Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1282

RIN 2590–AA27

Enterprise Duty To Serve Underserved Markets

AGENCY: Federal Housing Finance Agency.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: Section 1129 of the Housing and Economic Recovery Act of 2008 (HERA) amended section 1335 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act) to establish a duty for the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Enterprises) to serve three specified underserved markets—manufactured housing, affordable housing preservation, and rural markets—in order to increase the liquidity of mortgage investments and improve the distribution of investment capital available for mortgage financing for very low-, low- and moderate-income families in those markets. The Federal Housing Finance Agency (FHFA) is issuing and seeking comments on a proposed rule that would establish a method for evaluating and rating the Enterprises' performance in each underserved market for 2010 and each subsequent year. In addition, the proposed rule would set forth Enterprise transactions and activities that would be considered for the duty to serve.

The proposed rule would, among other things: Consider only manufactured homes titled as real property for purposes of the duty to serve the manufactured housing market; give the Enterprises latitude to concentrate on assisting particular affordable housing preservation programs that would benefit very low-, low- and moderate-income families; and define rural areas generally in accordance with the definition set forth in the Housing Act of 1949.

DATES: Written comments must be received on or before July 22, 2010.

ADDRESSES: You may submit your comments, identified by regulatory information number (RIN) 2590–AA27, by any of the following methods:

- *E-mail:* Comments to Alfred M. Pollard, General Counsel, may be sent by e-mail to *RegComments@fhfa.gov.* Please include "RIN 2590–AA27" in the subject line of the message.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comment to the *Federal eRulemaking Portal,* please also send it by e-mail to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by the Agency. Please include "RIN 2590–AA27" in the subject line of the message.
- *Hand Delivered/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA27, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The package should be logged at the Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.
- *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA27, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552.

FOR FURTHER INFORMATION CONTACT: Nelson Hernandez, Senior Associate Director, Office of Housing and Community Investment, (202) 408–2993, Brian Doherty, Manager, Office of Housing and Community Investment, (202) 408–2991, or Mike Price, Senior Policy Analyst, Office of Housing and Community Investment, (202) 408–2941. For legal questions, contact: Lyn Abrams, Attorney, (202) 414–8951, Kevin Sheehan, Attorney, (202) 414–8952, or Sharon Like, Associate General Counsel, (202) 414–8950. These are not toll-free numbers. The mailing address for each contact is: Office of General Counsel, Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Comments

FHFA invites comments on all aspects of the proposed rule, and may revise the language of the proposed rule as appropriate after taking all comments into consideration. Copies of all comments will be posted on FHFA's Internet Web site at *http://www.fhfa.gov.* In addition, copies of all comments received will be available for examination by the public on business days between the hours of 10 a.m. and 3 p.m., at the Federal Housing Finance Agency, Fourth Floor, 1700 G Street, NW., Washington, DC 20552. To make an appointment to inspect comments, please call the Office of General Counsel at (202) 414–6924.

II. Background

A. Establishment of FHFA

Effective July 30, 2008, HERA amended the Safety and Soundness Act to create FHFA as an independent agency of the federal government.[1] HERA transferred the safety and soundness supervisory and oversight responsibilities over the Enterprises from the Office of Federal Housing Enterprise Oversight (OFHEO) to FHFA. HERA also transferred the charter compliance authority and responsibility to establish, monitor and enforce the housing goals for the Enterprises from the Department of Housing and Urban Development (HUD) to FHFA. FHFA is responsible for ensuring that the Enterprises operate in a safe and sound manner, including maintenance of adequate capital and internal controls, that their operations and activities foster liquid, efficient, competitive, and resilient national housing finance markets, and that they carry out their public policy missions through authorized activities.[2]

Section 1302 of HERA provides, in part, that all regulations, orders and determinations issued by the Secretary of HUD (Secretary) with respect to the Secretary's authority under the Safety and Soundness Act, the Federal National Mortgage Association Charter

[1] *See* Division A, titled the "Federal Housing Finance Regulatory Reform Act of 2008," Title I, section 1101, Public Law No. 110–289, 122 Stat. 2654 (2008), codified at 12 U.S.C. 4501 *et seq.*

[2] *See* 12 U.S.C. 4513.

Act and the Federal Home Loan Mortgage Corporation Act (together, the Charter Acts), shall remain in effect and be enforceable by the Secretary or the Director of FHFA, as the case may be, until modified, terminated, set aside or superseded by the Secretary or the Director, any court, or operation of law. The Enterprises continue to operate under regulations promulgated by OFHEO and HUD until FHFA issues its own regulations.[3]

The Enterprises are government-sponsored enterprises chartered by Congress for the purpose of establishing secondary market facilities for residential mortgages.[4] Specifically, Congress established the Enterprises to provide stability in the secondary market for residential mortgages, respond appropriately to the private capital market, provide ongoing assistance to the secondary market for residential mortgages, and promote access to mortgage credit throughout the nation.[5]

B. Statutory Background

The Safety and Soundness Act provides that the Enterprises "have an affirmative obligation to facilitate the financing of affordable housing for low- and moderate-income families." 12 U.S.C. 4501(7). Section 1129 of HERA amended section 1335 of the Safety and Soundness Act to establish a duty for the Enterprises to serve three specified underserved markets, in order to increase the liquidity of mortgage investments and improve the distribution of investment capital available for mortgage financing for certain categories of borrowers in those markets. 12 U.S.C. 4565. Specifically, the Enterprises are required to provide leadership to the market in developing loan products and flexible underwriting guidelines to facilitate a secondary market for mortgages on housing for very low-, low- and moderate-income families with respect to manufactured housing, affordable housing preservation and rural markets.[6] *Id.* sec. 4565(a). In addition, section 1335(d)(1) requires FHFA to establish, by regulation effective for 2010 and each subsequent year, a method for evaluating and rating the Enterprises' performance of the duty to serve underserved markets. *Id.* sec. 4565(d)(1). FHFA is required to separately evaluate each Enterprise's performance with respect to each underserved market, taking into consideration the following:

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

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

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

(iv) The amount of investments and grants by the Enterprise in projects which assist in meeting the needs of the underserved markets (hereafter, the "investments and grants assessment factor").

Id. sec. 4565(d)(2).

The duty to serve provisions and issues for consideration are discussed further below.

C. Conservatorship

On September 6, 2008, the Director of FHFA appointed FHFA as conservator of the Enterprises in accordance with the Safety and Soundness Act to maintain the Enterprises in a safe and sound financial condition and to help assure performance of their public mission. The Enterprises remain under conservatorship at this time.

Because Congress enacted the duty to serve provisions in the Safety and Soundness Act before the Enterprises were placed in conservatorship, Congress developed the duty to serve requirements for normal Enterprise operating conditions, not conservatorship. While the Enterprises are in conservatorship, FHFA expects them to continue to fulfill their core statutory purposes which include their support for affordable housing. One set of measures of the Enterprises' support for affordable housing comes from the housing goals and another comes from the duty to serve. At the same time, all Enterprise activities, including those in support of affordable housing, must be consistent with the requirements of conservatorship.

Since the establishment of the conservatorships, the combined losses at the two Enterprises depleted all of their capital and required them to draw about $145 billion from the Department of the Treasury (Treasury) under the Senior Preferred Stock Purchase Agreements with Treasury. By letter dated February 2, 2010, FHFA's Acting Director reported to Congress that having the Enterprises engage in new products would be inconsistent with the goals of conservatorship and, consequently, that the Enterprises would be limited to continuing their existing core business activities and taking actions necessary to advance the goals of the conservatorship (Letter to Congress).[7]

Under the terms of the Senior Preferred Stock Purchase Agreements, the Enterprises will be shrinking their retained mortgage portfolios by ten percent per year. The Administration has announced its intention to develop and present to Congress a plan for the future of the nation's housing finance system that will include a proposal for the ultimate resolution of the Enterprises in conservatorship. Administration and congressional leadership have each pointed to the coming year as likely to see substantial legislative action affecting the Enterprises' future form and function. FHFA intends to continue operating the conservatorships as set forth in the Letter to Congress in anticipation of congressional action on the future of the Enterprises. In recognition of the foregoing facts and circumstances, FHFA's approach to implementing section 1335 of the Safety and Soundness Act is to limit the proposed rule to existing core business activities at the Enterprises and not to require that they engage in new lines of business as a result of the duty to serve proposed rule.

III. Duty To Serve Underserved Markets

A. Implementation of the Duty To Serve

The Enterprises' public purposes include a broad obligation to serve moderate- and lower-income borrowers. Through HERA, Congress created a duty for the Enterprises to serve three specific underserved markets. The duty to serve is a new obligation for the Enterprises and a new oversight responsibility for FHFA. The proposed rule would set forth standards for compliance with the duty to serve, methods for evaluating and rating the Enterprises and requirements for the

[3] *See* HERA at section 1302, 122 Stat. 2795; 12 U.S.C. 4603.

[4] *See* 12 U.S.C. 1716 *et seq.;* 12 U.S.C. 1451 *et seq.*

[5] *Id.*

[6] The terms "very low-income", "low-income" and "moderate-income" are defined in 12 U.S.C. 4502.

[7] *See* Letter from Acting Director Edward J. DeMarco to the Honorable Christopher Dodd, Honorable Richard C. Shelby, Honorable Barney Frank, and Honorable Spencer Bachus (Feb. 2, 2010).

Enterprises to provide reports and data on their performance under the duty to serve.

B. Overview of Comments

The formal rulemaking for the duty to serve commenced with FHFA's publication of an Advance Notice of Proposed Rulemaking (ANPR), 74 FR 38572 (Aug. 4, 2009).[8] FHFA received 100 comment letters in response. The majority of the commenters addressed manufactured housing. Twenty-six individuals, 18 nonprofit organizations, 11 trade associations, 11 corporations, seven policy advocacy organizations and one government entity addressed this issue. FHFA also received comments on other issues from one individual, nine nonprofit organizations, six trade associations, one corporation, five policy advocacy organizations, one government agency, one professional association and both Enterprises.

In addition to the comment letters, FHFA held five in-person meetings and one teleconference with manufactured housing industry representatives. These discussions covered current secondary mortgage market support for manufactured housing, the practices and operations of the industry and the consumer protections afforded manufactured housing borrowers. On December 3, 2009, FHFA hosted a forum on affordable housing, which was attended by members of the Affordable Housing Advisory Councils of the 12 Federal Home Loan Banks. The forum focused on manufactured housing and rural housing issues. Summaries of the forum, the meetings and the teleconference are available on FHFA's Web site.

Commenters on the duty to serve the manufactured housing market focused primarily on personal property (chattel) loans for manufactured homes and manufactured home community[9] financing. Fifty-seven commenters, including most of the individuals and nonprofit organizations, opposed consideration for chattel loans, or would limit consideration of such loans to instances in which they were backed by rigorous consumer protections.

With regard to manufactured home communities, individuals, nonprofit organizations, and policy advocacy groups expressed concern about the lack of tenant protections in communities owned by investors. Although some commenters favored consideration for loans made in support of these communities, this support was conditioned upon FHFA's establishing significant protections for residents. The manufactured housing corporations and trade associations generally favored duty to serve consideration for purchases of mortgages on investor-owned and resident-owned manufactured home communities. They commented that a dearth of new manufactured home communities are being developed, there is a shortage of financing for such communities, many communities need to refinance over the next several years, and there are harmful effects on residents when a community cannot obtain financing and must convert to a different use.

FHFA received sixteen comments regarding the affordable housing preservation market. The commenters, who included one trade association, four policy advocacy organizations, seven nonprofit organizations, one government agency and both Enterprises, addressed a range of issues. Most commenters supported consideration under the affordable housing preservation market for Enterprise assistance to HUD's Neighborhood Stabilization Program (NSP) and state and local foreclosure prevention programs. However, other commenters opposed consideration for assistance to NSP, but did favor consideration for state and local foreclosure prevention programs. A few commenters suggested consideration for assisting with Treasury's loan modification programs. Most of the affordable housing advocate commenters wanted less rigorous underwriting assumptions for properties receiving Section 8 payments or other property-based HUD subsidies. There was also strong support for more interaction between the Enterprises and state and local Housing Finance Agencies (HFAs).

The majority of comments on rural markets addressed the definition of "rural area." In the ANPR, FHFA requested comment on three definitions of "rural area." While some commenters supported at least one of those three definitions, more than half of the commenters on this issue supported adoption of the definition of "rural area" from the Housing Act of 1949, which was not one of the definitions identified in the ANPR. These commenters, all of whom are involved in rural housing mortgage lending or development, are familiar with this definition and use it within their organizations. The comments received and the merits of the different definitions are analyzed in detail below under the discussion of the duty to serve rural markets.

Several commenters supported evaluating the Enterprises' performance by using an evaluation methodology similar to that used to evaluate compliance with the Community Reinvestment Act (CRA). Other commenters stated that the four tests for evaluation set forth in the ANPR should not necessarily be given equal weight in evaluating the Enterprises' performance.

C. Underserved Markets

The duty to serve provisions in the Safety and Soundness Act indicate that the markets for manufactured housing, affordable housing preservation and rural areas are underserved and in need of particular assistance by the Enterprises. The extent of the lack of service and some of the factors underlying it are discussed below.

1. Manufactured Housing

According to Home Mortgage Disclosure Act (HMDA) data for 2008, home purchase applications for manufactured homes are denied at three times the rate that applications for site-built homes are denied. Further, of those mortgages that are originated, 60 percent are "higher-cost mortgages" under HMDA[10], whereas only 8 percent of originations for site-built homes are higher-cost mortgages. Manufactured housing borrowers may have few refinancing options even if interest rates decrease.[11]

A number of other factors combine to make the manufactured housing market underserved. In recent times, mortgage insurance has been generally unavailable for manufactured homes. Moreover, comparable properties, particularly in rural areas, can be difficult to identify, which makes appraisals more difficult. Also, unlike site-built housing, many manufactured homes have been financed as personal property, which many commenters viewed as offering terms less favorable to borrowers.[12]

[8] 74 FR 38572 (Aug. 4, 2009).

[9] In this rulemaking FHFA is using the term "manufactured home communities" to mean "manufactured home parks."

[10] For the 2008 reporting year, lenders reported the difference between the loan's annual percentage rate (APR) and the yield on Treasury securities having comparable periods of maturity, if that difference is equal to or greater than 3 percentage points for loans secured by a first lien on a dwelling, or equal to or greater than 5 percentage points for loans secured by a subordinate lien on a dwelling. *See* 67 FR 43218 (June 27, 2002).

[11] Jon Thompson, "Manufactured housing: An expected beneficiary from subprime mortgage disruption," p. 3. (Advantus Capital Management, 4th Qtr. 2007), available at *http://www.advantuscapital.com/adv/pdf/F67229.pdf.*

[12] Manufactured housing industry commenters asserted there could be advantages to personal property mortgages. The Manufactured Housing

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2. Affordable Housing Preservation

Affordable housing is preserved when an owner acts to keep rents affordable for low- and moderate-income households while ensuring that the property remains in good physical and financial condition for an extended period.[13] While affordable housing preservation is often associated with programs to help existing subsidized properties remain financially viable, it also encompasses efforts to keep unsubsidized properties in good condition while maintaining affordability for low- and moderate-income households. Many owners of subsidized properties face the need to refinance the loans on their properties, either because the original financing is nearing maturity or because they need to obtain equity from the property to perform major upgrades and repairs. Congressional hearings have highlighted the problems in this area.[14]

A variety of factors make the affordable housing preservation market difficult to serve. For example, the disruptions in the financial markets and the general lowering in value of Low Income Housing Tax Credits (LIHTCs) affect some of the programs that the Enterprises are required to assist. Transactions in many of the enumerated programs are generally project specific, involving multiple sources for debt and equity. Structuring is often complex, and the transaction process is often difficult and lengthy.

Units lacking rental assistance, which are often in older and/or small multifamily properties, provide a significant share of housing affordable to low- and moderate-income families. Keeping these units in the housing stock at reasonable rents can be more cost-effective than building new subsidized units.[15] One way to achieve this is to make financing for affordable housing preservation available on better terms.

3. Rural Areas

Practitioners and researchers have identified a number of long-standing impediments to affordable housing in rural areas. One impediment is the lower population density, which may prevent developers and operators from taking advantage of economies of scale in developing affordable housing in rural areas.[16] In addition, rural areas often have fewer nonprofit housing development corporations with the capacity to handle complicated government subsidy programs and the long and difficult housing development process.[17] Many smaller communities and governments have difficulty funding public utilities essential to constructing housing. Moreover, there are fewer lenders in rural areas than in metropolitan areas, and rural lenders may lack the back office capacity and the necessary scale of volume to effectively sell mortgages in the secondary market.

In 2007, the Housing Assistance Council (HAC) testified that "[n]early 3.6 million rural households are cost burdened, paying more than 30 percent of their monthly income for housing costs."[18] HAC further testified that less than 16 percent of the rural population is minority; however, this population was disproportionately affected by poor housing conditions, as rural minorities are more likely than rural whites to live in substandard housing.[19]

D. Market-by-Market Considerations

1. Manufactured Housing Market—Proposed § 1282.32

Section 1335 of the Safety and Soundness Act requires the Enterprises to "develop loan products and flexible underwriting guidelines to facilitate a secondary market for mortgages on manufactured homes for very low-, low-, and moderate-income families." 12 U.S.C. 4565(a)(1)(A). Manufactured housing could be an important housing option for lower-income families. Nearly half of all loans originated on manufactured homes from 2004 to 2008 were for families with incomes at or below 80 percent of area median income (AMI).[20] Manufactured housing also costs less initially than site-built housing. Manufactured homes tend to be much smaller, which significantly reduces the price of the home.[21] In addition, the average price per square foot of a new site-built home in 2008, exclusive of the cost of the land, was more than double that of a double-wide manufactured home.[22]

Investors have been cautious about manufactured housing in the wake of market disruptions at the end of the 1990s and the beginning of this decade, particularly in light of the demise of some of the larger specialized manufactured housing lenders. More recently, shortages of warehouse lines of credit, downgrades of existing asset-backed securities[23] and difficulties with bond insurance[24] have added to concerns.[25]

Institute, for example, suggested: (1) The overall principal loan amount is more affordable due to the absence of land in the transaction; (2) no appraisal, survey or private mortgage insurance is necessary, which lowers closing costs; (3) the customer does not encumber any real property; (4) tax, titling fees, homeowners insurance and service warranties can be financed; and (5) the transaction is generally faster.

[13] *See* "Window of Opportunity—Preserving Affordable Housing" p. 6 (MacArthur Foundation, Nov. 2007), available at *http://www.macfound.org/atf/cf/%7BB0386CE3-8B29-4162-8098-E466FB856794%7D/MAC_1107_Singles.pdf.*

[14] *See e.g.,* "Affordable Housing Preservation," Hearing before the Subcomm. on Housing and Transportation of the Senate Comm. on Banking, Housing, and Urban Affairs, 107th Cong., 2nd Sess. (Oct. 9, 2002) (S. Hearing 107–1014), available at *http://www.gpo.gov/congress/senate/pdf/107hrg/90543.pdf;* "Legislative Options for Preserving Federally- and State-assisted Affordable Housing and Preventing Displacement of Low-Income, Elderly, and Disabled Tenants," Hearing Before the Subcomm. on Housing & Community Opportunities of the House Comm. on Financial Services, 111th Cong., 1st Sess. (July 15, 2009) (Serial No. 111–59), available at *http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:53239.wais.*

[15] *See* National Housing Trust, "Affordable Housing Preservation FAQs" (2010), available at *http://www.nhtinc.org/preservation_faq.php.*

[16] *See generally* National Rural Housing Coalition, "Preserving Rural America's Affordable Rental Housing" (Oct. 2004), available at *http://www.nrhcweb.org/news/515PreservationReport.pdf*; E. Bolda, *et al.,* "Creating Affordable Rural Housing with Services: Options and Strategies," Working Paper #19 (Apr. 2000), available at *http://muskie.usm.maine.edu/Publications/rural/WP%2319.pdf.*

[17] *See* Joe Myer, "Developing Rural Housing Despite the Obstacles—Why It is Hard to Build Affordable Housing in Rural Delaware" (Winter 2002), available at *http://www.housingforall.org/housing_in_rural_de.htm.*

[18] Statement of Moises Loza, Housing Assistance Council, before the Subcomm. on Housing and Community Development, U.S. House of Representatives (May 8, 2007), available at *http://financialservices.house.gov/hearing110/htloza050807.pdf.*

[19] "Rural Housing Programs: Review of Fiscal Year 2008 Budget and Pending Rural Housing Legislation," Hearing Before the Subcomm. on Housing & Community Opportunities of the House Comm. on Financial Services, 110th Cong., 1st Sess. 28 (May 8, 2007) (Serial No. 110–27), available at *http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:37205.pdf.*

[20] This assessment is based on HMDA data from 2004–2008, exclusive of HOEPA mortgages and mortgages lacking borrower income information.

[21] The average size of a site-built house in 2008 was 2,459 square feet, whereas the average square footage of a single-wide manufactured home was 1,105 square feet and the average square footage of a double-wide manufactured home was 1,775 square feet. *See* U.S. Bureau of the Census, "Cost & Size Comparisons for New Manufactured Homes and New Single Family Site Built Homes" (2004–2008), available at *http://www.census.gov/const/mhs/sitebuiltvsmh.pdf.*

[22] In 2008, the average price per square foot for a new site-built home was $88.55 and for a new double-wide manufactured home was $42.87. *See id.*

[23] *See generally* Standard & Poor's, "Ratings Roundup: Monoline and Financial Institution Rating Volatility Drive Fourth-Quarter U.S. ABS Downgrades" (Jan. 28, 2009), available at *http://www.ambac.com/pdfs/RA/Volatility%20Drive%20Fourth-Quarter%20U.S.%20ABS%20Downgrades%20(01-28-09).pdf.*

[24] *See generally* Standard & Poor's, "S&P various actions on 182 U.S. rtgs after Ambac downgrade" (July 8, 2009), available at *http://www.reuters.com/article/idUSWNA860120090708.*

[25] As an illustration of the recent market, according to Origen Financial Services, the lack of

Manufactured housing could be an option for very low- and low-income families who reside in rural areas. HMDA data for 2008 show that 15 percent of all loan originations on manufactured homes in rural areas were for families with incomes at or below 50 percent of AMI, and another 29 percent were for families with incomes greater than 50 percent but at or below 80 percent of AMI. From 2004 through 2008, loan originations on manufactured homes in rural areas were more than double loan originations on manufactured homes in non-rural areas. Nearly half of all manufactured housing loans in rural areas during that time period were for families whose incomes were 80 percent or less of AMI.

One study explained the importance of manufactured housing to rural areas this way:

> The prevalence of manufactured housing in rural areas is in part a reflection of the costs and logistical challenges of site-built construction on relatively remote and scattered sites. It is also due to rural residents' generally lower incomes, and to the challenge of arranging standard mortgage financing for lots and land uses that do not conform to customary mortgage-underwriting criteria. Part of manufactured housing's appeal, in fact, lies in the ease with which units can be sited, a characteristic that is particularly important in areas lacking well developed construction and trade sectors. Manufactured housing's popularity in rural areas also results from a lack of affordable housing options, such as multifamily rental units, which are rarely developed at a cost-effective scale in low-density settings.[26]

The Enterprises have not been major investors in manufactured housing mortgages in recent years. Some industry commenters observed that manufactured housing loans are significantly under-represented in the Enterprises' mortgage portfolios in comparison with site-built homes. In particular, the Manufactured Housing Association for Regulatory Reform (MHARR) commented that manufactured housing loans now constitute less than one percent of the total business portfolios of both Enterprises, even though manufactured housing has historically represented approximately 10 to 15 percent of the single-family housing market. The fact that the majority of manufactured home loans were not financed as real property helps to explain why manufactured home loans constitute a small share of the Enterprises' business.

HMDA data do not specify the portion of these manufactured home loans that are financed as chattel, but the U.S. Census Bureau reported that in 2008, 63 percent of new manufactured homes placed for residential use were titled as personal property.[27]

In the ANPR, FHFA invited comment on the appropriate treatment under the duty to serve the manufactured housing market for personal property loans, land-home loans, real estate loans and loans for manufactured home communities. The comments are discussed in the relevant sections below.

Personal Property Loans. Section 1335(d)(3) of the Safety and Soundness Act provides that in determining whether the Enterprises have complied with the duty to serve the manufactured housing market, "the Director may consider loans secured by both real and personal property." 12 U.S.C. 4565(d)(3). FHFA is proposing that only loans titled as real property be considered towards the Enterprise's duty to serve.

Neither Enterprise has an ongoing business activity of purchasing chattel loans, although at least one of them has made limited bulk purchases of such loans in the past. Purchasing or guaranteeing chattel loans would require each Enterprise to develop operational capacities and risk management processes not currently in place. Moreover, to ensure that such lending was done responsibly would require each Enterprise to develop an extensive set of consumer protection requirements. Thus, FHFA proposes that chattel loans on manufactured homes not be considered towards the duty to serve the manufactured housing market as these loans are inconsistent with Enterprise conservatorship and would require substantial new efforts by the Enterprises to ensure safe and sound operations and sustainable homeownership for families.

The following paragraphs describe the widely divergent views FHFA received on this topic in response to the ANPR and the bases for the proposed exclusion of chattel loans.

Seventy-six commenters addressed the appropriateness of Enterprise support for personal property (chattel) loans on manufactured homes. Organizations representing consumers and manufactured home community residents expressed serious reservations about chattel lending. CFED, for example, stated that chattel loans provide low-income families with higher rates, less optimal terms and reduced consumer protections, as compared to a mortgage loan, and this was echoed in other comment letters.

Manufactured housing industry commenters asserted that manufactured housing financed as chattel provides a low cost housing option for lower-income borrowers, and that the secondary market for these loans is limited. These industry commenters largely supported providing duty to serve consideration for Enterprise purchase of chattel loans and suggested that the Enterprises purchase them on a flow basis and in significant quantities.[28]

In proposing that only loans titled as real property be considered towards the duty to serve, FHFA recognizes that manufactured housing financing often differs from financing for site-built homes. Interest rates charged for chattel loans are typically higher than those for real estate-secured loans.[29] Normally, chattel loans have shorter maturities and offer fewer consumer protections than real property loans. In several states, manufactured homes cannot be titled as real property[30] and, as a result,

a reliable source for a loan warehouse facility and the uncertainty of the availability of an exit in the securitization market caused it to stop originating loans for its own account and sell its portfolio of unsecuritized loans at a substantial loss. *See* Origen Financial, Inc., Annual Report on Form 10–K, as Amended, For the Fiscal Year Ended December 31, 2008, p. 2, available at *http://www.origenfinancial.com/sites/default/files/as_printed_Origen_10-K.pdf.*

[26] Neighborhood Reinvestment Corporation, "An Examination of Manufactured Housing as a Community-and Asset-Building Strategy," p. 6 (Sept. 2002), available at *http://www.jchs.harvard.edu/publications/communitydevelopment/W02–11_apgar_et_al.pdf.*

[27] *See* U.S. Bureau of the Census, "Cost & Size Comparisons For New Manufactured Homes and New Single Family Site Built Homes (2004–2008)," available at *http://www.census.gov/const/mhs/sitebuiltvsmh.pdf.*

[28] The Enterprises generally acquire single-family mortgage loans for securitization or for portfolio through either "flow" or "bulk" transaction channels. In the flow business, which represents the majority of their mortgage acquisitions, the Enterprises typically enter into agreements that generally set agreed-upon guaranty fee prices for a lender's future delivery of individual loans over a specified time period. Bulk business involves transactions in which a defined set of loans is to be delivered in bulk, a process which allows the Enterprises to review the loans for eligibility and pricing prior to delivery in accordance with the terms of the applicable contracts. Guaranty fees and other contract terms for bulk mortgage acquisitions are negotiated on an individual transaction basis, thereby enabling the Enterprises to adjust pricing more rapidly than in a flow transaction to reflect changes in market conditions and the credit risk of the specific transactions.

[29] *See* Ronald A. Wirtz, "Home, sweet (manufactured?) home" *Fedgazette* (July 2005), available at *http://www.minneapolisfed.org/pubs/fedgaz/05-07/cover.cfm.* Annual percentage rates may also be higher. For example, in 2007 one lender advertised an average annual percentage rate of 10.14 percent for its chattel loans and an average annual percentage rate of 7.54 percent for its real estate-secured loans. *See* "Tammac Manufactured Housing Advantage" (2007), available at *http://www.cdscreative.com/images/portfolio/tammac-holdings.pdf.*

[30] More than 40 states reportedly provide for conversion to real estate titles for manufactured

Continued

are not afforded certain borrower protections that apply when loans are secured by real property. Delinquencies and defaults on chattel loans typically exceed rates on mortgage loans.[31]

Sustainable homeownership results, in part, from the enforcement of appropriate consumer protections. Consumer organizations and some manufactured home resident organizations were particularly concerned that the Real Estate Settlement Procedures Act (RESPA), which requires that consumers receive an estimate of costs prior to closing and which prohibits payment of referral fees among settlement providers, does not apply to chattel loans. The National Consumer Law Center commented that the distinction between real property and personal property is especially important upon default because if a home is personal property rather than real property, the rights of the creditor are governed by Article 9 of the Uniform Commercial Code and the home may be subject to self-help repossession.[32] Further, the National Consumer Law Center commented that if the home is real property, upon default most states require that the creditor use the foreclosure process.

Commenters suggested that if FHFA determines that manufactured homes secured by chattel loans be considered, FHFA should require borrower protections such as: (i) Capping the annual percentage rate (APR) at 3.5 points above the prime rate; (ii) banning prepayment penalties; (iii) banning yield spread premiums; and (iv) requiring that lease terms extend five years beyond the term of the loan.[33]

Commenters also emphasized the importance of RESPA-like protections for chattel loans. However, developing such protections may require legislative and regulatory changes beyond the scope of the duty to serve.

The Enterprises have minimal experience with chattel financing, and the high level of defaults related to such financing creates significant credit and operational risks.[34] The depreciation in the value of the manufactured home could result in greater loss to the Enterprise in the event of default on the loan.[35] Manufactured homes are generally regarded as depreciating assets, even in a strong market environment.[36] A 2005 report by Lehman Brothers estimated the expected annual depreciation rate at three to four percent annually.[37] Likewise, Abt Associates noted that "[m]anufactured housing where the household does not own the lot is not an investment in any sense * * * [i]t should be thought of as a type of consumer durable."[38] The Office of Thrift Supervision cautioned lenders engaged in manufactured housing finance to carefully manage the risk of collateral depreciation for the homes.[39]

Upon consideration of the risks facing the borrowers and the Enterprises, FHFA proposes that only Enterprise purchases of mortgages on manufactured homes titled as real property and activities related to such mortgages be considered toward the duty to serve the manufactured housing market. Enterprise purchases of chattel mortgages or other mortgages not titled as real estate, and any activity related to such mortgages, would not be considered. The proposed rule would define "manufactured home" in accordance with the definition of "manufactured home" used by HUD under section 603(6) of the Manufactured Home Construction and Safety Standards Act of 1974, as amended, 42 U.S.C. 5402(6), and implementing regulations.[40]

FHFA has determined that very low-, low- and moderate-income families can be best served through manufactured housing titled as real property and that the Enterprises, as part of their mission to increase the liquidity of mortgages to low- and moderate-income families, can play a significant role in serving this segment of the market. In addition, the safe and sound operations of the Enterprises in conservatorship are better protected

homes. *See* Cathy Adkins, "Manufactured Housing: Not What You Think" (National Conference of State Legislatures, Apr. 2007), available at *http://www.ncsl.org/default.aspx?tabid=12742.*

[31] *See generally* Michael Koss, "Manufactured Housing ABS—Valuation in a Troubled Sector," p. 22 (Feb. 9, 2005) (Lehman Brothers Fixed-Income Research) (regarding the performance of different types of manufactured housing collateral). Origen Financial Services, LLC, commented that the Enterprises frequently object to purchasing chattel loans because of their high default rates and that about 30 percent of chattel loans fail during the life of the loan.

[32] For information on consumer protections under repossession, *see* Government Accountability Office, "Federal Housing Administration—Agency Should Assess the Effects of Proposed Changes to the Manufactured Home Loan Program," GAO–07–879, 26–27 (Aug. 2007), available at *http://www.gao.gov/new.items/d07879.pdf. See generally* A. Schmitz, "Promoting the Promise Manufactured Homes Provide for Affordable Housing," 13 Journal of Affordable Housing 394–395 (No. 3) (Spring 2004), available at *http://lawweb.colorado.edu/profiles/pubpdfs/schmitz/SchmitzAHCDL.pdf;* Consumers Union, "Manufactured housing: A home that the law still treats like a car" (Feb. 2005), available at *http://www.consumersunion.org/mh/docs/Feb2005.pdf.*

[33] For a discussion of consumer concerns about the origination and servicing of manufactured housing mortgages, *see generally* S. West, "Manufactured Housing Finance and the Secondary Market," Vol. 2, Issue 1, Community Development Investment Review 39 (2006) (Federal Reserve Bank of San Francisco), available at *http://www.frbsf.org/publications/community/review/062006/west.pdf* (Current financing of manufactured housing is expensive; the secondary market for manufactured housing mortgages must include the Enterprises and strategies to reduce investor risk.); A. Schmitz, "Promoting the Promise Manufactured Homes Provide for Affordable Housing," 13 Journal of Affordable Housing 384 (No. 3) (Spring 2004), available at *http://lawweb.colorado.edu/profiles/pubpdfs/schmitz/SchmitzAHCDL.pdf* (State laws differ with respect to real and personal property financing and with respect to corresponding consumer protection provisions; the relatively small number of manufactured housing lenders allows them to garner bargaining power over consumers and has led to predatory financing.).

[34] By letter dated February 2, 2010, FHFA advised Congress of its concerns about new Enterprise initiatives that could require entry into new business lines with little prior experience or the dedication of Enterprise personnel already operating in a stressed environment. *See* Letter to Congress at 7.

[35] One manufactured housing lender observed: "The value of manufactured houses has tended to depreciate over time * * * rapid depreciation may cause the fair market value of borrowers' manufactured houses to be less than the outstanding balance of their loans. In cases where borrowers have negative equity in their houses, they may not be able to resell their manufactured houses for enough money to repay their loans and may have less incentive to continue to repay their loans, which may lead to increased delinquencies and defaults." Origen Financial, Inc., Annual Report on Form 10–K, as Amended, for the Fiscal Year Ended December 31, 2008, p. 7, available at *http://www.origenfinancial.com/sites/default/files/as_printed_Origen_10-K.pdf.*

[36] *See* S. Nelson & G. Bailey, "Manufactured Housing RMBS Performance Update," p. 1 (Nov. 17, 2009) (Fitch Ratings). *See also* Consumer Federation of America, "The Promise and Pitfalls of Building Wealth through Manufactured Housing," p. 2–3 (*http://content.knowledgeplex.org/kp2/cache/documents/1895/189501.pdf;* April 2006), available at Dominion Bond Rating Service, "Methodology—Rating U.S. Residential Mortgage-Backed Securities Transactions," p. 22 (Apr. 2009), available at *http://www.dbrs.com/research/227912/rating-u-s-residential-mortgage-backed-securities-transactions.pdf* ("Historically, chattel paper posed difficulties for investors of RMBS since the greatest recovery value is in the land, not the structure.").

[37] *See* Michael Koss, "Manufactured Housing ABS—Valuation in a Troubled Sector," p. 13 (Feb. 9, 2005) (Lehman Brothers Fixed-Income Research). Advantus Capital views manufactured homes as depreciating like a car depreciates. *See* Jon Thomson, "Manufactured housing: An expected beneficiary from subprime mortgage disruption" 3 (Advantus Capital Management, 4th Qtr. 2007), available at *http://www.advantuscapital.com/adv/pdf/F67229.pdf.*

[38] T. Boehm & A. Schlottmann, "Is Manufactured Housing a Good Alternative for Low-Income Families? Evidence from the American Housing Survey," p. 50 (December 2004), available at *http://www.huduser.org/Publications/pdf/IsManufacturedHousingAGoodAlternativeForLow-IncomeFamiliesEvidenceFromTheAmericanHousingSurvey.pdf*

[39] *See* Office of Thrift Supervision, Examination Handbook, 212.25 (Sept. 2008), available at *http://files.ots.treas.gov/422320.pdf.*

[40] This definition is consistent with the definition of "manufactured housing" in FHFA's regulation governing Federal Home Loan Bank advances to members, at 12 CFR 950.1.

when real estate is pledged as collateral for the mortgage loan.

Other Types of Manufactured Home Loans. In the ANPR, FHFA requested comment on definitions for land-home loans. FHFA has reviewed the comments received and literature on land-home loans and found no universal agreement on terminology or definitions. Fannie Mae commented that it "has many years of experience purchasing loans secured by real property manufactured housing, sometimes called 'land home' mortgages." The Manufactured Housing Institute (MHI) described "land-home non-conforming mortgage loans" as including both the acquisition of the home and the land as part of the loan transaction, but as not conforming to one or more of the Enterprises' underwriting requirements. According to MHI, there is a separate classification of "real property conforming mortgage loans," which includes both the acquisition of the home and the land as part of the loan transaction and meets the Enterprises' underwriting requirements.

With some manufactured housing financing transactions, a single loan is secured by separate liens against the home and against the real estate on which the home is sited. In the event of a default, this arrangement provides the lender with the option of proceeding against either the home or the real estate, whichever is most advantageous. These types of transactions would not be considered under the proposed rule, but FHFA welcomes further comment as to their relative merits in serving very low-, low- and moderate-income families in the manufactured housing market.

Manufactured Home Communities. Enterprise assistance to manufactured home communities would not be considered for purposes of the duty to serve the manufactured housing market in the proposed rule.

Although some manufactured home communities may include units owned by the community that are rented to tenants, manufactured home communities generally provide siting for chattel financed homes, and for the reasons discussed previously, the proposed rule would not allow for consideration for assistance to manufactured homes not titled as real property. Advocacy organizations representing tenants highlighted significant concerns about the vulnerability of tenants in investor-owned communities. In their view, short-term leases, in combination with the expense and difficulty involved in relocating a manufactured home, made tenants vulnerable to a variety of difficulties, including unexpectedly high rental increases and conversions of communities to other uses with the resulting displacement of tenants. Enterprise support for housing under these circumstances would not be consistent with the intent of the duty to serve.

The ANPR solicited comments on whether and how Enterprise assistance for manufactured home communities should be considered for purposes of the duty to serve the manufactured housing market and whether there should be differences in how resident-owned and investor-owned communities are treated. Eighty-four commenters addressed this issue. There was support from most commenters for considering assistance to resident-owned communities. Commenters did not cite resident protection issues in connection with these types of communities. To the contrary, community, resident and consumer advocacy organizations suggested that Enterprise assistance with resident-owned communities would support affordable housing for lower-income families. ROC USA commented that after 25 years and over $150 million in originations for resident-owned communities, it had "not had a single loan lost or charged off."

Several commenters stated that this market faces significant difficulties. The commenters indicated that there is a shortage of financing for manufactured home communities, many communities need to refinance over the next several years, few new communities are being developed and residents face dislocation when a community cannot obtain financing and must convert to a different use.[41] In addition, commenters stated that manufactured home communities are analogous to multifamily properties in providing affordable housing and that multifamily properties receive significant support from the Enterprises.

However, many resident and consumer advocacy commenters identified certain tenant protections that would be necessary in conjunction with providing assistance to manufactured home communities including requirements that:

(i) The term of the lease on the lot where the home is sited is tied to the term of the mortgage on the manufactured home;

(ii) Rental increases on the lot where the home is sited would be governed by formulas based on published, third party indices;

(iii) Residents would be notified significantly in advance of any sale of the community by the owner and would have a collective right of first refusal to purchase the community;

(iv) Residents would have the right to sell their homes in place to persons of their choosing; and

(v) Residents would have the right to form resident associations and conduct resident meetings.

In light of the potential for manufactured home communities to provide affordable housing to very low-, low- and moderate-income families, FHFA solicits comment on whether assistance to manufactured home communities should be considered for purposes of the duty to serve the manufactured housing market. FHFA particularly encourages comments on the safety and soundness of financing, distinctions between investor-owned and resident-owned communities, and the potential to ensure appropriate consumer protections in conjunction with such assistance.

2. Affordable Housing Preservation Market—Proposed § 1282.33

Affordable housing preservation focuses primarily on "at risk properties." A property becomes "at risk" "either when its rent affordability restrictions expire, or because mismanagement or disinvestment cause [sic] the property to deteriorate and become unsafe or uninhabitable."[42] Across the country, thousands of multifamily properties with federal, state or local subsidies or financing are at risk of conversion to market rate rents, obsolescence, or foreclosure, if owners are unable to refinance loans. The Enterprises can play an important role in preserving affordable multifamily properties by offering owners refinancing alternatives to Federal Housing Administration (FHA), state and local financing programs.

Section 1335(a)(1)(B) of the Safety and Soundness Act requires the Enterprises to "develop loan products and flexible underwriting guidelines to facilitate a secondary market to preserve housing affordable to very low-, low-, and

[41] A different view was expressed by Hometown American Communities, who commented that financing for manufactured home communities is generally available including from various life insurance companies.

[42] Stewards of Affordable Housing for the Future, "Housing at Risk", available at *http://www.poah.org/about/at-risk.htm.* According to HUD, the general definition of "affordability" is for a household to pay no more than 30 percent of its annual income on housing. *See http://www.hud.gov/offices/cpd/affordablehousing/index.cfm.*

moderate-income families," including assistance to housing projects under the following programs:

i. The project-based and tenant-based rental assistance programs under Section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f);

ii. The program under Section 236 of the National Housing Act (rental and cooperative housing for lower income families) (12 U.S.C. 1715z-1);

iii. The below-market interest rate mortgage program under Section 221(d)(4) of the National Housing Act (housing for moderate-income and displaced families) (12 U.S.C. 1715*l*);

iv. The supportive housing for the elderly program under Section 202 of the Housing Act of 1959 (12 U.S.C. 1701q);

v. The supportive housing program for persons with disabilities under Section 811 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 8013);

vi. The programs under title IV of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11361 *et seq.*), but only permanent supportive housing projects subsidized under such programs;

vii. The rural rental housing program under Section 515 of the Housing Act of 1949 (42 U.S.C. 1485);

viii. The low-income housing tax credit (LIHTC) under Section 42 of the Internal Revenue Code of 1986 (26 U.S.C. 42); and

ix. Comparable state and local affordable housing programs.

12 U.S.C. 4565(a)(1)(B).

Under the proposed rule, Enterprise assistance to housing projects under these programs would be considered under the duty to serve the affordable housing preservation market. FHFA will pay particular attention to the volume of existing loans that are maturing and may need refinancing in the affordable housing preservation market. The Enterprises would not be required to assist each program every year, but could take a step-by-step, concentrated approach. For example, an Enterprise might initially focus on the HUD Section 8, Section 236 and Section 202 programs. Several commenters asserted that the Enterprises should do more to support small multifamily properties.

The Enterprises have existing loan products that may meet the need of some owners seeking to refinance subsidized properties eligible to be considered under the affordable housing preservation market. The Enterprises offer subsidized property owners options not available under FHA programs, such as shorter terms and amortization periods, although these may not be as competitive as some FHA programs. The Enterprises have several loan products already in place for refinancing loans on Section 8 properties and Sections 236 and 202 loans. The properties refinanced under these programs are more numerous than properties refinanced pursuant to other enumerated programs, and their financing structure is more immediately suited to the Enterprises' existing operations. Other enumerated programs may require additional time for the Enterprise to tailor financing and other assistance, in particular, Section 221(d)(4), Section 811 and Section 515 programs, the McKinney-Vento Homeless Assistance Act and LIHTCs. In some or all of these cases, developing or implementing new loan products may be inconsistent with the requirements of conservatorship, but Enterprise outreach, such as providing technical assistance, or other support may be possible and appropriate.

The status of the enumerated programs and the role that the Enterprises could play in assisting them are discussed below.

Section 8. Both Enterprises currently purchase refinance mortgages on properties with HUD Section 8 contracts known as Housing Assistance Payments (HAP) contracts. Under this program, property owners receive rent payment subsidies from HUD and, in return, the property owner agrees to maintain affordable rents and maintain housing quality standards. Several commenters, including the Consumer Federation of America, Center for Responsible Lending, National Consumer Law Center, and Local Initiatives Support Corporation (LISC), stated that the Enterprises' underwriting guidelines are unnecessarily strict. For example, the Enterprises do not count all of the Section 8 payments as rental income and require additional reserves to protect against appropriations risk.[43] In the commenters' view, this may make refinancing a property infeasible or result in a lower loan amount and, therefore, fewer funds for repairs and replacement.

LISC commented in detail about the need for changes in Enterprise Section 8 financing. According to this comment letter, the Enterprises should modify their underwriting guidelines to allow the debt service coverage ratios to be based upon the full amount of the Section 8 rent levels, provided these rents were not above market levels. In addition, the letter suggested that the Enterprises may give better treatment for the debt service coverage ratios and the loan-to-value ratios for non-subsidized or LIHTC-only projects than they do for projects subsidized under Section 8, which may be a disincentive for financing of Section 8 projects.

Section 236. Both Enterprises currently have programs for purchasing refinance mortgages on Section 236 below-market interest rate (BMIR) loans. HUD's Section 236 program, also known as Section 236 Decoupling, permits an owner to refinance into a conventional multifamily mortgage while maintaining the interest rate subsidy provided by HUD. The HUD subsidy is referred to as Interest Reduction Payments (IRPs), and they are made directly to the lender. The amount HUD pays is the difference between the note rate and one percent. The Section 236 programs of both Enterprises use a bifurcated loan structure where the real estate loan and IRP payments amortize separately. The loan must be structured to ensure that the IRP payments are liquidated prior to the maturing of the real estate loan. HUD data indicate that there are over 1,300 outstanding Section 236 BMIR loans, and that about 200 of these loans will mature in 2010 and 2011.[44]

Section 221(d)(4). The Section 221(d)(4) program provides financing for the construction or major rehabilitation of multifamily rental properties and for permanent financing when construction is completed. The program is not subsidized, and there are no income restrictions on tenants. Therefore, the program may provide housing for other than very low-, low- and moderate-income households. Section 221(d)(4) loans purchased by the Enterprise may be considered as long as the units financed serve the income groups targeted by the duty to serve.

While the Safety and Soundness Act does not specifically mention the HUD Section 221(d)(3) program, this program, which is for nonprofit sponsors, can have a BMIR loan component. FHFA solicits comments on whether Enterprise purchases of Section 221(d)(3) loans should be considered under the duty to serve the affordable housing preservation market.

Section 202. Opportunities for the Enterprises to purchase refinanced Section 202 loans for the low-income elderly could grow due to legislative and HUD program changes and the increasing number of Section 202

[43] "Appropriations risk" is the possibility that Congress will not appropriate any funds for a program, or appropriate less funds than requested by the executive branch.

[44] HUD Insured Multifamily Mortgages Database, available at *http://www.hud.gov/offices/hsg/comp/rpts/mfh/mf_f47.cfm.*

properties in need of funding for rehabilitation. Established by the National Housing Act of 1959, Section 202 was a loan program without rental subsidies from 1959 to 1974. In 1974, HUD began to provide rental subsidies, but replaced subsidized loans with direct financing at prevailing market interest rates. As a result of the National Housing Act of 1990, HUD discontinued financing Section 202 properties, and instead, the Section 202 program became a capital advance program under which HUD provided construction or rehabilitation funds to sponsors, and after construction, rental subsidies. In return, sponsors were required to keep rents affordable to elderly households for a period of 40 years.

Most loans financed under Section 202 from 1959 to 1974 have 50-year terms, and most sponsors with such loans have already refinanced or sold their properties for redevelopment. The remaining Section 202 properties are at risk of deteriorating or being sold for redevelopment but not as affordable properties.[45] Section 202 properties that were financed from 1969 to 1974 are most in need of new financing.[46] Many properties financed from 1974 to 1990 have loans with interest rates exceeding nine percent and might also benefit from legislative changes. Refinancing would allow owners to acquire additional funds for rehabilitation, which could then be used to repair or rehabilitate Section 202 properties.[47] HUD data show that over 2,800 outstanding Section 202 loans are eligible for refinancing.[48]

Most Section 202 properties are refinanced through FHA-insured programs. FHA programs offer financing terms such as lower debt service coverage ratios and higher loan-to-value ratios than conventional mortgage lenders. More importantly, sponsors can refinance properties using contract rents rather than lower market rents, which usually results in a larger loan amount and more cash available to the sponsor for rehabilitation and reserves.

By actively pursuing Section 202 refinancing opportunities, the Enterprises would be able to provide more refinancing options for sponsors. Conventional financing through the Enterprises would allow sponsors access to adjustable rate mortgages with shorter maturities and amortization periods. Legislative changes to further facilitate refinancing of Section 202 loans have been introduced in Congress.[49] If these changes are enacted into law, the Enterprises would have increased opportunities to purchase refinanced mortgages and preserve Section 202 housing. Given the growing need for Section 202 sponsors to have available refinancing options other than FHA and state and local programs, Enterprise assistance in this area is particularly useful.

Section 811. The Section 811 program is a capital advance and rental assistance program for low-income disabled persons, and was created by the Cranston-Gonzalez National Housing Act of 1990. Under current law, Section 811 properties carry no debt, and HUD rental subsidies cover the difference between HUD-determined operating expenses and rental income.[50] There are no provisions under current law for refinancing Section 811 properties, and nonprofit organizations could not qualify for financing because excess cash flows produced by the properties under the program are minimal. Further, owners participating in the Section 811 program are required to maintain the property as housing for the disabled for a period of 40 years, and it will be at least 20 more years before low-income use restrictions on owners expire. However, the President's 2011 budget proposes changes to the Section 811 program and will introduce Project Rental Assistance Contracts (PRACs) as part of the program.[51] This would open up new opportunities for the Enterprises to provide long-term funding for properties receiving Section 811 PRACs.

McKinney-Vento Homeless Assistance Act. Programs under title IV of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11361 *et seq.*) provide supportive housing grants to help the homeless, especially homeless families with children, transition to independent living. Nonprofits that develop such supportive housing can use a combination of equity and financing sources, but such projects typically do not involve mortgages, which effectively limits Enterprise duty to serve activity under these programs. FHFA solicits comments on how the Enterprises could provide assistance to properties subsidized pursuant to the McKinney-Vento Homeless Assistance Act for purposes of the duty to serve the affordable housing preservation market.

Sections 515 and 538. Both Enterprises currently have programs to help owners of properties with the U.S. Department of Agriculture's (USDA) Section 515 direct loans to support low-income housing in rural areas. The Enterprises could also purchase eligible Section 538 loans that refinance Section 515 properties. Section 538 is the primary program used by USDA to preserve affordable rural rental housing.

Low-Income Housing Tax Credits (LIHTCs). LIHTCs, which are an important source of equity for new low-income rental housing, face significant challenges in today's market. Traditionally, the Enterprises have been among the largest investors in LIHTCs. Now in conservatorship, the Enterprises have no business reasons to purchase LIHTCs and are not currently purchasing them.

Neighborhood Stabilization Program. The proposed rule would add the Neighborhood Stabilization Program (NSP) administered by state and local governments with funds provided by HUD, as an eligible state and local affordable housing program for purposes of the duty to serve the affordable housing preservation market. The NSP is designed to enable communities to address problems related to mortgage foreclosure and abandonment through the purchase of foreclosed or abandoned homes. Under the NSP, at least 25 percent of NSP funds must be used to purchase and redevelop abandoned or foreclosed homes that will be used to house families with incomes that do not exceed 50 percent of AMI.

Some commenters, including the National Association of Home Builders and several consumer advocacy organizations, suggested that Enterprise assistance with foreclosure prevention efforts done in conjunction with

[45] *See generally* "The American Association of Homes and Services for the Aging", House Financial Services Comm., Subcomm. on Housing and Community Opportunity, "Legislative Options for Preserving Federally- and State-Assisted Affordable Housing and Preventing Displacement of Low-Income, Elderly and Disabled Tenants," 111th Cong., 1st Sess. (July 15, 2009) (Statement for the Record), available at *http://www.house.gov/apps/list/hearing/financialsvcs_dem/aahsa_statement_for_the_record.pdf.*

[46] *Id.*

[47] *See* Vincent F. O'Donnell, "Prepayment and Refinancing of Section 202 Direct Loans—A Summary of HUD Notices H 2002–16 and H 2004–21" (Feb. 25, 2005), available at *http://docs.google.com/viewer?a=v&q=cache:OS9fkvDzizwJ:www.lisc.org/files/896_file_asset_upload_file62_6015.pdf+.org+h+2004–21+lisc+February+25&hl=en&gl=us&pid=bl&srcid=ADGEESjfLlsfyFT-b-DHQ8QSySzpNFYC5VTDHxWlM74Ji4PmkCWW2aFM9bzzQOeXlu7iwS8Tzpo6jShgeYzBOBsEdxcMAaFM-pR2WpxlKvtWL1XZmcoS_F9fsbV8cUbyqcmouUB8Hycy&sig=AHIEtbR0BncO3GAII_rSAfSyljUDOH_Y9g.*

[48] HUD Insured Multifamily Mortgages Database, available at *http://www.hud.gov/offices/hsg/comp/rpts/mfh/mf_f47.cfm.*

[49] *See* S. 118—111th Cong.: "Section 202 Supportive Housing for the Elderly Act of 2009," available at *http://thomas.loc.gov/cgi-bin/query/z?c111:S.118:.*

[50] For a description of the Section 811 program, *see http://www.hud.gov/offices/hsg/mfh/progdesc/disab811.cfm.*

[51] For a description of the PRAC initiative, *see http://www.hud.gov/offices/cfo/reports/2011/cjs/Housing_For_Persons_Disabilities_2011.pdf.*

nonprofit organizations and state and local governments that receive NSP funds should be considered towards the duty to serve. The consumer commenters also encouraged greater Enterprise involvement in helping community development financial institutions (CDFIs) finance foreclosed properties that have been acquired by nonprofits through debt and equity investments.

Comparable State and Local Affordable Housing Programs. The Enterprises' support of state and local affordable housing programs has been primarily through purchases of LIHTCs and mortgage revenue bonds (MRBs) from state and local HFAs. The National Council of State Housing Agencies (NCSHA) has made increased cooperation between HFAs and the Enterprises a top legislative and regulatory goal for 2010.[52]

As a result of the liquidity crisis facing HFAs, on October 19, 2009, FHFA, in conjunction with Treasury and HUD, announced an initiative to support state and local HFAs through a new bond purchase program that will support new lending by HFAs and a temporary credit and liquidity program that will improve the access of HFAs to liquidity for outstanding HFA bonds.[53] Fannie Mae and Freddie Mac both played a role in this program, which, through its support of HFA liquidity, could expand resources for low- and moderate-income borrowers who want to purchase or rent homes that are affordable over the long term. On January 13, 2010, Treasury, FHFA and HUD announced the completion of all transactions under the initiative, which involved more than 90 HFAs. Two commenters noted that there needs to be a closer partnership between state and local HFAs and the Enterprises in order to expand affordable housing preservation opportunities. However, commenters did not suggest any specific programs or activities where the Enterprises could assist.

Several commenters suggested other potential sources of affordable housing units that should be preserved such as:

(i) Subsidized or non-subsidized affordable housing where there is and/or will be a local, state or federal long-term affordable use restriction in place for at least 20 percent of the units;

(ii) State mortgage subsidy programs;

(iii) State low-income housing tax credit programs;

(iv) Tax-exempt bond-financed housing;

(v) Public housing and state public housing involving mixed-finance redevelopment; and

(vi) Affordable, sustainable communities and healthy housing programs.

FHFA invites further comments on the merit of considering any of these other potential sources of affordable housing as part of the Enterprises' duty to serve, consistent with the requirements of conservatorship described earlier.

3. Rural Markets—Proposed §§ 1282.1, 1282.34

Section 1335(a)(1)(C) of the Safety and Soundness Act requires the Enterprises to "develop loan products and flexible underwriting guidelines to facilitate a secondary market for mortgages on housing for very low-, low-, and moderate-income families in rural areas." 12 U.S.C. 4565(a)(1)(C). An appropriate definition for "rural area" and the types of Enterprise activities that should be considered are discussed below.

Definition of "Rural Area." In the ANPR, FHFA suggested three definitions of "rural area." The first definition is based on classifications used by the U.S. Census Bureau for the 2000 census and distinguishes between urban and rural areas. Urban areas are classified as all territory, population, and housing units located within urbanized areas and urban clusters. In general, urbanized areas must have a core with a population density of 1,000 persons per square mile and may contain adjoining territory with at least 500 persons per square mile. Urban clusters have at least 2,500 but less than 50,000 persons. Rural areas are classified as all territory located outside of urbanized areas and urban clusters. Three commenters favored this definition.

The second definition defines "rural areas" as all counties assigned a USDA Rural-Urban Continuum code (RUC code), which the USDA uses to classify rural areas. These codes are available for all U.S. counties and for municipios (county equivalents) in Puerto Rico. Because data on other U.S. territories, including Guam and the Virgin Islands, are lacking, FHFA suggested treating these territories as "rural areas." A disadvantage of using the RUC code is that designations based on RUC codes are county-based. Consequently, these designations could encompass both urban and rural areas, as occurs with very large counties, particularly west of the Mississippi River. Commenters recognized this disadvantage and were generally not in favor of this definition.

The third definition would combine two different designations, one used by the U.S. Census Bureau and one used by the USDA. Under this two-pronged definition, all census tracts designated by the U.S. Census Bureau as nonmetropolitan, *i.e.,* outside metropolitan statistical areas (MSAs) designated by the Office of Management and Budget (OMB), would be considered rural areas, as would all census tracts outside of urbanized areas and urban clusters, as designated by USDA's Rural-Urban Commuting Area (RUCA) code. Because it would be census tract-based, it would be more granular than county-based or MSA-based definitions and should better distinguish between rural areas and non-rural areas. Furthermore, this definition would be easily implemented by the Enterprises' existing geocoding systems. Freddie Mac and two other commenters supported this definition.

One disadvantage of the third definition, as some commenters pointed out, is that a census tract could be excluded if a small portion is also included within an "Urbanized Area" or an "Urban Cluster." Also, as with the other definitions, this definition is based upon aging 2000 census data, and updated information is not expected to be available until 2012 or 2013. Another disadvantage of the third definition is that USDA does not plan to extend the RUCA code to Puerto Rico until at least 2012, and RUCA codes are not currently assigned to census tracts in the other U.S. territories. In the ANPR, FHFA suggested filling this gap by using the RUC code described above to augment the RUCA code in Puerto Rico and other U.S. territories or by creating an estimate of the RUCA code for these areas.

FHFA solicits further comment on the three definitions discussed in the ANPR and how to address the operational concerns involved.

A number of commenters, including USDA and Fannie Mae, recommended that FHFA adopt the definition of "rural area" from the Housing Act of 1949, as implemented by USDA. Under this definition, "rural area" means any open country or any town, village, city, or place that is not part of or associated with an urban area, and that "(1) has a population not in excess of 2,500 inhabitants, or (2) has a population in excess of 2, 500 but not in excess of 10,000 if it is rural in character, or (3) has a population in excess of 10,000 but

[52] *See* "NCSHA 2010 Legislative and Regulatory Priorities," (Oct. 14, 2009), available at *http://www.ncsha.org/resource/ncsha-2010-legislative-and-regulatory-priorities.*

[53] U.S. Department of the Treasury, "Administration Announces Initiatives for State and Local Housing Finance Agencies," Press Release (Oct. 19, 2009), available at *http://www.ustreas.gov/press/releases/tg323.htm.*

not in excess of 20,000 and (A) is not contained within a standard metropolitan statistical area, and (B) has a serious lack of mortgage credit for lower and moderate income families." 42 U.S.C. 1490.

The proposed rule would define "rural area" for purposes of the duty to serve consistent with the above definition. Because rural housing practitioners and USDA use this definition, its adoption would obviate the need for practitioners to adapt their practices and systems to fit a new definition. In addition, since the definition is maintained by USDA, it would not need to be updated by FHFA with successive censuses.

The proposed definition may present operational concerns to FHFA and to the Enterprises. The Government Accountability Office (GAO) has found that because MSAs contain both urban and rural areas and have increased substantially in both size and number in recent decades, the use of MSAs may no longer be a good way to distinguish urban territory from rural territory.[54] In addition, it would be necessary for the Enterprises to automate the coding of a rural/urban designation based on information currently available only through the USDA Web site. The USDA Web site is designed for loan underwriters and originators with much smaller transaction volume, who must enter property addresses individually into the Web site to determine which addresses are located in rural areas. The volume of the Enterprises' transactions is much larger, and they will need the capability to automate the rural/urban designation for large numbers of properties.

FHFA suggests two approaches for addressing the coding problem. First, USDA's RUCA code could be used until USDA implements an automated system for coding multiple properties. A second approach is for originators of loans purchased on a flow basis to manually enter the property addresses in USDA's Web site and provide the resulting classification data to the Enterprise. For loans purchased in bulk transactions, the Enterprise would be allowed to use the RUCA code definition for determining "rural area" rather than the Housing Act of 1949 definition.

The definition proposed for "rural area" may not encompass all tribal lands and colonias.[55] Very low-, low- and moderate-income families in these areas face unique housing challenges. In comments received in response to the ANPR, two nonprofit organizations and one policy advocacy organization stated that tribal lands should be automatically included in the definition of "rural area"; one trade association opposed this.

FHFA requests further comments on whether tribal lands and colonias should be included in the definition of "rural area" and how to define colonias.

Inclusion of Rural Housing Service (RHS) Programs. Under the RHS's Section 538 program, the federal government guarantees loans made through approved lenders to build or acquire apartments for moderate-income tenants in rural areas. USDA and HAC commented on the need for secondary market support for Section 538 mortgages, emphasizing that Section 538 multifamily properties provide housing for lower-income families. HAC also recommended duty to serve consideration for Enterprise assistance to the RHS Section 514 program, which finances housing for farm workers in rural areas.

Section 514 loans cannot be supported by the Enterprises in the same way as Section 538 loans, because Section 514 loans are made directly by USDA, which holds them in its portfolio. FHFA solicits comments on what type of assistance the Enterprises could provide for residential lending to farm workers in rural areas and under the Section 514 program in particular.

A number of commenters sought express FHFA authorization for particular RHS loan programs under the duty to serve rural markets. For purposes of the duty to serve, it is not necessary that FHFA specifically determine the eligibility of individual federal, state or local programs that support rural housing. As a general matter, where: (1) An Enterprise's mortgage purchase, or other activity related to such mortgage, is authorized under the Charter Act; (2) the property financed is residential real estate located within a rural area; and (3) the income of the residents falls within the duty to serve income limits, the units financed may be considered.

Enterprise Activities in Rural Markets. The Safety and Soundness Act enumerates specific housing programs for the Enterprises to assist to fulfill their duty to serve the affordable housing preservation market but does not prescribe specific programs for purposes of the Enterprises' duty to serve rural markets. The Enterprises have latitude to address the needs in rural markets. FHFA expects each Enterprise to evaluate its current activities in rural areas and opportunities to increase those activities to address liquidity needs. For example, an Enterprise may market its products to lenders in rural areas in an effort to increase the number of approved lenders in those areas. An Enterprise may also purchase or otherwise assist with loans guaranteed under USDA programs and any other residential mortgage to the extent such mortgage otherwise qualifies for consideration. FHFA expects the Enterprises to thoroughly review their underwriting guidelines to ensure they are appropriate for rural markets.

Some rural areas with very high median incomes may lack affordable multifamily housing for lower-income workers employed there. FHFA seeks comment on what assistance the Enterprises might be able to provide in these areas for purposes of the duty to serve rural markets.

E. Evaluating and Rating Performance

1. Overview of Evaluation

Section 1335(d) of the Safety and Soundness Act requires FHFA to separately evaluate whether each Enterprise has complied with the duty to serve each underserved market and annually "rate the performance of each Enterprise as to the extent of compliance." 12 U.S.C. 4565(d). Both Enterprises and most other commenters suggested a flexible approach to evaluation. Commenters generally supported an evaluation methodology similar to that used by regulators to determine compliance with the CRA, and FHFA has incorporated certain CRA-like features into the proposed rule. *See* 12 U.S.C. 2901 *et seq.;* 12 CFR parts 25, 228, 345, and 563e.

The proposed rule would require each Enterprise to submit an underserved markets plan under which its performance would be evaluated and rated. FHFA would consider four factors in determining whether an Enterprise has complied with the duty to serve. These four factors were described as four "tests" in the ANPR, but have been renamed "assessment factors" in the

[54] *See* United States Government Accountability Office, GAO–05–110, "Rural Housing—Changing the Definition of Rural Could Improve Eligibility Determinations" (Dec. 2004), available at *http://www.gao.gov/new.items/d05110.pdf.*

[55] For purposes of HUD's Colonia Set-Aside Program, a "colonia" is any identifiable community in the U.S.-Mexico border regions of Arizona, California, New Mexico and Texas that is determined to be a colonia on the basis of objective criteria, including lack of a potable water supply, inadequate sewage systems, and a shortage of decent, safe and sanitary housing. The border region is the area within 150 miles of the U.S.-Mexico border excluding MSAs with populations exceeding one million. *See http://www.hud.gov/offices/cpd/communitydevelopment/programs/colonias/cdbgcolonias.cfm.*

proposed rule.[56] FHFA would evaluate each Enterprise's performance on each assessment factor and assign a rating of satisfactory or unsatisfactory to each assessment factor in each underserved market. Based on the assessment factor ratings, FHFA would assign a rating to the Enterprise of "in compliance" or "noncompliance" with the duty to serve each underserved market.

Enterprise new products and new activities are subject to the prior approval and prior notice requirements FHFA established pursuant to section 1321 of the Safety and Soundness Act. *See* 12 U.S.C. 4541, 12 CFR Part 1253. However, innovation in the provision of services to underserved markets is not necessarily the same as the concept of new products requiring FHFA approval under section 1321 of the Safety and Soundness Act. In the Letter to Congress, FHFA advised Congress that permitting the Enterprises to engage in new products is inconsistent with the goals of conservatorship and further instructed them not to submit such requests under the new products rule.[57] This guidance does not prohibit the Enterprises from engaging in new activities that are substantially similar to existing activities previously approved by FHFA, or from modifying underwriting guidelines for existing loan products, consistent with safety and soundness and the requirements of conservatorship. FHFA will consider this guidance when evaluating the Enterprise's plan and performance of its duty to serve underserved markets.

2. Underserved Markets Plan—Proposed § 1282.35

FHFA proposes that each Enterprise provide an underserved markets plan against which the Enterprise would be evaluated and rated. The plan would be similar to a "strategic plan" under the CRA, but the plan would be mandatory rather than optional.[58] In its plan, the Enterprise would establish benchmarks and objectives upon which FHFA would evaluate and rate its performance. The plan would specify the actions the Enterprise would take and results it expects to achieve under each assessment factor for each underserved market. The Enterprise would be required to specify benchmarks and objectives to achieve a rating of satisfactory for each assessment factor in each underserved market. Although the plan may include non-quantitative considerations, it must include objective measurements with sufficient specificity to enable FHFA to evaluate and rate the Enterprise's performance against those measures. All benchmarks and objectives must have a timeframe for completion.

The proposed rule would identify benchmarks and objectives for each assessment factor that the Enterprise must address in its plan. These are discussed in more detail below.

Loan Product Assessment Factor. The loan product assessment factor requires evaluation of the Enterprise's "development of loan products, more flexible underwriting guidelines, and other innovative approaches to providing financing to each" underserved market. *Id.* sec. 4565(d)(2)(A).

FHFA received several comments addressing the loan product assessment factor. Fannie Mae suggested that FHFA give appropriate consideration to research and development activities that may not show results in their initial phase, but which are necessary for long-term planning and development. CFED commented that loan products for previously owned manufactured homes and energy-efficient single-wide manufactured homes serve the most underserved segments of the manufactured housing industry and should be considered under the loan product assessment factor. FHFA agrees with these comments and will consider these activities, provided they meet the other requirements set forth in the proposed rule.

To comply with this assessment factor, the proposed rule would require the Enterprise to evaluate its underwriting guidelines, which could include empirical testing of different parameters and modification of loan products in an effort to increase the availability of loans to families in each income group targeted by the duty to serve, consistent with prudent lending practices. FHFA expects the Enterprise to identify underwriting obstacles that could prevent service to underserved families. Enterprise modification of underwriting guidelines, particularly in the manufactured housing and rural markets, could also be considered. In its plan, the Enterprise would be permitted to establish additional benchmarks and objectives that could be considered under the loan product assessment factor.

Outreach Assessment Factor. The outreach assessment factor requires evaluation of "the extent of outreach [by the Enterprises] to qualified loan sellers and other market participants" in each of the three underserved markets. *Id.* sec. 4565(d)(2)(B). For this assessment factor, the Enterprises are expected to engage market participants and pursue relationships that result in enhanced service to each underserved market. These market participants could include nontraditional issuers, such as CDFIs and consortia sponsored by banks, local and state governments or others.

USDA indicated that one way to assess outreach in rural markets would be to consider the number of approved Fannie Mae or Freddie Mac lenders in a state that are active in lending in rural areas. USDA suggested, as an example, a goal for each state to have at least three active approved lenders and for each lender to have financed three different properties within that state over a two-year period. In the example, the Enterprise would be evaluated on its performance relative to such a quantitative benchmark and objective in its plan.

Other examples include actions such as simplifying the procedures for approving new seller-servicers that specialize in a particular underserved market, conducting relevant market surveys and forums to gather information on how to better serve the particular market and marketing existing products targeted towards an underserved market. In response to commenters, Enterprise training in its products and processes to market participants would also be considered. This could include training for specialized participants in an underserved market, such as USDA field staff, nonprofit and for-profit lenders and state and local HFAs.

The proposed rule would require the Enterprise to specify new relationships it would develop with qualified loan sellers, its outreach to market participants that serve families in each income group targeted by the duty to serve and technical support it would provide. The Enterprise could also specify other outreach activities in its plan.

Loan Purchase Assessment Factor. The loan purchase assessment factor requires FHFA to consider "the volume of loans purchased in each of such underserved markets relative to the market opportunities available to the [E]nterprise." *Id.* sec. 4565(d)(2)(C). The Safety and Soundness Act further states that FHFA "shall not establish specific quantitative targets nor evaluate the [E]nterprises based solely on the volume of loans purchased." *Id.*

FHFA received specific suggestions from commenters regarding implementation of the loan purchase assessment factor. USDA suggested that

[56] For stylistic simplicity, where a commenter speaks of the four "tests" as set forth in the ANPR, the preamble will describe them as "assessment factors."

[57] *See* Letter to Congress at 6.

[58] For information on strategic plans under CRA regulations, *see generally* 12 CFR 228.27.

the Enterprises buy at least five percent of the total new construction loans guaranteed by the Guaranteed Rural Rental Housing Program. Under USDA's proposal, this would escalate to 10 percent in the second year and 15 percent in the third year. Similarly, the Center for Responsible Lending, CFED and the National Consumer Law Center recommended requiring that Enterprise participation in affordable housing preservation be proportional to its service to the larger multifamily market.

The proposed rule would set forth benchmarks and objectives for the loan purchase assessment factor that the Enterprise must establish in its plan. Although FHFA is not establishing quantitative targets, FHFA would consider the Enterprise's past performance on the volume of loans purchased in a particular underserved market relative to the volume of loans the Enterprise purchases in that underserved market in a given year.

The Enterprise's plan would provide FHFA with assessments and analyses of the market opportunities available for each underserved market and describe the Enterprise's expected volume of loan purchases for a given year. The plan would be subject to FHFA review, which would normally take into account difficulties in forecasting future performance and the need for flexibility in dealing with unexpected market changes.

Investments and Grants Assessment Factor. The investments and grants assessment factor requires evaluation of "the amount of investments and grants in projects which assist in meeting the needs of such underserved markets." 12 U.S.C. 4565(d)(2)(D).

CFED provided several suggestions for grants in connection with manufactured housing, such as grants that promote peer-learning and industry knowledge on innovative and promising practices on the development of new products and activities. Under appropriate circumstances, these may be considered.

The proposed rule would require the Enterprise to specify in its plan the benchmarks and objectives it would establish for the investments and grants assessment factor. The plan would describe the Enterprise's projected investments and grants in a given year and any other benchmark and objective the Enterprise deems relevant.

Other Considerations. The Enterprises would have the option, in their plans, of selecting within each underserved market particular programs to emphasize in a particular year. As discussed previously, for example, the Enterprises would not be required to assist each enumerated program in the affordable housing preservation market every year. Rather, the Enterprises could target certain programs in a given year. Likewise, for rural markets an Enterprise may choose to emphasize assistance with particular RHS programs. The plan should articulate the reasons for choosing particular programs.

Although the Enterprises are in conservatorship, FHFA expects them to show tangible results in each underserved market and to be a catalyst for mortgage lending to very low-, low- and moderate-income families in each underserved market. The Enterprises should expect mortgage purchases and activities pursuant to the duty to serve to be profitable, even though they may be less so than activities that do not serve these underserved markets.

Submission and Review of Plan. The proposed rule would set forth procedures for submission and review of the plan. The Enterprise would be required to submit the plan to FHFA at least 90 days before the plan's effective date of January 1st of a particular year. The term of the plan must be for two years.

Within 60 days of receipt of the plan, FHFA would inform the Enterprise of any concerns with or objections to the plan and, if necessary, would direct the Enterprise to amend the plan to FHFA's satisfaction.

For the 2010 evaluation year, FHFA would expect the Enterprises to submit a plan as soon as practical after publication of the final rule, and with the earliest feasible effective date.

Assigned Ratings. The proposed rule would require that the Enterprise establish benchmarks and objectives in its plan to achieve an assigned rating of satisfactory on each assessment factor in each underserved market. The proposed rule would specify appropriate benchmarks and objectives that may result in a rating of satisfactory.

Satisfactory performance would mean that an Enterprise has diligently and with a degree of success pursued opportunities and acted on the opportunities to serve the market in a given year. Satisfactory performance would include attention to families in each income group targeted by the duty to serve and responsiveness to the needs of the particular underserved market.

Unsatisfactory performance would mean that the results were poor and the Enterprise did not meet the benchmarks and objectives in its plan for a rating of satisfactory.

FHFA solicits comments on whether the assigned ratings for each assessment factor should be limited to satisfactory or unsatisfactory or have additional possible ratings such as outstanding or marginal.

3. Determination of Compliance—Proposed § 1282.36

FHFA would evaluate an Enterprise's performance annually, as required by the Safety and Soundness Act. 12 U.S.C. 4565(d)(1). In rating the Enterprise, FHFA would determine whether the Enterprise has substantially achieved its benchmarks and objectives for the desired rating as set forth in its plan. In determining substantial achievement, FHFA would consider the specific needs and conditions of each underserved market and the financial condition of the Enterprise. If market conditions or the financial condition of the Enterprise change markedly during an evaluation year, FHFA would take this into consideration. FHFA would also consider input from the Enterprise, market participants and others, such as housing and financial researchers, as to the Enterprise's performance, financial condition and the needs and opportunities in the underserved markets.

Evaluation of Assessment Factors. When evaluating an Enterprise's compliance with the duty to serve, FHFA would not mechanically tally an Enterprise's performance on each assessment factor into a total score for that market. Rather, FHFA would evaluate and weight each assessment factor based on the needs of the particular underserved market, overall market conditions and the financial condition of the Enterprise.

Some commenters suggested a mathematical weighting of the four assessment factors to generate overall scores for the individual underserved markets. FHFA has considered these comments and has determined that a rigid mathematical weighting of the assessment factors would not provide FHFA with sufficient flexibility when evaluating an Enterprise's compliance with the duty to serve during conservatorship.

ROC USA suggested that the assessment factors for loan products, outreach and investments and grants should initially count more than loan purchases, but FHFA has not adopted this approach in the proposed rule. Loan purchases are the core business of the Enterprises and result in a tangible and immediate benefit to the families targeted for assistance. Accordingly, the loan purchase assessment factor, along with the outreach assessment factor, would receive significant weight in FHFA's evaluation. Although FHFA would also consider the Enterprises' performance under the loan product

assessment factor, this would not include any requirement that the Enterprises enter new lines of business. Because the Enterprises are in conservatorship and are obligated to pay dividends to the Treasury for preferred shares of Enterprise stock that Treasury holds, the investments and grants assessment factor would receive little to no weight.

Evaluation and Rating for 2010. For the 2010 evaluation year, FHFA would consider the administrative and operational effects on the Enterprises of not having final guidance in place for the entire year, and the Enterprises would only be rated for the portion of 2010 for which the rule is effective.

4. Requirements for Transactions or Activities—Proposed §§ 1282.37 Through 1282.39

The proposed rule would establish requirements for how transactions or activities would be treated. With some exceptions, the counting rules and other requirements would be similar to those established for the housing goals. For example, under appropriate circumstances, a single transaction could count towards the achievement of multiple housing goals, and in the same way one transaction could be considered towards more than one underserved market. Also, specialized transactions such as guarantees of MRBs and purchases of participations in mortgages would be treated in the same manner as under the Enterprises' housing goals regulation. Consistent with the comments received, FHFA proposes to measure performance in terms of units rather than mortgages or unpaid principal balance for the loan purchase assessment factor.

Under the proposed rule, Enterprise purchases of HOEPA mortgages and mortgages with unacceptable terms or conditions, as defined by FHFA in existing 12 CFR 1282.1, would not be considered under the duty to serve underserved markets. Thus, for example, purchase money mortgages exceeding the thresholds in 12 CFR 1282.1 would not be considered. In addition, Enterprise purchase of mortgages where the sale or financing of prepaid single-premium credit life insurance products occurs in connection with the origination would not be considered.

The proposed rule would provide that Enterprise purchases of mortgages that do not conform to the interagency Statement on Subprime Mortgage Lending [59] and the Interagency Guidance on Nontraditional Mortgage Product Risks [60] would not be considered under the duty to serve. To receive consideration under the duty to serve, all single-family loans purchased by the Enterprises must meet the standards in the Statement and Guidance. The Enterprises are expected to review the operations of loan sellers to ensure that the loans being sold to the Enterprises meet the standards in the Statement and Guidance.

The proposed rule would require that the Enterprise use actual income or rent of the borrower or tenant when this is available. When this is not available for rental properties, the Enterprise could estimate affordability by using the median income level of the census tract where the property is located, relative to AMI. FHFA seeks comment on whether an alternative basis for estimating affordability would be more effective. For example, the affordability of rental units in a census tract could be estimated based on the affordable proportion of all rental units securing new mortgages in that census tract.

The proposed rule would not limit the number of units with missing data for which an Enterprise could estimate affordability. Comments as to whether and how FHFA should impose a limit are invited.

F. Enforcement of Duty to Serve—Proposed §§ 1282.40, 1282.41

Section 1336(a)(4) of the Safety and Soundness Act provides that the duty to serve underserved markets is enforceable to the same extent and under the same enforcement provisions as are applicable to the Enterprise housing goals, except as otherwise provided. *See* 12 U.S.C. 4566(a)(4). Accordingly, if an Enterprise fails to comply with, or there is a substantial probability that the Enterprise will not comply with, its duty to serve a particular underserved market in a given year, FHFA would determine whether the benchmarks and objectives in the Enterprise's plan are or were feasible.

In determining feasibility, FHFA would consider factors such as market conditions and the financial condition of the Enterprise. The proposed rule would provide that if FHFA determines that such compliance is or was feasible, FHFA would follow the procedures in 12 U.S.C. 4566(b). The proposed rule would also include provisions for submitting a housing plan in the Director's discretion, if the Director determines that the Enterprise did not comply with its duty to serve a particular underserved market.

G. Reports and Data Submission—Proposed § 1282.66

The ANPR solicited comment on appropriate reporting and data submission requirements. The comments received were not extensive.

The Center for Responsible Lending, Consumer Federation of America and National Consumer Law Center commented that FHFA should consider requiring each Enterprise to annually publish a comprehensive report that describes the Enterprise's activities in each underserved market. Freddie Mac commented that the reporting requirements should be flexible and that FHFA should utilize existing Enterprise systems and processes. LISC commented that requiring the Enterprises to provide a complete listing of transactions would be valuable as long as confidentiality concerns are appropriately addressed.

FHFA proposes to require the Enterprise to provide three quarterly reports and one annual report on its performance and progress towards meeting its duty to serve each underserved market. The reports would contain both narrative and summary statistical information, supported by submission of appropriate transaction-level data. The annual report would include a description of the Enterprise's market opportunities for loan purchases that year that were available in each underserved market, to the extent data is available, the volume of qualifying loans purchased that year, a comparison of the Enterprise's loan purchases in that year with its loan purchases in past years, and a comparison of market opportunities with the size of the relevant markets in the past, to the extent data are available. The annual reports would also include discussion of the factors affecting the availability of loans for purchase that meet the requirements of the regulation. These factors could include market or accounting requirements for lenders to retain loans in portfolio or to sell them, the availability and pricing of credit enhancements from third parties and competition from other secondary market participants.

IV. Paperwork Reduction Act

The proposed rule does not contain any information collection requirement

[59] Office of the Comptroller of the Currency, Federal Reserve Board, Federal Deposit Insurance Corporation, Office of Thrift Supervision, National Credit Union Administration, "Statement on Subprime Mortgage Lending," 72 FR 37569–575 (July 10, 2007).

[60] Office of the Comptroller of the Currency, Federal Reserve Board, Federal Deposit Insurance Corporation, Office of Thrift Supervision, National Credit Union Administration, "Interagency Guidance on Nontraditional Mortgage Product Risks." 71 FR 58609–618 (Oct. 4, 2006).

that requires the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

V. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). FHFA has considered the impact of the proposed rule under the Regulatory Flexibility Act. The General Counsel of FHFA certifies that the proposed rule, if adopted as a final rule, is not likely to have a significant economic impact on a substantial number of small business entities because the regulation is applicable only to the Enterprises, which are not small entities for purposes of the Regulatory Flexibility Act.

List of Subjects in 12 CFR Part 1282

Mortgages, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, FHFA proposes to further amend part 1282 of subchapter E of 12 CFR chapter XII, as proposed to be revised at 75 FR 9061 (February 26, 2010), as follows:

SUBCHAPTER E—HOUSING GOALS AND MISSION

PART 1282—ENTERPRISE HOUSING GOALS AND MISSION

1. The authority citation for part 1282 is revised to read as follows:

Authority: 12 U.S.C. 4501, 4502, 4511, 4513, 4526, 4561–4566, 4603.

2. In § 1282.1, add the following definitions in alphabetical order:

§ 1282.1 Definitions.

* * * * *

Manufactured home, for purposes of subpart C of this part, means a manufactured home as defined in section 603(6) of the Manufactured Home Construction and Safety Standards Act of 1974, as amended, 42 U.S.C. 5402(6), and implementing regulations.

* * * * *

Rural area, for purposes of subpart C of this part, shall have the same meaning as provided in 42 U.S.C. 1490.

* * * * *

3. Add subpart C to read as follows:

Subpart C—Duty to Serve

Sec.
1282.31 General.
1282.32 Manufactured housing market.
1282.33 Affordable housing preservation market.
1282.34 Rural markets.
1282.35 Underserved markets plan.
1282.36 Evaluations and assigned ratings.
1282.37 Consideration of transactions or activities.
1282.38 General requirements for loan purchases.
1282.39 Special requirements for loan purchases.
1282.40 Failure to comply.
1282.41 Housing plans.

Subpart C—Duty to Serve

§ 1282.31 General.

(a) This subpart sets forth the Enterprises' duty to serve three underserved markets as required by section 1335 of the Safety and Soundness Act, 12 U.S.C. 4565. This subpart also establishes for 2010 and subsequent years, standards and procedures for evaluating and rating each Enterprise's compliance with the duty to serve underserved markets.

(b) Nothing in this subpart shall permit or require an Enterprise to engage in any activity that would otherwise be inconsistent with its Charter Act or the Safety and Soundness Act.

§ 1282.32 Manufactured housing market.

(a) *Duty in general.* Each Enterprise shall develop loan products and flexible underwriting guidelines to facilitate a secondary market for eligible mortgages on manufactured homes for very low-, low- and moderate-income families. The Enterprise's activities under this section shall serve each such income group in the year for which the Enterprise is evaluated and rated.

(b) *Eligible activities.* Mortgages on manufactured homes and activities related to such mortgages shall be eligible for consideration under the duty to serve the manufactured housing market provided that:

(1) The home is titled as real property; and

(2) The loan does not provide for mandatory arbitration of disputes.

§ 1282.33 Affordable housing preservation market.

(a) *Duty in general.* Each Enterprise shall develop loan products and flexible underwriting guidelines to facilitate a secondary market to preserve housing affordable to very low-, low- and moderate-income families under eligible housing programs. The Enterprise's activities under this section shall serve each such income group in the year for which the Enterprise is evaluated and rated.

(b) *Eligible housing programs.* Enterprise activities related to housing projects under the following programs shall be eligible for consideration under the affordable housing preservation market:

(1) The project-based and tenant-based rental assistance housing programs under section 8 of the U.S. Housing Act of 1937, 42 U.S.C. 1437f;

(2) The rental and cooperative housing for lower income families under section 236 of the National Housing Act, 12 U.S.C. 1715z–1;

(3) The housing program for moderate-income and displaced families under section 221(d)(4) of the National Housing Act, 12 U.S.C. 1715*l*;

(4) The supportive housing program for the elderly under section 202 of the Housing Act of 1959, 12 U.S.C. 1701q;

(5) The supportive housing program for persons with disabilities under section 811 of the Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. 8013;

(6) The permanent supportive housing projects subsidized under Title IV of the McKinney-Vento Homeless Assistance Act, 42 U.S.C. 1136*1 et seq.*;

(7) The rural rental housing program under section 515 of the Housing Act of 1949, 42 U.S.C. 1485;

(8) Low-income housing tax credits under section 42 of the Internal Revenue Code of 1986, 26 U.S.C. 42;

(9) The Neighborhood Stabilization Program; and

(10) Other comparable affordable housing programs administered by a state or local government that preserve housing affordable to very low-, low- and moderate-income families, as may be determined by FHFA in its discretion.

(c) *Level of assistance.* An Enterprise shall not be required to assist every program enumerated in paragraphs (b)(1) through (b)(9) of this section in a particular year.

§ 1282.34 Rural markets.

Each Enterprise shall develop loan products and flexible underwriting guidelines to facilitate a secondary market for mortgages on housing for very low-, low- and moderate-income families in rural areas. The Enterprise's activities under this section shall serve each such income group in the year for

which the Enterprise is evaluated and rated.

§ 1282.35 Underserved markets plan.

(a) *General.* Each Enterprise shall submit an underserved markets plan describing the steps it will take to serve each underserved market. FHFA will annually evaluate the Enterprise on its performance in all three underserved markets pursuant to the plan.

(b) *Term of plan.* The plan shall cover a period of two years.

(c) *Plan content.*—(1) The plan shall specify measurable benchmarks and objectives designed to achieve a rating of satisfactory for each assessment factor in each underserved market. For each underserved market, the plan shall address each benchmark and objective set forth in paragraphs (c)(2) through (c)(5) of this section and describe with sufficient specificity the steps the Enterprise will take to accomplish such benchmark and objective. The plan shall include annual measurable benchmarks and objectives and a timeframe for meeting them.

(2) *Benchmarks and objectives for loan product assessment factor.*—(i) Loan features or products the Enterprise will evaluate or develop to increase the number of loans available to very low-, low- and moderate-income families in a particular underserved market;

(ii) The Enterprise's evaluation of and changes to its underwriting guidelines for existing loan products for the purpose of increasing the number of very low-, low- and moderate-income families that would qualify for such products. Any changes must be consistent with the Safety and Soundness Act and the safe and sound operation of the Enterprise;

(iii) The degree to which such loan features, products or evaluation of or changes to underwriting guidelines serve families in each income group targeted by the duty to serve; and

(iv) Any other benchmark and objective the Enterprise deems relevant.

(3) *Benchmarks and objectives for outreach assessment factor.*—(i) New relationships the Enterprise will develop with qualified loan sellers that serve the needs of very low-, low- and moderate-income families in a particular underserved market;

(ii) Enterprise outreach to market participants, such as community organizations, community development financial institutions, and organizations or market participants that serve families in each income group targeted by the duty to serve;

(iii) Technical support the Enterprise will provide to qualified loan sellers and market participants. Technical support may include seminars, training and literature on the Enterprise's loan products and processes, and any other support that would assist qualified loan sellers and market participants gain a better understanding of the Enterprise's products; and

(iv) Any other benchmark and objective the Enterprise deems relevant.

(4) *Benchmarks and objectives for loan purchase assessment factor.*—(i) The volume of loans the Enterprise will purchase that serves the particular underserved market;

(ii) The market opportunities for Enterprise mortgage purchases in the underserved area. Descriptions of market opportunities shall be supported by market size estimations;

(iii) The Enterprise's past performance on the volume of loans purchased in a particular underserved market relative to the volume of loans the Enterprise will purchase in such underserved market in a given year;

(iv) The extent to which the loans purchased will serve each income group targeted by the duty to serve; and

(v) Any other benchmark and objective the Enterprise deems relevant.

(5) *Benchmarks and objectives for investments and grants assessment factor.*—(i) Investments and grants the Enterprise intends to make in a particular year; and

(ii) Any other benchmark and objective the Enterprise deems relevant.

(d) *Procedures.*—(1) An Enterprise shall submit the plan to FHFA at least 90 days before the effective date of the plan.

(2) The effective date of the plan shall be January 1st of that evaluation year.

(3) Within 60 days of receipt of an Enterprise's plan, FHFA will review the plan and inform the Enterprise of any concerns with or objections to the plan.

(4) If FHFA objects to a plan submitted by the Enterprise, the Enterprise shall submit an amended plan to FHFA not later than 15 days following notification from FHFA.

(e) *Criteria for evaluating plan content.* FHFA will evaluate a plan using the following criteria:

(1) The extent to which the plan addresses each assessment factor and describes the steps the Enterprise will take to implement each benchmark and objective for each assessment factor in each underserved market;

(2) The extent to which the plan establishes measurable benchmarks and objectives to achieve a rating of satisfactory and to serve a particular underserved market;

(3) The innovativeness and effectiveness of the steps the Enterprise will take to accomplish the benchmarks and objectives and whether those steps will be responsive to the needs of a particular underserved market; and

(4) The extent to which the plan serves families in each targeted income group in a particular underserved market.

(f) *Satisfactory rating.* Benchmarks and objectives appropriate for a rating of satisfactory for a particular assessment factor may include:

(1) Use of innovative products, practices and services;

(2) Improvement in performance from year to year;

(3) Responsiveness to the needs of a particular underserved market;

(4) Assistance with products and programs for first-time homebuyers;

(5) Assistance to insured depository institutions in meeting their CRA requirements;

(6) Attention to families in each income group targeted by the duty to serve; and

(7) For the loan purchase assessment factor, improvement in loan purchases over prior years.

(g) *Unsatisfactory rating.* Failure to substantially achieve the benchmarks and objectives for a rating of satisfactory on a particular assessment factor shall result in a rating of unsatisfactory for that assessment factor.

§ 1282.36 Evaluations and assigned ratings.

(a) *Assessment factors.*—(1) FHFA will separately evaluate an Enterprise's performance on each of the four assessment factors, as provided in paragraphs (a)(2) through (a)(5) of this section, in each underserved market. FHFA will evaluate and rate each Enterprise's performance in each underserved market on an annual basis.

(2) *Loan product assessment factor.* FHFA will evaluate each Enterprise on its development of loan products, more flexible underwriting guidelines, and other innovative approaches to providing financing to each underserved market.

(3) *Outreach assessment factor.* FHFA will evaluate each Enterprise on the extent of its outreach to qualified loan sellers and other market participants in each underserved market.

(4) *Loan purchase assessment factor.* FHFA will evaluate each Enterprise on the volume of loans it purchases in each underserved market relative to the market opportunities available to the Enterprise.

(5) *Investments and grants assessment factor.* FHFA will evaluate each Enterprise on the amount of its investments and grants in projects that

assist in meeting the needs of each underserved market, taking into consideration the safe and sound operation of the Enterprise and the requirements of conservatorship.

(b) *Evaluation of assessment factors.* In determining whether an Enterprise has complied with the duty to serve each underserved market, FHFA will annually evaluate the Enterprise under its underserved markets plan and assign a rating as follows:

(1) FHFA will assign a rating of satisfactory or unsatisfactory to each assessment factor in each underserved market based on FHFA's determination of whether the Enterprise has substantially achieved its benchmarks and objectives under its underserved markets plan;

(2) In determining whether the Enterprise has substantially achieved its benchmarks and objectives, FHFA will consider market factors and other circumstances beyond the Enterprise's control that affected the Enterprise's ability to fully achieve its benchmarks and objectives.

(c) *Determination of compliance.* For each underserved market, FHFA will assign a rating of "in compliance" or "noncompliance" with the duty to serve that market.

§ 1282.37 Consideration of transactions or activities.

(a) *General.* FHFA shall determine whether an Enterprise transaction or activity shall be considered for purposes of the duty to serve underserved markets. In this determination, FHFA will consider whether the transaction or activity facilitates a secondary market for mortgages: On manufactured homes for very low-, low- and moderate-income families; to preserve housing affordable to very low-, low- and moderate-income families under eligible housing programs; and on housing for very low-, low- and moderate-income families in rural areas. If FHFA determines that a transaction or activity will be considered for purposes of the duty to serve underserved markets, such transaction or activity will be considered under the relevant assessment factor for each underserved market it serves.

(b) *Not considered.* The following transactions or activities shall not be considered for purposes of the duty to serve underserved markets and shall not be considered for any assessment factor, even if the transaction or activity would otherwise be considered under § 1282.39:

(1) Enterprise contributions to the Housing Trust Fund, 12 U.S.C. 4568, and the Capital Magnet Fund, 12 U.S.C. 4569, and mortgage purchases funded with such grant amounts;

(2) HOEPA mortgages and mortgages with unacceptable terms and conditions;

(3) Mortgages that do not conform to the interagency Statement on Subprime Mortgage Lending, 72 FR 37569–575 (July 10, 2007), and the Interagency Guidance on Nontraditional Mortgage Product Risks, 71 FR 58609–618 (Oct. 4, 2006);

(4) Mortgages on manufactured homes not titled as real property or that provide for mandatory arbitration of disputes, or any activity related to such mortgages;

(5) Mortgages on manufactured home communities or any activity related to such mortgages;

(6) Purchases of single-family private label securities;

(7) Commitments to buy mortgages at a later date or time;

(8) Options to acquire mortgages;

(9) Rights of first refusal to acquire mortgages;

(10) Mortgage purchases to the extent they finance any dwelling units that are secondary residences;

(11) Single-family refinancing mortgages that result from conversion of balloon notes to fully amortizing notes, if the Enterprise already owns or has an interest in the balloon note at the time conversion occurs;

(12) Purchases of subordinate lien mortgages (second mortgages);

(13) Transactions or activities for which either Enterprise previously received consideration under the duty to serve underserved markets within the five years immediately preceding the current performance year;

(14) Purchases of mortgages where the property has not been approved for occupancy;

(15) Any interests in mortgages that the Director determines, in writing, shall not be treated as interests in mortgages;

(16) Purchases of State and local government housing bonds except as provided in § 1282.39(g); and

(17) Any combination of factors in paragraphs (b)(1) through (b)(16) of this section.

(c) *FHFA review of transactions or activities.* FHFA may determine whether and how any transaction or activity will be considered for purposes of the duty to serve underserved markets, including treatment of missing data. FHFA will notify each Enterprise in writing of any determination regarding the treatment of any transaction or activity.

(d) *The year in which a transaction or activity will be considered.* A transaction or activity will be considered for purposes of the duty to serve underserved markets in the year in which the transaction or activity is completed. FHFA may determine that partial consideration is appropriate for a transaction or activity that begins in a particular year but is not completed until a subsequent year, except that transactions that count toward the loan purchase assessment factor shall be considered in the year in which the Enterprise purchased the mortgage.

(e) *Consideration under one assessment factor.* A transaction or activity will only be considered under one assessment factor in a particular underserved market.

(f) *Consideration toward multiple underserved markets.* A transaction or activity, including dwelling units financed by an Enterprise's mortgage purchase, shall be considered for each underserved market for which such transaction or activity qualifies in that year.

§ 1282.38 General requirements for loan purchases.

(a) *General.* This section shall apply to Enterprise mortgage purchases that will be considered under the loan purchase assessment factor for a particular underserved market. Only dwelling units that are financed by mortgage purchases eligible to be considered under the duty to serve a particular underserved market, and that are not specifically excluded as ineligible under § 1282.37(b), may be considered.

(b) *Rental units.* For purposes of counting rental units toward the loan purchase assessment factor, mortgage purchases financing such units shall be evaluated based on the income of actual or prospective tenants where such data is available, *i.e.,* known to a lender.

(1) *Use of income.* Each Enterprise shall require lenders to provide to the Enterprise tenant income information, but only when such information is known to the lender. When the income of actual tenants is available, the income of the tenant shall be compared to the median income for the area, adjusted for family size as provided in § 1282.17, or as provided in § 1282.18 if family size is not known.

(i) When such tenant income information is available for all occupied units, the Enterprise's performance shall be based on the income of the tenants in the occupied units. For unoccupied units that are vacant and available for rent and for unoccupied units that are under repair or renovation and not available for rent, the Enterprise shall use rent levels for comparable units in the property to determine affordability,

except as provided in paragraph (b)(1)(ii) of this section.

(ii) When income for tenants is available to a lender because a project is subject to a federal housing program that establishes the maximum income for a tenant or a prospective tenant in rental units, the income of prospective tenants may be counted at the maximum income level established under such housing program for that unit, but such tenant income shall not exceed 100 percent of area median income. In determining the income of prospective tenants, the income shall be projected based on the types of units and market area involved. Where the income of prospective tenants is projected, each Enterprise must determine that the income figures are reasonable considering the rents (if any) on the same units in the past and considering current rents on comparable units in the same market area.

(2) *Use of rent.* When the income of the prospective or actual tenants of a dwelling unit is not available, performance will be evaluated based on rent and whether the rent is affordable to the income group targeted by the underserved market. A rent is affordable if the rent does not exceed the maximum income levels as provided in § 1282.19. In determining contract rent for a dwelling unit, the actual rent or average rent by unit type shall be used.

(3) *Model units and rental offices.* A model unit or rental office may be counted towards the loan purchase assessment factor only if an Enterprise determines that the number of such units is reasonable and minimal considering the size of the property.

(4) *Timeliness of information.* When counting dwelling units, each Enterprise shall use tenant and rental information as of the time of mortgage acquisition.

(c) *Missing data or information*—(1) When an Enterprise lacks sufficient information to determine whether an owner-occupied unit in a property securing a mortgage purchased by an Enterprise counts toward the loan purchase assessment factor for a particular underserved market because the income of the mortgagor is not available, the Enterprise may not count such unit.

(2) When an Enterprise lacks sufficient information to determine whether a rental unit in a property securing a mortgage purchased by an Enterprise counts toward the loan purchase assessment factor for a particular underserved market because neither the income of prospective or actual tenants, nor the actual or average rental data, are available, an Enterprise may estimate affordability with respect to such unit by using the median income level of the census tract where the property is located, as determined by FHFA based on the most recent decennial census.

(d) *Application of median income*—(1) For purposes of determining an area's median income under §§ 1282.17 through 1282.19 and the definitions in § 1282.1, the area is:

(i) The metropolitan area, if the property which is the subject of the mortgage is in a metropolitan area; and

(ii) In all other areas, the county in which the property is located, except that where the State non-metropolitan median income is higher than the county's median income, the area is the State non-metropolitan area.

(2) When an Enterprise cannot precisely determine whether a mortgage is on dwelling unit(s) located in one area, the Enterprise shall determine the median income for the split area in the manner prescribed by the Federal Financial Institutions Examination Council for reporting under the Home Mortgage Disclosure Act, if the Enterprise can determine that the mortgage is on dwelling unit(s) located in:

(i) A census tract;

(ii) A census place code;

(iii) A block-group enumeration district;

(iv) A nine-digit zip code; or

(v) Another appropriate geographic segment that is partially located in more than one area ("split area").

(e) *Sampling not permitted.* Performance under the loan purchase assessment factor for each underserved market for each year shall be based on a complete tabulation of dwelling units for that year; a sampling of such dwelling units is not acceptable.

(f) *Newly available data.* When an Enterprise uses data to determine whether a dwelling unit counts toward the loan purchase assessment factor for a particular underserved market and new data is released after the start of a calendar quarter, the Enterprise need not use the new data until the start of the following quarter.

§ 1282.39 Special requirements for loan purchases.

(a) *General.* Subject to FHFA's determination of whether a transaction or activity shall be considered for purposes of the duty to serve underserved markets, the transactions and activities identified in this section shall be treated as mortgage purchases as described, and be considered under the loan purchase assessment factor. A transaction or activity that is covered by more than one paragraph below must satisfy the requirements of each such paragraph.

(b) *Credit enhancements*—(1) Dwelling units financed under a credit enhancement entered into by an Enterprise shall be treated as mortgage purchases only when:

(i) The Enterprise provides a specific contractual obligation to ensure timely payment of amounts due under a mortgage or mortgages financed by the issuance of housing bonds (such bonds may be issued by any entity, including a State or local housing finance agency); and

(ii) The Enterprise assumes a credit risk in the transaction substantially equivalent to the risk that would have been assumed by the Enterprise if it had securitized the mortgages financed by such bonds.

(2) When an Enterprise provides a specific contractual obligation to ensure timely payment of amounts due under any mortgage originally insured by a public purpose mortgage insurance entity or fund, the Enterprise may, on a case-by-case basis, seek approval from the Director for such transactions to count under the loan purchase assessment factor for a particular underserved market.

(c) *Risk-sharing.* Mortgages purchased under risk-sharing arrangements between an Enterprise and any federal agency under which the Enterprise is responsible for a substantial amount (50 percent or more) of the risk shall be treated as mortgage purchases.

(d) *Participations.* Participations purchased by an Enterprise shall be treated as mortgage purchases only when the Enterprise's participation in the mortgage is 50 percent or more.

(e) *Cooperative housing and condominiums*—(1) The purchase of a mortgage on a cooperative housing unit ("a share loan") or a mortgage on a condominium unit shall be treated as a mortgage purchase.

(2) The purchase of a mortgage on a cooperative building ("a blanket loan") or a mortgage on a condominium project shall be treated as a mortgage purchase.

(3) Where an Enterprise purchases both a blanket loan on a cooperative building and share loans for units in the same building, both the blanket loan and the share loan(s) shall be treated as mortgage purchases. Where an Enterprise purchases both a condominium project mortgage and mortgages on condominium dwelling units in the same project, both the condominium project mortgages and the mortgages on condominium dwelling units shall be treated as mortgage purchases.

(f) *Seasoned mortgages.* An Enterprise's purchase of a seasoned mortgage shall be treated as a mortgage purchase.

(g) *Purchase of refinancing mortgages.* The purchase of a refinancing mortgage by an Enterprise shall be treated as a mortgage purchase only if the refinancing is an arms-length transaction that is borrower-driven.

(h) *Mortgage revenue bonds.* The purchase or guarantee of a mortgage revenue bond issued by a State or local housing finance agency shall be treated as a purchase of the underlying mortgages only to the extent the Enterprise has sufficient information to determine whether the underlying mortgages or mortgage-backed securities serve very low-, low- or moderate-income families in a particular underserved market.

(i) *Loan modifications.* An Enterprise's modification of a loan in accordance with the Making Home Affordable program announced on March 4, 2009, that is held in the Enterprise's portfolio or that is in a pool backing a security guaranteed by the Enterprise, shall be treated as a mortgage purchase.

(j) *Seller dissolution option*—(1) Mortgages acquired through transactions involving seller dissolution options shall be treated as mortgage purchases only when:

(i) The terms of the transaction provide for a lockout period that prohibits the exercise of the dissolution option for at least one year from the date on which the transaction was entered into by the Enterprise and the seller of the mortgages; and

(ii) The transaction is not dissolved during the one-year minimum lockout period.

(2) FHFA may grant an exception to the one-year minimum lockout period described in paragraphs (j)(1)(i) and (j)(1)(ii) of this section, in response to a written request from an Enterprise, if FHFA determines that the transaction furthers the purposes of the Enterprise's Charter Act and the Safety and Soundness Act.

(3) For purposes of paragraph (j) of this section, "seller dissolution option" means an option for a seller of mortgages to the Enterprises to dissolve or otherwise cancel a mortgage purchase agreement or loan sale.

§ 1282.40 Failure to comply.

If the Director determines that an Enterprise has not complied with, or there is a substantial probability that the Enterprise will not comply with, the duty to serve a particular underserved market in a given year and the Director determines that such compliance is or was feasible, the Director will follow the procedures in 12 U.S.C. 4566(b).

§ 1282.41 Housing plans.

(a) *General.* If the Director determines that an Enterprise did not comply with the duty to serve a particular underserved market in a given year, the Director may require the Enterprise to submit a housing plan for approval by the Director.

(b) *Nature of housing plan.* If the Director requires a housing plan, the housing plan shall:

(1) Be feasible;

(2) Be sufficiently specific to enable the Director to monitor compliance periodically;

(3) Describe the specific actions that the Enterprise will take—:

(i) To comply with the duty to serve a particular underserved market for the next calendar year; or

(ii) To make such improvements and changes in its operations as are reasonable in the remainder of the year, if the Director determines that there is a substantial probability that the Enterprise will fail to comply with the duty to serve a particular underserved market in such year; and

(4) Address any additional matters relevant to the housing plan as required, in writing, by the Director.

(c) *Deadline for submission.* The Enterprise shall submit the housing plan to the Director within 45 days after issuance of a notice requiring the Enterprise to submit a housing plan. The Director may extend the deadline for submission of a housing plan, in writing and for a time certain, to the extent the Director determines an extension is necessary.

(d) *Review of housing plans.* The Director shall review and approve or disapprove housing plans in accordance with 12 U.S.C. 4566(c)(4) and (c)(5).

(e) *Resubmission.* If the Director disapproves an initial housing plan submitted by an Enterprise, the Enterprise shall submit an amended housing plan acceptable to the Director not later than 15 days after the Director's disapproval of the initial housing plan; the Director may extend the deadline if the Director determines an extension is in the public interest. If the amended housing plan is not acceptable to the Director, the Director may afford the Enterprise 15 days to submit a new housing plan.

4. Add § 1282.66 in subpart D to read as follows:

§ 1282.66 Enterprise reports on duty to serve.

(a) *Quarterly reports.* Each Enterprise shall submit to the Director a quarterly report on its transactions and activities undertaken pursuant to its underserved markets plan, which shall include detailed information on the Enterprise's progress towards meeting the benchmarks and objectives in its plan.

(b) *Annual report.* To comply with the requirements in sections 309(n) of the Fannie Mae Charter Act and 307(f) of the Freddie Mac Act and for purposes of FHFA's Annual Housing Report to Congress, each Enterprise shall submit to the Director an annual report on its transactions and activities undertaken pursuant to its underserved markets plan no later than 60 days after the end of each calendar year. For each underserved market, the annual report shall include: a description of the Enterprise's market opportunities for loan purchases during the evaluation year to the extent data is available; the volume of qualifying loans purchased by the Enterprise; a comparison of the Enterprise's loan purchases with its loan purchases in prior years; and a comparison of market opportunities with the size of the relevant markets in the past, to the extent data are available.

Dated: May 28, 2010.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–0365; Airspace Docket No. 10–AAL–12]

RIN 2120–AA66

Proposed Amendment of Colored Federal Airway B–38; Alaska

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Colored Federal Airway Blue 38 (B–38), in Alaska. Specifically this action would remove a segment of B–38 from Haines Non-directional Beacon (NDB) to the Whitehorse, Yukon Territories Canada (XY NDB). The FAA is proposing this action in preparation of the eventual decommissioning of XY NDB by the Canadian Air Authority NAV CANADA.

DATES: Comments must be received on or before July 22, 2010.