below the low- or moderate-income limit; evidence that the subsequent purchaser is receiving direct homebuyer assistance from another government program with household income targeting requirements substantially equivalent to those of the AHP; purchase price of the AHP-assisted unit is less than the median home price in the area; the AHP-assisted unit is located in a census tract or block group where at least 51 percent of the households are low- or moderate-income; or Federal Housing Administration (FHA) or other underwriting standards indicate that the income required to purchase the AHP-assisted unit at the purchase price is low- or moderate-income.

Commenters generally offered mixed opinions on the use of proxies, providing a variety of responses addressing which proxies would serve as acceptable methods for likely determining the income of the subsequent purchaser. A Bank supported the use of two proxies: third-party certifications; and evidence that the subsequent purchaser was

receiving direct homebuyer assistance from another government program. The Bank noted that using median home price and census tract income data may not be reasonable approaches as these data points would not adequately recognize or track areas affected by gentrification. The Bank asserted that gentrification occurs gradually and that median sales price and census tract data would not reflect investor purchases and sales to new or higher-income populations.

Another Bank supported the use of third-party certifications, evidence that the subsequent purchaser was receiving direct homebuyer assistance from another government program, and FHA or other underwriting standards. A nonprofit organization supported use of the latter two proxies.

The nonprofit organization objected to the use of geographically-based proxies, such as the purchase price of the AHP-assisted unit relative to area median home price, or location of the unit in a census tract or block group where at least 51 percent of the households are low- or moderate-income, because higher income homebuyers could purchase homes in low-income neighborhoods or census tracts. Another nonprofit organization stated that certain portions of distressed neighborhoods may be more upscale than nearby sections due to the presence of certain amenities, such as water features and golf courses. The commenter also opposed the use of third-party certifications, stating that it had witnessed significant unintended consequences of certification requirements in the context of FHA insurance and the foreclosure process.

A nonprofit organization encouraged the use of person-based proxies, such as evidence that the homebuyer received down payment assistance or participated in first-time homebuyer programs or family self-sufficiency programs, rather than

geographically-based proxies, stating that geographically-based proxies fail to account for gentrification. The commenter stated, however, that self-certification or certain types of third-party certification (by the loan originator, for example) would be adequate.

One Bank expressed concern generally about the exception to the subsidy repayment requirement for sale to a low- or moderate-income purchaser, noting that the subsequent purchaser's income is not correlated to the AHP-assisted household's income. The Bank asserted that the subsidy repayment exception results in different treatment of similarly situated AHP-assisted households based on the subsequent purchaser's income. Another Bank objected to any requirement for a Bank or member to obtain sensitive income information from a subsequent purchaser with which neither institution has a contractual relationship.

FHFA has considered the comments regarding the use of proxies in the AHP and determined that the use of certain proxies will help ensure that Banks and members are not requiring repayment of subsidy by AHP-assisted households in cases where the subsequent purchaser is low- or moderate-income. Therefore, FHFA will require that Banks use one or more proxies that are reasonable indicators that the subsequent purchaser is likely a low- or moderate-income household, pursuant to Agency guidance. FHFA acknowledges commenters' discussions of the limitations of the proxies included in the NPRM. The Agency notes that as approximations, no proxy will be able to definitively determine the income of the subsequent purchaser.

AHP subsidy repayment exception for de minimis subsidy amount. Section 1291.15(a)(7)(ii)(C) of the final rule provides for an exception to the AHP subsidy repayment requirement for AHP-assisted households where the amount of AHP subsidy

subject to repayment pursuant to the calculation in § 1291.15(a)(7)(v) is $2,500 or less. Under that provision, if the pro rata subsidy amount is $2,500 or less, calculation of net proceeds is unnecessary. The current regulation does not provide for an exception to the AHP subsidy repayment requirement for "*de minimis*" amounts of AHP subsidy subject to repayment.

FHFA requested comments in the proposed rule on whether, if the owner-occupied retention agreement requirement were retained in the final rule, there should be an exception to AHP subsidy repayment where the amount of subsidy subject to repayment, after calculating the net proceeds or net gain, is $1,000 or less. A number of commenters specifically supported a $1,000 *de minimis* threshold. For example, a state government housing authority, an individual commenter, and a Bank stated that at a net gain of $1,000, the administrative cost of ensuring repayment generally exceeds the value of any recaptured AHP subsidy. A national nonprofit intermediary recommended a *de minimis* threshold of greater than $2,000, stating that this amount constitutes a reasonable balance between the need for sound Program stewardship and asset building for low- or moderate-income families. An affordable housing policy organization and a national trade organization recommended a *de minimis* threshold of at least $5,000. A nonprofit consumer organization supported FHFA establishing the *de minimis* threshold amount for the Banks, and suggested that it be adjusted using an inflator based on the Agency's house price index so that it remains reasonable as home prices escalate.

The affordable housing policy organization stated that if the original AHP subsidy amount was $5,000 or less, there should be no subsidy repayment requirement, as such a small amount of subsidy would be unlikely to trigger flipping, and the transaction costs

would nullify the value of the AHP subsidy. A community-based affordable housing financing organization and a community bank made a similar recommendation where the original AHP subsidy was $7,500 or less, or $10,000 or less, respectively, on the basis that the administrative expense was likely to exceed the value of the investment, and households should be entitled at a minimum to recover their required investment at the time of sale, net of AHP repayment so as not to impose financial injury.

The Banks supported a "*de minimis*" threshold exception to the AHP subsidy repayment requirement, but recommended that the amount of the threshold be determined by each Bank based on the specific facts and circumstances of its district, rather than set by FHFA in the regulation. One Bank stated that the Banks should be authorized to adjust the *de minimis* threshold over time to account for housing market fluctuations and inflation. Another Bank suggested that the Banks be permitted to establish a *de minimis* amount based on a percentage of the original AHP subsidy amount, rather than a fixed dollar amount, because of the variations in the size of AHP subsidy amounts provided by the different Banks. A nonprofit organization recommended requiring each Bank to establish a *de minimis* threshold based on the Bank's and its members' actual administrative costs for assigning a lien on a property and calculating repayments of subsidy. The commenter stated that applying a *de minimis* threshold would avoid economic waste, but that support of a prescribed amount was impossible without further data.

FHFA has considered the comments and has decided to establish a *de minimis* threshold of $2,500 in the final rule. As discussed in the NPRM and underscored by the comments, establishing a *de minimis* threshold of $2,500 may deter flipping of AHP-

assisted units, while at the same time minimize the financial burden on low- or moderate-income households of having to repay AHP subsidy if they sell their homes during the AHP retention period. The underlying policy of the AHP has always been that the purpose of the AHP subsidy is to enable low- or moderate-income households to receive the benefits of homeownership including appreciation in the value of their homes and, thus, to minimize any AHP subsidy repayments. A $2,500 threshold will also reduce the administrative obligations of the Banks and members associated with recovering AHP subsidies.

In response to the comments to adopt a *de minimis* threshold greater than $1,000, FHFA analyzed Bank data for set-aside grants awarded to households in 2012 and subsequently repaid during the five-year retention period ending in 2017. The data indicate that 1,080 grants of a total 10,203 set-aside grants awarded in 2012 were repaid during that time period. FHFA queried the data to determine how many of those grants would have been subject to *de minimis* thresholds of $2,000 or $2,500. The Agency's analysis revealed that at a $2,000 *de minimis* threshold, 683 of the 1,080 repaid grants, which is approximately 2 out of every 3 repaid grants, or 65 percent, would have been exempted from repayment. At a $2,500 *de minimis* threshold, 783 of the 1,080 repaid grants, which is approximately 3 out of every 4 repaid grants, or approximately 73 percent, would have been exempted from repayment.

Based on this data, FHFA has decided to set the *de minimis* threshold exception for AHP subsidy repayment at $2,500. This will result in fewer households subject to subsidy recapture, thereby enabling households to benefit more from appreciation in the value of their homes, and reduce the Banks' operational expenses associated with the

subsidy repayment process. FHFA set the *de minimis* threshold at a fixed dollar amount, rather than a percentage that varies based upon the grant amount, for ease of implementation by the Banks, members, and households. FHFA considered requiring each Bank to establish a *de minimis* threshold based on the actual administrative costs incurred by the Bank and its members for assigning liens on properties and calculating subsidy repayments, but did not receive any comments or other information quantifying the actual administrative costs that FHFA could evaluate. FHFA also opted not to index the *de minimis* threshold to an inflator based upon the Agency's house price index, in order to provide a definitive *de minimis* threshold for AHP stakeholders. However, FHFA may consider adjusting the *de minimis* threshold in the future to account for house price fluctuations and Bank use of the new authority to establish higher set-aside grant amounts per household.

Other exceptions to subsidy repayment. Consistent with § 1291.9(a)(7)(ii) of the current regulation, § 1291.9(a)(7)(ii) of the final rule provides that the obligation to repay a pro rata portion of the AHP subsidy amount upon sale or refinancing does not apply if the unit was assisted with a permanent mortgage loan funded by an AHP subsidized advance. Also consistent with the current regulation, the final rule provides an exception to repayment obligation if, following a refinancing, the unit continues to be subject to a deed restriction or other legally enforceable retention agreement or mechanism.

Termination of AHP subsidy repayment obligation. Section 1291.15(a)(7)(iv) of the final rule clarifies that the obligation to repay AHP subsidy to a Bank terminates not only after any event of foreclosure, but also after transfer by deed in lieu of foreclosure, assignment of an FHA mortgage to HUD, or death of the owner(s) of the unit. This is

consistent with guidance FHFA has provided to the Banks clarifying that transfer by deed in lieu of foreclosure is the functional equivalent of foreclosure, facilitating coordination of the AHP with FHA requirements, and clarifying that the heirs of the AHP-assisted homeowner are not subject to any AHP subsidy repayment obligation upon the death of such homeowner.

The proposed rule requested comments on whether this clarification should be made in the final rule if FHFA retained the current requirement for owner-occupied retention agreements in the final rule. The Banks and a trade organization favored including the clarifying language in the final rule. One Bank stated that the clarification would be useful for members and project sponsors using the AHP Bank in that it would help the Banks resolve ongoing issues with homebuyers using FHA loans as the underwriters flag the loans if this language is missing from the AHP retention agreements. The Bank also indicated that elderly owners are sometimes reluctant to sign the AHP retention agreement for fear that the potential AHP subsidy repayment obligation will fall on their beneficiaries upon their death(s).

Retention agreements for rental projects. The final rule retains § 1291.9(a)(8) of the current regulation, which contains the requirement for AHP 15-year retention agreements for rental projects, with several changes that are discussed below. Current § 1291.9(a)(8) provides that if a rental project is sold or refinanced during the 15-year retention period, the full amount of the AHP subsidy must be repaid to the Bank, unless certain exceptions apply.

Notice to the Bank or Bank designee. In a change from the current regulation and proposed rule, the final rule provides that the retention agreement for rental projects shall

include a requirement that notice of a sale or refinancing of the rental project during the AHP 15-year retention period be provided to the Bank and, in its discretion, to a designee of the Bank. This is consistent with the change made for owner-occupied retention agreements discussed above. The current regulation requires that such notice be provided to the Bank or its designee. The proposed rule would have provided that the notice be provided to both the Bank and its designee. The NPRM stated that requiring notice to both the Bank and its designee (typically a member) would facilitate Program operations by giving the Bank simultaneous notice with the Bank's designee (if the Bank has one), and could facilitate repayment of AHP subsidy to the Bank in cases where a member subsequently fails and is subject to receivership actions by other federal agencies.

A Bank and a nonprofit intermediary supported the proposal. The Bank stated that owners of multifamily properties often do not have other incentives to provide the Bank or its member with notice, and without notice to the Bank, the Bank might find it difficult to know the identity of the acquiring owner in the case of a sale, or whether the subsidy should remain with the property or the Bank should request repayment. A nonprofit lender recommended providing the Banks discretion regarding whether to require that project owners provide the notice to the Banks or designees. Two Banks opposed any change in the notice requirement because they address issues directly with the project sponsor. One Bank also stated that providing notice to the member may be viewed as imposing additional obligations on the member, which could discourage members' use of the AHP.

For the same reasons discussed above under the owner-occupied retention agreements, the final rule requires that notice be provided to the Bank and, in its discretion, to a designee of the Bank.

Sale, transfer, or assignment. Consistent with proposed § 1291.15(a)(7), § 1291.15(a)(8) of the final rule clarifies that the retention agreement applies not only to a sale of the rental project, but also to a transfer or assignment of title or deed, during the AHP 15-year retention period, as these forms of conveyance are the functional equivalent of sales. FHFA received no comments on this provision.

Project sponsor qualifications. The final rule relocates current § 1291.5(c)(10) on project sponsor qualifications to § 1291.15(b)(2), and makes a number of changes from the proposed rule. Specifically, the final rule requires the Banks to evaluate the qualifications of, and any covered misconduct by, the project sponsor at AHP application, and prior to each AHP subsidy disbursement. The Bank's AHP subsidy application form and AHP subsidy disbursement form (or other related documents) must include a requirement for the project sponsor to certify to this effect. The Banks will not be required to evaluate the qualifications and any misconduct of the project sponsor's affiliates and team members, including general contractors, as proposed. The final rule does not include the proposed rule's references to the project sponsor's affiliates and team members, including general contractors, in the sponsor qualifications and Agreements sections, as proposed, because the definition of "sponsor" is not being expanded to include such parties.

Section 1291.1 of the current regulation defines the "sponsor" of a project as a nonprofit, for-profit, or public entity meeting one of four specific criteria. Section

1291.5(c)(10) provides that for a project to be eligible to receive AHP subsidy, the project sponsor must be qualified and able to perform its responsibilities as committed to in its AHP application. Paragraphs (b)(4) and (g)(3) of § 1291.5 require a Bank to verify that the project meets its AHP application commitments at AHP application, and prior to each disbursement of AHP subsidy to the project, respectively.

The proposed rule would retain the definition of "sponsor" in current § 1291.1, but would have revised § 1291.5(c)(10) by extending the qualifications requirement to the project sponsor's affiliates and team members, including the general contractor. Thus, at AHP application, and prior to each AHP subsidy disbursement to a project, a Bank would have been required to determine whether the project sponsor, as well as all of its affiliates and team members, are qualified to perform the AHP project application commitments. The proposed rule would have added a requirement in the Agreements section of the regulation that, at AHP application, and prior to each disbursement of AHP subsidy to the project, the project sponsor must certify, or respond to specific questions about, whether it and its affiliates and team members have engaged in any misconduct as defined in FHFA's Suspended Counterparty Program regulation or by the Bank. The Bank's AHP subsidy application form and subsidy disbursement forms, or other related forms, would have been be required to include the qualifications criteria and certification or questions about any misconduct to be completed by the project sponsor.

Commenters who responded to this issue overwhelmingly opposed the proposal. A nonprofit intermediary commented that evaluating the qualifications of the general contractor and its team members at AHP application would be problematic because the project sponsor has yet to identify them at the AHP application stage. The nonprofit

intermediary and a wide diversity of other commenters noted that project sponsors often select the general contractors after all funding sources are committed to the project and the project is ready to move forward to loan closings and construction. The nonprofit intermediary also stated that other financing sources frequently require that project sponsors conduct rigorous bidding processes in selecting general contractors, making a parallel evaluation by the Banks of the general contractors' qualifications unnecessary and overly burdensome.

The Bank Advisory Councils urged FHFA to maintain the current regulatory requirement for project sponsor qualifications and require that project sponsors certify compliance with the FHFA's Suspended Counterparty Program regulation only prior to AHP subsidy disbursement. The Bank Advisory Councils stated their preference for the Banks to be able to rely on the due diligence and capacity review by other funders of project sponsors and their affiliates and team members. The Bank Advisory Councils noted that the Banks currently have processes in place to monitor project progress and the project sponsor's performance.

The Banks asserted that requiring that the Banks' assessment of project sponsor capacity include compliance with FHFA's Suspended Counterparty Program regulation by all parties is unnecessary. They stated that the Banks lack privity of contract with general contractors and other parties and, therefore, cannot compel them to disclose such information. The Banks emphasized this point in particular with respect to owner-occupied rehabilitation grants that involve multiple contractors. They also commented that other funding sources perform due diligence reviews of the general contractor.

A Bank pointed out that while the term "sponsor" is defined in the current

regulation and proposed rule as a nonprofit, for-profit, or public entity meeting one of four specified criteria, the proposal states in § 1291.15(b)(2) that "a project sponsor includes all affiliates and team members such as the general contractor." The Bank stated that if the term "sponsor" is intended to include affiliates and team members, the Bank would need to consider whether its AHP subsidy collection efforts and settlements in the event of project noncompliance could extend beyond the assets of the project sponsor to include those of the project sponsor's affiliates and team members. A nonprofit intermediary noted that the proposed rule did not provide guidance on the definitions of "affiliate" and "team member."

A nonprofit developer commented that the proposal would "cut out" team members that have yet to establish a track record in the industry from AHP participation. Likewise, a housing authority stated that the proposal has the potential to unreasonably exclude, or discriminate against, AHP applicants with new or less tested team members, but who possess sufficient overall strength as a team to be successful.

FHFA's intent for the proposal was to ensure that, in addition to the project sponsor, the project sponsor's affiliates and team members have the necessary qualifications to perform the AHP application commitments. The proposal was also intended to enable a Bank to identify any misconduct by the project sponsor and any affiliates or team members so that the Bank could determine whether it should accept the project sponsor's AHP application or approve requests from the project sponsor for AHP subsidy disbursement. Banks would have the latitude to define "misconduct" to include types of misconduct beyond those specifically addressed by FHFA in the Suspended Counterparty Program regulation. Therefore, if a Bank subsequently determined that a

project sponsor's certification was false and that the project sponsor or its affiliates and team members were not qualified to perform the AHP application commitments, the Bank would have a contractual basis to cancel the project sponsor's AHP application and deny its requests for disbursement of AHP subsidy. The Bank would also have a basis to reject future AHP applications from the project sponsor, or to reject AHP applications that include the project sponsor's affiliates or team members, on the basis that the project sponsor is not qualified to carry out its AHP responsibilities.

As noted by the commenters, however, project sponsors generally have not selected their general contractors at the time of AHP application. Thus, it would be impossible for project sponsors to evaluate and certify as to the qualifications and any misconduct of their general contractors and the general contractors' subcontractors at the time of AHP application. Concerning the comments on the Banks' lack of privity with the general contractors and that an evaluation by the Banks of the general contractors' qualifications parallel to that of other funders is unnecessary, FHFA notes that it did not propose that the Banks evaluate or underwrite directly the general contractors' qualifications, but rather that the Banks obtain certifications from the project sponsors on their general contractors' qualifications. The Agency's decision not to adopt the proposed requirement for evaluation of the general contractor's qualifications should alleviate commenters' concerns that projects with less experienced team members would be excluded where the project team as a whole possesses the capacity to successfully develop the project.

Accordingly, the final rule requires the Banks to obtain a certification from the project sponsor of only its own qualifications and lack of misconduct at the time of AHP

application and at AHP subsidy disbursement.

The final rule makes two clarifications to the proposed rule language. First, it changes the reference to "misconduct" to "covered misconduct" to reflect the terminology in the Suspended Counterparty Program regulation. Second, it states that if a Bank adopts its own definition of "covered misconduct," that definition must incorporate the definition of "covered misconduct" in the Suspended Counterparty Program regulation at a minimum.

Application to existing AHP agreements. The final rule relocates § 1291.9(c) of the current regulation to § 1291.15(c), and revises the provision to make it applicable only to existing AHP agreements where the Bank is a party. The provisions of the AHP regulation, as amended from time to time, are deemed incorporated into all such agreements. This amendment recognizes that FHFA regulates the Banks and not third parties. FHFA will provide guidance, as necessary, for specific situations where a Bank is not a party to existing AHP agreements and questions arise as to applicability of AHP amendments to those agreements.

§ 1291.16 Conflicts of interest

Consistent with the proposed rule, the final rule relocates current § 1291.10, which addresses conflicts of interest regarding financial interests of Bank directors, Bank employees, Bank Advisory Council members, and their family members, unchanged to § 1291.16. FHFA did not propose any changes to this section.

A Bank commented that the terms "financial interest" and "family member" were overly broad and should be defined in accordance with comparable terms in FHFA's

regulation governing conflict of interest policies for Bank directors.[17] The Bank identified several ordinary course financial transactions that it said should not be considered "financial interests" for AHP conflict of interest purposes because they would not be expected to motivate Bank directors, Bank employees, or Bank Advisory Council members to influence decisions by the Bank regarding the evaluation, approval, funding, monitoring, or any remedial process for an AHP project. Examples cited included the purchase of an insurance product, an investment in a 401(k) account, and a retirement pension plan. FHFA notes that the scope of the AHP conflict of interest policy provision in § 1291.16 is limited to financial interests "in projects" that are the subject of a pending or approved AHP application and, thus, does not apply to the types of routine transactions cited by the Bank.

Subpart C–General Fund and Targeted Funds

§ 1291.20 Establishment of programs

General Fund. Consistent with the proposed rule, § 1291.20(a)(1) of the final rule replaces current § 1291.5(a) by requiring each Bank to establish a General Fund pursuant to the requirements of this part. "General Fund" is the new term for the current "Competitive Application Program."

Eligibility requirements. Consistent with the current regulation, § 1291.20(a)(2) of the final rule provides that a Bank may not adopt eligibility requirements for its General Fund except as specifically authorized in the regulation.

FHFA did not receive comments on these provisions.

Targeted Funds. As proposed, § 1291.20(b)(1) of the final rule provides that a

[17] 12 CFR 1261.11(f)(1), (2).

Bank may establish, in its discretion, a maximum of three Targeted Funds, on a phased-in basis, to address specified affordable housing needs in its district. Targeted Funds are further discussed above under Section III.B. and § 1291.12(c)(1) (phase-in of funding allocations).

Proposed § 1291.20(b) would have prohibited a Bank from establishing a Targeted Fund unless at least 12 months had passed since the publication of the Bank's TCLP. The final rule addresses the timing of the establishment of Targeted Funds in § 1291.13(d) and (e), and in § 1290.6(c) of the Community Support Requirements regulation. Comments received on the proposed timing requirements are addressed under § 1290.6 above.

The final rule establishes the phase-in requirements for a Bank's establishment of Targeted Funds. A Bank may establish one Targeted Fund in the first year that it establishes a Targeted Fund. If a Bank has previously administered at least one Targeted Fund in any preceding year, a Bank may establish two Targeted Funds. If a Bank has previously administered two Targeted Funds in any preceding year, it may establish three Targeted Funds. The phase-in requirements help ensure that a Bank has demonstrated its ability to manage the risks associated with administering more than one competitive program in a year.

Eligibility requirements. As discussed above under Section III.B., § 1291.20(b)(2) of the final rule adopts the proposed requirement that the Banks adopt and implement parameters (referred to as "controls" in the proposed rule), as specified in their AHP Implementation Plans, for ensuring that each Targeted Fund is designed to receive sufficient numbers of applicants for the amount of AHP funds allocated to the Targeted

Fund to facilitate a robust (referred to as "genuinely" in the proposed rule) competitive scoring process. In addition, as with General Funds, the final rule provides that the Banks may not adopt eligibility requirements for their Targeted Funds except as specifically authorized in the regulation.

The Banks questioned whether this proposed requirement was designed to measure sufficiency in terms of a Bank's approach in soliciting applications, or based on the number of applications actually received. Two of those Banks suggested that the measurement be based on the structure of the Targeted Fund and not on the actual number of applications received. FHFA notes that the language stating that the Targeted Fund is "*designed* to receive sufficient number of applicants" indicates that the requirement pertains to the scope and scoring methodology of the Targeted Fund, and is not a guarantee of the actual number of applications received. Therefore, no change to this language is made in the final rule.

§ 1291.21 Eligible applicants

Member applicants. As proposed, the final rule relocates the eligibility requirement for member applicants in § 1291.5(b)(2) of the current regulation to § 1291.21(a), without changes except that the reference to the "competitive application program" is replaced with references to the General Fund and any Targeted Funds established by the Bank. FHFA did not receive any comments on this provision.

Project sponsor qualifications. As proposed, the final rule relocates the eligibility requirements in § 1291.5(c)(10) of the current regulation for project sponsors applying for AHP funds in conjunction with members to § 1291.21(b). The final rule retains the current requirement that a project sponsor must be qualified and able to perform its

responsibilities. As further discussed under § 1291.15(b)(2) above, the final rule does not include the proposal to extend the qualifications requirement to include the project sponsor's affiliates and team members, including general contractors.

§ 1291.22 Funding rounds; application process

As proposed, the final rule relocates the funding round and application process requirements in § 1291.5(b)(1), (b)(3), and (b)(4) of the current regulation to § 1291.22. The final rule substitutes the term "rounds" for "periods" to reflect common usage among the Banks and AHP stakeholders. FHFA did not receive any comments on this section.

§ 1291.23 Eligible projects

Eligibility requirements. Consistent with the proposed rule, new § 1291.23 of the final rule sets forth the eligibility requirements for AHP projects, and comprises a number of provisions related to what constitutes an eligible project in § 1291.5(c) of the current regulation. This section includes the eligibility requirements for owner-occupied and rental housing projects, projects that are or are not occupied, project feasibility, timing of AHP subsidy use, retention agreements for owner-occupied and rental projects, and compliance with fair housing laws. In a change from the proposed rule, the current eligibility requirement for a five-year retention agreement for owner-occupied projects in § 1291.5(c)(9)(i) where the AHP subsidy is used for purchase, or purchase in conjunction with rehabilitation, is retained in § 1291.23(d)(1) of the final rule, as discussed in Section III.D. above.

Tenant income qualification in rental projects. Section 1291.23(a)(2)(ii) of the final rule provides that, in order for an occupied rental project to satisfy the income targeting commitments in the AHP application at initial occupancy after completion of

the purchase or rehabilitation, the project must have a relocation plan for current occupants that is approved by one of the project's federal, state, or local government funders, or a reasonable relocation plan that is otherwise approved by the Bank according to standards included in its AHP Implementation Plan. The proposed rule would have required a relocation plan approved by one of the project's primary funders.

Under the current regulation, for rental projects that are not occupied at the time of application and are approved for AHP subsidy, the households must have incomes meeting the income targeting commitments in the approved AHP application upon initial occupancy of the rental units. For projects involving the purchase or rehabilitation of rental housing that are occupied at the time of AHP application, the households must have incomes meeting the income targeting commitments in the approved AHP application at the time of the AHP application. The purpose of qualifying current occupants' incomes at the time of AHP application is to discourage displacement of occupants whose incomes are higher than the income commitments in the approved AHP application.

FHFA specifically requested comments on how to encourage preservation of rental projects through the AHP while discouraging displacement of current occupants with incomes higher than those targeted in the AHP application, including whether the proposed requirement for a relocation plan approved by the primary funder of the project is reasonable. A state agency and a bank supported the proposed requirement for submission of a relocation plan, stating that it would provide adequate protection of tenants from displacement. A trade organization recommended that the Banks have discretion to either establish such a policy or to defer to policies established for other

subsidy programs assisting the project.

Several other commenters and a Bank noted that there may be cases where review by the Bank may be necessary to determine whether a relocation plan provides adequate tenant protections and assistance. A nonprofit intermediary recommended that the Banks have discretion to evaluate the appropriateness of tenant protections in the context of the local market. Another Bank, a CDFI, and a nonprofit developer stated that for multifamily preservation projects that have no relocation plans because they lack government funding or their primary funders are commercial banks, the Bank should have authority to approve a relocation plan. The Bank reported that in 15 percent of its rental rehabilitation projects, AHP funds and the projects' replacement reserves were the only sources of funds and, thus, the projects were not subject to relocation plans approved under a government program.

The majority of commenters that addressed this issue, including nonprofit intermediaries, trade associations, a lender, and nonprofit developers, recommended that FHFA require the Banks to apply either a "next tenant" policy or a "grandfather" policy to existing tenants who exceed the AHP income commitments in order to avoid displacement of those tenants from the project. Under a "next tenant" policy, the project's current tenant income mix would not be evaluated at the time of AHP application, but the project owner would be required to rent the unit, when it becomes vacant, of a tenant not meeting the AHP income commitments to a tenant who meets those commitments. In contrast, a "grandfather" policy would deem tenants in previously or currently-income restricted units who were income-eligible at the time they moved in but whose incomes subsequently exceed the income-eligibility thresholds, as income-

eligible under the AHP. Two commenters stated that a "grandfather" policy would be consistent with HUD requirements, which prohibit the permanent relocation of existing residents in many preservation transactions, as well as with proposed legislative changes to LIHTC policy and the California Tax Credit Allocation Committee's regulations. One commenter stated that without use of a "grandfather" policy, preservation projects financed through HUD Sections 202 and 236, and the Rental Assistance Demonstration program, would be disadvantaged in the AHP application process. Another commenter recommended that the relocation requirement for currently assisted properties be consistent with other federal program requirements.

After considering the comments, FHFA is adopting in the final rule the proposal to allow income qualification of current occupants at initial occupancy after completion of the purchase or rehabilitation, at the Bank's discretion provided there is a relocation plan for current occupants that is approved by one of the project's federal, state, or local government funders, or a reasonable relocation plan for current occupants that is otherwise approved by the Bank. By requiring that the relocation plan be government-approved, or otherwise approved by the Bank subject to a reasonableness standard, as opposed to any relocation plan approved by one of the project's primary funders, the final rule helps ensure that the relocation plan meets standards for adequate relocation protections and assistance to tenants. Allowing a Bank to approve a reasonable relocation plan also responds to the commenters' concerns about projects where there is no government-approved relocation plan, or where the Bank has determined that some types of relocation plans typically approved in its district may not provide adequate tenant relocation protections.

FHFA acknowledges the value in the commenters' recommendations that the Banks be allowed to "grandfather" existing tenants based on their incomes when they moved into the project. However, FHFA has not included this recommendation in the final rule because the income targeting requirements for other federal and state programs could differ substantially from the AHP income targeting requirements (e.g., targeting units at 60 percent, 65 percent, or 80 percent AMI, as opposed to the AHP income targeting requirement of 50 percent AMI for at least 20 percent of the units in the rental project).

FHFA is also not adopting commenters' recommendations for a "next-tenant" policy in the final rule. While the approach would avoid displacement of current tenants not meeting the AHP income targeting commitments, it could be a number of years before these tenants move out of the building and AHP income-eligible tenants replace them, meaning the project would not be serving AHP-income eligible households for some period of time. In addition, the practice could increase the income-targeting monitoring burden on the Banks and project sponsors.

§ 1291.24 Eligible uses

Eligible uses of AHP subsidy. Consistent with the proposed rule, § 1291.24(a) of the final rule groups together a number of provisions in § 1291.5(c) of the current regulation related to eligible uses of AHP subsidy. These include: use of the AHP subsidy for purchase, construction, or rehabilitation of owner-occupied or rental housing; determinations of the need for the AHP subsidy, including sponsor-provided permanent financing; reasonable project costs determinations; reasonable financing costs determinations; eligible counseling costs; eligible refinancing; optional Bank district

eligibility requirements; and calculation of the AHP subsidy. The provisions and any changes are discussed below.

Need for AHP subsidy. The final rule relocates the need for AHP subsidy eligibility requirement in § 1291.5(c)(2) of the current regulation to § 1291.24(a)(3), but does not adopt the proposed changes. FHFA plans instead to separately address the need for subsidy determination.

The current regulation requires that rental projects establish their eligibility for AHP subsidy by demonstrating: (1) a need for the AHP subsidy; (2) developmental and operational feasibility; and (3) project cost reasonableness. The regulation states that the estimated sources of funds for a project must equal its estimated uses of funds, as reflected in the project's development budget. Where the project's uses of funds exceed its sources of funds (excluding the AHP subsidy), the difference is the project's need for AHP subsidy, which is the maximum amount the project may receive.

As discussed in the NPRM, Banks and various stakeholders have asserted that the current regulatory language, as well as preamble language from an earlier AHP rulemaking, indicate that, for rental projects, the Banks are only required to review the project's development budget and not its operating *pro forma* in determining its need for AHP subsidy. The NPRM noted that FHFA's long-standing policy has been that the Banks review both the project development budget and the operating *pro forma* in making this determination.

In an effort to address any misunderstandings or differences in views about the process and requirements for determining a rental project's need for AHP subsidy, the proposed rule would have required the Banks to review the project's operating *pro forma*,

in addition to the development budget, consistent with FHFA's long-standing policy. As discussed in the NPRM, a Bank must review a rental project's development budget to determine whether a funding gap exists between the sources and uses of funds. Review of the project's operating *pro forma* enables the Bank to assess the reasonableness of the project's projected cash flow, which could have an impact on the Bank's assessment of the need for AHP subsidy. For example, a debt coverage ratio or cash flow amount that exceeds the Bank's feasibility standards could indicate that the project does not need the full amount of AHP subsidy requested because it will have sufficient funds from ongoing operations to repay the debt associated with developing the rental project. If so, the project may be able to supplant part, or all, of the AHP subsidy through other means.

The NPRM included proposed guidance for evaluating that a project's cash flow and costs are reasonable, and how the Banks should perform the need for subsidy analysis in cases where: (1) capitalized reserves exceed the Bank's project cost guidelines; (2) the project provides supportive services; and (3) the cash flow or debt coverage ratio exceeds the Bank's project cost guidelines.

Numerous commenters, including the Banks, nonprofit advocacy organizations and intermediaries, trade associations, and nonprofit and for-profit developers, expressed views about the proposed regulatory change and guidance for determining the need for subsidy. A majority of the commenters opposed requiring the Banks to review a project's operating *pro forma* in addition to its development budget. A common concern raised was that the proposal could lead to cancellation of AHP subsidy awards due to a lack of need for the subsidy, negatively impacting individual projects and the overall Program. The commenters acknowledged the value of the operating *pro forma* in

assessing the financial viability of a rental project, but not in determining the project's need for subsidy. The commenters emphasized that having a strong cash flow at some point during a project's lifecycle does not indicate that the project can borrow more funds or attract additional grant funding. One nonprofit affordable housing intermediary stressed that because AHP funds play a subordinate role in the production and financing of affordable housing, FHFA should not require the Banks to assess independently the reasonableness of a rental project's cash flow. The commenter stated that the Banks should be permitted to rely on cash flow and debt service parameters established by first position lenders and equity sources. The commenter and a nonprofit housing developer recommended that FHFA issue guidance encouraging the Banks to leverage the underwriting processes of other funding sources when making a need for subsidy determinations at application or at initial monitoring. One of the commenters also suggested that FHFA allow the Banks to rely on certifications by the project owner that the AHP funds were needed, or to structure AHP awards as loans or repayable grants that the project could repay from cash flow if funds remained.

For rental projects providing supportive services, the proposed guidance in the NPRM recognized the challenges associated with the analysis of these projects since, under the Bank Act and the AHP regulation, AHP subsidy may not be used to fund supportive services expenses. The NPRM stated that the Banks should require a separate supportive services budget that captures income and expenses for all supportive services activities to ensure that the project can reasonably offer them. The NPRM indicated that for projects where a government entity provides operating subsidies that fund both housing operating costs and supportive services and the operating subsidies cannot be

readily bifurcated, the operating *pro forma* should capture the supportive services income and expenses. The Banks and many other commenters stated that requiring creation of an operating *pro forma* for housing and a separate one for supportive services could result in an inaccurate accounting of costs. They recommended that supportive services expenses be treated as standard operating expenses and, therefore, included in the operating *pro forma*.

The comments received in response to the proposed regulatory change and guidance reflect significant differences between the commenters' understanding of, and experience implementing, the requirement for determining need for subsidy and the Agency's rationale for addressing and clarifying the requirement. In light of these differences, the final rule does not adopt the proposed regulatory requirement for the Banks to review the operating *pro forma* in determining the need for AHP subsidy, and the proposed guidance is not included in the final rule preamble. Instead, FHFA plans to separately address the need for subsidy determination.

Sponsor-provided permanent financing to homeowners. As proposed, the final rule relocates the requirements in § 1291.5(c)(2)(ii) of the current regulation for sponsor-provided permanent financing to § 1291.24(a)(3)(ii) with no changes from the current regulation. FHFA expects to initiate a rulemaking on this subject in the near future.

The current regulation provides that when a Bank determines the need for AHP subsidy in homeownership projects where the sponsor extends permanent financing to the homebuyer, the sponsor's cash contribution (which is included in the project's cash sources of funds) shall include the present value of any payments the sponsor is to receive from the buyer, including any cash down payment from the buyer, plus the

present value of any purchase note the sponsor holds on the unit. If the note carries a market interest rate commensurate with the credit quality of the buyer, the present value of the note equals the face value of the note. If the note carries an interest rate below the market rate, the present value of the note shall be determined using the market rate to discount the cash flows.

Prior to the issuance of the proposed rule, some Banks and AHP stakeholders requested that FHFA eliminate this provision, citing the complexity of the calculation. Others suggested that the regulation should treat sponsors like revolving loan funds, on the basis that their financing model operates essentially as a revolving loan fund. FHFA specifically requested comments in the proposed rule on whether the current AHP requirements for sponsor-provided permanent financing are reasonable, including whether the sponsors have a need for AHP subsidy in light of their particular financing model, and whether the current method in the regulation for determining their need for AHP subsidy understates or overstates the amount of AHP subsidy needed. FHFA also requested comments on whether the regulation should consider sponsors using this financing model to be revolving loan funds and, if so, whether they should be subject to current or different AHP revolving loan fund requirements.

A national intermediary and a number of its affiliates opposed the current AHP regulatory requirements for sponsor-provided permanent financing. They stated that the AHP regulation does not require any other lender to disclose how it obtains funds to lend to a homebuyer and that this is an unfair burden placed solely on sponsor-provided permanent mortgage lenders. Commenters stated that, from a practical and examination standpoint, the AHP subsidy must be disclosed on the Closing Disclosure, which shows

the face value of the mortgage loan and demonstrates the pass through of the AHP grant to the homebuyer. The national intermediary further stated that the regulatory requirement was intended to show that due to lending money at a below market interest rate, the AHP subsidy is needed as a source for the discounted loan (present value of the loan). The commenter asserted, however, that since the "present value loan amount" is not on the Closing Disclosure, this creates an additional document for these organizations to create that is burdensome and provides no additional value to the Banks in evaluating the need for AHP subsidy.

In view of the comments and the value of receiving further input on these issues, FHFA has not adopted any changes to these requirements in the final rule and intends to conduct rulemaking in the near future on sponsor-provided permanent financing.

Prohibited uses of AHP subsidy. As in the proposed rule, § 1291.24(b) of the final rule includes the prohibited uses of AHP subsidy set forth in § 1291.5(c)(16) of the current regulation. These prohibited uses are: certain prepayment fees imposed by a Bank; fees imposed by a Bank for cancellation of a subsidized advance commitment; and processing fees charged by members for providing AHP direct subsidies to a project.

As proposed, § 1291.24(b)(4) of the final rule adds that, consistent with current practice, capitalized reserves, periodic deposits to reserve accounts, operating expenses, and supportive services expenses are not eligible uses of AHP subsidy. The Banks concurred that supportive services expenses are not an eligible use of AHP subsidy. No comments were received on the other prohibited uses of AHP subsidy.

Optional Bank district eligibility requirements–maximum subsidy limits. As proposed, § 1291.24(c) of the final rule retains § 1291.5(c)(15) of the current regulation,

which authorizes a Bank to establish limits on the maximum amount of AHP subsidy available per member, per project, or per project unit in a single AHP funding round, and adds that a Bank may establish a maximum subsidy limit per project sponsor. This change and other changes are discussed below.

Maximum subsidy limit per member each year. As proposed, the final rule removes the reference in the current regulation to "per member each year" as unnecessary because it can be factored into the subsidy limit per member in a single AHP funding round, especially as no Bank currently conducts more than one AHP funding round per year.

Maximum subsidy limit per project sponsor. As proposed, the final rule revises the current regulation to allow a Bank to adopt a maximum subsidy limit per project sponsor in a single AHP funding round. A Bank might choose to establish such a limit in order to provide opportunities for smaller or less experienced project sponsors to compete successfully for AHP subsidies. On the other hand, a project sponsor limit could prevent worthy projects developed by larger, more experienced project sponsors from receiving AHP subsidy. FHFA specifically requested comments in the NPRM on the potential advantages and disadvantages of allowing the Banks to impose a maximum subsidy limit per project sponsor.

One Bank supported the proposal on the basis that it would reduce the concentration of AHP awards in a small number of project sponsors. Several other commenters provided mixed or qualified views on the proposal. A Bank stated that a project sponsor subsidy limit could provide an opportunity for other types of project sponsors to participate, but it could also restrict project sponsors with otherwise

competitive applications from receiving AHP awards. A trade association stated that a project sponsor subsidy limit could limit Bank exposure to risk associated with a single project sponsor and encourage diversification of project sponsors, but because project sponsors differ substantially in size, scale, geographic scope, capacity, and internal controls, individual AHP applications should be evaluated based on their merits without an arbitrary project sponsor subsidy limit. The commenter recommended that the Banks establish any project sponsor subsidy limit as a percentage of total AHP awards, so that it is high enough to allow a project sponsor to receive multiple awards in a single AHP funding round. A nonprofit affordable housing intermediary likewise supported awarding AHP subsidy based on the merits of individual applications, but acknowledged that having a project sponsor subsidy limit would make the AHP subsidy available to more project sponsors.

Other commenters opposed providing the Banks discretion to adopt project sponsor subsidy limits. A nonprofit affordable housing intermediary commented that the Banks can have a much greater impact if they award AHP subsidy based on the merits of individual applications rather than setting an arbitrary maximum subsidy limit per project sponsor. Two nonprofit developers stated that the proposed project sponsor subsidy limit would penalize project sponsors that have multiple projects that score well and are eligible for subsidy awards. A trade organization stated that the proposed project sponsor subsidy limit would allow less qualified projects and project sponsors to benefit at the expense of better qualified projects and project sponsors whose applications exceed the subsidy limit, thereby eroding the transparency of the application approval process.

After consideration of the comments, FHFA has decided to adopt the proposal in

the final rule. Each Bank should have discretion to determine whether the benefits of establishing a project sponsor subsidy limit in its district outweigh its potential disadvantages, based on factors such as the characteristics of their project sponsor applicant pools, the record of accomplishment of experienced and less experienced project sponsors in receiving AHP subsidy awards, and the housing needs of the district.

Number of maximum subsidy limits per Fund. Consistent with Agency guidance for the current Competitive Application Program and with the proposed rule, the final rule provides that a Bank may establish only one maximum AHP subsidy limit per member, per project, or per project unit for the General Fund and for each Targeted Fund, which shall apply to all applicants to the specific Fund. This requirement also applies to the newly authorized maximum subsidy limit per project sponsor. The purpose of this requirement is to ensure consistency, clarity, and a level playing field for all applicants to a specific Fund, and avoid administrative burdens for the Banks if they were permitted to determine different subsidy limits for different regions or types of projects.

As proposed, the final rule further provides that the maximum AHP subsidy limit per project or per project unit may differ for each Fund. FHFA's intent in providing this flexibility is to allow the Banks to establish maximum subsidy limits for each Fund that addresses the specific characteristics of project applicants for that Fund. For instance, a Bank may want to establish a higher maximum subsidy limit per project for a Targeted Fund focused on certain geographies or development types in light of differences in housing development costs, such as high-cost areas or projects where most units contain three or more bedrooms to accommodate larger households. FHFA did not receive any comments on this proposal.

Applications to multiple Funds--subsidy amount. Consistent with the proposed rule, § 1291.24(d) of the final rule provides that if an AHP application for a project is submitted to more than one Fund at the same time, the application for each Fund must be for the same amount of AHP subsidy. This will ensure that the project demonstrates the same need for AHP subsidy in each application. If a project sponsor applies for a different amount of AHP subsidy in each application, the Bank would communicate with the sponsor to determine which subsidy amount the Bank should evaluate for both applications. Otherwise, it would raise questions about whether the project would be over-subsidized if awarded the higher amount of subsidy. FHFA did not receive any comments on this proposal.

§ 1291.25 Scoring methodologies

As discussed in Section III.A. above, the final rule does not adopt the proposed outcome-based framework and instead revises the scoring-based project selection framework in the current regulation for the General Fund. New § 1291.25 addresses scoring methodologies for evaluating applications under the General Fund and Targeted Funds. Section 1291.25 retains much of the content in current § 1291.5(d)(1) through (4), with certain modifications discussed below. The requirements for the scoring criteria for the General Fund and Targeted Funds are included in new §§ 1291.26 and 1291.27, respectively.

Written scoring methodologies. Section 1291.25(a)(1) of the final rule establishes requirements for the Banks' scoring methodologies that are generally comparable to current § 1291.5(d)(1) with changes to reflect the Banks' new authority to administer Targeted Funds. Consistent with the current regulation, a Bank's scoring methodologies

must be written, and a Bank may not adopt additional scoring criteria or scoring points allocations except as specifically authorized by the regulation. Consistent with proposed § 1291.25(a), the final rule provides that the scoring methodology for each Fund may be different.

Scoring points allocations. Section 1291.25(a)(2)(i) of the final rule establishes scoring points allocation requirements for the General Fund. Consistent with current § 1291.5(d)(2) and proposed § 1291.25(b), the final rule requires that a Bank allocate 100 points among the relevant scoring criteria. However, as discussed in Section III.A. above, the final rule revises the current minimum scoring points allocation requirements. Specifically, while the income targeting scoring criterion must still be allocated at least 20 points, and the remaining scoring criteria must still be allocated at least 5 points each, if a Bank adopts a scoring criterion for home purchase by low- or moderate-income households as an optional scoring criterion, the Bank may allocate fewer than the full 5 points to it, with the remainder of such points allocated to one or a combination of the other scoring criteria other than to the Bank district priorities scoring criterion. The scoring points allocation requirements are further discussed in connection with specific scoring criteria under § 1291.26 below.

In addition, as proposed, the final rule provides that if a Bank adopts a scoring criterion under its Bank district priority for housing located in the Bank's district, the Bank may not allocate points to the scoring criterion in a way that excludes all out-of-district projects from its General Fund. This provision strengthens the statement in the preamble to the 2006 AHP final rule that a Bank should not use the scoring criterion in

this way by explicitly prohibiting the allocation of points in such way. FHFA did not receive comments on this provision.

For Targeted Funds, as proposed, § 1291.25(a)(2)(ii) of the final rule requires a Bank to allocate 100 points among all of the scoring criteria adopted by the Bank for the Targeted Fund. The final rule adds a requirement that a Bank may not allocate more than 50 points to any one scoring criterion for a Targeted Fund in order to ensure that applications are evaluated in a competitive process, taking all of the scoring criteria into account.

Scoring tied applications. Section 1291.25(c) of the final rule adopts, as proposed, a requirement that each Bank establish and implement, as necessary, a scoring tie-breaker policy to address the case of two or more applications to its General Fund or any Targeted Fund receiving identical scores in the same AHP funding round and there is insufficient AHP subsidy to approve all of the tied applications but sufficient subsidy to approve at least one of them. The specific requirements in the final rule for the scoring tie-breaker policy are consistent with guidance FHFA has provided to the Banks and with the proposed rule, except that the final rule provides that the approval of tied applications as alternates is only applicable if the Bank has adopted a written policy to approve alternates for funding under the applicable Fund. Approval of alternates is discussed further under § 1291.28(b) below. FHFA did not receive comments on this provision.

§ 1291.26 Scoring criteria for the general fund

Final rule. In a significant change from the proposed rule, and as discussed in Section III.A. above, the final rule does not adopt the proposed outcome-based framework for project selection, and instead revises the scoring-based project selection

framework in the current regulation. The scoring-based framework in the final rule incorporates housing needs priorities from the current regulation and the proposed rule, and provides the Banks with additional discretion in the selection of Bank district housing needs than is provided in the current regulation.

Current regulation. The current regulation prescribes a scoring-based project selection system based on a 100-point scale. Under the current system, each Bank must allocate at least five points to each of two scoring criteria reflecting priorities in the Bank Act -- use of donated or conveyed government-owned or other properties, and sponsorship by a nonprofit organization or government entity. Each Bank must allocate at least 40 points collectively to five scoring criteria reflecting FHFA regulatory priorities -- 20 points to income targeting, and five points each to housing for homeless households, promotion of empowerment, AHP subsidy per unit, and community stability. Of the remaining 50 points, a minimum of 5 points must be allocated to each of two Bank district priority categories: the first Bank district priority, for which a Bank selects one or more housing needs from 12 eligible housing needs specified in the regulation; and the second Bank district priority addressing one or more housing needs in the Bank's district, as defined by the Bank, with the Bank permitted to select an eligible housing need from the first Bank district priority provided it is different from the housing needs selected by the Bank under the second Bank district priority. The current regulation, thus, establishes a 50-50 distribution of points that must be allocated to: (i) the combination of statutory and regulatory priorities; and (ii) the combination of first and second Bank district priorities.

Current Regulatory Scoring Framework

Scoring Priorities	MINIMUM POINT ALLOCATIONS
Priorities: Statutory – Mandatory	
Federal government/donated or conveyed properties	**5**
Sponsorship – Nonprofit or government	**5**
Priorities: Regulatory – Mandatory	
Targeting to lower income households	**20**
Housing for homeless households	**5**
Promotion of empowerment	**5**
Community stability	**5**
Amount of AHP subsidy per unit	**5**
Priorities: Banks – Mandatory	
First Bank District Priorities (eligible housing needs identified in regulation)	**5**
Second Bank District Priorities (housing needs identified by Banks)	**5**

50 point minimum total for mandatory statutory and regulatory priorities.

Proposed rule. As discussed in in Section III.A. above, the proposed rule would have replaced the current scoring-based framework with an outcome-based approach which would have included four regulatory priorities for: (1) very low-income targeting for rental units; (2) underserved communities and populations; (3) creating economic opportunity; and (4) affordable housing preservation, with examples of eligible housing needs specified under the latter three regulatory priorities.

Comments. The Banks jointly submitted an alternative proposal for project selection that retains the current scoring-based system, with certain changes to the regulatory priorities and required minimum scoring allocations, as described below.

Banks' Proposed Scoring Framework

Scoring Priorities	MINIMUM POINT ALLOCATIONS
Priorities: Statutory – Mandatory	
Federal government/donated or conveyed properties	**5**
Sponsorship – Nonprofit or government	**5**
Home Purchase (required under certain circumstances)	**5**
Priorities: Regulatory – Mandatory	
Targeting to lower income households	**15**
Underserved communities and populations	**5**
Creating economic opportunity	**5**
Affordable housing preservation	**5**
Community stability	**5**
Priorities: Banks – Optional	
Bank District Priorities (housing needs identified by Banks)	**0**

50 point minimum total for mandatory statutory and regulatory priorities.

Statutory priorities. The Banks' proposal retains the following statutory priorities as mandatory scoring priorities, consistent with the current regulation and proposed rule: (1) projects sponsored by a government or nonprofit entity; and (2) projects using donated or conveyed government property. The Banks' proposal adds a scoring criterion for the Bank Act priority for the purchase of homes by low- or moderate-income households,[18] which a Bank would be required to implement if it does not allocate at least 10 percent of its total annual required AHP contribution to Homeownership Set-Aside Programs. Each of the statutory priorities is allocated a minimum of 5 points.

Regulatory priorities. The Banks' proposal also includes five regulatory priorities, each of which must be allocated a minimum of 5 points, except that income

[18] 12 U.S.C. 1430(j)(3)(A).

targeting must be allocated at least 15 points, resulting in a combined minimum allocation of 35 points. These priorities generally include the four regulatory priorities in the proposed rule, but with some modifications to the specific eligible housing needs included under those regulatory priorities. The fifth regulatory priority is community stability, which the Banks' proposal retains, with limited revisions, from the current regulation. The Banks' proposal does not retain the current scoring criterion for AHP subsidy per unit. The Banks' proposed minimum allocation of 35 points for the regulatory priorities is a reduction from the 40 points the current regulation requires the Banks to allocate to the regulatory priorities therein. In FHFA's view, this proposed five-point reduction in the number of points allocated to regulatory priorities would not significantly impact whether FHFA has met its statutory requirement to establish priorities for the use of the AHP subsidies.[19] The Banks' proposal further supports this conclusion because it maintains the current 50-50 point allocation between statutory/regulatory priorities and Bank district priorities, as further discussed below.

In addition, the Banks' proposal retains certain standards in the current scoring criteria. The proposal retains the current 60 percent maximum scoring standard for targeting very low-income households as part of the income targeting priority. The Bank's proposal also retains the current minimum threshold of 20 percent for the number of units in a project that must target homeless or special needs households in order to receive points, and includes a minimum 20 percent threshold for projects serving other targeted populations, in contrast to the 50 percent minimum threshold for these populations in the proposed rule. In addition, the Banks' proposal makes slight changes

[19] *See* 12 U.S.C. 1430(j)(9)(B).

to the types of populations included under the special needs and other targeted populations categories, discussed further below. Finally, the Banks' proposal provides for the Banks to define the terms "rural area" and "affordable housing preservation," as currently allowed, and to define "residential economic diversity," rather than use the current regulatory definition. The proposed rule would have required the Banks to use FHFA's Duty to Serve definitions of those terms.

Bank district priorities. The Banks' proposal permits the Banks to allocate the remaining maximum of 50 points to priorities that address affordable housing needs in the Bank's district that the Bank has not otherwise adopted in its scoring framework.

Additional comments received from the Banks and other commenters on specific scoring criteria proposed by FHFA are discussed below.

Decision in final rule. FHFA finds the Banks' proposal to be a reasonable approach for project selection, subject to certain changes in response to various comments received and to achieve specific policy objectives. Accordingly, the final rule adopts a scoring-based framework based on the current regulation that incorporates many features from the Banks' proposal – significantly, the statutory priorities in the current regulation, an additional statutory priority for home purchases by low- or moderate-income households, the proposed regulatory priorities for income targeting, underserved communities and populations, creating economic opportunity, and affordable housing preservation (in conjunction with community stability), and a Bank district priority as in the current regulation. The regulatory priorities incorporate the regulatory priorities in the current regulation but are broader in scope. The statutory and regulatory priorities, and related comments received, are discussed further below.

Final Rule Scoring Framework

Scoring Priorities	MINIMUM POINT ALLOCATIONS
Priorities: Statutory – Mandatory	
Federal government/donated or conveyed properties	**5**
Sponsorship – Nonprofit or government	**5**
Home Purchase (required under certain circumstances)	**5**
Priorities: Regulatory – Mandatory	
Targeting to lower income households	**20**
Underserved communities and populations	**5**
Creating economic opportunity	**5**
Community stability, including affordable housing preservation	**5**
Priorities: Banks – Optional	
Bank District Priorities (housing needs identified by Banks)	**0**

50 point minimum total for mandatory statutory and regulatory priorities.

Statutory priorities for government properties and project sponsorship (§ 1291.26(a), (b)). The scoring framework in the final rule retains the statutory priorities for the use of donated or conveyed government properties and for projects sponsored by a nonprofit organization or government entity. A for-profit developer commented that retention of these scoring criteria would greatly limit participation in the program by affordable housing providers. A CDFI opposed land donation as a scoring criterion, questioning its utility in the current affordable housing environment. A nonprofit developer stated that donated land is available to it on very few occasions. A Bank Advisory Council stated that at the time Congress enacted the Bank Act amendments authorizing the AHP, there were significant government-held, real estate-owned inventories and proposed military base closures, but that government properties are now rarely a factor in the funding of affordable housing projects, illustrating the need for regulatory flexibility. Several CDFIs commented that revolving loan fund programs

typically do not score well under this criterion.

FHFA acknowledges, as it did in the NPRM, that in the Program's experience, a relatively limited number of projects have satisfied the government properties priority, and the Agency expects that to continue. However, because the use of government-owned properties is a priority specified in the Bank Act, FHFA is retaining it as a scoring criterion in the project selection framework in the final rule.

Similarly, sponsorship of a project by a nonprofit organization or government entity is a priority specified in the Bank Act and, therefore, is also retained as a scoring criterion in the project selection framework in the final rule. The Banks award a majority of AHP awards through their Competitive Application Programs to projects with nonprofit or government entity sponsors. Continued support of these types of project sponsors is important because they have a long record of using AHP subsidies to support affordable housing.

Statutory priority for purchase of homes by low- or moderate-income households (§ 1291.26(c)). The project selection framework in the final rule adds a statutory priority for the purchase of homes by low- or moderate-income households that a Bank must adopt if it does not allocate at least 10 percent of its total required annual AHP contribution to Homeownership Set-Aside Programs. This requirement is consistent with the Banks' proposal for project selection.

Proposed § 1291.48(b) would have required that, each year, each Bank award at least 10 percent of its annual required AHP contribution to low- or moderate-income households, or to projects targeting such households, for the purchase by such households of homes under any or some combination of the Bank's General Fund, any Targeted

Funds, and any Homeownership Set-Aside Programs. As discussed in the NPRM, this priority is consistent with the priority in the Bank Act for the purchase of homes by low- or moderate-income families. FHFA specifically requested comments on whether 10 percent of a Bank's total annual required AHP contribution constitutes sufficient prioritization for this home purchase priority, or whether the percentage should be higher or lower. A number of commenters expressed differing views over the proposed 10 percent figure. A Bank stated that it would establish an appropriate prioritization, while the Banks opposed it as overly prescriptive and difficult to meet in high cost areas.

The scoring criterion in the final rule responds to commenters' concerns that the proposed 10 percent allocation to a Bank's Homeownership Set-Aside Programs would be too restrictive. In areas of Bank districts where the cost of homeownership is very high, comparatively fewer low- or moderate- income households would be able to afford to purchase homes, even if funds for down payment and closing costs were available to them from a Homeownership Set-Aside Program. A Bank with such high cost areas in its district, thus, may prefer not to allocate funds to Homeownership Set-Aside Programs and to support instead the development of rental units as the most impactful use of its AHP subsidies. The final rule enables the Banks to address such situations by providing them the option to adopt the scoring criterion for home purchase by low- or moderate-income households in lieu of allocating at least 10 percent of their AHP funds to Homeownership Set-Aside Programs. FHFA expects that such a scoring criterion will have an impact, even in the absence of a set-aside program.

Regulatory priority for income targeting (§ 1291.26(d)). The scoring framework in the final rule retains the current regulatory priority for targeting very low- and low- or

moderate-income households, including the specific scoring methodology for targeting these households. The final rule continues the current required allocation of at least 20 points for this priority, in contrast to the Banks' proposal to reduce the minimum point allocation to 15 points.

Proposed § 1291.48(c) would have established an outcome requirement for a regulatory priority for very low-income targeting for rental units. Each Bank would have been required to ensure that each year, at least 55 percent of all rental units in rental projects receiving AHP awards under the Bank's General Fund and any Targeted Funds are reserved for very low-income households (households with incomes at or below 50 percent AMI). FHFA specifically requested comments on this proposed requirement, including whether the proposed 55 percent threshold, the applicability solely to rental units, and income-targeting at 50 percent AMI were appropriate.

Commenters generally opposed the proposal. The Banks, a Bank Advisory Council, and two trade and policy organizations expressed concern that this requirement would fail to recognize the benefits of mixed-income occupancy projects, which allow developers to cross-subsidize units. A nonprofit intermediary stated that the income targeting standards should align with LIHTC income targeting standards. The Banks' project selection proposal retains the standard for targeting very low- and low- or moderate-income households set forth in the current regulation, which, for rental projects, requires the Banks to award the maximum income targeting score to projects that reserve 60 percent of the units for households with incomes at or below 50 percent AMI.

As discussed under Section III.A. above, the final rule does not adopt the proposed outcome-based scoring framework, including this proposed very low-income

targeting regulatory priority. Instead, consistent with the Banks' project selection proposal, the final rule retains the current scoring criterion for income targeting in order to continue the AHP's important role in addressing the housing needs of very low- as well as low- or moderate-income households. Retaining the existing 20-point minimum allocation for income targeting also emphasizes the AHP's role in this regard. At the same time, the final rule retains the current 60 percent of units standard, which is intended to encourage the awarding of more points to mixed-income housing. The income targeting standards in the regulation cannot be changed to align completely with the LIHTC income targeting standards because the Bank Act's standards are different.

Regulatory priorities for underserved communities and populations, creating economic opportunities, and community stability including affordable housing preservation.

The final rule adopts three regulatory priorities, each of which comprises a number of specified eligible housing needs, some of which are scoring criteria in the current regulation. The specified eligible housing needs are examples of the kinds of housing needs a Bank may choose to adopt under each regulatory priority and are not exclusionary. A Bank may choose to adopt other housing needs under the regulatory priority that are similar in nature to those specified under the regulatory priority. FHFA may also specify additional eligible housing needs under the regulatory priorities by separate guidance, as new housing needs arise. A Bank must adopt at least one housing need as a scoring criterion under each of the three regulatory priorities.

FHFA's research to develop the housing priorities in the proposed rule leads it to believe that these three regulatory priorities represent the most pressing housing needs

currently facing the Nation, while providing the Banks sufficient flexibility to meet future housing needs. The three regulatory priorities and examples of their eligible housing needs are discussed below.

Regulatory priority for underserved communities and populations (§ 1291.26(e))

Consistent with the proposed rule, the final rule adopts a regulatory priority for underserved communities and populations, including the following eligible housing needs described in further detail below: housing for homeless households; housing for special needs populations; housing for other targeted populations; housing in rural areas; and rental housing for extremely low-income households. FHFA may also identify other specific housing needs as eligible under this regulatory priority by separate guidance, as new housing needs arise.

Housing for homeless households (§ 1291.26(e)(1)). As proposed, the final rule includes housing for homeless households as an eligible housing need under the underserved communities and populations regulatory priority. In contrast to the current regulation, the final rule makes adoption of a housing for homeless households scoring criterion optional rather than mandatory. In a change from the proposed rule, the final rule retains the current minimum threshold for the number of units that must be reserved for homeless households at 20 percent in order for a project to receive points. The proposed rule would have increased the minimum threshold to 50 percent to encourage projects dedicated to serving the needs of those households. FHFA specifically requested comments on whether this proposed increase would be appropriate.

Commenters overwhelmingly opposed the proposed increase in the minimum threshold. A number of commenters raised project development concerns with the

proposal, such as difficulties in securing a project site or project financing. A Bank Advisory Council stated that a minimum 50 percent threshold would be very challenging for project sponsors to meet given the lack of operating subsidies available for homeless housing and special needs housing. A Bank and its Bank Advisory Council emphasized that a minimum 50 percent threshold would not align with current housing models or the requirements of other funders that also fund AHP projects, especially since many housing finance agencies require that a maximum of 25 or 30 percent of the units in a project target homeless households. A number of representatives of a nonprofit developer stated that a specific project would not have been able to overcome community opposition if it had been required to reserve 50 percent of its units for homeless households. A number of nonprofit housing developers asserted that many homeownership projects, even those serving specified populations, would find it difficult to meet a 50 percent threshold as these populations often find it difficult to qualify for homeownership opportunities.

FHFA is persuaded by the commenters that increasing the current minimum 20 percent threshold for homeless households to 50 percent could create difficulties for the financing of such projects, particularly in states or localities with limited designated funding sources for such households. The Agency also recognizes that the development of such projects at a 50 percent threshold level may face community opposition. Therefore, the final rule retains the current minimum threshold of 20 percent for homeless households.

Housing for special needs (§ 1291.26(e)(2)). As proposed, the final rule includes housing for special needs populations as an eligible housing need under the underserved communities and populations regulatory priority. The current regulation includes

housing for special needs populations as an optional eligible housing need under the first Bank district priority. As in the current regulation and proposed rule, the final rule includes the following as eligible special needs populations under this scoring criterion: the elderly; persons recovering from physical abuse or alcohol or drug abuse; persons with HIV/AIDS; persons with disabilities; and housing that is visitable by persons with physical disabilities who are not occupants of such housing. In addition, as proposed, the final rule expands the eligible special needs populations from those in the current regulation to include: formerly incarcerated persons; victims of domestic violence, dating violence, sexual assault or stalking; and unaccompanied youth.

However, in a change from the proposed rule, the final rule retains the current minimum threshold of 20 percent for the number of units that must be reserved for special needs populations in order for a project to receive scoring points. FHFA specifically requested comments on whether this proposed increase, which was intended to encourage projects dedicated to serving special needs populations, would be appropriate. In addition, in contrast to the proposed rule, which would have required projects with units serving special needs populations to provide supportive services or access to supportive services for the specific special needs population served, the final rule does not require projects to provide such services or access to such services in order to receive points under this scoring criterion.

One commenter supported the proposed increase in the minimum threshold from 20 to 50 percent, stating that significant evidence documents that people with disabilities prefer to live in housing designed to address their specific needs, rather than being dispersed through a mixed-occupancy project. Commenters otherwise overwhelmingly

opposed the proposed increase in the minimum threshold. A Bank Advisory Council stated that a minimum 50 percent threshold would be very challenging for project sponsors to meet given the lack of operating subsidies available for special needs. A Bank and its Advisory Council emphasized that a minimum 50 percent threshold would not align with current housing models or the requirements of other funders that also fund AHP projects, especially since, according to these commenters, many housing finance agencies require that a maximum of 25 or 30 percent of the units in a project target special needs. Numerous commenters also questioned whether the proposed increase in the threshold would be consistent with other applicable federal law governing the housing integration of persons with disabilities.[20] A nonprofit intermediary indicated that, since 2015, one-third of its AHP-funded supportive housing projects targeted less than 50 percent of their units to supportive housing. The commenter indicated that this portion of its portfolio provided needed housing units for households who benefited from the provision of supportive housing units. The commenter stated that increasing the threshold to 50 percent could diminish the flexibility developers need, impeding supportive housing development in some communities. A number of nonprofit housing developers asserted that many homeownership projects, even those serving specified populations, would find it difficult to meet a 50 percent threshold as special populations often find it difficult to qualify for homeownership opportunities. An advocacy organization that focuses on the housing needs of people with disabilities opposed the proposed 50 percent threshold for housing for people with disabilities, stating that it would result in isolation of such individuals from other populations. The commenter

[20] *See* 28 CFR 35.130(d).

recommended that FHFA consider adopting a maximum limit of 25 percent of the number of units within a project that could be reserved for occupancy by the applicable targeted population, citing HUD's Section 811 Project Rental Assistance program as a federal program reflecting this approach.

For the same reasons discussed under the homeless households scoring criterion above, the final rule retains the current minimum threshold of 20 percent for special needs households. The final rule does not adopt the commenter's recommendation to establish a maximum 25 percent limit on the number of units in a project that could be reserved for occupancy by persons with disabilities because it would unnecessarily constrain Banks in districts that can accommodate projects with a higher threshold.

Several commenters objected to the proposed requirement that projects provide supportive services, or access to supportive services, for special needs populations in order to receive points under this scoring criterion. As discussed in the NPRM, this requirement was proposed because these populations have special needs associated with their particular life circumstances that could be addressed by targeted supportive services. An advocacy organization focused on addressing the needs of persons with disabilities urged that the final rule provide project sponsors with discretion to offer supportive services and provide residents with disabilities individual choice in how and from whom they access services. The Banks' project selection proposal does not require provision of, or access to, supportive services for special needs populations. One Bank, in support of the Banks' project selection proposal, stated that many housing providers do not provide on-site supportive services, and another Bank stated that, among those providers who do provide supportive services, many may not continue to do so in the future. Several Banks

recommended that the final rule leave the decision on whether supportive services are appropriate for particular projects to the discretion of affordable housing developers.

FHFA notes that the proposed rule would not have required the provision of supportive services but merely "access to" those services. Nevertheless, FHFA finds the comments on supportive services persuasive and has not included a supportive services requirement in the final rule. The final rule, instead, authorizes the Banks, in their discretion, to adopt a supportive services requirement for specific special needs populations identified by the Bank.

Other commenters provided input on the specific special needs populations proposed for inclusion under this scoring criterion. An advocacy organization that focuses on addressing the needs of people with disabilities supported including people with disabilities as an underserved population under the special needs scoring criterion. An intermediary that focuses on supportive housing supported the inclusion of: formerly incarcerated persons; victims of domestic violence, dating violence, sexual assault, or stalking; and unaccompanied youth. No commenter objected to the inclusion of any of the populations specified in the proposed rule.

Accordingly, the final rule includes the eligible special needs populations specified in the proposed rule. As discussed in the NPRM, the reference to "persons with AIDS" in the current regulation is updated to "persons with HIV/AIDS" to more closely align it with common nomenclature and in recognition of the fact that persons with HIV experience comparable housing needs to persons with AIDS. The term "mentally or physically disabled persons" in the current regulation similarly is updated to "persons with disabilities" to reflect more commonly acceptable terminology. As discussed in the

NPRM, persons with disabilities are included under this scoring criterion because they benefit from housing features such as wheelchair-accessibility or enhancements for visual or hearing impairments.

Housing for other targeted populations (§ 1291.26(e)(3)). As proposed, the final rule includes housing for other targeted populations as an eligible housing need under the underserved communities and populations regulatory priority. Generally consistent with the proposed rule, the final rule includes the following as eligible "other targeted populations:" agricultural workers; military veterans; Native Americans; households requiring large units; and kinship care households, because of the significant housing needs these populations face, as discussed in the NPRM. In a technical change from the proposed rule, as discussed further below, the final rule replaces the term "multigenerational households" with "kinship care households," and removes the category of persons with disabilities, which are covered under the special needs scoring criterion. In addition, for the same reasons discussed under the homeless households and special needs scoring criteria above, the final rule does not adopt the proposed increase in the number of units reserved for occupancy by the relevant targeted population from 20 to 50 percent. FHFA specifically requested comments on whether this proposed increase, which was intended to encourage projects dedicated to serving other targeted populations, would be appropriate. The final rule also does not include the qualifying phrase "not necessarily with supportive services" that was in the proposed rule because, as discussed under the special needs scoring criterion above, the final rule does not adopt a supportive services requirement for that scoring criterion.

FHFA received several comments on this proposed scoring category, including comments on the types of targeted populations that should be included. A nonprofit affordable housing intermediary strongly supported the inclusion of the specified other targeted populations as a regulatory priority, noting that many of the specified populations reside in rural communities. The commenter also recommended that FHFA narrow the targeting of housing for Native Americans to housing for Native Americans on or near federally recognized tribal lands, stating that this is where housing needs are most acute for this population. The Banks' proposal for project selection replaces the term "Native Americans" with "Native Peoples," to ensure that the category includes Native Alaskan and Hawaiian populations. The Banks' proposal eliminates the multigenerational household category. Multiple Banks characterized the term "multigenerational" as ambiguous, expressing concern that the proposed rule would prioritize housing that accommodates only parents and children.

As proposed, the final rule includes Native Americans as a specific eligible targeted population under this scoring category, in view of their significant housing needs, as discussed in the NPRM. The final rule continues to use the term "Native Americans" because it is commonly used in other programs. Under this scoring category, a Bank may also include Native Alaskan and Native Hawaiian populations, at its discretion. The Agency acknowledges the acute housing needs of Native Americans on or near federally recognized tribal lands, but also recognizes that Bank districts vary in the degree to which they contain federally recognized tribal lands. The broader definition in the final rule gives the Banks discretion to best target AHP subsidies to meet the housing needs of Native American populations in their districts.

Regarding multigenerational households, such as grandparents raising grandchildren, the NPRM explained that such households may have a need for special housing that includes, for example, features of elderly projects (e.g., handrails in bathrooms and hallways), as well as features of family housing (e.g., outdoor play spaces). To better describe the intended population in response to the comments, the final rule replaces the term "multigenerational household" with the term "kinship care." Kinship care households are defined as households in which children are in the care of cohabitating relatives, such as grandparents, aunts, or uncles, or cohabitating close family friends.

Housing in rural areas (§ 1291.26(e)(4)). Consistent with the proposed rule, the final rule includes housing in rural areas as an eligible housing need under the underserved communities and populations regulatory priority, in light of the significant and particularized housing needs experienced by rural households, as discussed in the NPRM. However, unlike the proposed rule, which would have defined "rural area" according to the definition in FHFA's Duty to Serve regulation, the final rule follows the approach of the current regulation and allows each Bank to adopt its own definition of "rural area." That definition, like the Bank's Program in general, would have to be reasonable, and would be subject to FHFA examination.

A trade association and two nonprofit affordable housing intermediaries specifically supported the proposed inclusion of rural housing as a specified need in the Program. One of the intermediaries commented that its partners, largely comprising rural community-based housing providers, found that their applications for AHP funds are less competitive than in the past. The commenter suggested that rural applicants do not score

as well as urban or suburban applicants, whose projects are of a larger scale and whose borrowers may have higher incomes and greater access to financial services. Several commenters provided input on the proposed definition of "rural area." The nonprofit intermediary stated that, though it regards local government entities and communities as best equipped to define rural areas, it supported the proposed definition as a comprehensive and structured classification for rural areas under the AHP. It characterized the proposed definition as an enhancement that relies on a more accurate definition of rural territory and that minimizes misclassification of projects in suburban or exurban areas.

In contrast, a Bank and its Bank Advisory Council asserted that the proposed definition is overly restrictive within metropolitan areas because it excludes small towns that are truly rural in character. These commenters also stated that the AHP would not be able to maximally coordinate with USDA programs, as there are areas eligible for USDA assistance under USDA's definition of "rural area" that would be excluded under the proposed definition. In their proposal for project selection, the Banks recommended that each Bank have the authority to define "rural area." One Bank commented that the proposed definition would be overly complicated for purposes of the AHP. The Bank indicated that the Banks designed their project selection proposal to provide each Bank with flexibility to adopt its own definition so that each Bank could align its standards with those used by other state and local affordable housing financing sources that fund AHP projects.

FHFA is persuaded by commenters' concerns about the definition of "rural area" in the proposed rule. The Agency's aim of aligning, where appropriate, AHP definitions

with those in other FHFA programs such as the Duty to Serve Program was not intended to constrain each Bank's flexibility to coordinate with other funding sources in responding to housing needs within its district. Continuing to give the Banks discretion to define "rural area" will allow them to align their Programs with other local and state funding programs for affordable housing. Accordingly, and consistent with the current regulation, the final rule authorizes each Bank to establish its own definition of "rural area."

Rental housing for extremely low-income households (§ 1291.26(e)(5)). As proposed, the final rule includes housing for extremely low-income households as an eligible housing need under the underserved communities and populations regulatory priority, in light of the severe affordable housing challenges faced by such households, as discussed in the NPRM. Consistent with the proposed rule, the final rule adds a definition of "extremely low-income household" in § 1291.1 to mean a household with an income at or below 30 percent AMI. In a change from the proposed rule, the final rule authorizes each Bank to define its own minimum threshold for the percentage of units reserved for extremely low-income households that a project must meet in order to qualify for points under this scoring criterion. The proposed rule would have set this minimum threshold at 20 percent. FHFA specifically requested comments on whether the proposed 20 percent minimum threshold is appropriate.

Several housing policy organizations, a CDFI, and two nonprofit developers generally supported this proposed scoring criterion. A nonprofit developer supported the scoring criterion but encouraged FHFA to allow AHP-funded projects targeting extremely low-income occupants to adjust their income targeting and rent restrictions in

the event the project sponsor, through no fault of its own, loses its project-based operating subsidy. One of the housing policy organizations acknowledged the benefits of targeting extremely low-income households, but asserted that a minimum 20 percent threshold could be difficult to meet in states that do not have local or state rental housing development resources and access to federal project-based rental assistance programs. The commenter suggested use of a sliding points scale to encourage projects that target more units to extremely low-income people, up to a maximum of 20 or 25 percent of the units in a project, rather than establishing a minimum of 20 percent of the units. A nonprofit intermediary recommended a sliding points scale of up to 100 percent of the units in a project.

Other commenters opposed the proposed minimum 20 percent threshold. A Bank commented that it may render smaller projects financially infeasible. A CDFI trade organization stated that while targeting units for extremely low-income households is important, a minimum 20 percent threshold would create incentives for concentrations of populations of extremely low-income households, which would decrease residential economic diversity. A CDFI opposed a minimum 20 percent threshold on the grounds that projects that overestimate the number of extremely low-income units they can support may face financial instability. A trade organization supported the goal of targeting extremely low-income households, but stated that a minimum 20 percent threshold would not be feasible because the amount of AHP subsidy would generally be insufficient to offset the reduction in rents required to serve such households. The Banks stated that some projects may not be able to secure rent subsidies to support a minimum 20 percent threshold, making the projects financially infeasible.

The Banks' proposal on project selection does not include a scoring priority for housing for extremely low-income households. One Bank stated that the Banks could address this housing need under their Bank district priority scoring criterion, and that including a scoring criterion for housing for extremely low-income households would overlap with the scoring criterion for housing for other targeted populations. Another Bank stated that a scoring criterion for housing for extremely low-income households would be redundant with the income targeting scoring criterion. Multiple Banks expressed doubt that a project meeting a 20 percent threshold for extremely low-income households could demonstrate financial feasibility.

In summary, most commenters acknowledged the importance of targeting extremely low-income households, but objected to the proposed minimum 20 percent threshold. After consideration of the comments on the proposed threshold, including the recommendation for a sliding scale that would allow projects with some extremely low-income units but less than 20 percent to receive points, FHFA is persuaded that a 20 percent threshold may be too high in most circumstances. FHFA notes that the differing comments on the proposed threshold may stem from the differences in the financial viability of projects with extremely low-income units in different local housing markets. Therefore, in order to encourage targeting of extremely low-income households while providing adequate discretion to the Banks to take into account differences in housing markets among the Banks, the final rule includes a scoring criterion for projects targeting such households but also authorizes the Banks to establish their own minimum thresholds for the number of units a project is required to reserve for such households in order for the project to receive scoring points.

FHFA notes that most Banks have not allocated scoring points for projects specifically targeting extremely low-income households, which suggests that including this housing need under the underserved communities and populations regulatory priority would not be redundant. FHFA also notes that housing for extremely low-income households is an optional scoring category in the final rule, which Banks may choose to adopt in addition to the mandatory regulatory priority for income targeting for very low-income households.

Regulatory priority for creating economic opportunity (§ 1291.26(f))

As proposed, the final rule adopts a regulatory priority for creating economic opportunity, including the following eligible housing needs as scoring criteria: promotion of empowerment and residential economic diversity. FHFA may also identify other specific housing needs that facilitate economic opportunity as eligible under this regulatory priority by separate guidance, as new housing needs arise. The eligible housing needs are discussed further below.

Promotion of empowerment (§ 1291.26(f)(1)). Consistent with the proposed rule, the final rule includes promotion of empowerment as an eligible housing need under the creating economic opportunity regulatory priority. In contrast to the current regulation, promotion of empowerment would be an optional rather than a mandatory scoring criterion. As proposed, the final rule retains the eligible empowerment services included in § 1291.5(d)(5)(v) of the current regulation. For the reasons discussed in the NPRM and comments discussed below, the final rule adds the following empowerment services not included in the current regulation: childcare; adult daycare services; afterschool care; tutoring; health services, including mental health and behavioral health services; and

workforce preparation and integration.

A nonprofit intermediary that focuses on supportive housing strongly supported the addition of health services as an eligible empowerment activity. The commenter urged that the final rule include an explicit reference to mental and behavioral health services, which are mentioned in the case study cited in the NPRM. FHFA concurs in the importance of mental and behavioral health services and has added a reference to these services in connection with health services in the final rule. Consistent with the proposed rule, the reference to "welfare to work" in the current regulation is updated to "workforce preparation and integration" to broaden the scope beyond households receiving public assistance to include initiatives providing skills to those entering or re-entering the workforce. FHFA received no comments addressing any of the other proposed additions to the promotion of empowerment scoring criterion.

Residential economic diversity (§ 1291.26(f)(2)). As proposed, the final rule includes residential economic diversity as an eligible housing need under the regulatory priority for creating economic opportunity. The current regulation includes residential economic diversity as an optional scoring criterion under the first Bank district priority. The proposed rule would have revised the current definition of residential economic diversity to reflect the definition in FHFA's Duty to Serve regulation. The final rule adopts a modified version of the Duty to Serve definition that provides discretion to the Banks in defining certain component terms thereof, as further discussed below.

The proposed rule would have defined "residential economic diversity" as the financing of either affordable housing in a high opportunity area, or mixed-income housing in an area of concentrated poverty, with those terms defined in accordance with

the Duty to Serve regulation and Evaluation Guidance. FHFA received a number of comments opposing adoption of the Duty to Serve definition. Two Banks and a Bank Advisory Council preferred to have discretion to adopt their own definitions in order to be able to align their Programs with the economic characteristics of their districts. One Bank recommended that FHFA expand the definition to explicitly include the development of mixed-income housing in middle- and high-income neighborhoods, in addition to low- and moderate-income neighborhoods, in order to provide the Banks flexibility to respond to the best evidence on the impact of living in high opportunity areas for low-income families. The Banks' proposal on project selection allows each Bank to define "high opportunity area," and allows mixed-income housing in any area that the Bank designates. The Banks indicated that they prefer flexibility to align the residential economic diversity standards with those of state and local funders.

FHFA agrees with the comments that requiring use of the Duty to Serve definition for residential economic diversity under the AHP, especially the component definition of "high opportunity area," could limit the extent to which the Bank are able to align their Programs, where appropriate, with residential economic diversity standards of state and local funders. The final rule, therefore, allows each Bank to define "high opportunity area." In addition, FHFA is persuaded that mixed-income housing may, in certain Bank districts and under some circumstances, be beneficial in middle- and high-income neighborhoods. Accordingly, the final rule does not adopt the proposed requirement that the mixed-income housing be located in an area of concentrated poverty, and instead provides discretion to the Banks to designate the areas in which the mixed-income housing must be located.

Regulatory Priority for Community Stability Including Affordable Housing Preservation (§ 1291.26(g))

In a change from the proposed rule, the final rule adopts community stability, including affordable housing preservation, as a regulatory priority. Community stability is a mandatory scoring criterion in the current regulation, but was not included as a regulatory priority in the proposed rule. Section 1291.5(d)(5)(ix) of the current regulation provides that a project may receive points under this scoring criterion if it promotes community stability, such as by rehabilitating vacant or abandoned properties, being an integral part of a neighborhood stabilization plan approved by a unit of state or local government, and not displacing low- or moderate-income households, or if such displacement will occur, assuring that such households will be assisted to minimize the impact of such displacement. The final rule adds, as an example of the types of projects that promote community stability, projects that preserve affordable housing. The final rule further modifies the current community stability scoring criterion by replacing the term "neighborhood stabilization plan" with "community development or economic development strategy," and providing that such a strategy may be approved by an instrumentality of government. The final rule also retains the above-described non-displacement provision from the current regulation. In a change from the proposed rule, the final rule does not provide examples illustrating the types of projects that may be considered affordable housing preservation.

The proposed rule would have specified two eligible housing needs under the proposed affordable housing preservation regulatory priority: affordable rental housing preservation and affordable homeownership preservation. Affordable rental housing

preservation would have included housing needs such as: existing affordable housing in need of rehabilitation as indicated by deteriorating physical condition, high vacancy rates, or poor financial performance; affordable rental housing with energy or water efficiency improvements (meeting the requirements in the Duty to Serve regulation); projects that received funding from certain government affordable rental housing programs specified under the Duty to Serve regulation, *i.e.*, HUD Section 8, Section 236, Section 221(d)(4), Section 202, and Section 811 programs; McKinney-Vento Homeless Assistance; USDA Section 515; LIHTC; or other state or local affordable housing programs comparable to the foregoing housing programs. Affordable homeownership preservation would have included owner-occupied rehabilitation, shared equity programs, owner-occupied housing with energy or water efficiency improvements (meeting the requirements in the Duty to Serve regulation), or other housing finance strategies to preserve homeownership. A Bank has discretion under the final rule to include any of these types of housing needs under its community stability scoring criterion.

In addition, the final rule provides that FHFA may also identify other mechanisms for affordable rental housing preservation or affordable homeownership preservation as eligible under this regulatory priority by separate guidance, as new housing needs arise.

A Bank commented that including affordable housing preservation as a regulatory priority would provide substantial encouragement to address this pressing need effectively. Other commenters indicated that the proposed affordable housing preservation definition is too narrow. A number of nonprofit developers stated that the proposed regulatory priority would apply only in very limited circumstances to affordable homeownership projects such as those where the AHP sponsor is engaged in owner-

occupied rehabilitation or permanent affordability strategies. The commenters asserted that, although the types of affordable homeownership preservation identified in the proposed rule are viable and important strategies in many areas of the country, they may not be the most impactful or appropriate for many communities in each of the Banks' districts. The Bank Advisory Councils and a Bank noted that the proposed affordable housing preservation regulatory priority would not include projects that repurpose or adapt non-housing properties, such as former schools, industrial properties, or commercial properties, which would be covered under the current community stability scoring criterion. The Banks' proposal for project selection includes separate regulatory priorities for affordable housing preservation and community stability.

FHFA notes that the proposed regulatory priority for affordable housing preservation would have allowed the Banks to adopt other types of affordable housing preservation needs similar to those specified in the regulatory priority. However, FHFA acknowledges that replacing the current community stability scoring criterion with affordable housing preservation would have omitted strategies outside of affordable housing preservation that are important for addressing community stability, such as adaptive re-use and the development of infill housing that are included under the current community stability scoring criterion. Because affordable housing preservation is an important strategy for achieving community stability, the final rule adopts a regulatory priority for community stability that specifically includes affordable housing preservation. FHFA is not retaining the proposed definition of affordable housing preservation, which referenced specific programs and strategies included in the Duty to Serve regulation, in order to provide the Banks flexibility to include those or other

housing needs under affordable housing preservation to meet the specific housing needs of their districts.

Current Regulatory Priority for Subsidy per Unit

As proposed, the final rule eliminates the current mandatory scoring criterion for AHP subsidy per unit. This criterion favors more highly leveraged projects, such as LITHC projects and other large rental projects, where the AHP award is a smaller percentage of the total project development budget. A Bank may want to encourage AHP awards to projects that may not be able to leverage as much funding from other sources and, therefore, need deeper subsidy from the AHP. Eliminating this scoring criterion provides the Banks with more discretion to target the types of projects that best meet the housing needs in their districts. The Banks' proposal for project selection also eliminates this scoring criterion. Under the final rule, a Bank, in its discretion, could choose to include AHP subsidy per unit as a scoring criterion under its Bank district priorities category.

Bank District Priorities (§ 1291.26(h))

The final rule adopts a cumulative minimum points allocation of 50 points for the statutory and regulatory priorities, consistent with the cumulative minimum points allocation required for the statutory and regulatory priorities in the current regulation. The final rule permits the Banks to allocate the remaining maximum 50 points to affordable housing needs in the Banks' districts selected by the Banks. This is a modified version of the current regulation, which has two scoring categories of Bank district priorities. Under the first Bank district priority, a Bank must choose one or more housing needs from 12 specified eligible housing needs. Under the second Bank district priority,

a Bank adopts one or more housing needs in the Bank's district identified by the Bank, which must be different from those chosen by the Bank under its first Bank district priority. The final rule essentially combines the current first and second Bank district priorities into one category under which a Bank may adopt specific district housing needs, for a maximum of 50 points. This will provide the Banks with additional flexibility to tailor their General Funds to meet specific housing needs in their districts.

§ 1291.27 Scoring criteria for Targeted Funds

Section 1291.27 of the final rule sets forth general requirements for scoring criteria for Targeted Funds. For each Targeted Fund established by a Bank, the Bank must include a minimum of three different scoring criteria, as established by the Bank, that allow the Bank to select applications that meet the specific affordable housing need or needs being addressed by the Targeted Fund. This requirement for at least three scoring criteria is consistent with the Banks' comment on the scoring criteria for Targeted Funds and is a change from the proposed rule, which did not include this requirement. As discussed under § 1291.25 above, the maximum points allocation for a single scoring criterion under a Targeted Fund is 50 points. These requirements should promote a robust competitive scoring process under the Targeted Fund.

§ 1291.28 Approval of AHP applications under the General Fund and Targeted Funds

AHP application approvals generally. Consistent with the application approval requirements in the current regulation, the final rule provides generally that a Bank's board of directors shall approve (*i.e.*, award) applications for AHP subsidy under the General Fund and any Targeted Funds that meet all of the applicable AHP eligibility requirements in descending order, starting with the highest scoring application until the

total funding amount for the particular AHP funding round, except for any amount insufficient to fund the next highest scoring application, has been approved. Exceptions to this process, as proposed, are discussed below.

AHP application alternates. Section 1291.28(b) of the final rule provides the Banks with discretion to approve a specified number, as determined by the Bank in its discretion, of the next highest scoring applications as alternates eligible for funding, and may approve any tied applications as alternates eligible for funding pursuant to § 1291.28(c)(2), when any previously committed AHP subsidies become available, pursuant to a written policy established by the Bank. If a Bank has established such a policy for approving alternates for funding and sufficient previously committed AHP subsidies become available within one year of application approval, the Bank is required to approve the designated alternates for funding within that one-year period. This is a change from the current regulation, which requires a Bank to approve at least the next four highest scoring applications in the General Fund as alternates, but gives the Bank the option whether to approve the designated alternates for funding if previously committed AHP subsidies become available within one year of application approval. The final rule is consistent with the proposed requirement that the Banks fund the General Fund alternates within one year of approval if any previously committed AHP subsidies become available, but requires this only where the Bank has adopted a policy to approve alternates for funding. The final rule also links approval of tied applications as alternates, pursuant to § 1291.28(c)(2), to establishment by a Bank of a written policy for approval of alternates for funding. In addition, the final rule applies the above requirements applicable to the approval of General Fund alternates to the approval of Targeted Fund

alternates. The proposed rule would have given the Banks discretion regarding the approval and funding of Targeted Fund alternates.

The purpose of FHFA's proposal to require funding of alternates under the General Fund within one year of approval if previously committed AHP funds become available was to ensure that the Banks award the AHP funds to alternates in the General Fund rather than selecting General Fund alternates but transferring AHP funds from the General Fund to the Bank's Homeownership Set-Aside Programs or Targeted Funds instead. The Banks and a trade association opposed the proposal, noting that projects approved as alternates typically seek additional funding sources or change the scope of the development if approved as alternates, which may significantly change the structure of the projects. They pointed out that a mandatory funding requirement for such projects would require the Banks to first re-underwrite the projects to determine their satisfaction with the AHP eligibility requirements, including the need for AHP subsidy, which would increase the burden and costs to the Banks and the project sponsors. The Banks further stated that the proposal could require the Banks to fund alternates that do not serve the housing needs prioritized in the Banks' TCLPs or the proposed outcome requirements. The Banks and their Bank Advisory Councils urged FHFA to continue allowing the Banks the discretion to approve alternates for the General Fund, and to provide similar discretion to approve alternates for any Targeted Funds established by the Banks.

FHFA finds relevant the comments that previously committed AHP subsidies often do not become available until well after the conclusion of the AHP funding round, by which time alternates' applications may no longer reflect the current structure of the projects or their funding needs. Projects may also have received funding from other

sources in the meantime to substitute for the AHP funding requested. The projects, thus, may no longer meet the AHP eligibility requirements, including the need for AHP subsidy, or may need to be re-scored due to the changes in the projects' structures and funding. Requiring re-underwriting, as well as possible re-scoring, of these projects may be unnecessary and burdensome in such circumstances. In addition, the Banks should not have to select alternates if they do not intend to fund these projects. Accordingly, the final rule revises the current regulation to make the approval of alternates discretionary rather than mandatory for the Banks, pursuant to a written policy established by the Bank, and to require the Bank to approve such alternates for funding within one year of approval if any previously committed AHP subsidies become available but only if the Bank has a policy to approve alternates for funding.

Where a Bank does not adopt a policy to approve alternates for its General Fund or any Targeted Funds, the Bank may use previously committed AHP subsidies that become available under the applicable Fund to address other district affordable housing needs through the Banks' Homeownership Set-Aside Programs or project modifications, as currently permitted, or through any Bank Targeted Funds. This may benefit Banks, for example, that wish to establish a Targeted Fund to address a federal- or state-declared disaster. It may also benefit Banks receiving requests for subsidy to assist households under their Homeownership Set-Aside Programs that exceed the current maximum annual allowable funding allocation of 35 percent, which is retained in the final rule.

Tied applications. As discussed above under the scoring tie-breaker policies in §§ 1291.25(c) and 1291.28(c)(2) of the final rule, where there is insufficient AHP subsidy to approve all tied applications for the General Fund or a Targeted Fund, and the Bank has a

written policy to approve alternates for funding under the applicable Fund, the Bank must approve a tied application as an alternate if it does not prevail under the Bank's scoring tie-breaker methodology, or is tied with another application but requested more subsidy than the amount of AHP funds that remain to be awarded under the Fund. This is consistent with current FHFA guidance to the Banks for their General Funds except that it is only required, under the final rule, where the Bank has a written policy to approve alternates.

Applications to multiple Funds—approval under one Fund. Section 1291.28(d) of the final rule provides that if an application for the same project is submitted to more than one Fund at a Bank in a calendar year and the application scores high enough to be approved under each Fund, the Bank shall approve the application under only one of the Funds pursuant to the Bank's policy established in its AHP Implementation Plan. For example, a Bank's policy could provide that any project that is competitive under multiple Funds will be approved under the General Fund. The proposed rule referred to submission of an application for the same project in an AHP funding round. The final rule changes this to a calendar year to take into account that Banks may hold separate funding rounds for their General Fund and Targeted Funds at different times in a calendar year. No comments were received on this proposal.

No re-ranking of scored applications and alternates. As discussed in Section III.A. above, the final rule does not adopt the proposal to allow the Banks, in their discretion, to re-rank scored applications and alternates, in light of FHFA's determination not to adopt the proposed outcomes framework in the final rule.

No delegation. The final rule retains the provision in the current regulation

prohibiting a Bank's board of directors from delegating to Bank officers or other Bank employees the responsibility to approve or disapprove the AHP subsidy applications, as well as alternates. Since the final rule provides that the Banks are no longer required to approve alternates, the final rule states that the delegation prohibition is applicable to the approval of alternates only if a Bank has a written policy to approve alternates for funding under its General Fund or any Targeted Fund. The final rule does not adopt the proposed prohibition on delegation by the Bank's board to a committee of the board because the approval of AHP applications is not a strategic policy decision. Comments received on delegation are covered in the previous discussion of comments on the other proposed prohibited delegations in Section III.F. above.

§ 1291.29 Modifications of approved AHP applications

The final rule relocates the provisions on modifications of approved AHP applications from current § 1291.5(f) to § 1291.29, with a number of clarifying and other changes.

Approval of modifications. Consistent with the proposed rule, the final rule provides that if the requirements for a modification are satisfied, the Bank must approve the modification request, unless the request is for an increase in AHP subsidy, which a Bank may approve in its discretion. The final rule is a change from the current regulation, which allows for Bank discretion in approving all modification requests. If a project re-scores successfully in its original funding round and all of the other modification requirements are satisfied, there should be no reason for the Bank not to approve the modification. FHFA did not receive any comments on removing discretionary approvals.

Cure of noncompliance. The final rule provides that before a Bank may approve a modification request, it must first request that the project sponsor or owner make a reasonable effort to cure any AHP noncompliance within a reasonable period of time. This provision includes clarifying language in response to comments on the proposed language, and is consistent with similar clarifying language made in the "waterfall" provisions for remedying project noncompliance discussed under § 1291.60 below. Comments on the cure of noncompliance language are discussed under § 1291.60 below.

Re-scoring of application. Consistent with the current regulation, § 1291.29(a)(3) of the final rule provides that in order to be approved for a modification, the application, as reflective of the changes requested, must continue to score high enough to have been approved in the AHP funding round in which it was originally scored and approved by the Bank. In response to questions that have arisen as to what it means to score high enough where a Bank also approved applications as alternates during the original AHP funding round, the proposed rule would have clarified that the application must continue to score as high as the lowest ranking alternate that was not simply designated as an alternate but approved for funding by the Bank in the application's original AHP funding round. Because the final rule allows a Bank to approve alternates for funding in its discretion pursuant to a written policy adopted by the Bank, the final rule states that the lowest ranking alternate approved for funding by the Bank is the applicable standard where the Bank has a written policy to approve alternates for funding. FHFA did not receive any comments on this proposed standard.

Good cause. Consistent with the current regulation and proposed rule, the final rule continues to require that there be good cause for a modification, with the Bank's

analysis and justification for the modification documented in writing. As proposed, the final rule clarifies that remediation of project noncompliance is not, in and of itself, good cause for a modification. As discussed below under § 1291.60 (Remedial Actions for Project Noncompliance), the final rule adds that the written analysis and justification for good cause must include why a cure of noncompliance was not successful or attempted.

A Bank provided comments on the good cause determination for modifying a project. The Bank noted that it considered remediation of project noncompliance, by itself, to be good cause for modification. The Bank stressed that a project that remains eligible for an award in its original AHP funding round after the modification should be eligible for a modification without having to cure noncompliance first, notwithstanding the changes made after application approval. The Bank emphasized the need to preserve the AHP's ability to accept and adapt to a project's needs. The Bank cited potential changes to green initiatives or the number of units reserved for homeless households that may or may not impact the project's budget or financing commitments, as examples of the types of changes justifying good cause for a modification. The Bank contended that a cure-first requirement would add unnecessary administrative costs for the Banks, the project sponsors, and the members when the projects are eligible for project modifications in any case based on their scoring, feasibility, and need for subsidy.

FHFA is not persuaded by the Bank's comments. Remediation of project noncompliance is not, in and of itself, good cause for a modification. There must be other reasonable justification for the modification, such as a change in market conditions, loss of committed funding to subsidize project rents, or loss of a major employer in the community that makes it difficult to find households at the incomes committed to in the

project's AHP application to occupy the targeted units in the project. Otherwise, there would be less of an incentive to cure noncompliance if project sponsors knew they could simply request a modification of the project terms to no longer be in noncompliance. The final rule adds that the written analysis and justification for good cause must include why a cure of noncompliance was not successful or attempted.

Consistent with the proposed rule, the final rule also makes technical changes to the language in § 1291.29(b)(1) to clarify any ambiguity about the requirement that requests for subsidy increase modifications must also meet the requirements for approval applicable to other modifications in § 1291.29(a).

§ 1291.30 Procedures for funding

Consistent with the proposed rule, the final rule relocates the procedures for AHP funding from § 1291.5(g) of the current regulation to § 1291.30, with several changes.

Cancellation of AHP application approvals. The final rule clarifies in § 1291.30(b) and (c) that if a Bank cancels any AHP application approvals due to lack of progress towards draw-down and use of the AHP subsidies or noncompliance with AHP eligibility requirements, the requirement to make the AHP subsidies available to other AHP-eligible projects also includes the option to make the subsidies available to other AHP-eligible households.

Compliance upon disbursement of AHP subsidies. The final rule removes the reference to a change in the need for AHP subsidy in § 1291.30(c). This language is superfluous because as the rule states, at each disbursement of AHP subsidy, a project must meet all eligibility requirements, which include the need for AHP subsidy.

Notification under subsidy re-use programs. As discussed under §§ 1291.13

above and 1291.64(b) below, in a change from the proposed rule, the final rule retains the current regulatory provision enabling a Bank to adopt, in its discretion, a program allowing re-use of AHP subsidy repayments in the same project. Accordingly, § 1291.30(f) of the final rule also retains current § 1291.5(g)(6), which requires project sponsor notification to the Bank and the member of the re-use of repaid AHP direct subsidy where the Bank has authorized such re-use.

Bank board duties and delegation. As proposed, the final rule eliminates current § 1291.5(h), which addresses Bank board duties and delegations, as these duties and delegations are addressed elsewhere in the final rule.

§ 1291.31 Lending and re-lending of AHP direct subsidy by revolving loan funds

The final rule relocates § 1291.5(c)(13) of the current regulation, which addresses the requirements for lending and re-lending of AHP direct subsidies by revolving loan funds to § 1291.31, without change except as related to the elimination of the requirement for a retention agreement for owner-occupied rehabilitation in the final rule. The revolving loan fund provisions were designed for lending and re-lending of the AHP subsidy by distinct projects in specific locations, or for pipelines of expected projects meeting specific criteria that the revolving loan fund anticipates funding and that would be specified in its AHP application. Under the regulation, the revolving loan fund may be scored on the specific criteria it establishes in its AHP application for its pipeline of projects, without having to actually identify specific projects in the AHP application.

To assist in anticipated future rulemaking on revolving loan funds under the AHP, FHFA specifically requested comments in the NPRM on why certain AHP scoring criteria have been difficult to meet, how the AHP retention periods could be satisfied,

how AHP subsidy would be repaid in the event of project noncompliance, how the revolving loan fund can demonstrate a need for AHP subsidy, and the potential positive or negative impacts of eliminating the owner-occupied retention agreement requirement for revolving loan funds.

A nonprofit affordable housing intermediary expressed general support for increased use of AHP funds by revolving loan funds. A trade association for CDFIs stated that it would be particularly interested in working with FHFA and the Banks on expanding the use and impact of revolving loan funds. A Bank indicated that revolving loan funds can help meet the rehabilitation needs of owner-occupied units.

Several CDFIs and Banks commented that identifying specific project locations or addresses in AHP applications is problematic for revolving loan funds. One of the Banks stated that revolving loan fund applications cannot score sufficient points in categories tied to geography, inclusion of donated properties, economic diversity, or income targeting because the revolving loan funds cannot commit with certainty to the characteristics of a project or household as specific addresses or households are often unknown by the revolving loan fund at the time of AHP application.

A CDFI and a Bank suggested that applications for revolving loan funds should describe a pipeline of potential projects rather than discrete projects. Another CDFI suggested developing a scoring system based on a commitment to impact and homebuyer benefit, rather than on specific property addresses. The commenter also recommended establishing separate scoring criteria within the AHP scoring framework for revolving loan funds.

Two Banks reported not having received revolving loan fund applications for the

AHP and encouraged FHFA to engage in a separate rulemaking for revolving loan funds. One of the Banks indicated that it was not aware of any revolving loan funds in the market that meet the current AHP regulatory requirements, and that it did not know how to make the AHP more amenable to revolving loan funds. The other Bank stated that the proposed outcome requirements would not necessarily facilitate the use of revolving loan funds.

In response to FHFA's request for comment, FHFA received several comments on whether organizations using sponsor-provided permanent financing models should be considered to be revolving loan funds. A national nonprofit opposed this, stating that it uses this model and would likely be excluded from competitive AHP Funds if it were treated exclusively as a revolving loan fund under any future AHP regulation. A Bank stated that, by definition, there are similarities between revolving loan funds and sponsor-provided permanent financing models since the funds of each are recycled on an ongoing basis. The Bank stated, however, that unlike a revolving loan fund, sponsor-provided permanent financing models are project specific and have readily available information that can be vetted during the application process.

FHFA is unclear on how to interpret the comments on identifying specific property locations in AHP applications. As discussed in the NPRM and above, the current regulation allows a Bank to score a revolving loan fund based on the specific criteria it establishes in its AHP application for its pipeline of projects, without having to actually identify specific projects in the AHP application. FHFA will consider the comments received on this issue, as well as comments received in response to its anticipated future rulemaking, in determining the treatment of revolving loan funds under

the AHP regulation.

§ 1291.32 Use of AHP subsidy in loan pools

The final rule relocates § 1291.5(c)(14) of the current regulation, which addresses the requirements for use of AHP subsidies in loan pools, to § 1291.32, with a change to remove the requirement for retention agreements for owner-occupied rehabilitation in current § 1291.5(c)(14)(iii).

The current regulation establishes specific conditions under which a Bank may provide AHP subsidies under its Competitive Application Program for the origination of first mortgage loans or rehabilitation loans with subsidized interest rates to AHP-eligible household through a purchase commitment by an entity that will purchase and pool the loans. As stated in the NPRM, FHFA is not aware that any loan pools meeting these conditions have applied for AHP subsidy since adding the regulatory authority in 2006. FHFA is also not aware of any loan pools of this type currently existing in the housing market. FHFA specifically requested comments in the NPRM on whether there are loan pools currently operating in the market that meet the conditions in the regulation, how the loan pools are addressing current housing market needs, and the potential positive or negative impacts of eliminating the owner-occupied retention agreement requirement for loan pools. FHFA received only one comment on this section, from a Bank, which stated that it had no experience with loan pools meeting the AHP requirements.

FHFA anticipates engaging in a future rulemaking on loan pools with respect to the AHP, and will consider comments received in response to such rulemaking in determining the treatment of loan pools under the AHP regulation.

Subpart D–Homeownership Set-Aside Programs

§ 1291.40 Establishment of programs

The final rule relocates § 1291.6(a) of the current regulation on the Bank establishment of Homeownership Set-Aside Programs to § 1291.40. As proposed, the final rule states that these programs are optional by adding that a Bank may establish such programs "in its discretion." The final rule does not include the proposed requirement that a Bank's analyses for establishing such programs be included in its TCLP, as previously discussed under § 1290.6 (Bank Community Support Programs).

§ 1291.41 Eligible applicants

The final rule relocates § 1291.6(b) of the current regulation on eligible member applicants to § 1291.41, without change. No comments were received on this provision.

§ 1291.42 Eligibility requirements

The final rule relocates § 1291.6(c) of the current regulation on the eligibility requirements for Homeownership Set-Aside Programs to § 1291.42, with several changes, as proposed.

Adoption of additional eligibility requirements. Consistent with informal guidance provided by FHFA to the Banks and the proposed rule, the final rule clarifies that the Banks may not adopt eligibility requirements under their Homeownership Set-Aside Programs beyond those set forth in this section, except those related to household eligibility pursuant to § 1291.42(b)(3). No comments were received on this proposed clarification.

One-third funding allocation requirement—first-time homebuyers or owner-occupied rehabilitation—conforming change. As discussed above under § 1291.12(b) (funding allocation for Homeownership Set-Aside Programs), the final rule requires that

at least one-third of a Bank's annual Homeownership Set-Aside Program funding allocation be for first-time homebuyers or households receiving set-aside funds for owner-occupied rehabilitation, or a combination of both. The final rule adds conforming language in § 1291.42(b)(3) for households receiving set-aside funds for owner-occupied rehabilitation.

Maximum grant limit. Consistent with the proposed rule, the final rule authorizes the Banks to provide, through their members, set-aside grants of up to $22,000 per household, subject to annual upward adjustment in accordance with FHFA's House Price Index (HPI). This is a change from the current regulation, which authorizes set-aside grants of up to $15,000 per household and does not provide for annual HPI adjustments. The purpose of the increase in the subsidy limit is to respond to increases in the costs associated with buying or rehabilitating homes in high cost areas, as well as the high costs of certain types of rehabilitation. It will also bring the subsidy limit in line with changes in the HPI since 2002, when the regulation established the $15,000 subsidy limit. The HPI upward adjustments will account for future house price increases, negating any need for periodic revisions of the subsidy limit by regulation. FHFA will notify the Banks annually of the maximum subsidy amount based on the HPI.

A number of commenters generally supported raising the subsidy limit per household from $15,000 to $22,000. Some of the commenters provided reasons for their support that were cited by FHFA in the NPRM, specifically, that the proposed increase would provide additional flexibility, benefit homeowners in high-cost areas, and support owner-occupied rehabilitation and aging in place. The Banks, nonprofit organizations, and a CDFI supported the proposed annual upward HPI adjustments. The Banks stated

that because the adjustment would measure average price fluctuations in the single-family housing market, it would provide insight to the Banks about whether they should increase their individual subsidy limit in housing markets that are becoming less affordable.

A state agency cautioned that the proposed increase in the subsidy limit could augment purchasers' ability to buy bigger houses, resulting in fewer grant recipients overall. A trade association stated that raising the raising the subsidy limit while also removing the requirement for owner-occupied retention agreements, as proposed, could increase the likelihood of the AHP subsidy being misused.

As discussed in the NPRM and above, the purpose of the increase in the subsidy limit is to respond to increases in the costs associated with buying or rehabilitating homes in high cost areas, as well as the high costs of certain types of rehabilitation generally. The increase also brings the subsidy limit in line with changes in the HPI since 2002. The HPI shows that $15,000 in January 2002 has approximately the same buying power as $21,500 today. FHFA acknowledges commenters' concern that Bank adoption of the proposed higher subsidy limit could result in fewer households receiving set-aside subsidies. However, because most Banks have established subsidy limits below the current $15,000 limit, FHFA believes that an increase in the subsidy limit to $22,000 is not likely to result in a significant overall reduction in the number of households assisted by the Banks under their set-aside programs.

Owner-occupied retention agreements. As discussed under Section III.D. above, the proposed rule would have eliminated the requirement for all owner-occupied retention agreements. The owner-occupied retention agreement requirement for

households assisted with set-aside funds in current § 1291.6(c)(5), thus, would have been eliminated. Because the final rule retains the requirement for owner-occupied retention agreements where the AHP subsidy is used for purchase, or for purchase in conjunction with rehabilitation, the retention agreement requirement for such uses of AHP subsidy is retained in § 1291.42(e) of the final rule.

§ 1291.43 Approval of AHP applications

The final rule relocates § 1291.6(d) of the current regulation, which addresses the approval of set-aside applications in accordance with the Banks' criteria governing the allocation of funds, to § 1291.43, without substantive change.

§ 1291.44 Procedures for funding

The final rule relocates § 1291.6(e) of the current regulation, which addresses the procedures for set-aside funding, to § 1291.44, without substantive change.

Subpart E–Outcome Requirements for Statutory and Regulatory Priorities

FHFA proposed a number of benchmarks for demonstrating compliance with the proposed outcome-based approach for project selections. As discussed in Section III.A. above, FHFA has decided not to adopt the proposed outcome-based approach to project selection in the final rule. Accordingly, the provisions in proposed Subpart E are not adopted in the final rule.

Subpart E–Monitoring

§ 1291.50 Monitoring under the General Fund and Targeted Funds

Initial monitoring of AHP projects receiving LIHTC. Consistent with the proposed rule, § 1291.50(a)(3)(i) of the final rule streamlines the initial monitoring requirements for LIHTC projects that also receive AHP subsidy. The final rule retains

the current initial monitoring requirement that the Banks review certifications from LIHTC project sponsors that the residents' incomes and the rents comply with the income-targeting and rent commitments in the approved AHP application. It also includes a requirement, consistent with Bank practice, that the Banks review the LIHTC project's rent rolls, which include each household's income and rent. However, the final rule removes the current requirement that the Banks review other back-up documentation on household incomes and rents at initial monitoring for LIHTC projects. The final rule also streamlines the language of the LIHTC monitoring provisions as proposed.

The proposed rule requested comments on whether this proposed streamlining of the Banks' initial monitoring requirements for LIHTC projects is reasonable, taking into consideration the risks of noncompliance and the costs of project monitoring. Commenters who commented on this proposal overwhelmingly supported it. A nonprofit affordable housing intermediary, a trade group, and the Banks stated generally that the proposal is reasonable and would not add any operational risks.

In 2017, 51 percent of AHP projects received LIHTC, similar to the percentage of AHP projects that received LIHTC in the previous several years. Thus, any amendments to the LIHTC monitoring requirements will impact the Banks and many project sponsors and members that participate in the AHP. As discussed further in the NPRM, it is reasonable to allow the Banks to rely on the monitoring by the state-designated tax credit allocation agencies of AHP-assisted LIHTC projects because the LIHTC income, rent, and long-term retention period requirements have been substantially equivalent to those of the AHP, the tax credit allocation agencies monitor the projects, and LIHTC projects rarely go out of compliance with the income and rent requirements. Further, multiple

parties retain a strong incentive to monitor LIHTC projects for income and rent compliance. LIHTC project owners bear responsibility for ensuring that their projects comply with the program's income, rent, and retention period requirements. The owners face severe consequences for noncompliance, which serve as a substantial deterrent to noncompliance. Because LIHTC investors cannot receive the benefits of the tax credits for units that are not in compliance, LIHTC project owners guarantee to their investors that their projects will remain in compliance, or the project owners must repay investors the amount of tax credits lost plus any penalties or interest levied by the IRS.

The Banks currently are permitted to review LIHTC back-up documentation at initial monitoring on a risk basis. Given the low risks of noncompliance by LIHTC projects, the Banks can establish review schedules for the back-up documentation that are not especially burdensome. Although the administrative burdens on the project sponsors to provide, and the Banks to review, LIHTC back-up documentation (other than rent rolls) at initial monitoring may not be significant, eliminating this requirement will benefit the Banks and project sponsors by reducing their administrative costs.

Initial and long-term monitoring of AHP projects funded by certain other government programs specified in FHFA guidance. As proposed, § 1291.50(a)(3)(i) of the final rule provides that, for AHP projects funded by certain other government programs specified in separate FHFA guidance, the Banks will only be required to review project sponsor certifications and rent rolls, and not any other back-up documentation, at initial monitoring. For long-term monitoring, § 1291.50(c)(1)(ii) of the final rule provides that the Banks will only be required to review annual project sponsor certifications on incomes and rents for such projects, and will not be required to review

any back-up documentation for incomes and rents, including rent rolls. FHFA guidance will include government programs that have the same or substantially equivalent rent, income, and retention period requirements as the AHP, very low occurrences of noncompliance with those requirements, and monitoring entities that have demonstrated and continue to demonstrate their ability to monitor the programs. FHFA will update the guidance as appropriate to remain current with federal program developments.

The FHFA guidance initially will specify the following federal government programs, which meet the standards outlined above, as eligible for the streamlined monitoring:

- HUD Section 202 Program for the Elderly;
- HUD Section 811 Program for Housing the Disabled;
- USDA Section 515 Rural Multifamily Program; and
- USDA Section 514 Farmworker Multifamily Program.

In 2017, approximately two-thirds of AHP projects received funding from other federal programs. As further discussed in the NPRM, FHFA reviewed the extent to which AHP projects also receive subsidies from HUD and USDA programs to assess the extent to which the Banks could reasonably rely on HUD and USDA monitoring for these projects. In 2017, 24 percent of AHP projects received HOME Program financing, 8 percent received Community Development Block Grant (CDBG) funds, and 9 percent received other federal financing, including from USDA. FHFA then analyzed the HUD and USDA programs to determine which programs have substantially equivalent rent, income, and retention requirements to the AHP, very low noncompliance rates, and where the monitoring entity has demonstrated and continues to demonstrate effective

monitoring of a respective program. The Agency determined that the four programs noted above meet these standards. FHFA has not identified other programs that meet these standards at this time. The proposed rule requested comments on whether this proposed reduction of the Banks' initial and long-term monitoring requirements for AHP projects funded by certain other government programs is reasonable, taking into consideration the risks of noncompliance and the costs of project monitoring. Many commenters, including trade groups, intermediaries, and nonprofit developers supported reliance on the monitoring of other federal funders of AHP projects. The Banks similarly supported the proposed changes to the initial and long-term monitoring requirements that would align them with the monitoring requirements of other federal programs, stating that they present very little risk. An intermediary supported reduced monitoring for projects involving USDA Section 514 and Section 515 properties because it would decrease regulatory and reporting burden. A CDFI supported reduced monitoring because it decreases the final burden on project sponsors, members, and the Banks.

A nonprofit organization opposed reduction to the monitoring requirements for income and rental validation at initial monitoring. The commenter stated that projects are most likely to go out of compliance during the initial lease-up phase, and that Bank review at initial monitoring would likely ensure that the project remained compliant in the long term. The commenter did not identify any specific information to justify its position. Two policy organizations encouraged FHFA to continue to evaluate other federal programs such as HOME, CDBG, Rental Assistance Demonstration, and Section 8 Project-Based Rental Assistance, to determine whether the programs could be included in the guidance.

It is reasonable to allow the Banks to conduct less monitoring of AHP projects funded by any of the four programs to be included in the FHFA guidance, given the low noncompliance risk to the AHP due to the overlap of the AHP monitoring requirements with USDA and HUD's monitoring practices, the substantially equivalent income, rent and retention requirements, and the programs' very low noncompliance rates. Eliminating the requirement to provide and review back-up documentation (other than rent rolls) for such projects at initial monitoring, and eliminating the requirement to provide and review any back-up documentation (including rent rolls) for such projects during long-term monitoring, will also benefit project sponsors and the Banks by reducing their administrative costs, albeit modestly for the Banks.[21] In addition, aligning the AHP monitoring requirements for such projects with USDA's monitoring may encourage more USDA-funded projects to apply for AHP funds, thus increasing the proportion of rural families served by the AHP.

FHFA will continue to assess the programs recommended by the commenters, as well as other possible programs, and may add programs in the guidance as appropriate. Programs will be removed from the guidance when they no longer meet the standards for inclusion in the guidance.

Enhanced long-term monitoring certifications. Consistent with the proposed rule, § 1291.50(c)(1)(i) of the final rule codifies existing Bank best practices that require submission by project sponsors of annual project certifications during the AHP 15-year retention period to include not only the household income and rent information, but also information addressing the on-going financial viability of the project, such as whether the

[21] The Banks have an average of 260 AHP rental projects per Bank in long-term monitoring, where monitoring reasonably be reduced through a risk-based monitoring plan. are

project is current on property taxes and loan payments, its vacancy rate, and whether it is in compliance with its commitments to other funding sources.

As discussed in the NPRM, during long-term monitoring, the Banks are required to monitor projects for compliance with the household income targeting and rent commitments in their AHP applications. This information may not reveal operational and viability challenges the projects are experiencing. By obtaining additional information from project sponsors about the project, the Banks may be able to work with other funders to address project concerns and any noncompliance, including attempting remediation through workout strategies or recovery of AHP subsidies for noncompliance. The requirement for enhanced certifications modestly increases the reporting requirements for project sponsors and Banks that are not currently requiring such enhanced certifications. FHFA did not receive any comments on the proposed enhanced certifications.

Notice requirement for LIHTC project noncompliance during AHP long-term retention period. As discussed under § 1291.15(a)(5)(ii) above, the final rule requires the Banks to include in their AHP monitoring agreements with members, and for members to include in their agreements with project owners, a requirement that project owners provide prompt written notice to the Bank if an AHP-assisted LIHTC project is in material and unresolved noncompliance with LIHTC household income targeting or rent requirements at any time during the AHP 15-year retention period. Section 1291.50(c)(1)(ii) of the final rule includes a corresponding monitoring requirement that the Banks must review LIHTC noncompliance notices received from project owners during the 15-year retention period, which will make the Banks aware of any material

and unresolved noncompliance so that they can take remedial or other actions regarding the project as appropriate.

Risk factors and other monitoring. Consistent with the current regulation and proposed rule, § 1291.50(c)(2)(i) of the final rule requires that a Bank's written monitoring policies take risk factors into account. The final rule adds project sponsor performance as one of the risk factors that Banks may take into account because previous compliance history may be a useful criterion for Banks to consider in developing their monitoring policies.

§ 1291.51 Monitoring under Homeownership Set-Aside Programs

The final rule relocates the monitoring provisions for the Homeownership Set-Aside Program from current § 1291.7(b) to § 1291.51. The proposed rule would have removed the requirement in current § 1291.7(b)(ii) for verifying that AHP-assisted owner-occupied units are subject to retention agreements because it would have eliminated the requirement for owner-occupied retention agreements. However, as discussed in Section III.D. above, the final rule eliminates the requirement for owner-occupied retention agreements only where the household uses the AHP subsidy solely for owner-occupied rehabilitation. Accordingly, the final rule retains the current verification requirement for owner-occupied retention agreements where the households uses the AHP subsidy for purchase of the unit, or for purchase of the unit in conjunction with rehabilitation.

Subpart F–Remedial Actions for Noncompliance

The final rule relocates the provisions on remedial actions for AHP noncompliance from § 1291.8 of the current regulation to Subpart F. As proposed, the

final rule addresses each type of noncompliance – project sponsor or owner, member, or Bank – in a separate section so that the responsibilities and potential liabilities of each party are clear. As proposed, the final rule also makes substantive changes to the order in which certain remedial actions must be taken, with certain clarifications to the provision on curing noncompliance. The changes are further discussed below.

§ 1291.60 Remedial actions for project noncompliance

Consistent with the proposed rule, § 1291.60 of the final rule addresses remedial actions for AHP project noncompliance. The language is revised and streamlined to provide greater clarity on the scope of the section and the responsibilities of the parties. As discussed extensively in Section III.E. above, the final rule adopts certain substantive changes by establishing a sequence of remedial steps for a Bank to follow before recovering AHP subsidy. The final rule also clarifies factors for Bank consideration in determining whether to accept less than the full amount of AHP subsidy due. Because the final rule is not adopting the proposed outcome-based requirements, the final rule does not adopt proposed § 1291.65, which would have provided for a number of remedial actions that FHFA could take to address Bank noncompliance with the outcome requirements, including housing plans and reimbursement of the AHP Fund.

The changes in the final rule that are not discussed in Section III.E. above, are discussed below.

Scope. Consistent with the proposed rule, § 1291.60 of the final rule sets forth the requirements applicable to the Banks in the event of noncompliance by an AHP-assisted project with its AHP application commitments and the requirements of the AHP regulation, including any use of AHP subsidy by the project sponsor or owner for

purposes other than those committed to in the AHP application. As proposed, the final rule clarifies that this section does not apply to individual AHP-assisted households, or to the sale or refinancing by such households of their homes, as there is no ongoing Bank monitoring of households once they purchase their homes, and sale or refinancing during the AHP five-year retention period is not considered noncompliance.

Elimination of project noncompliance. Section 1291.60(b) of the final rule establishes a sequence of remedial steps for a Bank to follow before recovering AHP subsidy, as discussed below.

Cure of noncompliance (§ 1291.60(b)(1)). To address concerns that the proposed cure-first requirement might compel project sponsors or owners to continue to attempt curative efforts when project noncompliance cannot be cured, the final rule includes clarifying language applying a reasonableness standard for the level of these efforts. This clarification in the final rule codifies practices Banks generally follow now.

Project modification (§ 1291.60(b)(2)). As proposed, the final rule further provides that if the project noncompliance cannot be cured within a reasonable period of time, the Bank shall determine whether the circumstances of the noncompliance can be eliminated through a project modification under § 1291.29, and if so, the Bank must approve the modification request (except for modifications requests for AHP subsidy increases, whose approval remains discretionary for the Banks).

Reasonable collection efforts, including settlement (§ 1291.60(c)). Consistent with the proposed rule, § 1291.60(c)(1) of the final rule provides that if the circumstances of a project's noncompliance cannot be eliminated through a cure or modification, the Bank, or the member if delegated the responsibility, must first make a demand on the

project sponsor or owner for repayment of the full amount of the AHP subsidy not used in compliance with the commitments in the AHP application or the AHP regulation. This is intended to ensure that the Banks attempt to recover all of the subsidy due before considering settlements. This provision also clarifies that if the noncompliance is occupancy by over-income households, the amount of AHP subsidy due is calculated based on the number of units in noncompliance, the length of the noncompliance, and the portion of the AHP subsidy attributable to the noncompliant units.

Section 1291.60(c)(2) of the final rule specifies that if the demand for repayment of the full amount of subsidy due is unsuccessful, then the Bank, or the member if delegated the responsibility and in consultation with the Bank, is required to make reasonable efforts to collect the subsidy from the project sponsor or owner, which may include settlement for less than the full amount of subsidy due. As proposed, the final rule clarifies that members would carry out these efforts in consultation with the Bank, consistent with current practice.

The final rule also retains the proposal to clarify that the facts and circumstances to consider in determining whether to settle include not only the degree of culpability of the noncomplying parties and the extent of the Bank's or member's collection efforts, as provided in the current regulation, but also the financial capacity of the project sponsor or owner, assets securing the AHP subsidy, and other assets of the project sponsor or owner. FHFA specifically requested comments on whether the facts and circumstances included in the proposed rule are appropriate for consideration during reasonable collection efforts, and whether there are other factors that should be considered.

The Banks, a Bank Advisory Council, a trade association, and a nonprofit

organization opposed the proposal on several different bases. The Banks stated that the facts and circumstances in the proposed rule were worthy but represented just a few of the considerations used in the subsidy recapture process. The Banks requested, therefore, that FHFA not codify the factors in the regulation, but rather allow each Bank to evaluate the fact-specific scenarios of a subsidy recapture and settlement process based on its own guidelines.

A Bank Advisory Council and a nonprofit organization stated that expanding the requirements of reasonable collection efforts to include the Bank's review of the financial capacity and assets of both the project sponsor and project owner would increase the Bank's administrative burden. The commenters stated that the proposal could decrease the number of project sponsors, project owners, and members willing to submit applications for AHP subsidy. Several commenters warned that the proposed requirements regarding the repayment of AHP subsidy would require project sponsors to act as guarantors, responsible for repaying all or a portion of the AHP subsidy due to noncompliance. A Bank and a trade association opposed the proposal, stating that it would effectively make AHP funds recourse obligations of the project sponsor and project owner, although affordable rental housing financing, particularly for LIHTC projects, is normally nonrecourse, and was not appropriate.

Settlement represents the last resort in a series of steps that a Bank initiates to remedy a project's noncompliance, in cases where the noncompliance cannot be eliminated through a cure or modification and the demand for full repayment of the AHP subsidy is unsuccessful. It is reasonable, in these rare instances, for a Bank to take into account the financial capacity and assets of both the project sponsor and owner to

determine whether they have the ability to repay a portion of the AHP subsidy. The Bank would not require repayment of subsidy if they do not have resources to do so. The requirement for the project sponsor or owner to repay all or a portion of the AHP subsidy in the case of noncompliance that cannot be resolved through a cure or modification is a longstanding requirement of the AHP and, therefore, is unlikely to decrease the number of applications for AHP subsidy. For these reasons, the final rule retains the proposed clarifications described above.

As proposed, the final rule also eliminates current § 1291.8(d)(2), which provided the Banks the option of seeking FHFA's prior approval for a proposed subsidy settlement. As discussed in the NPRM, only one Bank has used this option and it was for two similar cases. The Banks may enter into subsidy settlements, in their discretion, provided the settlements are supported by reasonable justifications. The Banks have made these types of business decisions for many years without seeking prior FHFA approval. Moreover, the final rule further clarifies the factors the Banks should consider in deciding whether to settle with a project sponsor or project owner. FHFA did not receive any comments on this provision.

§ 1291.61 Recovery of subsidy for member noncompliance

Section 1291.61 of the final rule addresses member noncompliance, which is addressed in § 1291.8(b)(1) of the current regulation. The final rule clarifies the language to focus on noncompliance with a member's AHP application or the AHP regulation as a result of the member's actions or omissions, consistent with similar language applicable to the Banks and project sponsors in the current regulation and Subpart F, rather than on impermissible use of the subsidy by the member. FHFA did not receive any comments

on this section.

§ 1291.62 Bank reimbursement of AHP fund

As proposed, the final rule relocates § 1291.8(e) of the current regulation, which addresses circumstances where a Bank is required to reimburse its AHP fund, to § 1291.62, with no substantive changes. FHFA did not receive any comments on this section.

§ 1291.63 Suspension and debarment

Consistent with the proposed rule, the final rule relocates § 1291.8(g) of the current regulation, which addresses suspension or debarment of members, project sponsors, or project owners, to § 1291.63, without change. FHFA did not receive any comments on this section.

§ 1291.64 Use of repaid AHP subsidies

Use of repaid AHP subsidies for other AHP-eligible projects or households. Consistent with the proposed rule, § 1291.64 of the final rule includes § 1291.8(f)(1) of the current regulation, which provides that AHP subsidy repaid to a Bank under the AHP regulation must be made available by the Bank for other AHP-eligible projects. As proposed, the final rule also clarifies that the repaid subsidy may also be made available by the Bank for AHP-eligible households.

Re-use of repaid AHP direct subsidies in the same project. The final rule retains § 1291.8(f)(2) of the current regulation, which provides for re-use of repaid AHP direct subsidies in the same project, in the Bank's discretion. The proposed rule would have eliminated the requirement for owner-occupied retention agreements in all cases, meaning no AHP subsidy would be repaid by households if they sold their homes during

the five-year AHP retention period, rendering the ability to re-use repaid subsidy in the project moot. The final rule retains the owner-occupied retention agreement requirement where the household uses the subsidy for purchase of the unit, or purchase of the unit in conjunction with rehabilitation, but not where the household uses the subsidy solely for rehabilitation. Thus, there remains the possibility for repayments of subsidy by households if they sell their homes during the five-year retention period and none of the regulatory exceptions to subsidy repayment applies. FHFA did not receive any comments on this re-use of repaid subsidies provision.

§ 1291.65 Transfer of program administration

The final rule relocates § 1291.8(h) of the current regulation, which addresses transfer of a Bank's Program to another Bank in the event of mismanagement of its Program, to § 1291.65, with no changes. The proposed rule did not propose any changes to this provision, and no comments were received on it.

Removal of Obsolete Provision

As proposed, the final rule rescinds current § 1291.8(i) because the provision refers to a now-repealed Finance Board regulatory provision that was intended to establish a formal process for review by the Board of Directors of the Finance Board of certain types of supervisory decisions, which FHFA opted not to adopt.[22] Though it is not directly comparable to the repealed Finance Board provision, FHFA's Ombudsman regulation provides an avenue for the Banks to present complaints and appeals to the Agency about their regulation or supervision.[23] FHFA did not receive any comments on

[22] 12 CFR 907.9.
[23] *See* 12 CFR part 1213.

this proposed rescission.

Subpart G–Affordable Housing Reserve Fund

§ 1291.70 Affordable Housing Reserve Fund

Consistent with the proposed rule, the final rule relocates § 1291.12 of the current regulation, which addresses the requirements for an Affordable Housing Reserve Fund, to § 1291.70. The final rule revises the current provision by requiring that amounts remaining unused or uncommitted at year-end are deemed to be used or committed if, in combination with AHP funds that have been returned to the Bank or de-committed from canceled projects, they are insufficient to fund: (1) AHP application alternates in the Bank's final funding round of the year for its General Fund or any Targeted Funds, if the Bank has a policy to approve alternates for funding under such Funds; (2) pending applications for funds under any Bank Homeownership Set-Aside Programs; and (3) project modifications for AHP subsidy increases approved by the Bank. The proposed rule would have prioritized the General Fund and then any Targeted Funds. The final rule does not adopt this proposed change in order to provide the Banks with flexibility on how to use such funds. FHFA did not receive any comments on this proposed revision. FHFA notes that in the history of the Program, there has never been a need to establish an Affordable Housing Reserve Fund.

V. Consideration of Differences between the Banks and the Enterprises

Section 1313(f) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 requires the Director of FHFA, when promulgating regulations relating to the Banks, to consider the differences between the Banks and the Enterprises

(Fannie Mae and Freddie Mac) as they relate to the Banks' cooperative ownership structure, mission of providing liquidity to members, affordable housing and community development mission, capital structure, and joint and several liability. The final rule applies only to the Banks. It amends the current AHP regulation to revise the scoring criteria governing the selection of AHP award recipients; provide additional authority to the Banks regarding certain Program operations, streamline project monitoring requirements, clarify various parties' responsibilities regarding AHP noncompliance, eliminate the requirement for retention agreements for AHP subsidy used to rehabilitate owner-occupied units without an accompanying purchase, and clarify certain operational requirements. In preparing this final rule, the Director considered the differences between the Banks and the Enterprises as they relate to the above factors, and determined that the amendments in the final rule are positive for the affordable housing mission of the Banks and neutral regarding the other statutory factors. FHFA requested comments in the NPRM regarding whether differences related to those factors should result in any revisions to the proposed rule. No significant relevant comments were received.

VI. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA)[24] requires that Federal agencies, including FHFA, consider the impact of paperwork and other information collection burdens imposed on the public. Under the PRA and the implementing regulations of the Office of Management and Budget (OMB), no agency may conduct or sponsor, and no person is required to respond to, an information collection unless it displays a currently valid OMB control number. Part 1291 contains six information collections (ICs) relating

[24] 44 U.S.C. 3501 *et seq*.

to the Banks' AHPs, which have been approved by OMB under the PRA and assigned control number 2590-0007 (entitled "Affordable Housing Program"; expires Mar. 31, 2020). The final rule modifies some of the information collection requirements in part 1291 and makes other changes to the regulation that affect the reporting and recordkeeping burdens imposed by the regulation. FHFA has submitted the proposed and final rules and an analysis of the revised ICs to OMB for review and has requested approval of a three-year extension of control number 2590-0007.

A. Background

As revised by the final rule, part 1291 contains six ICs: (1) competitive applications for AHP subsidy under General Funds and Targeted Funds; (2) compliance submissions for approved General Fund and Targeted Fund projects at AHP subsidy disbursement; (3) modification requests for approved General Fund and Targeted Fund projects; (4) initial monitoring submissions for approved General Fund and Targeted Fund projects; (5) long-term monitoring submissions for approved General Fund and Targeted Fund projects; and (6) Homeownership Set-Aside Program applications and certifications. These ICs are substantially the same as the six currently-approved ICs in existing part 1291, although ICs #1 through #5 have been re-titled to refer to the Banks' "General Fund and Targeted Fund projects" instead of their "Competitive Application Program projects." Under the final rule (as under the proposed rule), projects funded under the Banks' General Funds and Targeted Funds will be subject to a competitive application process and to requirements regarding subsidy disbursements, modification requests, and initial and long-term monitoring that are similar to those that apply to the Banks' Competitive Application Programs.

As required by 5 CFR 1320.8(d)(3), the **SUPPLEMENTARY INFORMATION** to the proposed rule included a PRA statement setting forth FHFA's burden estimates for the six ICs, as revised by the proposed rule, and requested public comments on those estimates and on the reporting and recordkeeping burdens that would be imposed by the rule.[25] The PRA statement also detailed, for each IC, how FHFA arrived at its burden estimate, the effect of the proposed rule on the scope of the IC and the burden estimate, and how the collected information would be used.

In compliance with 5 CFR 1320.11(b), FHFA submitted the proposed rule and an analysis of the revised ICs to OMB for review simultaneously with the publication of the proposed rule. On June 6, 2018, OMB issued a Notice of Action (NOA) to FHFA, pursuant to 5 CFR 1320.11(c), stating that OMB had not yet approved the revised ICs and that the terms of the prior renewal of the control number remained in effect. The NOA instructed FHFA to address all comments received in response to the proposed rule's PRA statement. Under 5 CFR 1320.11(f), FHFA must explain how any IC contained in the final rule responds to any comments received from OMB or the public and must identify and explain any modifications made in the final rule, or explain why it rejected the comments. Aside from the NOA filed by OMB, FHFA received no comments in response to the PRA statement in the proposed rule.

Although not generated by PRA comments or concerns, there are a number of substantive differences between the proposed and final rules, as detailed above. While some of these differences touch upon information collection requirements, FHFA has concluded that the only difference that will have a material effect on the paperwork

[25] *See* 83 FR at 11370-74.

burden imposed by the final rule is the decision not to adopt the proposed increase, from 35 to 40 percent, in the maximum percentage of AHP funds Banks may allocate to their Homeownership Set-Aside programs. In estimating the paperwork burden that IC #6 would have imposed under the proposed rule, FHFA anticipated that the increase in the maximum allocation percentage, in combination with generally higher Bank incomes, would lead the average annual number of Homeownership Set-Aside Program applications and certifications to increase significantly, to 15,000 from the 13,000 that FHFA had estimated in connection with the prior renewal of the control number. This led FHFA to estimate that the average annual burden imposed by IC #6 would increase from 65,000 to 75,000 hours under the proposed rule. Because the final rule does not implement the proposed maximum allocation percentage increase, however, FHFA now anticipates that the Banks will receive an average of only 13,260 Homeownership Set-Aside Program applications and certifications annually. This figure represents a two percent increase from the most recent estimate of 13,000, to reflect a slightly higher level of Homeownership Set-Aside Program activity arising from anticipated higher Bank incomes over the next three years. As a result of this change, FHFA has modified its burden estimate for revised IC #6 downward to 66,300 hours from the 75,000 hours reflected in the proposed rule's PRA statement (a decrease of 8,700 hours).

Aside from the modification of the burden estimate for IC #6 discussed above, the burden estimates for, and material details regarding, each revised IC remain as described in the PRA statement for the proposed rule. The final burden estimates for revised part 1291 appear below.

B. Burden Estimates for Respondents

FHFA estimates that the average total burden that will be imposed upon Bank members and AHP project sponsors and owners annually over the next three years by the six ICs in revised part 1291 will be 118,905 hours. This represents an increase of 3,155 total hours over the estimate of 115,750 hours made in connection with the most recent renewal of the OMB control number. The burden estimate for each IC and the manner in which the estimate was calculated are set forth below.

1. Competitive Applications for AHP Subsidy under General Funds and Targeted Funds

FHFA estimates that Banks will receive an annual average of 1,485 competitive applications for subsidy from Bank members on behalf of project sponsors and owners under their General Funds and Targeted Funds over the next three years and that it will take an average of 24 hours to prepare and submit each application, resulting in an estimated annual average burden of 35,640 hours for IC #1.

2. Compliance Submissions for Approved General Fund and Targeted Fund Projects at AHP Subsidy Disbursement

FHFA estimates that the Banks will receive an annual average of 715 submissions over the next three years from Bank members and project sponsors verifying that projects approved under the Banks' General Funds and Targeted Funds continue to comply with the regulatory eligibility requirements and all commitments made in the approved AHP applications at the time of subsidy disbursement and that it will take an average of one hour to prepare each submission, resulting in an estimated annual average burden of 715 hours for IC #2.

3. Modification Requests for Approved General Fund and Targeted Fund Projects

FHFA estimates that Banks will receive an annual average of 290 requests from Bank members and project sponsors for modifications to projects that have been approved under the Banks' AHP competitive application programs over the next three years and that it will take an average of 2.5 hours to prepare each request, resulting in an estimated annual average burden of 725 hours for IC #3.

4. Initial Monitoring Submissions for Approved General Fund and Targeted Fund Projects

FHFA estimates that Banks will receive an annual average of 510 submissions from Bank members and project sponsors of documentation required by the Banks as part of their initial monitoring of in-progress and recently completed projects approved under their General Funds and Targeted Funds over the next three years and that it will take an average of 4.5 hours to prepare each submission, resulting in an estimated annual average burden of 2,295 hours for IC #4.

5. Long-Term Monitoring Submissions for Approved General Fund and Targeted Fund Projects

FHFA estimates that Banks will receive an annual average of 4,900 submissions from Bank members and project sponsors of documentation required by the Banks as part of their long-term monitoring of completed projects approved under their General Funds and Targeted Funds over the next three years and that it will take an average of 2.7 hours to prepare each submission, resulting in an estimated annual average burden of 13,230 hours for IC #5.

6. Homeownership Set-Aside Program Applications and Certifications

FHFA estimates that Banks will receive from Bank members an annual average of

13,260 applications and required certifications for AHP direct subsidies under their Homeownership Set-Aside Programs and that it will take an average of 5 hours to prepare each submission, resulting in an estimated annual average burden of 66,300 hours for IC #6.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act[26] 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.[27] FHFA has considered the impact of the final rule under the Regulatory Flexibility Act. The General Counsel of FHFA certifies that the final rule is not likely to have a significant economic impact on a substantial number of small entities because the regulation applies to the Banks, which are not small entities for purposes of the Regulatory Flexibility Act.

VIII. Congressional Review Act

In accordance with the Congressional Review Act,[28] FHFA has determined that this final rule is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB).

List of Subjects

12 CFR Part 1290

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[26] 5 U.S.C. 601 *et seq*.
[27] 5 U.S.C. 605(b).
[28] *See* 5 U.S.C. 804(2).

Banks and banking, Credit, Federal home loan banks, Housing, Mortgages, Reporting and recordkeeping requirements.

12 CFR Part 1291

Community development, Credit, Federal home loan banks, Housing, Low- and moderate-income housing, Mortgages, Reporting and recordkeeping requirements.

For the reasons stated in the Preamble, FHFA amends parts 1290 and 1291 of Title 12 of the Code of Federal Regulations as follows:

PART 1290—COMMUNITY SUPPORT REQUIREMENTS

1. The authority citation for part 1290 continues to read as follows:

Authority: 12 U.S.C. 1430(g).

2. Amend § 1290.6 by revising paragraph (a)(5) and adding paragraph (c) to read as follows:

§ 1290.6 Bank community support programs.

(a) *** * ***

(5) Include an annual Targeted Community Lending Plan approved by the Bank's board of directors and subject to modification. The Bank's board of directors shall not delegate to a committee of the board, Bank officers, or other Bank employees the responsibility to adopt or amend the Targeted Community Lending Plan. The Targeted Community Lending Plan shall:

(i) Reflect market research conducted in the Bank's district;

(ii) Describe how the Bank will address identified credit needs and market opportunities in the Bank's district for targeted community lending;

(iii) Be developed in consultation with (and may only be amended after

consultation with) its Advisory Council and with members, housing associates, and public and private economic development organizations in the Bank's district;

(iv) Establish quantitative targeted community lending performance goals;

(v) Identify and assess significant affordable housing needs in its district that will be addressed through its Affordable Housing Program under 12 CFR part 1291, reflecting market research conducted or obtained by the Bank; and

(vi) For any Targeted Funds established by the Bank under its Affordable Housing Program, specify, from among the identified affordable housing needs, the particular affordable housing needs the Bank plans to address through such Targeted Funds.

* * * * *

(c) Public access. A Bank shall publish its current Targeted Community Lending Plan on its publicly available website, and shall publish any amendments to its Targeted Community Lending Plan on the website within 30 days after the date of their adoption by the Bank's board of directors. If a Bank plans to establish any Targeted Funds under its Affordable Housing Program, the Bank must publish its Targeted Community Lending Plan (as amended) on the website on or before the date of publication of its annual Affordable Housing Program Implementation Plan, and at least 90 days before the first day that applications may be submitted to the Targeted Fund, unless the Targeted Fund is specifically targeted to address a federal- or state-declared disaster.

3. Add § 1290.8 to read as follows:

§ 1290.8 Compliance dates.

From **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION OF**

THIS FINAL RULE IN THE FEDERAL REGISTER] to December 31, 2020, a Bank shall comply with either prior part 1290 (in 12 CFR part 1290 (January 1, 2018 edition)) or this part 1290. On and after January 1, 2021, a Bank shall comply with this part 1290.

PART 1291—FEDERAL HOME LOAN BANKS' AFFORDABLE HOUSING PROGRAM

4. Revise part 1291 to read as follows:

PART 1291—FEDERAL HOME LOAN BANKS' AFFORDABLE HOUSING PROGRAM

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1291.1 Definitions.
1291.2 Compliance dates.

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1291.21 Eligible applicants.
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1291.23 Eligible projects.
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1291.25 Scoring methodologies.
1291.26 Scoring criteria for the General Fund.
1291.27 Scoring criteria for Targeted Funds.
1291.28 Approval of AHP applications under the General Fund and Targeted Funds.
1291.29 Modifications of approved AHP applications.
1291.30 Procedures for funding.
1291.31 Lending and re-lending of AHP direct subsidy by revolving loan funds.

1291.32 Use of AHP subsidy in loan pools.

Subpart D–Homeownership Set-Aside Programs

1291.40 Establishment of programs.
1291.41 Eligible applicants.
1291.42 Eligibility requirements.
1291.43 Approval of AHP applications.
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Subpart E–Monitoring

1291.50 Monitoring under General Fund and Targeted Funds.
1291.51 Monitoring under Homeownership Set-Aside Programs.

Subpart F–Remedial Actions for Noncompliance

1291.60 Remedial actions for project noncompliance.
1291.61 Recovery of subsidy for member noncompliance.
1291.62 Bank reimbursement of AHP fund.
1291.63 Suspension and debarment.
1291.64 Use of repaid AHP subsidies.
1291.65 Transfer of Program administration.

Subpart G–Affordable Housing Reserve Fund

1291.70 Affordable Housing Reserve Fund.

Authority: 12 U.S.C. 1430(j).

Subpart A–General

§ 1291.1 Definitions.

As used in this part:

Affordable means that:

(1) The rent charged to a household for a unit that is to be reserved for occupancy by a household with an income at or below 80 percent of the median income for the area, does not exceed 30 percent of the income of a household of the maximum income and size expected, under the commitment made in the AHP application, to occupy the unit

(assuming occupancy of 1.5 persons per bedroom or 1.0 persons per unit without a separate bedroom); or

(2) The rent charged to a household, for rental units subsidized with Section 8 assistance under 42 U.S.C. 1437f or subsidized under another assistance program where the rents are charged in the same way as under the Section 8 program, if the rent complied with this definition at the time of the household's initial occupancy and the household continues to be assisted through the Section 8 or another assistance program, respectively.

AHP means the Affordable Housing Program required to be established by the Banks pursuant to 12 U.S.C. 1430(j) and this part.

AHP project means a single-family or multifamily housing project for owner-occupied or rental housing that has been awarded or has received AHP subsidy under a Bank's General Fund and any Targeted Funds.

Cost of funds means, for purposes of a subsidized advance, the estimated cost of issuing Bank System consolidated obligations with maturities comparable to that of the subsidized advance.

Direct subsidy means an AHP subsidy in the form of a direct cash payment.

Eligible household means a household that meets the income limits and other requirements specified by a Bank for its General Fund and any Targeted Funds and Homeownership Set-Aside Programs, provided that:

(1) In the case of owner-occupied housing, the household's income may not exceed 80 percent of the median income for the area; and

(2) In the case of rental housing, the household's income in at least 20 percent of

the units may not exceed 50 percent of the median income for the area.

Eligible project means a project eligible to receive AHP subsidy pursuant to the requirements of this part.

Extremely low-income household means a household that has an income at or below 30 percent of the median income for the area, with the income limit adjusted for household size in accordance with the methodology of the applicable median income standard selected from those enumerated in the definition of "median income for the area," unless such median income standard has no household size adjustment methodology.

Family member means any individual related to a person by blood, marriage, or adoption.

Funding round means a time period, as determined by a Bank, during which the Bank accepts AHP applications for subsidy under its General Fund and any Targeted Funds.

General Fund means a program that each Bank is required to establish and under which the Bank approves *(i.e.*, awards) applications for AHP subsidy through a competitive application scoring process and disburses the subsidy, pursuant to the requirements of this part.

Homeownership Set-Aside Program means a program established by a Bank, in its discretion, under which the Bank approves (*i.e.*, awards) applications for AHP direct subsidy through a noncompetitive process developed by the Bank and disburses the subsidy, pursuant to the requirements of this part.

Household's investment means the following, to the extent paid by the household

and documented (in the Closing Disclosure or other settlement statement, if applicable, or elsewhere) to the Bank or its designee:

(1) Reasonable and customary costs paid by the household in connection with the purchase of the unit (including real estate broker's commission, attorney's fees, and title search fees);

(2) Any down payment paid in connection with the household's purchase of the unit;

(3) The cost of any capital improvements made after the household's purchase of the unit until the time of the subsequent sale, transfer, assignment of title or deed, or refinancing; and

(4) The amount of principal on any mortgage senior to the AHP subsidy lien or other legally enforceable AHP subsidy repayment obligation repaid by the household.

LIHTC means Low-Income Housing Tax Credits under section 42 of the Internal Revenue Code (26 U.S.C. 42).

Loan pool means a group of mortgage or other loans meeting the requirements of this part that are purchased, pooled, and held in trust.

Low- or moderate-income household means a household that has an income of 80 percent or less of the median income for the area, with the income limit adjusted for household size in accordance with the methodology of the applicable median income standard selected from those enumerated in the definition of "median income for the area," unless such median income standard has no household size adjustment methodology.

Median income for the area means one or more of the following median income

standards as determined by a Bank, after consultation with its Advisory Council, in its AHP Implementation Plan:

(1) The median income for the area, as published annually by HUD;

(2) The median income for the area obtained from the Federal Financial Institutions Examination Council;

(3) The applicable median family income, as determined under 26 U.S.C. 143(f) (Mortgage Revenue Bonds) and published by a state agency or instrumentality;

(4) The median income for the area, as published by the United States Department of Agriculture; or

(5) The median income for an applicable definable geographic area, as published by a federal, state, or local government entity, and approved by FHFA, at the request of a Bank, for use under the AHP.

Multifamily building means a structure with five or more dwelling units.

Net earnings of a Bank means the net earnings of a Bank for a calendar year before declaring or paying any dividend under section 16 of the Bank Act (12 U.S.C. 1436). For purposes of this part, "dividend" includes any dividends on capital stock subject to a redemption request even if under GAAP those dividends are treated as an "interest expense."

Net proceeds means:

(1) In the case of a sale, transfer, or assignment of title or deed of an AHP-assisted unit by a household during the AHP five-year retention period, the sales price minus reasonable and customary costs paid by the household in connection with the transaction (including real estate broker's commission, attorney's fees, and title search

fees) and outstanding debt superior to the AHP subsidy lien or other legally enforceable AHP subsidy repayment obligation;

(2) In the case of a refinancing of an AHP-assisted unit by a household during the AHP five-year retention period, the principal amount of the new mortgage minus reasonable and customary costs paid by the household in connection with the transaction (including attorney's fees and title search fees) and the principal amount of the refinanced mortgage.

Owner-occupied project means, for purposes of a Bank's General Fund and any Targeted Funds, one or more owner-occupied units in a single-family or multifamily building, including condominiums, cooperative housing, and manufactured housing.

Owner-occupied unit means a dwelling unit occupied by the owner of the unit. Housing with two to four dwelling units consisting of one owner-occupied unit and one or more rental units is considered a single owner-occupied unit.

Program means the Affordable Housing Program established pursuant to this part.

Rental project means, for purposes of a Bank's General Fund and any Targeted Funds, one or more dwelling units for occupancy by households that are not owner-occupants, including overnight and emergency shelters, transitional housing for homeless households, mutual housing, single-room occupancy housing, and manufactured housing communities.

Retention period means:

(1) Five years from closing for an AHP-assisted owner-occupied unit where the AHP subsidy is used for purchase of the unit or for purchase in conjunction with rehabilitation of the unit; and

(2) Fifteen years from the date of completion for a rental project.

Revolving loan fund means a capital fund established to make mortgage or other loans whereby loan principal is repaid into the fund and re-lent to other borrowers.

Single-family building means a structure with one to four dwelling units.

Sponsor means a not-for-profit or for-profit organization or public entity that:

(1) Has an ownership interest (including any partnership interest), as defined by the Bank in its AHP Implementation Plan, in a rental project;

(2) Is integrally involved, as defined by the Bank in its AHP Implementation Plan, in an owner-occupied project, such as by exercising control over the planning, development, or management of the project, or by qualifying borrowers and providing or arranging financing for the owners of the units;

(3) Operates a loan pool; or

(4) Is a revolving loan fund.

Subsidized advance means an advance to a member at an interest rate reduced below the Bank's cost of funds by use of a subsidy.

Subsidy means:

(1) A direct subsidy, provided that if a direct subsidy is used to write down the interest rate on a loan extended by a member, sponsor, or other party to a project, the subsidy must equal the net present value of the interest foregone from making the loan below the lender's market interest rate; or

(2) The net present value of the interest revenue foregone from making a subsidized advance at a rate below the Bank's cost of funds.

Targeted Fund means a program established by a Bank, in its discretion, to address specific affordable housing needs within its district that are unmet, have proven difficult to address through its General Fund, or align with objectives identified in its strategic plan, under which the Bank approves (*i.e.*, awards) applications for AHP subsidy through a competitive application scoring process developed by the Bank and disburses the subsidy, pursuant to the requirements of this part.

Very low-income household means a household that has an income at or below 50 percent of the median income for the area, with the income limit adjusted for household size in accordance with the methodology of the applicable median income standard selected from those enumerated in the definition of "median income for the area," unless such median income standard has no household size adjustment methodology.

Visitable means, in either owner-occupied or rental housing, at least one entrance is at-grade (no steps) and approached by an accessible route such as a sidewalk, and the entrance door and all interior passage doors are at least 34 inches wide, offering 32 inches of clear passage space.

§ 1291.2 Compliance dates.

(a) General January 1, 2021 compliance date. Except as provided in paragraph (b) of this section, from **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION OF THIS FINAL RULE IN THE FEDERAL REGISTER]** to December 31, 2020, a Bank shall comply with either prior part 1291 (in 12 CFR part 1291 (January 1, 2018 edition)) or this part 1291, and on and after January 1, 2021, a Bank shall comply with this part 1291.

(b) January 1, 2020 compliance date for owner-occupied retention agreements;

exception for adoption of proxies. From **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION OF THIS FINAL RULE IN THE FEDERAL REGISTER]** to December 31, 2019, a Bank shall comply with either prior § 1291.9(a)(7) (in 12 CFR part 1291 (January 1, 2018 edition)) or § 1291.15(a)(7), and on and after January 1, 2020, a Bank shall comply with § 1291.15(a)(7), except that a Bank shall comply with § 1291.15(a)(7)(ii)(B) on the date set forth in the FHFA guidance on proxies referenced therein.

Subpart B–Program Administration and Governance

§ 1291.10 Required annual AHP contribution.

Each Bank shall contribute annually to its Program the greater of:

(a) 10 percent of the Bank's net earnings for the previous year; or

(b) That Bank's pro rata share of an aggregate of $100 million to be contributed in total by the Banks, such proration being made on the basis of the net earnings of the Banks for the previous year, except that the required annual AHP contribution for a Bank shall not exceed its net earnings in the previous year.

§ 1291.11 Temporary suspension of AHP contributions.

(a) Request to FHFA. If a Bank finds that the contributions required pursuant to § 1291.10 are contributing to the financial instability of the Bank, the Bank may apply in writing to FHFA for a temporary suspension of such contributions.

(b) Director review—(1) Financial instability. In determining the financial instability of a Bank, the Director shall consider such factors as:

(i) Severely depressed Bank earnings;

(ii) A substantial decline in Bank membership capital; and

(iii) A substantial reduction in Bank advances outstanding.

(2) Limitations on grounds for suspension. The Director shall not suspend a Bank's annual AHP contributions if it determines that the Bank's reduction in earnings is due to:

(i) A change in the terms of advances to members that is not justified by market conditions;

(ii) Inordinate operating and administrative expenses; or

(iii) Mismanagement.

§ 1291.12 Allocation of required annual AHP contribution.

Each Bank, after consultation with its Advisory Council and pursuant to written policies adopted by the Bank's board of directors, shall meet the following requirements for allocation of its required annual AHP contribution.

(a) General Fund. Each Bank shall allocate annually at least 50 percent of its required annual AHP contribution to provide funds to members through a General Fund established and administered by the Bank pursuant to the requirements of this part.

(b) Homeownership Set-Aside Programs. A Bank may, in its discretion, allocate annually, in the aggregate, up to the greater of $4.5 million or 35 percent of its required annual AHP contribution to provide funds to members participating in Homeownership Set-Aside Programs established and administered by the Bank pursuant to the requirements of this part, provided that at least one-third of the Bank's aggregate annual set-aside allocation to such programs is allocated to assist first-time homebuyers or households for owner-occupied rehabilitation, or a combination of both.

(c) Targeted Funds—phase-in requirements for funding allocations. Unless

otherwise directed by FHFA and subject to the phase-in requirements for the number of Targeted Funds in § 1291.20(b), a Bank may, in its discretion, allocate annually, up to:

(1) 20 percent, in the aggregate, of its required annual AHP contribution to any Targeted Funds;

(2) 30 percent, in the aggregate, of its required annual AHP contribution to any Targeted Funds, provided that it allocated at least 20 percent, in the aggregate, of its required annual AHP contribution to one or more Targeted Funds in any preceding year; or

(3) 40 percent, in the aggregate, of its required annual AHP contribution to any Targeted Funds, provided that it allocated at least 30 percent, in the aggregate, of its required annual AHP contribution to one or more Targeted Funds in any preceding year.

(d) Acceleration of funding. A Bank may, in its discretion, accelerate to its current year's Program from future required annual AHP contributions an amount up to the greater of $5 million or 20 percent of its required annual AHP contribution for the current year. The Bank may credit the amount of the accelerated contribution against required AHP contributions under this part 1291 over one or more of the subsequent five years.

(e) No delegation. A Bank's board of directors shall not delegate to a committee of the board, Bank officers, or other Bank employees the responsibility for adopting the Bank's policies for its General Fund and any Targeted Funds and Homeownership Set-Aside Programs.

§ 1291.13 Targeted Community Lending Plan; AHP Implementation Plan.

(a) Targeted Community Lending Plan—(1) Identification of housing needs.

Pursuant to the requirements of 12 CFR 1290.6(a)(5)(v) and (vi), a Bank's annual Targeted Community Lending Plan adopted under its community support program shall, among other things, identify the significant affordable housing needs in its district that will be addressed through its AHP, as well as any specific affordable housing needs it plans to address through any Targeted Funds as set forth in its AHP Implementation Plan.

(2) Public access. A Bank shall publish its current Targeted Community Lending Plan on its publicly available website, and shall publish any amendments to its Targeted Community Lending Plan on the website within 30 days after the date of their adoption by the Bank's board of directors. If a Bank plans to establish any Targeted Funds under its AHP, the Bank must publish its Targeted Community Lending Plan (as amended) on the website on or before the date of publication of its annual AHP Implementation Plan, and at least 90 days before the first day that applications may be submitted to the Targeted Fund, unless the Targeted Fund is specifically targeted to address a federal- or state-declared disaster.

(3) Notification of Plan amendments to FHFA. A Bank shall notify FHFA of any amendments to its Targeted Community Lending Plan within 30 days after the date of their adoption by the Bank's board of directors.

(b) AHP Implementation Plan. Each Bank's board of directors, after consultation with its Advisory Council, shall adopt a written AHP Implementation Plan, and shall not amend the AHP Implementation Plan without first consulting its Advisory Council. The Bank's board of directors shall not delegate to Bank officers or other Bank employees the responsibility for such prior consultations with the Advisory Council, and shall not delegate to a committee of the board, Bank officers, or other Bank employees the

responsibility for adopting or amending the AHP Implementation Plan. The AHP Implementation Plan shall set forth, at a minimum:

(1) The applicable median income standard or standards adopted by the Bank consistent with the definition of "median income for the area" in § 1291.1.

(2) For the General Fund established by the Bank pursuant to § 1291.20(a), the Bank's requirements for the General Fund, including the Bank's scoring methodology, including its scoring tie-breaker policy adopted pursuant to §§ 1291.25(c) and 1291.28(c), and any policy on approving AHP application alternates for funding pursuant to §§ 1291.25(c)(6) and 1291.28(b).

(3) For each Targeted Fund established by the Bank, if any, pursuant to § 1291.20(b), the Bank's requirements for the Targeted Fund, including the Bank's scoring methodology for each Fund, including its scoring tie-breaker policy adopted pursuant to §§ 1291.25(c) and 1291.28(c), and any policy on approving AHP application alternates for funding pursuant to §§ 1291.25(c)(6) and 1291.28(b), and the parameters adopted pursuant to § 1291.20(b)(2).

(4) The Bank's policy on how it will determine under which Fund to approve an application for the same project that is submitted to more than one Fund at a Bank in a calendar year and scores high enough to be approved under each Fund, pursuant to § 1291.28(d).

(5) For each Homeownership Set-Aside Program established by the Bank, if any, pursuant to § 1291.40, the Bank's requirements for the program, including the Bank's application and subsidy disbursement methodology.

(6) The Bank's retention agreement requirements for projects and households

under its General Fund, any Targeted Funds, and any Homeownership Set-Aside Programs, pursuant to § 1291.15(a)(7) and (8), including the proxy or proxies selected by the Bank for determining a subsequent purchaser's income pursuant to FHFA guidance under § 1291.15(a)(7)(ii)(B).

(7) The Bank's standards for approving a relocation plan for current occupants of rental projects pursuant to § 1291.23(a)(2)(ii)(B).

(8) Any optional Bank district eligibility requirements adopted by the Bank pursuant to § 1291.24(c).

(9) The Bank's requirements for funding revolving loan funds, if adopted by the Bank pursuant to § 1291.31;

(10) The Bank's requirements for funding loan pools, if adopted by the Bank pursuant to § 1291.32;

(11) The Bank's requirements for monitoring under its General Fund and any Targeted Funds and Homeownership Set-Aside Programs pursuant to §§ 1291.50 and 1291.51.

(12) The Bank's requirements, including time limits, for re-use of repaid AHP direct subsidy in the same project, if adopted by the Bank pursuant to § 1291.64(b).

(c) Advisory Council review. Prior to the amendment of a Bank's AHP Implementation Plan, the Bank shall provide its Advisory Council an opportunity to review the document, and the Advisory Council shall provide its recommendations to the Bank's board of directors for its consideration.

(d) Notification of Plan amendments to FHFA. A Bank shall notify FHFA of any amendments made to its AHP Implementation Plan within 30 days after the date of their

adoption by the Bank's board of directors.

(e) Public access. A Bank shall publish its current AHP Implementation Plan on its publicly available website, and shall publish any amendments to the AHP Implementation Plan on the website within 30 days after the date of their adoption by the Bank's board of directors.

§ 1291.14 Advisory Councils.

(a) Appointment. (1) Each Bank's board of directors shall appoint an Advisory Council of 7 to 15 persons who reside in the Bank's district and are drawn from community and not-for-profit organizations that are actively involved in providing or promoting low- and moderate-income housing, and community and not-for-profit organizations that are actively involved in providing or promoting community lending, in the district. Community organizations include for-profit organizations.

(2) Each Bank shall solicit nominations for membership on the Advisory Council from community and not-for-profit organizations pursuant to a nomination process that is as broad and as participatory as possible, allowing sufficient time for responses.

(3) The Bank's board of directors shall appoint Advisory Council members from a diverse range of organizations so that representatives of no one group constitute an undue proportion of the membership of the Advisory Council, giving consideration to the size of the Bank's district and the diversity of low- and moderate-income housing and community lending needs and activities within the district.

(b) Terms of Advisory Council members. Pursuant to policies adopted by the Bank's board of directors, Advisory Council members shall be appointed by the Bank's board of directors to serve for terms of three years, which shall be staggered to provide

continuity in experience and service to the Advisory Council, except that Advisory Council members may be appointed to serve for terms of one or two years solely for purposes of reconfiguring the staggering of the three-year terms. No Advisory Council member may be appointed to serve for more than three full consecutive terms. An Advisory Council member appointed to fill a vacancy shall be appointed for the unexpired term of his or her predecessor in office.

(c) Election of officers. Each Advisory Council shall elect from among its members a chairperson, a vice chairperson, and any other officers the Advisory Council deems appropriate.

(d) Duties—(1) Meetings with the Banks. (i) The Advisory Council shall meet with representatives of the Bank's board of directors at least quarterly to provide advice on ways in which the Bank can better carry out its housing finance and community lending mission, including, but not limited to, advice on the low- and moderate-income housing and community lending programs and needs in the Bank's district, and on the use of AHP subsidies, Bank advances, and other Bank credit products for these purposes.

(ii) The Advisory Council's advice shall include recommendations on:

(A) The Bank’s Targeted Community Lending Plan, and any amendments thereto, pursuant to 12 CFR 1290.6(a)(5)(iii);

(B) The amount of AHP funds to be allocated to the Bank's General Fund and any Targeted Funds and Homeownership Set-Aside Programs, including how the set-aside funds should be apportioned under the one-third funding allocation requirement in § 1291.12(b);

(C) The AHP Implementation Plan and any subsequent amendments thereto;

(D) The Bank's scoring methodologies, related definitions, and any additional optional district eligibility requirements for the General Fund and any Targeted Funds; and

(E) The eligibility requirements and any priority criteria for any Homeownership Set-Aside Programs.

(2) Summary of AHP applications. The Bank shall comply with requests from the Advisory Council for summary information regarding AHP applications from prior funding rounds.

(3) Annual analysis; public access. (i) Each Advisory Council annually shall submit to FHFA by May 1 its analysis of the low- and moderate-income housing and community lending activity of the Bank by which it is appointed.

(ii) Within 30 days after the date the Advisory Council's annual analysis is submitted to FHFA, the Bank shall publish the analysis on its publicly available website.

(e) Expenses. The Bank shall pay Advisory Council members' travel expenses, including transportation and subsistence, for each day devoted to attending meetings with representatives of the board of directors of the Bank and meetings requested by FHFA.

(f) No delegation. A Bank's board of directors shall not delegate to Bank officers or other Bank employees the responsibility to appoint persons as members of the Advisory Council or to meet with the Advisory Council at the quarterly meetings required by the Bank Act (12 U.S.C. 1430(j)(11)).

§ 1291.15 Agreements.

(a) Agreements between Banks and members. A Bank shall have in place with each member receiving an AHP subsidized advance or AHP direct subsidy an agreement

or agreements containing, at a minimum, the following provisions, where applicable:

(1) Notification of member. The member has been notified of the requirements of this part as they may be amended from time to time, and all Bank policies relevant to the member's approved application for AHP subsidy.

(2) AHP subsidy pass-through. The member shall pass on the full amount of the AHP subsidy to the project or household, as applicable, for which the subsidy was approved.

(3) Use of AHP subsidy—(i) Use of AHP subsidy by the member. The member shall use the AHP subsidy in accordance with the terms of the member's approved application for the subsidy and the requirements of this part.

(ii) Use of AHP subsidy by the project sponsor or owner. The member shall have in place an agreement with each project sponsor or owner in which the project sponsor or owner agrees to use the AHP subsidy in accordance with the terms of the member's approved application for the subsidy and the requirements of this part.

(4) Repayment of AHP subsidies in case of noncompliance—(i) Noncompliance by the member. The member shall repay AHP subsidies to the Bank in accordance with the requirements of § 1291.61.

(ii) Noncompliance by a project sponsor or owner—(A) Agreement. The member shall have in place an agreement with each project sponsor or owner in which the project sponsor or owner agrees to repay AHP subsidies to the member or the Bank in accordance with the requirements of § 1291.60.

(B) Recovery of AHP subsidies. The member shall recover from the project sponsor or owner and repay to the Bank AHP subsidies in accordance with the

requirements of § 1291.60 (if applicable).

(5) Project monitoring—(i) Monitoring by the member. The member shall comply with the monitoring requirements applicable to it, as established by the Bank in its monitoring policies pursuant to §§ 1291.50 and 1291.51.

(ii) Agreement; LIHTC noncompliance notice. The member shall have in place an agreement with each project sponsor and owner, in which the project sponsor and owner agree to comply with the monitoring requirements applicable to such parties, as established by the Bank in its monitoring policies pursuant to § 1291.50. The member's agreement shall also include an agreement by the project owner to provide prompt written notice to the Bank if the project also received LIHTC and the project is in material and unresolved noncompliance with the LIHTC income targeting or rent requirements at any time during the AHP 15-year retention period.

(6) Transfer of AHP obligations—(i) To another member. The member shall make best efforts to transfer its obligations under the approved application for AHP subsidy to another member in the event of its loss of membership in the Bank prior to the Bank's final disbursement of AHP subsidies.

(ii) To a nonmember. If, after final disbursement of AHP subsidies to the member, the member undergoes an acquisition or a consolidation resulting in a successor organization that is not a member of the Bank, the nonmember successor organization assumes the member's obligations under its approved application for AHP subsidy, and where the member received an AHP subsidized advance, the nonmember assumes such obligations until prepayment or orderly liquidation by the nonmember of the subsidized advance.

(7) Owner-occupied units--required provisions for retention agreements. The member shall ensure that where a household receives AHP subsidy for purchase, or purchase in conjunction with rehabilitation, of an owner-occupied unit, the unit is subject to a deed restriction or other legally enforceable retention agreement or mechanism requiring that:

(i) Notice. The Bank, and in its discretion any designee of the Bank, shall be given notice of any sale, transfer, assignment of title or deed, or refinancing of the unit by the household occurring during the AHP five-year retention period;

(ii) Repayment of subsidy; exceptions. In the case of a sale, transfer, assignment of title or deed, or refinancing of the unit by the household during the retention period, the amount of AHP subsidy calculated in accordance with paragraph (a)(7)(v) of this section shall be repaid to the Bank, unless one of the following exceptions applies:

(A) The unit was assisted with a permanent mortgage loan funded by an AHP subsidized advance;

(B) The subsequent purchaser, transferee, or assignee is a low- or moderate-income household, as determined by the Bank. For any sale, transfer, or assignment that occurs after the date established by FHFA in guidance on the use of proxies, the Bank or its designee shall determine the household's income using one or more proxies that are reliable indicators of the subsequent purchaser's income, which may be selected by the Bank pursuant to the FHFA guidance and shall be included in the Bank's AHP Implementation Plan, unless documentation demonstrating that household's actual income is available. The Bank or its designee is not required to request or obtain such documentation, but must use it in lieu of a proxy if available;

(C) The amount of the AHP subsidy that would be required to be repaid in accordance with the calculation in paragraph (a)(7)(v) of this section is $2,500 or less; or

(D) Following a refinancing, the unit continues to be subject to a deed restriction or other legally enforceable retention agreement or mechanism described in this paragraph (a)(7);

(iii) Subsidy repayments to Bank, member, or project sponsor. In the case of a direct subsidy, such repayment of AHP subsidy shall be made:

(A) To the Bank. If the Bank has not authorized re-use of the repaid AHP subsidy or has authorized re-use of the repaid subsidy but not retention of such repaid subsidy by the member or project sponsor pursuant to § 1291.64(b) of this part, or has authorized retention and re-use of such repaid subsidy by the member or project sponsor pursuant to such section and the repaid subsidy is not re-used in accordance with the requirements of the Bank and such section; or

(B) To the member or project sponsor. To the member or project sponsor for re-use by such member or project sponsor, if the Bank has authorized retention and re-use of such subsidy by the member or project sponsor pursuant to § 1291.64(b);

(iv) Termination of subsidy repayment obligation. The obligation to repay AHP subsidy to the Bank shall terminate after any event of foreclosure, transfer by deed-in-lieu of foreclosure, an assignment of a Federal Housing Administration first mortgage to HUD, or death of the AHP-assisted homeowner; and

(v) Calculation of AHP subsidy repayment based on net proceeds and household's investment. The Bank shall be repaid the lesser of:

(A) The AHP subsidy, reduced on a pro rata basis per month until the unit is sold, transferred, or its title or deed transferred, or is refinanced, during the AHP five-year retention period; or

(B) Any net proceeds from the sale, transfer, or assignment of title or deed of the unit, or the refinancing, as applicable, minus the AHP-assisted household's investment.

(8) Rental projects--required provisions for retention agreements. The member shall ensure that an AHP-assisted rental project is subject to a deed restriction or other legally enforceable retention agreement or mechanism requiring that:

(i) Income and rent commitments. The project's rental units, or applicable portion thereof, must remain occupied by and affordable for households with incomes at or below the levels committed to be served in the approved AHP application for the duration of the AHP 15-year retention period;

(ii) Notice. The Bank, and in its discretion any designee of the Bank, shall be given notice of any sale, transfer, assignment of title or deed, or refinancing of the project by the project owner occurring during the retention period;

(iii) Repayment of subsidy; exceptions. In the case of a sale, transfer, assignment of title or deed, or refinancing of the project by the project owner during the retention period, the full amount of the AHP subsidy received by the project owner shall be repaid to the Bank, unless one of the following exceptions applies:

(A) The project continues to be subject to a deed restriction or other legally enforceable retention agreement or mechanism incorporating the income-eligibility and affordability restrictions committed to in the approved AHP application for the duration of the AHP 15-year retention period; or

(B) If authorized by the Bank, in its discretion, the households are relocated, due to the exercise of eminent domain, or for expansion of housing or services, to another property that is made subject to a deed restriction or other legally enforceable retention agreement or mechanism incorporating the income-eligibility and affordability restrictions committed to in the approved AHP application for the remainder of the AHP 15-year retention period; and

(iv) Termination of income and rent restrictions. The income-eligibility and affordability restrictions applicable to the project shall terminate after any foreclosure.

(9) Lending of AHP direct subsidies. If a member or a project sponsor lends AHP direct subsidy to a project, any repayments of principal and payments of interest received by the member or the project sponsor must be paid forthwith to the Bank, unless the direct subsidy is being both lent and re-lent by a revolving loan fund pursuant to § 1291.31(d).

(10) Special provisions where members obtain AHP subsidized advances—(i) Repayment schedule. The term of an AHP subsidized advance shall be no longer than the term of the member's loan to the project funded by the advance, and at least once in every 12-month period, the member shall be scheduled to make a principal repayment to the Bank equal to the amount scheduled to be repaid to the member on its loan to the project in that period.

(ii) Prepayment fees. Upon a prepayment of an AHP subsidized advance, the Bank shall charge a prepayment fee only to the extent the Bank suffers an economic loss from the prepayment.

(iii) Treatment of loan prepayment by project. If all or a portion of the loan or

loans financed by an AHP subsidized advance are prepaid by the project to the member, the member may, at its option, either:

(A) Repay to the Bank that portion of the advance used to make the loan or loans to the project, and be subject to a fee imposed by the Bank sufficient to compensate the Bank for any economic loss the Bank experiences in reinvesting the repaid amount at a rate of return below the cost of funds originally used by the Bank to calculate the interest rate subsidy incorporated in the advance; or

(B) Continue to maintain the advance outstanding, subject to the Bank resetting the interest rate on that portion of the advance used to make the loan or loans to the project to a rate equal to the cost of funds originally used by the Bank to calculate the interest rate subsidy incorporated in the advance.

(b) Agreements between Banks and project sponsors or owners—(1) Repayment of subsidies. A Bank may have in place an agreement with each project sponsor or owner, in which the project sponsor or owner agrees to repay AHP subsidies directly to the Bank in accordance with the requirements of § 1291.60.

(2) Project sponsor qualifications. A Bank's AHP subsidy application form and AHP subsidy disbursement form for each subsidy disbursement (or other related documents) must include a requirement for the project sponsor to provide a certification that it meets the project sponsor qualifications criteria established by the Bank and that it has not engaged in, and is not engaging in, covered misconduct as defined in FHFA's Suspended Counterparty Program regulation (12 CFR part 1227), or as defined by the Bank, provided the Bank's definition incorporates the definition in 12 CFR part 1227 at a minimum.

(c) Application to existing AHP agreements. The requirements of section 10(j) of the Bank Act (12 U.S.C. 1430(j)) and the provisions of this part, as amended, are incorporated into all AHP agreements between a Bank and any member, project sponsor, or project owner receiving AHP subsidies under the General Fund and any Targeted Funds, and between a Bank and any member or unit owner under any Homeownership Set-Aside Programs. To the extent the requirements of this part are amended from time to time, such agreements are deemed to incorporate the amendments to conform to any new requirements of this part. No amendment to this part shall affect the legality of actions taken prior to the effective date of such amendment.

§ 1291.16 Conflicts of interest.

(a) Bank directors and employees. (1) Each Bank's board of directors shall adopt a written policy providing that if a Bank director or employee, or such person's family member, has a financial interest in, or is a director, officer, or employee of an organization involved in, a project that is the subject of a pending or approved AHP application, the Bank director or employee shall not participate in or attempt to influence decisions by the Bank regarding the evaluation, approval, funding, monitoring, or any remedial process for such project.

(2) If a Bank director or employee, or such person's family member, has a financial interest in, or is a director, officer, or employee of an organization involved in, an AHP project such that he or she is subject to the requirements in paragraph (a)(1) of this section, such person shall not participate in or attempt to influence decisions by the Bank regarding the evaluation, approval, funding, monitoring, or any remedial process for such project.

(b) Advisory Council members. (1) Each Bank's board of directors shall adopt a written policy providing that if an Advisory Council member, or such person's family member, has a financial interest in, or is a director, officer, or employee of an organization involved in, a project that is the subject of a pending or approved AHP application, the Advisory Council member shall not participate in or attempt to influence decisions by the Bank regarding the approval for such project.

(2) If an Advisory Council member, or such person's family member, has a financial interest in, or is a director, officer, or employee of an organization involved in, an AHP project such that he or she is subject to the requirements in paragraph (b)(1) of this section, such person shall not participate in or attempt to influence decisions by the Bank regarding the approval for such project.

(c) No delegation. A Bank's board of directors shall not delegate to Bank officers or other Bank employees the responsibility to adopt the conflict of interest policies required by this section.

Subpart C–General Fund and Targeted Funds

§ 1291.20 Establishment of programs.

(a) General Fund—(1) Establishment. A Bank shall establish a General Fund pursuant to the requirements of this part.

(2) Eligibility requirements. A Bank may not adopt eligibility requirements for its General Fund except as specifically authorized in this part.

(b) Targeted Funds—(1) Establishment; number of Targeted Funds and funding allocation amounts. A Bank may establish, in its discretion, up to three Targeted Funds to address specified affordable housing needs in its district pursuant to the phase-in

funding allocation requirements in § 1291.12(c)(1), the following phase-in requirements for the number of Targeted Funds unless otherwise directed by FHFA, and any other applicable requirements of this part:

(i) One Targeted Fund;

(ii) Two Targeted Funds to be administered in the same calendar year, provided that the Bank administered at least one Targeted Fund in any preceding year; or

(iii) Three Targeted Funds to be administered in the same calendar year, provided that the Bank administered at least two Targeted Funds in any preceding year.

(2) Eligibility requirements. (i) A Bank shall adopt and implement parameters, which shall be included in its AHP Implementation Plan, for ensuring that each Targeted Fund is designed to receive sufficient numbers of applicants for the amount of AHP funds allocated to the Targeted Fund to enable the Bank to facilitate a robust competitive scoring process.

(ii) A Bank may not adopt eligibility requirements for its Targeted Funds except as specifically authorized in this part.

§ 1291.21 Eligible applicants.

(a) Member applicants. A Bank shall accept applications for AHP subsidy under its General Fund and any Targeted Funds only from institutions that are members of the Bank at the time the application is submitted to the Bank.

(b) Project sponsor qualifications—(1) In general. A project sponsor must be qualified and able to perform its responsibilities as committed to in the application for AHP subsidy funding the project.

(2) Revolving loan fund. Pursuant to written policies adopted by a Bank's board

of directors, a revolving loan fund sponsor that intends to use AHP direct subsidy in accordance with § 1291.31 shall:

(i) Provide audited financial statements that its operations are consistent with sound business practices; and

(ii) Demonstrate the ability to re-lend AHP subsidy repayments on a timely basis and track the use of the AHP subsidy.

(3) Loan pool. Pursuant to written policies adopted by a Bank's board of directors, a loan pool sponsor that intends to use AHP subsidy in accordance with § 1291.32 shall:

(i) Provide evidence of sound asset/liability management practices;

(ii) Provide audited financial statements that its operations are consistent with sound business practices; and

(iii) Demonstrate the ability to track the use of the AHP subsidy.

§ 1291.22 Funding rounds; application process.

(a) Funding rounds. A Bank may accept applications from proposed projects for AHP subsidy under its General Fund and any Targeted Funds during a specified number of funding rounds each year, as determined by the Bank.

(b) Submission of applications. Except as provided in § 1291.29(a), a Bank shall require applications for AHP subsidy to contain information sufficient for the Bank to:

(1) Determine that the proposed AHP project meets the eligibility requirements of this part; and

(2) Evaluate the application pursuant to the scoring methodology adopted by the Bank pursuant to §§ 1291.25, 1291.26, and 1291.27, as applicable.

(c) Review of applications submitted. Except as provided in § 1291.29(b), a Bank shall review the applications for AHP subsidy to determine that the proposed AHP project meets the eligibility requirements of this part, and shall evaluate the applications pursuant to the Bank's scoring methodology adopted pursuant to §§ 1291.25, 1291.26, and 1291.27, as applicable.

§ 1291.23 Eligible projects.

Projects receiving AHP subsidies pursuant to a Bank's General Fund and any Targeted Funds must meet the following eligibility requirements:

(a) Owner-occupied or rental housing. The AHP subsidy shall be used exclusively for:

(1) Owner-occupied housing. The purchase, construction, or rehabilitation of an owner-occupied project for very low-income or low- or moderate-income households, where the housing is to be used as the household's primary residence. A household must have an income meeting the income targeting commitments in the approved AHP application at the time it is qualified by the project sponsor for participation in the project;

(2) Rental housing. The purchase, construction, or rehabilitation of a rental project, where at least 20 percent of the units in the project are occupied by and affordable for very low-income households.

(i) Projects that are not occupied. For a rental project that is not occupied at the time the AHP application is submitted to the Bank for approval, a household must have an income meeting the income targeting commitments in the approved AHP application upon initial occupancy of the rental unit.

(ii) Projects that are occupied. (A) Except as provided in paragraph (a)(2)(ii)(B) of this section, for a rental project involving purchase or rehabilitation that is occupied at the time the AHP application is submitted to the Bank for approval, a household must have an income meeting the income targeting commitments in the approved AHP application at the time of such submission.

(B) If the project has a relocation plan for current occupants that is approved by one of its federal, state, or local government funders, or a reasonable relocation plan for current occupants that is otherwise approved by the Bank according to standards included in the Bank's AHP Implementation Plan, a household may have an income meeting the income targeting commitments upon initial occupancy of the rental unit after completion of the purchase or rehabilitation.

(b) Project feasibility—(1) Developmental feasibility. The project must be likely to be completed and occupied, based on relevant factors contained in the Bank's project feasibility guidelines, including, but not limited to, the development budget, market analysis, and project sponsor's experience in providing the requested assistance to households.

(2) Operational feasibility of rental projects. A rental project must be able to operate in a financially sound manner, in accordance with the Bank's project feasibility guidelines, as projected in the project's operating pro forma.

(c) Timing of AHP subsidy use. Some or all of the AHP subsidy must be likely to be drawn down by the project or used by the project to procure other financing commitments within 12 months of the date of approval of the application for AHP subsidy funding the project.

(d) Retention agreements—(1) Owner-occupied projects. Each AHP-assisted unit in an owner-occupied project for which the AHP subsidy was used for purchase, or for purchase in conjunction with rehabilitation, of the unit by the AHP-assisted household, is, or is committed to be, subject to a five-year retention agreement described in § 1291.15(a)(7).

(2) Rental projects. AHP-assisted rental projects are, or are committed to be, subject to a 15-year retention agreement as described in § 1291.15(a)(8).

(e) Fair housing. The project, as proposed, must comply with applicable federal and state laws on fair housing and housing accessibility, including, but not limited to, the Fair Housing Act, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, and the Architectural Barriers Act of 1969, and must demonstrate how the project will be affirmatively marketed.

§ 1291.24 Eligible uses.

(a) Eligible uses of AHP subsidy. AHP subsidies shall be used only for:

(1) Owner-occupied housing. The purchase, construction, or rehabilitation of owner-occupied housing.

(2) Rental housing. The purchase, construction, or rehabilitation of rental housing.

(3) Need for AHP subsidy—(i) Review of project development budget. The project's estimated sources of funds shall equal its estimated uses of funds, as reflected in the project's development budget. The difference between the project's sources of funds (excluding AHP subsidy) and uses of funds is the project's need for AHP subsidy, which is the maximum amount of AHP subsidy the project may receive. A Bank, in its

discretion, may permit a project's sources of funds to include or exclude the estimated market value of in-kind donations and voluntary professional labor or services (excluding the value of sweat equity), provided that the project's uses of funds also include or exclude, respectively, the value of such estimates.

(ii) Cash sources of funds. A project's cash sources of funds shall include any cash contributions by the sponsor, any cash from sources other than the sponsor, and estimates of funds the project sponsor intends to obtain from other sources but which have not yet been committed to the project. In the case of homeownership projects where the sponsor extends permanent financing to the homebuyer, the sponsor's cash contribution shall include the present value of any payments the sponsor is to receive from the buyer, which shall include any cash down payment from the buyer, plus the present value of any purchase note the sponsor holds on the unit. If the note carries a market interest rate commensurate with the credit quality of the buyer, the present value of the note equals the face value of the note. If the note carries an interest rate below the market rate, the present value of the note shall be determined using the market rate to discount the cash flows.

(iii) Cash uses. A project's cash uses are the actual outlay of cash needed to pay for materials, labor, and acquisition or other costs of completing the project. Cash costs do not include in-kind donations, voluntary professional labor or services, or sweat equity.

(4) Project costs—(i) In general. (A) Taking into consideration the geographic location of the project, development conditions, and other non-financial household or project characteristics, a Bank shall determine that a project's costs, as reflected in the

project's development budget, are reasonable, in accordance with the Bank's project cost guidelines.

(B) For purposes of determining the reasonableness of a developer's fee for a project as a percentage of total development costs, a Bank may, in its discretion, include estimates of the market value of in-kind donations and volunteer professional labor or services (excluding the value of sweat equity) committed to the project as part of the total development costs.

(ii) Cost of property and services provided by a member. The purchase price of property or services, as reflected in the project's development budget, sold to the project by a member providing AHP subsidy to the project, or, in the case of property, upon which such member holds a mortgage or lien, may not exceed the market value of such property or services as of the date the purchase price was agreed upon. In the case of real estate owned property sold to a project by a member providing AHP subsidy to the project, or property sold to the project upon which the member holds a mortgage or lien, the market value of such property is deemed to be the "as-is" or "as-rehabilitated" value of the property, whichever is appropriate. That value shall be reflected in an independent appraisal of the property performed by a state certified or licensed appraiser, as defined in 12 CFR 564.2(j) and (k), within 6 months prior to the date the Bank disburses AHP subsidy to the project.

(5) Financing costs. The rate of interest, points, fees, and any other charges for all loans that are made for the project in conjunction with the AHP subsidy shall not exceed a reasonable market rate of interest, points, fees, and other charges for loans of similar maturity, terms, and risk.

(6) Counseling costs. Counseling costs, provided:

(i) Such costs are incurred in connection with counseling of homebuyers who actually purchase an AHP-assisted unit; and

(ii) The cost of the counseling has not been covered by another funding source, including the member.

(7) Refinancing. Refinancing of an existing single-family or multifamily mortgage loan, provided that the refinancing produces equity proceeds and such equity proceeds up to the amount of the AHP subsidy in the project shall be used only for the purchase, construction, or rehabilitation of housing units meeting the eligibility requirements of this part.

(8) Calculation of AHP subsidy. (i) Where an AHP direct subsidy is provided to a project to write down the interest rate on a loan extended by a member, sponsor, or other party to a project, the net present value of the interest foregone from making the loan below the lender's market interest rate shall be calculated as of the date the application for AHP subsidy is submitted to the Bank, and subject to adjustment under § 1291.30(d).

(ii) Where an AHP subsidized advance is provided to a project, the net present value of the interest revenue foregone from making a subsidized advance at a rate below the Bank's cost of funds shall be determined as of the earlier of the date of disbursement of the subsidized advance or the date prior to disbursement on which the Bank first manages the funding to support the subsidized advance through its asset/liability management system, or otherwise.

(b) Prohibited uses of AHP subsidy. AHP subsidy may not be used to pay for:

(1) Certain prepayment fees. Prepayment fees imposed by a Bank on a member

for a subsidized advance that is prepaid, unless:

(i) The project is in financial distress that cannot be remedied through a project modification pursuant to § 1291.29;

(ii) The prepayment of the subsidized advance is necessary to retain the project's affordability and income targeting commitments;

(iii) Subsequent to such prepayment, the project will continue to comply with the terms of the approved AHP application and the requirements of this part for the duration of the original retention period;

(iv) Any unused AHP subsidy is returned to the Bank and made available for other AHP projects or households; and

(v) The amount of AHP subsidy used for the prepayment fee may not exceed the amount of the member's prepayment fee to the Bank;

(2) Cancellation fees. Cancellation fees and penalties imposed by a Bank on a member for a subsidized advance commitment that is canceled;

(3) Processing fees. Processing fees charged by members for providing AHP direct subsidies to a project; or

(4) Reserves and certain expenses. Capitalized reserves, periodic deposits to reserve accounts, operating expenses, or supportive services expenses.

(c) Optional Bank district eligibility requirements. A Bank may require a project receiving AHP subsidies to meet one or more of the following additional eligibility requirements adopted by the Bank's board of directors and included in its AHP Implementation Plan after consultation with its Advisory Council:

(1) AHP subsidy limits. A requirement that the amount of AHP subsidy requested

for the project does not exceed limits established by the Bank as to the maximum amount of AHP subsidy available per member, per project sponsor, per project, or per project unit in a single AHP funding round. A Bank may establish only one maximum subsidy limit per member, per sponsor, per project, or per project unit for the General Fund and for each Targeted Fund, which shall apply to all applicants to the specific Fund, but the maximum subsidy limit per project or per project unit may differ among the Funds; or

(2) Homebuyer or homeowner counseling. A requirement that a household must complete a homebuyer or homeowner counseling program provided by, or based on one provided by, an organization recognized as experienced in homebuyer or homeowner counseling, respectively.

(d) Applications to multiple Funds—subsidy amount. If an application for a project is submitted to more than one Fund at the same time, the application for each Fund must be for the same amount of AHP subsidy.

§ 1291.25 Scoring methodologies.

(a)(1) Written scoring methodologies. A Bank shall establish a written scoring methodology for its General Fund and for any Targeted Fund setting forth the Bank's scoring point allocations as required in paragraph (a)(2) of this section, scoring criteria adopted pursuant to the requirements of §§ 1291.26 and 1291.27, as applicable, and related definitions. The scoring methodology for each Fund may be different. A Bank shall not adopt scoring points allocations or scoring criteria for its General Fund and any Targeted Funds except as specifically authorized under this paragraph (a)(1) and §§ 1291.26 and 1291.27, respectively.

(2) Scoring points allocations—(i) General Fund. A Bank shall allocate 100

points among all of the scoring criteria adopted by the Bank for its General Fund pursuant to § 1291.26. The scoring criterion for targeting in § 1291.26(d) shall be allocated at least 20 points. The remaining scoring criteria shall be allocated at least 5 points each, except that if a Bank adopts the scoring criterion for home purchase by low- or moderate-income households in § 1291.26(c) as an optional scoring criterion, the Bank may allocate fewer than the full 5 points to it, with the remainder of such points allocated to one or a combination of the other scoring criteria in § 1291.26 other than to the scoring criterion for Bank district priorities in § 1291.26(h). If a Bank adopts a scoring criterion under its Bank district priorities for housing located in the Bank's district, the Bank may not allocate points to the scoring criterion in a way that excludes all out-of-district projects from its General Fund.

(ii) Targeted Funds. A Bank shall allocate 100 points among all of the scoring criteria adopted by the Bank for each Targeted Fund pursuant to § 1291.27. A Bank may not allocate more than 50 points to any one scoring criterion for a Targeted Fund.

(3) Fixed-point and variable-point scoring criteria. A Bank shall designate each scoring criterion as either a fixed-point or a variable-point criterion, defined as follows:

(i) Fixed-point scoring criteria are those that cannot be satisfied in varying degrees and are either satisfied or not, with the total number of points allocated to the criterion awarded by the Bank to an application meeting the criterion; and

(ii) Variable-point criteria are those where there are varying degrees to which an application can satisfy the criteria, with the number of points that may be awarded to an application for meeting the criterion varying, depending on the extent to which the application satisfies the criterion, based on a fixed scale or on a scale relative to the other

applications being scored. A Bank shall designate the targeting scoring criterion in § 1291.26(d) as a variable-point criterion.

(b) Satisfaction of scoring criteria. A Bank shall award scoring points to applications to a particular Fund based on satisfaction of the scoring criteria in the Bank's scoring methodology for that Fund.

(c) Scoring tied applications. A Bank shall establish and implement, as necessary, a scoring tie-breaker policy to address the case of two or more applications to its General Fund or any Targeted Fund receiving identical scores in the same AHP funding round and there is insufficient AHP subsidy to approve all of the tied applications but sufficient subsidy to approve one of them. A Bank shall meet the following requirements in establishing its scoring tie-breaker policy:

(1) The Bank shall consult with its Advisory Council prior to adoption of its policy;

(2) The Bank shall adopt the policy in advance of an AHP funding round and include it in its AHP Implementation Plan;

(3) The policy shall include the methodology used to break a scoring tie, which may differ for each Fund, and which shall be drawn from the particular Fund's scoring criteria adopted in the Bank's AHP Implementation Plan;

(4) The scoring tie-breaker methodology shall be reasonable, transparent, verifiable, and impartial;

(5) The scoring tie-breaker methodology shall be used solely to break a scoring tie and may not affect the eligibility of the applications, including financial feasibility, or their scores and resultant rankings;

(6) The Bank shall approve a tied application as an alternate pursuant to § 1291.28(b) if the application does not prevail under the scoring tie-breaker methodology, or if the application is tied with another application but requested more subsidy than the amount of AHP funds that remain to be awarded, if the Bank has a written policy to approve alternates for funding under the applicable Fund; and

(7) The Bank shall document in writing its analysis and results for each use of the scoring tie-breaker methodology.

§ 1291.26 Scoring criteria for the General Fund.

A Bank shall adopt in its scoring methodology for its General Fund all of the following categories of scoring criteria, including at least one housing need under each of paragraphs (e), (f), and (g) of this section, except that a Bank is not required to adopt the scoring criterion for homeownership by low- or moderate-income households in paragraph (c) of this section if the Bank allocates at least 10 percent of its required annual AHP contribution to any Homeownership Set-Aside Programs, and a Bank is not required to adopt the scoring criterion for Bank district priorities in paragraph (h) of this section:

(a) Use of donated or conveyed government-owned or other properties. The financing of housing using a significant proportion, as defined by the Bank in its AHP Implementation Plan, of:

(1) Land or units donated or conveyed by the federal government or any agency or instrumentality thereof; or

(2) Land or units donated or conveyed by any other party for an amount significantly below the fair market value of the property, as defined by the Bank in its

AHP Implementation Plan.

(b) Sponsorship by a not-for-profit organization or government entity. Project sponsorship by a not-for-profit organization, a state or political subdivision of a state, a state housing agency, a local housing authority, a Native American Tribe, an Alaskan Native Village, or the government entity for Native Hawaiian Home Lands.

(c) Home purchase by low- or moderate-income households. The financing of home purchases by low- or moderate-income households.

(d) Income targeting. The extent to which a project provides housing for very low- and low- or moderate-income households, as follows:

(1) Rental projects. An application for a rental project shall be awarded the maximum number of points available under this scoring criterion if 60 percent or more of the units in the project are reserved for occupancy by households with incomes at or below 50 percent of the median income for the area. Applications for projects with less than 60 percent of the units reserved for occupancy by households with incomes at or below 50 percent of the median income for the area shall be awarded points on a declining scale based on the percentage of units in a project that are reserved for households with incomes at or below 50 percent of the median income for the area, and on the percentage of the remaining units reserved for households with incomes at or below 80 percent of the median income for the area.

(2) Owner-occupied projects. Applications for owner-occupied projects shall be awarded points based on a declining scale to be determined by the Bank in its AHP Implementation Plan, taking into consideration percentages of units and targeted income levels.

(3) Separate scoring. For purposes of this scoring criterion, applications for owner-occupied projects and rental projects may be scored separately.

(e) Underserved communities and populations. The financing of housing for underserved communities or populations, by addressing one or more of the following specific housing needs:

(1) Housing for homeless households. The financing of rental housing, excluding overnight shelters, reserving at least 20 percent of the units for homeless households, the creation of transitional housing for homeless households permitting a minimum of 6 months occupancy, or the creation of permanent owner-occupied housing reserving at least 20 percent of the units for homeless households, with the term "homeless households" defined by the Bank in its AHP Implementation Plan.

(2) Housing for special needs populations. The financing of housing in which at least 20 percent of the units are reserved for households with specific special needs, such as: the elderly; persons with disabilities; formerly incarcerated persons; persons recovering from physical abuse or alcohol or drug abuse; victims of domestic violence, dating violence, sexual assault or stalking; persons with HIV/AIDS; or unaccompanied youth; or the financing of housing that is visitable by persons with physical disabilities who are not occupants of such housing. A Bank may, in its discretion, adopt a requirement that projects provide supportive services, or access to supportive services, for specific special needs populations identified by the Bank in order for the project to receive scoring points under this paragraph (e)(2).

(3) Housing for other targeted populations. The financing of housing in which at least 20 percent of the units are reserved for households specifically in need of housing,

such as agricultural workers, military veterans, Native Americans, households requiring large units, or kinship care households in which children are in the care of cohabitating relatives, such as grandparents, aunts or uncles, or cohabitating close family friends.

(4) Housing in rural areas. The financing of housing located in a rural area, as defined by the Bank in its AHP Implementation Plan.

(5) Rental housing for extremely low-income households. The financing of rental housing in which a minimum percentage of the units, as defined by the Bank in its AHP Implementation Plan, are reserved for extremely low-income households. Points awarded under this criterion shall be awarded in addition to any points awarded for income targeting under paragraph (d)(1) of this section, such that the points awarded to a project under this criterion and the income targeting criterion, combined, may exceed the maximum number of possible points awarded under the income targeting criterion.

(6) Other. The financing of other housing addressing specific housing needs of underserved communities or populations as FHFA may provide by guidance.

(f) Creating economic opportunity. The financing of housing that facilitates economic opportunity for the residents by addressing one or more of the following specific housing needs:

(1) Promotion of empowerment. The provision of housing in combination with a program offering services that assist residents in attaining life skills or moving toward better economic opportunities, such as: employment; education; training; homebuyer, homeownership or tenant counseling; child care; adult daycare services; afterschool care; tutoring; health services, including mental health and behavioral health services; resident involvement in decision making affecting the creation or operation of the project; or

workforce preparation and integration.

(2) Residential economic diversity. The financing of either affordable housing in a high opportunity area, or mixed-income housing in an area designated by the Bank, with those terms defined and area designated by the Bank in its AHP Implementation Plan.

(3) Other. The financing of other housing that facilitates economic opportunity as FHFA may provide by guidance.

(g) Community stability, including affordable housing preservation. The promotion of community stability, such as by preserving affordable housing, rehabilitating vacant or abandoned properties, or being an integral part of a community revitalization or economic development strategy approved by a unit of state or local government or instrumentality thereof, and not displacing low- or moderate-income households, or if such displacement will occur, assuring that such households will be assisted to minimize the impact of such displacement.

(h) Bank district priorities. The satisfaction of one or more housing needs in the Bank's district, as defined by the Bank in its AHP Implementation Plan, that the Bank has not otherwise adopted under this section.

§ 1291.27 Scoring criteria for Targeted Funds.

A Bank shall adopt in its scoring methodology for each Targeted Fund established by the Bank at least three different scoring criteria, as determined by the Bank in its discretion, that allow the Bank to select applications that meet the specific affordable housing need or needs being addressed by the Targeted Fund.

§ 1291.28 Approval of AHP applications under the General Fund and Targeted Funds.

(a) Approval of AHP applications. Subject to the requirements in paragraphs (c) and (d) of this section, a Bank shall approve applications for AHP subsidy under its General Fund and any Targeted Funds that meet all of the applicable AHP eligibility requirements in this part in descending order, starting with the highest scoring application until the total funding amount for the particular AHP funding round, except for any amount insufficient to fund the next highest scoring application, has been approved.

(b) AHP application alternates. For the General Fund and any Targeted Funds, the Bank also may, in its discretion, approve a specified number, as determined by the Bank, of the next highest scoring applications as alternates eligible for funding, and may approve any tied applications as alternates eligible for funding pursuant to paragraph (c)(2) of this section, if any previously committed AHP subsidies become available, pursuant to a written policy on approving alternates for funding established by the Bank and included in the Bank's AHP Implementation Plan. If a Bank has established such a policy for approving alternates for funding and sufficient previously committed AHP subsidies become available within one year of application approval, the Bank shall approve the designated alternates for funding within that one-year period.

(c) Tied applications. (1) Where two or more applications to a General Fund or Targeted Fund have identical scores in the same AHP funding round and there is insufficient AHP subsidy to approve all of the tied applications but sufficient subsidy to approve one of them, a Bank shall approve the tied application that prevails under the Bank's scoring tie-breaker methodology in its policy adopted pursuant to § 1291.25(c).

(2) A tied application that does not prevail under the Bank's scoring tie-breaker methodology, or is tied with another application but requested more subsidy than the

amount of AHP funds that remain to be awarded under the Fund, shall be approved as an alternate for funding if the Bank has a written policy to approve alternates for funding under the Fund.

(d) Applications to multiple Funds—approval under one Fund. If an application for the same project is submitted to more than one Fund at a Bank in a calendar year and the application scores high enough to be approved under each Fund, the Bank shall approve the application under only one of the Funds pursuant to the Bank's policy established in its AHP Implementation Plan.

(e) No delegation. A Bank's board of directors may not delegate to Bank officers or other Bank employees the responsibility to approve or disapprove the AHP subsidy applications, as well as any alternates under the Bank's General Fund and any Targeted Fund if the Bank has a written policy to approve alternates for funding under such Fund.

§ 1291.29 Modifications of approved AHP applications.

(a) Modification procedure. If, prior to or after final disbursement of funds to a project from all funding sources, in order to remedy noncompliance or receive additional subsidy, there is or will be a change in the project that would change the score that the project application received in the AHP funding round in which it was originally scored and approved, had the changed facts been operative at that time, a Bank shall approve in writing a request for a modification to the terms of the approved application, provided that:

(1) The Bank first requests that the project sponsor or owner make a reasonable effort to cure any noncompliance within a reasonable period of time, and the noncompliance could not be cured within a reasonable period of time;

(2) The project, incorporating any such changes, would meet the eligibility requirements of this part;

(3) The application, as reflective of such changes, continues to score high enough to have been approved in the AHP funding round in which the application was originally scored and approved by the Bank, which is as high as the lowest ranking alternate approved for funding by the Bank if the Bank has a written policy to approve alternates for funding; and

(4) There is good cause for the modification, which may not be solely remediation of noncompliance, and the analysis and justification for the modification, including why a cure of noncompliance was not successful or attempted, are documented by the Bank in writing.

(b) AHP subsidy increases; no delegation—(1) AHP subsidy increases. A Bank's board of directors may, in its discretion, approve or disapprove requests for modifications involving an increase in AHP subsidy in accordance with the requirements of paragraph (a) of this section.

(2) No delegation. The authority to approve or disapprove requests for modifications involving an increase in AHP subsidy shall not be delegated by the Bank's board of directors to Bank officers or other Bank employees.

§ 1291.30 Procedures for funding.

(a) Disbursement of AHP subsidies to members. (1) A Bank may disburse AHP subsidies only to institutions that are members of the Bank at the time they request a draw-down of the subsidies.

(2) If an institution with an approved application for AHP subsidy loses its

membership in a Bank, the Bank may disburse AHP subsidies to a member of such Bank to which the institution has transferred its obligations under the approved AHP application, or the Bank may disburse AHP subsidies through another Bank to a member of that Bank that has assumed the institution's obligations under the approved AHP application.

(b) Progress towards use of AHP subsidy. A Bank shall establish and implement policies, including time limits, for determining whether progress is being made towards draw-down and use of AHP subsidies by approved projects, and whether to cancel AHP application approvals for lack of such progress. If a Bank cancels any AHP application approvals due to lack of such progress, the Bank shall make the AHP subsidies available for other AHP-eligible projects or households.

(c) Compliance upon disbursement of AHP subsidies. A Bank shall establish and implement policies for determining, prior to its initial disbursement of AHP subsidy for an approved project, and prior to each subsequent disbursement, that the project meets the eligibility requirements of this part and all obligations committed to in the approved AHP application. If a Bank cancels any AHP application approvals due to noncompliance with eligibility requirements of this part, the Bank shall make the AHP subsidies available for other AHP-eligible projects or households.

(d) Changes in approved AHP subsidy amount where a direct subsidy is used to write down prior to closing the principal amount or interest rate on a loan. If a member is approved to receive AHP direct subsidy to write down prior to closing the principal amount or the interest rate on a loan to a project, and the amount of AHP subsidy required to maintain the debt service cost for the loan decreases from the amount of AHP

subsidy initially approved by the Bank due to a decrease in market interest rates between the time of approval and the time the lender commits to the interest rate to finance the project, the Bank shall reduce the AHP subsidy amount accordingly. If market interest rates rise between the time of approval and the time the lender commits to the interest rate to finance the project, the Bank, in its discretion, may increase the AHP subsidy amount accordingly.

(e) AHP outlay adjustment. If a Bank reduces the amount of AHP subsidy approved for a project, the amount of such reduction shall be returned to the Bank's AHP fund. If a Bank increases the amount of AHP subsidy approved for a project, the amount of such increase shall be drawn first from any currently uncommitted or repaid AHP subsidies and then from the Bank's required AHP contribution for the next year.

(f) Project sponsor notification of re-use of repaid AHP direct subsidy. Prior to disbursement by a project sponsor of AHP direct subsidy repaid to and retained by such project sponsor pursuant to a subsidy re-use program authorized by the Bank under § 1291.64(b), the project sponsor shall provide written notice to the member and the Bank of its intent to disburse the repaid AHP subsidy to a household satisfying the requirements of this part and the commitments made in the approved AHP application.

§ 1291.31 Lending and re-lending of AHP direct subsidy by revolving loan funds.

Pursuant to written policies established by a Bank's board of directors after consultation with its Advisory Council, a Bank, in its discretion, may provide AHP direct subsidy under its General Fund or any Targeted Funds for eligible projects and households involving both the lending of the subsidy and subsequent lending of subsidy principal and interest repayments by a revolving loan fund, provided the following

requirements are met:

(a) Submission of application. (1) An application for AHP subsidy under this section shall include the revolving loan fund's criteria for the initial lending of the subsidy, identification of and information on a specific proposed AHP project if required in the Bank's discretion, the revolving loan fund's criteria for subsequent lending of subsidy principal and interest repayments, and any other information required by the Bank.

(2) The information in the application shall be sufficient for the Bank to:

(i) Determine that the criteria for the initial lending of the subsidy, the specific proposed project if applicable, and the criteria for subsequent lending of subsidy principal and interest repayments, meet the eligibility requirements of § 1291.23; and

(ii) Evaluate the criteria for the initial lending of the subsidy, and the specific proposed project if applicable, pursuant to the scoring methodology established by the Bank pursuant to §§ 1291.25, 1291.26, and 1291.27, as applicable.

(b) Review of application. A Bank shall review the application for AHP subsidy to determine that the criteria for the initial lending of the subsidy, the specific proposed project if applicable, and the criteria for subsequent lending of subsidy principal and interest repayments, meet the eligibility requirements of § 1291.23, and shall evaluate the criteria for the initial lending of the subsidy and the specific proposed project, if applicable, pursuant to the scoring methodology established by the Bank pursuant to §§ 1291.25, 1291.26, and 1291.27, as applicable.

(c) Initial lending of subsidy. (1) The revolving loan fund's initial lending of the AHP subsidy shall meet the eligibility requirements of paragraph (a) of this section, shall

be to projects or households meeting the commitments in the approved application for AHP subsidy, and shall be subject to the requirements in §§ 1291.15 and 1291.50, respectively.

(2) If an owner-occupied unit or project funded under this paragraph (c) is in noncompliance with the commitments in the approved AHP application, or is sold or refinanced prior to the end of the applicable AHP retention period, the required amount of AHP subsidy shall be repaid to the revolving loan fund in accordance with §§ 1291.15(a)(7), 1291.15(a)(8), and 1291.60, and the revolving loan fund shall re-lend such repaid subsidy, excluding the amounts of AHP subsidy principal already repaid to the revolving loan fund, to another owner-occupied unit or project meeting the initial lending requirements of this paragraph (c) for the remainder of the retention period.

(d) Subsequent lending of AHP subsidy principal and interest repayments. (1) AHP subsidy principal and interest repayments received by the revolving loan fund from the initial lending of the AHP direct subsidy shall be re-lent by the revolving loan fund in accordance with the requirements of this paragraph (d), except that the revolving loan fund, in its discretion, may provide part or all of such repayments as nonrepayable grants to eligible projects in accordance with the requirements of this paragraph (d).

(2) The revolving loan fund's subsequent lending of AHP subsidy principal and interest repayments shall be for the purchase, construction, or rehabilitation of owner-occupied projects for households with incomes at or below 80 percent of the median income for the area, or of rental projects where at least 20 percent of the units are occupied by and affordable for households with incomes at or below 50 percent of the median income for the area, and shall meet all other eligibility requirements of this

paragraph (d).

(3) A Bank may, in its discretion, require the revolving loan fund's subsequent lending of subsidy principal and interest repayments to be subject to retention period, monitoring, and recapture requirements, as defined by the Bank in its AHP Implementation Plan.

(e) Return of unused AHP subsidy. The revolving loan fund shall return to the Bank any AHP subsidy that will not be used according to the requirements in this section.

§ 1291.32 Use of AHP subsidy in loan pools.

Pursuant to written policies established by a Bank's board of directors after consultation with its Advisory Council, a Bank, in its discretion, may provide AHP subsidy under its General Fund or any Targeted Funds for the origination of first mortgage or rehabilitation loans with subsidized interest rates to AHP-eligible households through a purchase commitment by an entity that will purchase and pool the loans, provided the following requirements are met:

(a) Eligibility requirements. The loan pool sponsor's use of the AHP subsidies shall meet the requirements under this section, and shall not be used for the purpose of providing liquidity to the originator or holder of the loans, or paying the loan pool's operating or secondary market transaction costs.

(b) Forward commitment. (1) The loan pool sponsor shall purchase the loans pursuant to a forward commitment that identifies the loans to be originated with interest-rate reductions as specified in the approved application for AHP subsidy to households with incomes at or below 80 percent of the median income for the area. Both initial purchases of loans for the AHP loan pool and subsequent purchases of loans to substitute

for repaid loans in the pool shall be made pursuant to the terms of such forward commitment and subject to time limits on the use of the AHP subsidy as specified by the Bank in its AHP Implementation Plan and the Bank's agreement with the loan pool sponsor, which shall not exceed one year from the date of approval of the AHP application.

(2) As an alternative to using a forward commitment, the loan pool sponsor may purchase an initial round of loans that were not originated pursuant to an AHP-specific forward commitment, provided that the entities from which the loans were purchased are required to use the proceeds from the initial loan purchases within time limits on the use of the AHP subsidy as specified by the Bank in its AHP Implementation Plan and the Bank's agreement with the loan pool sponsor, which shall not exceed one year from the date of approval of the AHP application. The proceeds shall be used by such entities to assist households that are income-eligible under the approved AHP application during subsequent rounds of lending, and such assistance shall be provided in the form of a below-market AHP-subsidized interest rate as specified in the approved AHP application.

(c) Each AHP-assisted owner-occupied unit and rental project receiving AHP direct subsidy or a subsidized advance shall be subject to the requirements of §§ 1291.15, 1291.50, and 1291.60, respectively.

(d) Where AHP direct subsidy is being used to buy down the interest rate of a loan or loans from a member or other party, the loan pool sponsor shall use the full amount of the AHP direct subsidy to buy down the interest rate on a permanent basis at the time of closing on such loan or loans.

Subpart D–Homeownership Set-Aside Programs

§ 1291.40 Establishment of programs.

A Bank may establish, in its discretion, one or more Homeownership Set-Aside Programs pursuant to the requirements of this part.

§ 1291.41 Eligible applicants.

A Bank shall accept applications for AHP direct subsidy under its Homeownership Set-Aside Programs only from institutions that are members of the Bank at the time the application is submitted to the Bank.

§ 1291.42 Eligibility requirements.

A Bank's Homeownership Set-Aside Programs shall meet the eligibility requirements set forth in this section. A Bank may not adopt additional eligibility requirements for its Homeownership Set-Aside Programs except for eligible households pursuant to paragraph (b) of this section.

(a) Member allocation criteria. AHP direct subsidies shall be provided to members pursuant to allocation criteria established by the Bank in its AHP Implementation Plan.

(b) Eligible households. Members shall provide AHP direct subsidies only to households that:

(1) Have incomes at or below 80 percent of the median income for the area at the time the household is accepted for enrollment by the member in the Bank's Homeownership Set-Aside Programs, with such time of enrollment by the member defined by the Bank in its AHP Implementation Plan;

(2) Complete a homebuyer or homeowner counseling program provided by, or based on one provided by, an organization experienced in homebuyer or homeowner

counseling, in the case of households that are first-time homebuyers; and

(3) Are first-time homebuyers or households receiving AHP subsidy for owner-occupied rehabilitation, in the case of households receiving subsidy pursuant to the one-third set-aside funding allocation requirement in § 1291.12(b), and meet such other eligibility criteria that may be established by the Bank in its AHP Implementation Plan, such as a matching funds requirement, homebuyer or homeowner counseling requirement for households that are not first-time homebuyers, or criteria that give priority for the purchase or rehabilitation of housing in particular areas or as part of a disaster relief effort.

(c) Maximum grant limit. Members shall provide AHP direct subsidies to households as a grant, in an amount up to a maximum established by the Bank, not to exceed $22,000 per household, which limit shall adjust upward on an annual basis in accordance with increases in FHFA's House Price Index (HPI). In the event of a decrease in the HPI, the subsidy limit shall remain at its then-current amount until the HPI increases above the subsidy limit, at which point the subsidy limit shall adjust to that higher amount. FHFA will notify the Banks annually of the maximum subsidy limit, based on the HPI. A Bank may establish a different maximum grant limit, up to the maximum grant limit, for each Homeownership Set-Aside Program it establishes. A Bank's maximum grant limit for each such program shall be included in its AHP Implementation Plan, which limit shall apply to all households in the specific program for which it is established.

(d) Eligible uses of AHP direct subsidy. Households shall use the AHP direct subsidies to pay for down payment, closing cost, counseling, or rehabilitation assistance

in connection with the household's purchase or rehabilitation of an owner-occupied unit, including a condominium or cooperative housing unit or manufactured housing, to be used as the household's primary residence.

(e) Retention agreement. An owner-occupied unit purchased, or purchased in conjunction with rehabilitation, using AHP direct subsidy, shall be subject to a five-year retention agreement described in § 1291.15(a)(7).

(f) Financial or other concessions. The Bank may, in its discretion, require members and other lenders to provide financial or other concessions, as defined by the Bank in its AHP Implementation Plan, to households in connection with providing the AHP direct subsidy or financing to the household.

(g) Financing costs. The rate of interest, points, fees, and any other charges for all loans made in conjunction with the AHP direct subsidy shall not exceed a reasonable market rate of interest, points, fees, and other charges for loans of similar maturity, terms, and risk.

(h) Counseling costs. The AHP direct subsidies may be used to pay for counseling costs only where:

(1) Such costs are incurred in connection with counseling of homebuyers who actually purchase an AHP-assisted unit; and

(2) The cost of the counseling has not been covered by another funding source, including the member.

(i) Cash back to household. A member may provide cash back to a household at closing on the mortgage loan in an amount not exceeding $250, as determined by the Bank in its AHP Implementation Plan, and a member shall use any AHP direct subsidy

exceeding such amount that is beyond what is needed at closing for closing costs and the approved mortgage amount as a credit to reduce the principal of the mortgage loan or as a credit toward the household's monthly payments on the mortgage loan.

§ 1291.43 Approval of AHP applications.

A Bank shall approve applications for AHP direct subsidy under its Homeownership Set-Aside Programs in accordance with the Bank's criteria governing the allocation of funds.

§ 1291.44 Procedures for funding.

(a) Disbursement of AHP direct subsidies to members. (1) A Bank may disburse AHP direct subsidies under its Homeownership Set-Aside Programs only to institutions that are members of the Bank at the time they request a draw-down of the subsidies.

(2) If an institution with an approved application for AHP direct subsidy loses its membership in a Bank, the Bank may disburse AHP direct subsidies to a member of such Bank to which the institution has transferred its obligations under the approved AHP application, or the Bank may disburse AHP direct subsidies through another Bank to a member of that Bank that has assumed the institution's obligations under the approved AHP application.

(b) Reservation of Homeownership Set-Aside Program subsidies. A Bank shall establish and implement policies for reservation of set-aside subsidies for households enrolled in the Bank's Homeownership Set-Aside Programs. The policies shall provide that set-aside subsidies be reserved no more than two years in advance of the Bank's time limit in its AHP Implementation Plan for draw-down and use of the subsidies by the household and the reservation of subsidies be made from the allocation for the

Homeownership Set-Aside Programs for the year in which the Bank makes the reservation.

(c) Progress towards use of AHP direct subsidy. A Bank shall establish and implement policies, including time limits, for determining whether progress is being made towards draw-down and use of the AHP direct subsidies by eligible households, and whether to cancel AHP application approvals for lack of such progress. If a Bank cancels any AHP application approvals due to lack of such progress, it shall make the AHP direct subsidies available for other applicants for AHP direct subsidies under the Homeownership Set-Aside Programs or for other AHP-eligible projects.

Subpart E–Monitoring

§ 1291.50 Monitoring under the General Fund and Targeted Funds.

(a) Initial monitoring policies for owner-occupied and rental projects. A Bank shall adopt written policies pursuant to which the Bank shall monitor each AHP owner-occupied project and rental project approved under its General Fund and any Targeted Funds prior to, and within a reasonable period of time after, project completion to verify, at a minimum, satisfaction of the requirements in this section.

(1) Satisfactory progress. The Bank shall determine that:

(i) The project is making satisfactory progress towards completion, in compliance with the commitments made in the approved AHP application, Bank policies, and the requirements of this part; and

(ii) Following completion of the project, satisfactory progress is being made towards occupancy of the project by eligible households.

(2) Project sponsor or owner certification, rent roll and other documentation;

backup and other project documentation. Within a reasonable period of time after project completion, the Bank shall review a certification from the project sponsor or owner, the project rent roll (which includes household incomes and rents), and any other documentation to verify that the project meets the following requirements, at a minimum:

(i) The AHP subsidies were used for eligible purposes according to the commitments made in the approved AHP application;

(ii) The household incomes and rents comply with the income targeting and rent commitments made in the approved AHP application;

(iii) The project's costs were reasonable in accordance with the Bank's project cost guidelines, and the AHP subsidies were necessary for the completion of the project as currently structured, as determined pursuant to § 1291.24(a)(4);

(iv) Each AHP-assisted unit of an owner-occupied project and rental project is subject to an AHP retention agreement that meets the requirements of § 1291.15(a)(7) and (8), respectively; and

(v) The services and activities committed in the approved AHP application have been provided.

(3) Back-up and other project documentation. The Bank's written monitoring policies shall include requirements for:

(i) Bank review within a reasonable period of time after project completion of back-up project documentation regarding household incomes and rents (not including the rent roll) maintained by the project sponsor or owner, except for projects that received funds from other federal, state or local government entities whose programs meet the requirements in paragraphs (b)(1) and (2) of this section as specified in separate FHFA

guidance, or projects that have also been allocated LIHTC; and

(ii) Maintenance and Bank review of other project documentation in the Bank's discretion.

(4) Sampling plan. The Bank shall not use a sampling plan to select the projects to be monitored under this paragraph (a), but may use a reasonable risk-based sampling plan to review the back-up project documentation.

(b) Long-term monitoring–reliance on other governmental monitoring for certain rental projects. For completed AHP rental projects that also received funds from federal, state, or local government entities other than LIHTC, a Bank may, in its discretion, for purposes of long-term AHP monitoring under its General Fund and any Targeted Funds, rely on the monitoring by such entities of the income targeting and rent requirements applicable under their programs, provided that the Bank can show that:

(1) The compliance profiles regarding income targeting, rent, and retention period requirements of the AHP and the other programs are substantively equivalent;

(2) The entity has demonstrated and continues to demonstrate its ability to monitor the project;

(3) The entity agrees to provide reports to the Bank on the project's incomes and rents for the full 15-year AHP retention period; and

(4) The Bank reviews the reports from the monitoring entity to confirm that they comply with the Bank's monitoring policies.

(c) Long-term monitoring policies for rental projects. In cases where a Bank does not rely on monitoring by a federal, state, or local government entity pursuant to paragraph (b) of this section, pursuant to written policies established by the Bank, the

Bank shall monitor completed AHP rental projects approved under its General Fund and any Targeted Funds, commencing in the second year after project completion through the AHP 15-year retention period, to verify, at a minimum, satisfaction of the requirements in this section.

(1) Annual project sponsor or owner certifications; backup and other project documentation. A Bank's written monitoring policies shall include requirements for:

(i) Bank review of annual certifications by project sponsors or owners to the Bank that household incomes and rents are in compliance with the commitments made in the approved AHP application during the AHP 15-year retention period, along with information on the ongoing financial viability of the project, including whether the project is current on its property taxes and loan payments, its vacancy rate, and whether it is in compliance with its commitments to other funding sources;

(ii) Bank review of back-up project documentation regarding household incomes and rents, including the rent rolls, maintained by the project sponsor or owner, except for projects that also received funds from other federal, state or local government entities whose programs meet the requirements in paragraphs (b)(1) and (2) of this section as specified in separate FHFA guidance, or projects that have been allocated LIHTC, provided that the Bank shall review any LIHTC noncompliance notices received from project owners pursuant to § 1291.15(a)(5)(ii) during the AHP 15-year retention period; and

(iii) Maintenance and Bank review of other project documentation in the Banks' discretion.

(2) Risk factors and other monitoring—(i) Risk factors; other monitoring. A

Bank's written monitoring policies shall take into account risk factors such as the amount of AHP subsidy in the project, type of project, size of project, location of project, sponsor experience and performance, and any monitoring of the project provided by a federal, state, or local government entity.

(ii) Risk-based sampling plan. A Bank may use a reasonable, risk-based sampling plan to select the rental projects to be monitored under this paragraph (c), and to review the back-up and any other project documentation. The risk-based sampling plan and its basis shall be in writing.

(d) Annual adjustment of targeting commitments. For purposes of determining compliance with the targeting commitments in an approved AHP application for both initial and long-term AHP monitoring purposes under a Bank's General Fund and any Targeted Funds, such commitments shall be considered to adjust annually according to the current applicable median income data. A rental unit may continue to count toward meeting the targeting commitment of an approved AHP application as long as the rent charged to a household remains affordable, as defined in § 1291.1, for the household occupying the unit.

§ 1291.51 Monitoring under Homeownership Set-Aside Programs.

(a) Adoption and implementation. Pursuant to written policies adopted by a Bank, the Bank shall monitor compliance with the requirements of its Homeownership Set-Aside Programs, including monitoring to determine, at a minimum, whether:

(1) The AHP subsidy was provided to households meeting all applicable eligibility requirements in § 1291.42(b) and the Bank's Homeownership Set-Aside

Program policies; and

(2) All other applicable eligibility requirements in § 1291.42 and the Bank's Homeownership Set-Aside Program policies are met, including that the AHP-assisted units are subject to retention agreements, as required under § 1291.15(a)(7), where the AHP subsidy was used for purchase of the unit, or for purchase of the unit in conjunction with rehabilitation.

(b) Member certifications; back-up and other documentation. The Bank's written monitoring policies shall include requirements for:

(1) Bank review of certifications by members to the Bank, prior to disbursement of the AHP subsidy, that the subsidy will be provided in compliance with all applicable eligibility requirements in § 1291.42;

(2) Bank review of back-up documentation regarding household incomes maintained by the member; and

(3) Maintenance and Bank review of other documentation in the Bank's discretion.

(c) Sampling plan. The Bank may use a reasonable sampling plan to select the households to be monitored, and to review the back-up and any other documentation received by the Bank, but not the member certifications required in paragraph (b) of this section. The sampling plan and its basis shall be in writing.

Subpart F–Remedial Actions for Noncompliance

§ 1291.60 Remedial actions for project noncompliance.

(a) Scope. This section sets forth the requirements applicable to the Banks in the event of noncompliance by an AHP-assisted project with the commitments made in its

application for AHP subsidies and the requirements of this part, including any use of AHP subsidy by the project sponsor or owner for purposes other than those committed to in the AHP application. This section does not apply to individual AHP-assisted households or to the sale or refinancing by such households of their homes.

(b) Elimination of project noncompliance—(1) Cure. In the event of project noncompliance, the Bank shall request that the project sponsor or owner make a reasonable effort to cure the noncompliance within a reasonable period of time. If the noncompliance cannot be cured within a reasonable period of time, the requirements for project modification in paragraph (b)(2) of this section shall apply. If the noncompliance is cured within a reasonable period of time, the Bank shall not require the project sponsor or owner to repay AHP subsidy to the Bank.

(2) Project modification. If the project sponsor or owner cannot cure the noncompliance within a reasonable period of time, the Bank shall determine whether the circumstances of the noncompliance can be eliminated through a modification of the terms of the AHP application pursuant to § 1291.29. When the circumstances of the noncompliance can be eliminated through a modification, the Bank shall approve the modification and shall not require the project sponsor or owner to repay AHP subsidy to the Bank.

(c) Reasonable collection efforts—(1) Demand for repayment. If the circumstances of a project's noncompliance cannot be eliminated through a cure or modification, the Bank, or the member if delegated the responsibility, shall make a demand on the project sponsor or owner for repayment of the full amount of the AHP subsidy not used in compliance with the commitments in the AHP application or the

requirements of this part (plus interest, if appropriate). If the noncompliance is occupancy by households with incomes exceeding the income-targeting commitments in the AHP application, the amount of AHP subsidy due is calculated based on the number of units in noncompliance, the length of the noncompliance, and the portion of the AHP subsidy attributable to the noncompliant units.

(2) Settlement. (i) If the demand for repayment of the full amount due is unsuccessful, the Bank, or the member if delegated the responsibility and in consultation with the Bank, shall make reasonable efforts to collect the subsidy from the project sponsor or owner, which may include settlement for less than the full amount due, taking into account factors such as the financial capacity of the project sponsor or owner, assets securing the AHP subsidy, other assets of the project sponsor or owner, the degree of culpability of the project sponsor or owner, and the extent of the Bank's or member's collection efforts.

(ii) The settlement with the project sponsor or owner must be supported by sufficient documentation showing that the sum agreed to be repaid under the settlement is reasonably justified, based on the facts and circumstances of the noncompliance, including any factors in paragraph (c)(2)(i) of this section that were considered in reaching the settlement.

§ 1291.61 Recovery of subsidy for member noncompliance.

A Bank shall recover from a member the amount of any AHP subsidy (plus interest, if appropriate) not used in compliance with the commitments in the member's AHP application or the requirements of this part as a result of the actions or omissions of the member.

§ 1291.62 Bank reimbursement of AHP fund.

(a) By the Bank. A Bank shall reimburse its AHP fund in the amount of any AHP subsidies (plus interest, if appropriate) not used in compliance with the commitments in an AHP application or the requirements of this part as a result of the actions or omissions of the Bank.

(b) By FHFA order. FHFA may order a Bank to reimburse its AHP fund in an appropriate amount upon determining that:

(1) The Bank has failed to reimburse its AHP fund as required under paragraph (a) of this section; or

(2) The Bank has failed to recover the full amount of AHP subsidy due from a project sponsor, project owner, or member pursuant to the requirements of §§ 1291.60 and 1291.61, and has not shown that such failure is reasonably justified, considering factors such as those in § 1291.60(c)(2)(i).

§ 1291.63 Suspension and debarment.

(a) At a Bank's initiative. A Bank may suspend or debar a member, project sponsor, or project owner from participation in the Program if such party shows a pattern of noncompliance, or engages in a single instance of flagrant noncompliance, with the terms of an approved application for AHP subsidy or the requirements of this part.

(b) At FHFA's initiative. FHFA may order a Bank to suspend or debar a member, project sponsor, or project owner from participation in the Program if such party shows a pattern of noncompliance, or engages in a single instance of flagrant noncompliance, with the terms of an approved application for AHP subsidy or the requirements of this part.

§ 1291.64 Use of repaid AHP subsidies.

(a) Use of repaid AHP subsidies for other AHP-eligible projects or households. Except as provided in paragraph (b) of this section, amounts of AHP subsidy, including any interest, repaid to a Bank pursuant to this part shall be made available by the Bank for other AHP-eligible projects or households.

(b) Re-use of repaid AHP direct subsidies in same project—(1) Requirements. AHP direct subsidy, including any interest, repaid to a member or project sponsor, as applicable, under a Bank's General Fund and any Targeted Funds may be repaid by such parties to the Bank for subsequent disbursement to and re-use by such parties, or retained by such parties for subsequent re-use, as authorized by the Bank, in its discretion, after consultation with its Advisory Council, in its AHP Implementation Plan, provided all of the following requirements are satisfied:

(i) The member or the project sponsor originally provided the AHP direct subsidy as down payment, closing cost, rehabilitation, or interest rate buy down assistance to an eligible household for purchase, or for purchase in conjunction with rehabilitation, of an owner-occupied unit pursuant to an approved AHP application;

(ii) The AHP direct subsidy, including any interest, was repaid to the member or project sponsor as a result of a sale, transfer, or assignment of title or deed of the unit prior to the end of the retention period to a subsequent purchaser that is not a low- or moderate-income household; and

(iii) The repaid AHP direct subsidy is made available by the member or project sponsor, within the period of time specified by the Bank in its AHP Implementation Plan, to another AHP-eligible household for purchase, or for purchase in conjunction with rehabilitation, of an owner-occupied unit in the same project in accordance with the terms

of the approved AHP application.

(2) No delegation. A Bank's board of directors shall not delegate to Bank officers or other Bank employees the responsibility to adopt any Bank policies on re-use of repaid AHP direct subsidies in the same project pursuant to paragraph (b) of this section.

§ 1291.65 Transfer of Program administration.

Without limitation on other remedies, FHFA, upon determining that a Bank has engaged in mismanagement of its Program, may designate another Bank to administer all or a portion of the first Bank's annual AHP contribution, for the benefit of the first Bank's members, under such terms and conditions as FHFA may prescribe.

Subpart G–Affordable Housing Reserve Fund

§ 1291.70 Affordable Housing Reserve Fund.

(a) Deposits. If a Bank fails to use or commit the full amount it is required to contribute to the Program in any year pursuant to § 1291.10(a), 90 percent of the unused or uncommitted amount shall be deposited by the Bank in an Affordable Housing Reserve Fund established and administered by FHFA. The remaining 10 percent of the unused and uncommitted amount retained by the Bank should be fully used or committed by the Bank during the following year, and any remaining portion shall be deposited in the Affordable Housing Reserve Fund.

(b) Use or commitment of AHP funds. Approval of applications for AHP funds from members sufficient to exhaust the amount a Bank is required to contribute pursuant to § 1291.10(a) shall constitute use or commitment of funds. Amounts remaining unused or uncommitted at year-end are deemed to be used or committed if, in combination with AHP funds that have been returned to the Bank or de-committed from canceled projects,

they are insufficient to fund:

(1) AHP application alternates in the Bank's final funding round of the year for its General Fund or any Targeted Funds, if the Bank has a policy to approve alternates for funding under such Funds;

(2) Pending applications for funds under the Bank's Homeownership Set-Aside Programs, if any; and

(3) Project modifications for AHP subsidy increases approved by the Bank pursuant to the requirements of this part.

(c) Carryover of insufficient amounts. Such insufficient amounts as described in paragraph (b) of this section shall be carried over by the Bank for use or commitment in the following year in its General Fund, any Targeted Funds, or any Homeownership Set-Aside Programs.

_____ Dated: November 16, 2018.

Melvin L. Watt,

Director, Federal Housing Finance Agency.

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