

Federal Financial Institutions Examination Council

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other person having custody of records of the ASC, who is required to respond to a subpoena or other legal process, shall attend at the time and place therein specified and respectfully de-

cline to produce any such record or give any testimony with respect thereto, basing such refusal on this section.

[64 FR 72501, Dec. 28, 1999]

CHAPTER XII—FEDERAL HOUSING FINANCE AGENCY

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SUBCHAPTER A—ORGANIZATION AND OPERATIONS

PART 1206—ASSESSMENTS

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AUTHORITY: 12 U.S.C. 4516.

SOURCE: 73 FR 56713, Sept. 30, 2008, unless otherwise noted.

§ 1206.1 Purpose.

This part sets forth the policy and procedures of the FHFA with respect to the establishment and collection of the assessments of the Regulated Entities under 12 U.S.C. 4516.

§ 1206.2 Definitions.

As used in this part:

Act means the Federal Housing Finance Regulatory Reform Act of 2008.

Adequately capitalized means the adequately capitalized capital classification under 12 U.S.C. 1364 and related regulations.

Director means the Director of the Federal Housing Finance Agency or his or her designee.

Enterprise means the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation; and “Enterprises” means, collectively, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation.

Federal Home Loan Bank, or *Bank*, means a Federal Home Loan Bank established under section 12 of the Federal Home Loan Bank Act (12 U.S.C. 1432).

FHFA means the Federal Housing Finance Agency.

Minimum required regulatory capital means the highest amount of capital necessary for a Bank to comply with any of the capital requirements established by the Director and applicable to it.

Regulated Entity means the Federal National Mortgage Association, the Federal Home Loan Mortgage Corpora-

tion, or any of the Federal Home Loan Banks.

Surplus funds means any amounts that are not obligated as of September 30 of the fiscal year for which the assessment was made.

Total exposure means the sum, as of the most recent June quarterly minimum capital report of the Enterprise, of the amounts of the following assets and off-balance sheet obligations that are used to calculate the quarterly minimum capital requirement of the Enterprise under 12 CFR part 1750:

- (1) On-balance sheet assets;
- (2) Guaranteed mortgage-backed securities; and
- (3) Other off-balance sheet obligations as determined by the Director.

Working capital fund means an account for amounts collected from the Regulated Entities to establish an operating reserve that is intended to provide for the payment of large or multiyear capital and operating expenditures, as well as unanticipated expenses.

§ 1206.3 Annual assessments.

(a) *Establishing assessments.* The Director shall establish annual assessments on the Regulated Entities in an amount sufficient to maintain a working capital fund and provide for the payment of the FHFA’s costs and expenses, including, but not limited to:

- (1) Expenses of any examinations under 12 U.S.C. 4517 and section 20 of the Federal Home Loan Bank Act (12 U.S.C. 1440);
- (2) Expenses of obtaining any reviews and credit assessments under 12 U.S.C. 4519;
- (3) Expenses of any enforcement activities under 12 U.S.C. 3645;
- (4) Expenses of other FHFA litigation under 12 U.S.C. 4513;
- (5) Expenses relating to the maintenance of the FHFA records relating to examinations and other reviews of the Regulated Entities;
- (6) Such amounts in excess of actual expenses for any given year deemed necessary to maintain a working capital fund;

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(7) Expenses relating to monitoring and ensuring compliance with housing goals;

(8) Expenses relating to conducting reviews of new products;

(9) Expenses related to affordable housing and community programs;

(10) Other administrative expenses of the FHFA;

(11) Expenses related to preparing reports and studies;

(12) Expenses relating to the collection of data and development of systems to calculate the House Price Index (HPI) and the conforming loan limit;

(13) Amounts deemed necessary by the Director to wind up the affairs of the Office of Federal Housing Enterprise Oversight and the Federal Housing Finance Board; and

(14) Expenses relating to other responsibilities of the FHFA under the Safety and Soundness Act, the Federal Home Loan Bank Act and the Act.

(b) *Allocating assessments.* The Director shall allocate the annual assessments as follows:

(1) *Enterprises.* Assessments collected from the Enterprises shall not exceed amounts sufficient to provide for payment of the costs and expenses relating to the Enterprises as determined by the Director. Each Enterprise shall pay a proportional share that bears the same ratio to the total portion of the annual assessment allocated to the Enterprises that the total exposure of each Enterprise bears to the total exposure of both Enterprises.

(2) *Federal Home Loan Banks.* Assessments collected from the Banks shall not exceed amounts sufficient to provide for payment of the costs and expenses relating to the Banks as determined by the Director. Each Bank shall pay a *pro rata* share of the annual assessments based on the ratio between its minimum required regulatory capital and the aggregate minimum required regulatory capital of every Bank.

(c) *Timing and amount of semiannual payment.* Each Regulated Entity shall pay on or before October 1 and April 1 an amount equal to one-half of its annual assessment.

(d) *Surplus funds.* Surplus funds shall be credited to the annual assessment

by reducing the amount collected in the following semiannual period by the amount of the surplus funds. Surplus funds shall be allocated to all Regulated Entities in the same proportion in which they were collected, except as determined by the Director.

§ 1206.4 Increased costs of regulation.

(a) *Increase for inadequate capitalization.* The Director may, at his or her discretion, increase the amount of a semiannual payment allocated to a Regulated Entity that is not classified as adequately capitalized to pay additional estimated costs of regulation of that Regulated Entity.

(b) *Increase for enforcement activities.* The Director may, at his or her discretion, adjust the amount of a semiannual payment allocated to a Regulated Entity to ensure that the Regulated Entity bears the estimated costs of enforcement activities under the Act related to that Regulated Entity.

(c) *Additional assessment for deficiencies.* At any time, the Director may make and collect from any Regulated Entity an assessment, payable immediately or through increased semiannual payments, to cover the estimated amount of any deficiency for the semiannual period as a result of increased costs of regulation of a Regulated Entity due to its classification as other than adequately capitalized, or as a result of enforcement activities related to that Regulated Entity. Any amount remaining from such additional assessment and the semiannual payments at the end of any semiannual period during which such an additional assessment is made shall be deducted *pro rata* (based upon the amount of the additional assessments) from the assessment for the following semiannual period for that Regulated Entity.

§ 1206.5 Working capital fund.

(a) *Assessments.* The Director shall establish and collect from the Regulated Entities such assessments he or she deems necessary to maintain a working capital fund.

(b) *Purposes.* Assessments collected to maintain the working capital fund shall be used to establish an operating reserve and to provide for the payment

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of large or multiyear capital and operating expenditures as well as unanticipated expenses.

(c) *Remittance of excess assessed funds.* At the end of each year for which an assessment under this section is made, the Director shall remit to each Regulated Entity any amount of assessed and collected funds in excess of the amount the Director deems necessary to maintain a working capital fund in the same proportions as paid under the most recent annual assessment.

§ 1206.6 Notice and review.

(a) *Written notice of budget.* The Director shall provide to each Regulated Entity written notice of the projected budget for the Agency for the upcoming fiscal year. Such notice shall be provided at least 30 days before the beginning of the applicable fiscal year.

(b) *Written notice of assessments.* The Director shall provide each Regulated Entity with written notice of assessments as follows:

(1) *Annual assessments.* The Director shall provide each Regulated Entity with written notice of the annual assessment and the semiannual payments to be collected under this part. Notice of the annual assessment and semiannual payments shall be provided before the start of the new fiscal year.

(2) *Immediate assessments.* The Director shall provide each Regulated Entity with written notice of any immediate assessments to be collected under § 1206.4 of this chapter. Notice of any immediate assessment and the required payments shall be provided at such reasonable time as determined by the Director.

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(3) *Changes to assessments.* The Director shall provide each Regulated Entity with written notice of any changes in the assessment procedures that the Director, in his or her sole discretion, deems necessary under the circumstances.

(c) *Request for review.* At the written request of a Regulated Entity, the Director, in his or her discretion, may review the calculation of the proportional share of the annual assessment, the semiannual payments, and any partial payments to be collected under this part. The determination of the Director upon such review is final. Except as provided by the Director, review by the Director does not suspend the requirement that the Regulated Entity make the semiannual payment or partial payment on or before the date it is due. Any adjustments determined appropriate shall be credited or otherwise addressed by the following year's assessment for that entity.

§ 1206.7 Delinquent payment.

The Director may assess interest and penalties on any delinquent semiannual payment or other payment assessed under this part in accordance with 31 U.S.C. 3717 (interest and penalty on claims) and part 1704 of this title (debt collection).

§ 1206.8 Enforcement of payment.

The Director may enforce the payment of any assessment under 12 U.S.C. 4631 (cease-and-desist proceedings), 12 U.S.C. 4632 (temporary cease-and-desist orders), and 12 U.S.C. 4626 (civil money penalties).

SUBCHAPTER B

PART 1231—GOLDEN PARACHUTE PAYMENTS AND INDEMNIFICATION PAYMENTS

Sec.

1231.1 Purpose.

1231.2 Definitions.

1231.3–1231.4 [Reserved]

1231.5 Factors to be taken into account.

AUTHORITY: 12 U.S.C. 4518(e).

SOURCE: 73 FR 53357, Sept. 16, 2008, unless otherwise noted.

§ 1231.1 Purpose.

The purpose of this part is to implement section 1318(e) of the Act by setting forth the standards that the Director will take into consideration in determining whether to limit or prohibit golden parachute payments to entity-affiliated parties.

[73 FR 54673, Sept. 23, 2008]

§ 1231.2 Definitions.

The following definitions apply to the terms used in this part:

(a) *Act* means the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501 *et seq.*), as amended by the Federal Housing Finance Regulatory Reform Act of 2008, enacted under Division A of the HERA.

(b) *Director* means the Director of FHFA or his or her designee.

(c) *Enterprise* means the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation (collectively, Enterprises) and, except as provided by the Director, any affiliate thereof.

(d) *Entity-affiliated party* means—

(1) Any director, officer, employee, or controlling stockholder of, or agent for, a regulated entity;

(2) Any shareholder, affiliate, consultant, or joint venture partner of a regulated entity, and any other person, as determined by the Director (by regulation or on a case-by-case basis) that participates in the conduct of the affairs of a regulated entity, provided that a member of a Bank shall not be deemed to have participated in the affairs of that Bank solely by virtue of

being a shareholder of, and obtaining advances from, that Bank;

(3) Any independent contractor for a regulated entity (including any attorney, appraiser, or accountant), if—

(i) The independent contractor knowingly or recklessly participates in—

(A) Any violation of any law or regulation;

(B) Any breach of fiduciary duty; or

(C) Any unsafe or unsound practice; and

(ii) Such violation, breach, or practice caused, or is likely to cause, more than a minimal financial loss to, or a significant adverse effect on, the regulated entity;

(4) Any not-for-profit corporation that receives its principal funding, on an ongoing basis, from any regulated entity; and

(5) The Office of Finance.

(e) *Federal Home Loan Bank* means a bank established under the Federal Home Loan Act; the term “Federal Home Loan Banks” means, collectively, all the Federal Home Loan Banks.

(f)(1) *Golden parachute payment* means any payment (or any agreement to make any payment) in the nature of compensation by any regulated entity for the benefit of any current entity-affiliated party pursuant to an obligation of such regulated entity that—

(i) Is contingent on, or by its terms is payable on or after, the termination of such party’s primary employment or affiliation with the regulated entity; and

(ii) Is received on or after the date on which—

(A) The regulated entity became insolvent;

(B) Any conservator or receiver is appointed for such regulated entity; or

(C) The Director determines that the regulated entity is in a troubled condition.

(2) The term “golden parachute payment” shall not include:

(i) Any payment made pursuant to a pension or retirement plan which is qualified (or is intended within a reasonable period of time to be qualified)

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under section 401 of the Internal Revenue Code of 1986 (26 U.S.C. 401) or pursuant to a pension or other retirement plan which is governed by the laws of any foreign country;

(ii) Any payment made pursuant to a bona fide deferred compensation plan or arrangement which the Director determines, by regulation or order, to be permissible; or

(iii) Any payment made by reason of death or by reason of termination caused by the disability of an entity-affiliated party.

(3) Any payment which would be a golden parachute payment but for the fact that such payment was made before the date referred to in paragraph (f)(1)(ii) shall be treated as a golden parachute payment if the payment was made in contemplation of the occurrence of an event described that paragraph.

(g) *FHFA* means the Federal Housing Finance Agency.

(h) *HERA* means the Housing and Economic Recovery Act of 2008, Public Law No. 110–289, 122 Stat. 2654 (July 30, 2008).

(i) *Office of Finance* means the Office of Finance of the Federal Home Loan Bank System (or any successor thereto).

(j) *Regulated entity* means the Federal National Mortgage Association and any affiliate thereof; the Federal Home Loan Mortgage Corporation and any affiliate thereof; or any Federal Home Loan Bank; the term “regulated entities” means, collectively, the Federal National Mortgage Association and any affiliate thereof; the Federal Home Loan Mortgage Corporation and any affiliate thereof; and any Federal Home Loan Bank.

(k) *Troubled condition* means a regulated entity that—

(1) Is subject to a cease-and-desist order or written agreement issued by the FHFA that requires action to improve the financial condition of the regulated entity or is subject to a proceeding initiated by the Director, which contemplates the issuance of an order that requires action to improve the financial condition of the regulated entity, unless otherwise informed in writing by the FHFA; or

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(2) Is informed in writing by the Director that it is in a troubled condition for purposes of the requirements of this part on the basis of the regulated entity’s most recent report of examination or other information available to the FHFA.

(1)–(n) [Reserved]

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§ 1231.5 Factors to be taken into account.

In determining whether to prohibit or limit any golden parachute payment, the Director shall consider the following factors—

(a) Whether there is a reasonable basis to believe that the entity-affiliated party has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the regulated entity that has had a material effect on the financial condition of the regulated entity;

(b) Whether there is a reasonable basis to believe that the entity-affiliated party is substantially responsible for the insolvency of the regulated entity, the appointment of a conservator or receiver for the regulated entity, or the troubled condition of the regulated entity (as defined in regulations prescribed by the Director);

(c) Whether there is a reasonable basis to believe that the entity-affiliated party has materially violated any applicable provision of Federal or State law or regulation that has had a material effect on the financial condition of the regulated entity;

(d) Whether the entity-affiliated party was in a position of managerial or fiduciary responsibility;

(e) The length of time that the party was affiliated with the regulated entity, and the degree to which the payment reasonably reflects compensation earned over the period of employment and the compensation involved represents a reasonable payment for services rendered; and

(f) Any other factor the Director determines relevant to the facts and circumstances surrounding the golden parachute payment, including but not limited to negligence, gross negligence, neglect, willful misconduct, breach of

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fiduciary duty, and malfeasance on the part of an entity-affiliated party.

[73 FR 53357, Sept. 16, 2008, as amended at 73 FR 54673, Sept. 23, 2008]

SUBCHAPTER D—FEDERAL HOME LOAN BANKS

PART 1261—FEDERAL HOME LOAN BANK DIRECTOR ELIGIBILITY AND ELECTIONS

- Sec.
- 1261.1 Definitions.
 - 1261.2 General provisions.
 - 1261.3 Designation of member directorships.
 - 1261.4 Director eligibility.
 - 1261.5 Determination of member votes.
 - 1261.6 Nominations for member and independent directorships.
 - 1261.7 Election process.
 - 1261.8 [Reserved]
 - 1261.9 Actions affecting director elections.
 - 1261.10 Independent director conflict of interests.
 - 1261.11 Conflict of interests policy for Bank directors.
 - 1261.12 Reporting requirements for Bank directors.
 - 1261.13 Ineligible Bank directors.
 - 1261.14 Vacant Bank directorships
 - 1261.15 Minimum number of member directorships.
 - 1261.16 Temporary rule for 2008 election of directors.

AUTHORITY: 12 U.S.C. 1426, 1427, and 1432.

SOURCE: 73 FR 55715, Sept. 26, 2008, unless otherwise noted.

§ 1261.1 Definitions.

For purposes of this part:

Act means the Federal Home Loan Bank Act, as amended (12 U.S.C. 1421 through 1449).

Bank, written in title case, means a Federal Home Loan Bank established under section 12 of the Act (12 U.S.C. 1432).

Bona fide resident of a Bank district means an individual who:

- (1) Maintains a principal residence in the Bank district; or
- (2) If serving as an independent director, owns or leases in his or her own name a residence in the Bank district and is employed in a voting state in the Bank district.

Director means the Director of the Federal Housing Finance Agency.

FHFA means the Federal Housing Finance Agency.

FHFA ID number means the number assigned to a member by the FHFA and used by the FHFA and the Banks to identify a particular member.

Guaranteed directorship means a member directorship that is required by section 7(c) of the Act (12 U.S.C. 1427(c)) to be designated as representing Bank members that are located in a particular state, other than a stock directorship.

Independent directorship means a directorship, as defined by section 7(a)(4)(A) of the Act, 12 U.S.C. 1427(a)(4)(A), that is filled by a plurality vote of the members at large by a person having the qualifications specified by section 7(a)(3)(B)(i) or (ii), 12 U.S.C. 1427(a)(3)(B)(i) or (ii).

Member directorship means a directorship, as defined by section 7(a)(4)(A) of the Act, 12 U.S.C. 1427(a)(4)(A), that is filled by a plurality vote of the members located in a particular state by a person who is an officer or director of a member located in that state, and includes guaranteed directorships and stock directorships.

Method of equal proportions means the mathematical formula used by the FHFA to allocate member directorships among the states in a Bank's district based on the relative amounts of Bank stock required to be held as of the record date by members located in each state.

Public interest director means a person serving in a public interest directorship.

Public interest directorship means an independent directorship filled by an individual with more than four years experience representing consumer or community interests in banking services, credit needs, housing or consumer financial protections.

Record date means December 31 of the calendar year immediately preceding the election year.

Stock directorship means a member directorship that is designated by the FHFA as representing the members located in a particular voting state based on the amount of Bank stock held required to be held by the members in that state as of the record date, other than a guaranteed directorship.

Voting state means the District of Columbia, Puerto Rico, or the state of the United States in which a member's

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principal place of business, as determined in accordance with 12 CFR part 925, is located as of the record date. The voting state of a member with a principal place of business located in the U.S. Virgin Islands as of the record date is Puerto Rico, and the voting state of a member with a principal place of business located in American Samoa, Guam, or the Commonwealth of the Northern Mariana Islands as of the record date is Hawaii.

§ 1261.2 General provisions.

(a) *Board size and composition.* Annually, the FHFA Director will determine the size of the board of directors for each Bank and will designate at least a majority, but no more than 60 percent, of the directorships as member directorships and the remainder as independent directorships.

(b) *Term of directorships.* The term of office of each directorship commencing on or after January 1, 2009 shall be four years, except as adjusted pursuant to section 7(d) of the Act (12 U.S.C 1427(d)) to achieve a staggered board, and shall commence on January 1 of the calendar year so designated by the FHFA.

(c) *Annual elections.* Each Bank annually shall conduct an election the purpose of which is to fill all directorships designated by the FHFA as commencing on January 1 of the calendar year immediately following such election. Subject to the provisions of the Act and in accordance with the requirements of this part, the disinterested members of the board of directors of each Bank, or a committee of disinterested directors, shall administer and conduct the annual election of directors. In so doing, the disinterested directors may use Bank staff or independent contractors to perform ministerial and administrative functions concerning the elections process.

(d) *Location of members.* In accordance with section 7(c) of the Act (12 U.S.C 1427(c)), for purposes of the election of member directors, a member is deemed to be located in its voting state, unless otherwise designated by the Director.

(e) *Dates.* If any date specified in this part for action by a Bank, or specified by a Bank pursuant to this part, falls on a Saturday, Sunday, or Federal holiday, the relevant time period is

deemed to be extended to the next calendar day that is not a Saturday, Sunday, or Federal holiday.

§ 1261.3 Designation of member directorships.

(a) *Determination of voting stock.* (1) On or before April 10 of each year, each Bank shall deliver to the FHFA a capital stock report that indicates, as of the record date, the number of members located in each voting state in the Bank's district, the number of shares of Bank stock that each member (identified by its FHFA ID number) was required to hold, and the number of shares of Bank stock that all members located in each voting state were required to hold. If a Bank has issued more than one class of stock, it shall report the total shares of stock of all classes required to be held by the members. The Bank shall certify to the FHFA that, to the best of its knowledge, the information provided in the capital stock report is accurate and complete, and that it has notified each member of its minimum capital stock holdings.

(2) If a Bank's capital plan was not in effect as of the record date, the number of shares of Bank stock that any member is required to hold as of the record date shall be determined in accordance with 12 CFR 925.20 and 925.22. If a Bank's capital plan was in effect as of the record date, the number of shares of Bank stock that any member was required to hold as of that date shall be determined in accordance with the minimum investment established by the capital plan for that Bank; however, for any member whose Bank stock is less than the minimum investment during a transition period, the amount of Bank stock to be reported shall be the number of shares of Bank stock actually owned by the member as of the record date.

(b) *Designation of member directorships as stock directorships.* The Director annually will conduct a designation of member directorships for each Bank based on the number of shares of Bank stock required to be held by the members in each state as of December 31 of the preceding calendar year, using the method of equal proportions. If a Bank has issued more than one class of

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stock, the Director will designate the directorships for each state in that Bank district based on the combined number of shares required to be held by the members in that state. For purposes of conducting the designation, if a Bank's capital plan was not in effect on the immediately preceding December 31, the number of shares of Bank stock required to be held by members as of that date shall be determined in accordance with 12 CFR 925.20 and 925.22. If a Bank's capital plan was in effect on the immediately preceding December 31, the number of shares of Bank stock required to be held by members as of that date shall be determined in accordance with the minimum investment established by such capital plan; however, for any members whose Bank stock is less than the minimum investment during a transition period, the amount of stock to be used in the designation of directorships shall be the number of shares of Bank stock actually owned by those members as of that December 31. In all cases, the Director will designate the directorships by using the information provided by each Bank in its capital stock report required by paragraph (a)(1) of this section.

(c) *Allocation of directorships.* (1) The member directorships designated by the Director will be allocated among the states by the Director in accordance with sections 7(b) and (c) of the Act.

(2) If the designation of directorships conducted by the Director under paragraph (c)(1) of this section eliminates any existing directorship, or if the allocation of directorships under this paragraph (c) designates any existing stock directorship to another state, the director elected or appointed to that existing directorship shall not be eligible to serve after the close of business on the immediately following December 31.

(d) *Notification.* On or before June 1 of each year, the FHFA will notify each Bank in writing of the total number of directorships established for the Bank and the number of member directorships designated as representing the members in each voting state in the Bank district. If the annual designation of member directorships results in

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an existing directorship being redesignated as representing members in a different state, the directorship shall be deemed to become vacant as of December 31 of that year, and thereafter shall be filled by the board of directors of the Bank with an eligible person who is an officer or director of a member located in the newly designated state, regardless of whether the term for the incumbent director would have expired by that date.

§ 1261.4 Director eligibility.

(a) *Eligibility requirements for member directors.* Each member director, and each nominee to a member directorship, shall be:

(1) A citizen of the United States; and

(2) An officer or director of a member that is located in the voting state to be represented by the member directorship, that was a member of the Bank as of the record date, and that meets all minimum capital requirements established by its appropriate Federal banking agency or appropriate state regulator.

(b) *Eligibility requirements for independent directors.* Each independent director, and each nominee to an independent directorship, shall be:

(1) A citizen of the United States; and

(2) A bona fide resident of the district in which the Bank is located.

(c) *Restrictions.* (1) A nominee is not eligible if he or she:

(i) Is an incumbent director, unless:

(A) The incumbent director's term of office would expire before the new term of office would begin; and

(B) The new term of office would not be barred by the term limit provision of section 7(d) of the Act (12 U.S.C. 1427(d)); or

(ii) Is a former director whose service would be barred by the term limit provision of section 7(d) of the Act.

(2) For purposes of applying the term limit provision of section 7(d) of the Act (12 U.S.C. 1427(d)):

(i) A term of office that is adjusted after July 30, 2008 to a period of fewer than four years shall not be deemed to be a full term;

(ii) Any three year term of office ending immediately before a term of office that is adjusted after July 30, 2008 to a period of fewer than four years and any

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term of office commencing immediately following such adjusted term of office shall constitute consecutive full terms of office; and

(iii) Any member director's service through election to any directorship with a three year term of office existing on or before July 30, 2008 shall be deemed to be service in a full term directorship to which the director has been elected.

(d) *Loss of eligibility.* (1) A director shall become ineligible to remain in office if, during his or her term of office, the directorship to which he or she has been elected is eliminated or, with respect to a member directorship, is redesignated by the FHFA as representing members located in another state, in accordance with §1261.3(c)(2). The incumbent director shall become ineligible after the close of business on December 31 of the year in which the directorship is redesignated or eliminated. Any directorship ceasing through elimination or redesignation shall not be deemed to be a full-term directorship for purposes of the section.

(2) In the case of a redesignation to another state, the redesignated directorship shall be filled by a majority vote of the remaining Bank directors, sitting as a board, regardless of whether the remaining directors constitute a quorum of the board.

§ 1261.5 Determination of member votes.

(a) *In general.* Each Bank shall determine, in accordance with this section, the number of votes that each member of the Bank may cast for each directorship that is to be filled by the vote of the members.

(b) *Number of votes.* For each member directorship and each independent directorship that is to be filled in an election, each member shall be entitled to cast one vote for each share of Bank stock that the member was required to hold as of the record date. Notwithstanding the preceding sentence, the number of votes that any member may cast for any one directorship shall not exceed the average number of shares of Bank stock required to be held as of the record date by all members located in the same state as of the record date.

If a Bank has issued more than one class of stock, it shall calculate the average number of shares separately for each class of stock, using the total number of members in a state as the denominator, and shall apply those limits separately in determining the maximum number of votes that any member owning that class of stock may cast in the election. If a Bank's capital plan was not in effect as of the record date, the number of shares of Bank stock that a member was required to hold as of the record date shall be determined in accordance with 12 CFR 925.20 and 925.22. If a Bank's capital plan was in effect as of the record date, the number of shares of Bank stock that a member was required to hold as of the record date shall be determined in accordance with the minimum investment requirement established by the Bank's capital plan; however, for any member whose Bank stock is less than the minimum investment during a transition period, the amount of Bank stock to be used shall be the number of shares of Bank stock actually owned by the member as of the record date.

(c) *Voting preferences.* If the board of directors of a Bank includes any voting preferences as part of its approved capital plan, those preferences shall supersede the provisions of paragraph (b) of this section that otherwise would allow a member to cast one vote for each share of Bank stock it was required to hold as of the record date. If a Bank establishes a voting preference for a class of stock, the members with voting rights shall remain subject to the provisions of section 7(b) of the Act (12 U.S.C. 1427(b)) that prohibit any member from casting any vote in excess of the average number of shares of stock required to be held by all members in its state.

§ 1261.6 Nominations for member and independent directorships.

(a) *Election announcement.* Within a reasonable time in advance of an election, a Bank shall notify each member in its district of the commencement of the election process. Such notice shall include:

(1) The number of member directorships designated for each voting state

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in the Bank district and the number of independent directorships for the Bank;

(2) The name of each incumbent Bank director, the name and location of the member at which each member director serves, and the name and location of the organization with which each independent director is affiliated, if any, and the expiration date of each Bank director's term of office;

(3) A brief statement describing the skills and experience the Bank believes are most likely to add strength to the board of directors, provided that the Bank previously has conducted the annual assessment permitted by §1261.9 and the Bank has elected to provide the results of the assessment to the members;

(4) An attachment indicating the name, location, and FHFA ID number of every member in the member's voting state, and the number of votes each such member may cast for each directorship to be filled by such members, as determined in accordance with §1261.5; and

(5) A nominating certificate.

(b) *Member directorship nominations.*

(1) Any member that is entitled to vote in the election may nominate an eligible individual to fill each available member directorship for its voting state by delivering to its Bank, prior to a deadline to be established by the Bank and set forth in the notice required in paragraph (a) of this section, a nominating certificate duly adopted by the member's governing body or by an individual authorized by the member's governing body to act on its behalf.

(2) The nominating certificate shall include the name of the nominee and the name, location, and FHFA ID number of the member the nominee serves as an officer or director.

(3) The Bank shall establish a deadline for delivery of nominating certificates, which shall be no earlier than 30 calendar days after the date on which the Bank delivers the notice required by paragraph (a) of this section, and the Bank shall not accept certificates received after that deadline. The Bank shall retain all accepted nominating certificates for at least two years after the date of the election.

(c) *Accepting member directorship nominations.* A Bank shall notify in writing any person nominated for a member directorship promptly upon receipt of the nominating certificate. A person may accept the nomination only by delivering to the Bank, prior to a deadline established by the Bank and set forth in its notice, an executed director eligibility certification form prescribed by the FHFA. A Bank shall allow each nominee at least 30 calendar days after the date the Bank delivered the notice of nomination within which to deliver the executed form. A nominee may decline the nomination by so advising the Bank in writing, or by failing to deliver a properly executed director eligibility certification form prior to the deadline. Each Bank shall retain all information received under this paragraph for at least two years after the date of the election.

(d) *Independent directorship nominations.* (1) Any individual who seeks to be an independent director of the board of directors of a Bank may deliver to the Bank, on or before the deadline set by the Bank for delivery of nominating certificates, an executed independent director application form prescribed by the FHFA that demonstrates that the individual both is eligible and has either of the following qualifications:

(i) More than four years experience representing consumer or community interests in banking services, credit needs, housing, or consumer financial protections; or

(ii) Knowledge of or experience in one or more of the areas set forth in paragraph (e) of this section.

(2) Any other interested party may recommend to the Bank that it consider a particular individual as a nominee for an independent directorship, but the Bank shall not nominate any individual unless the individual has delivered to the Bank, on or before the date the Bank has set for delivery of nominating certificates, an executed independent director application form prescribed by the FHFA. The application form prescribed by the FHFA will provide a means by which an individual can indicate an intent to be considered for a public interest directorship. Only individuals who indicate on the form that they wish to be considered for a

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public interest directorship may be nominated for such directorships. The board of directors of the Bank may consider any individual for any independent directorship nomination, provided it has determined that the individual is eligible and qualified. The board of directors of the Bank shall consult with the Bank's Advisory Council before nominating any individual for any independent directorship. Each Bank shall include in its by-laws the procedures it intends to use for the nomination and election of the independent directors, and shall retain all information received under this paragraph for at least two years after the date of the election.

(3) Each Bank shall determine the number of public interest directorships to be included among its authorized independent directorships, provided that each Bank shall at all times have at least two such directorships, and shall announce that number to its members in the notice required by paragraph (a) of this section. In submitting nominations to its members, each Bank shall nominate at least as many individuals as there are independent directorships to be filled in that year's election.

(e) *Independent director qualifications.* Any independent director or nominee for an independent directorship, other than a public interest director, shall submit to the Bank an independent director application form that includes information demonstrating how that person satisfies the requirement that he or she have experience in, or knowledge of, one or more of the following areas: Auditing and accounting; derivatives; financial management; organizational management; project development; risk management practices; and the law. In considering the qualifications of each such nominee for an independent directorship, the board of directors of a Bank shall consider that the nominee's knowledge or experience must be commensurate with that needed to oversee a financial institution with a size and complexity that is comparable to that of the Bank.

(f) *Eligibility verification.* Using the information provided on the director eligibility certification forms and on the independent director application forms

prescribed by the FHFA, a Bank shall verify that each nominee for each member directorship and independent directorship meets all of the eligibility requirements for such directorship, as set forth in the Act and this part. Before announcing any independent director nominee, the Bank shall deliver to the FHFA a copy of the independent director application forms executed by the individuals proposed to be nominated for independent directorships by the board of directors of the Bank.

§ 1261.7 Election process.

(a) *Ballots.* Promptly after verifying the eligibility of all nominees in accordance with with §1261.6(f), and if, within two weeks of the delivery of nominee application forms to the FHFA, the FHFA has not informed a Bank of any objection to the nomination of any independent director nominee, a Bank shall prepare and deliver a ballot to all members that were members as of the record date. The Bank shall include with each ballot a closing date for the Bank's receipt of voted ballots, which date shall be no earlier than 30 calendar days after the date such ballot is delivered to the member.

(1) A ballot shall include at least the following provisions:

(i) For states in which one or more member directorships are to be filled in the election, an alphabetical listing of the names of each nominee for such directorship, the name, location, and FHFA ID number of the member each nominee serves, the nominee's title or position with the member, and the number of member directorships to be filled by the members in that voting state in the election;

(ii) An alphabetical listing of the names of each nominee for a public interest directorship and a brief description of each nominee's experience representing consumer and community interests;

(iii) An alphabetical listing of the names nominee for the other independent directorships and a brief description of each nominee's qualifications, including his or her knowledge or experience in the areas of financial management, auditing and accounting,

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risk management practices, derivatives, project development, organizational management and any other area of knowledge or experience set forth in § 1261.6(e);

(iv) A statement that write-in candidates are not permitted; and

(v) A confidentiality statement prohibiting the Banks from disclosing how a member voted.

(2) At the election of the Bank, a ballot also may include, in the body or as an attachment, a brief description of the skills and experience of each nominee for a member directorship.

(b) *Statement on skills and experience.* If a Bank has conducted an annual assessment permitted by § 1261.9 and has included the results of the assessment as part of the notice to members required in § 1261.6(a), it may include with each ballot a statement of the results of that assessment or any subsequent assessment. If the statement differs from the statement provided under § 1261.6(a)(3), the Bank also shall include an explanation of why the statements differ.

(c) *Lack of member directorship nominees.* If, for any voting state, the number of nominees for the member directorships for that state is equal to or fewer than the number of such directorships to be filled in that year's election, the Bank shall deliver a notice to the members in the affected voting state (in lieu of providing a ballot) that such nominees shall be deemed elected without further action, due to a lack of nominees. Thereafter, the Bank shall declare elected all eligible nominees and in doing so may designate particular nominees to guaranteed directorships or stock directorships, respectively, if necessary. The directors declared elected shall be included as directors-elect in the report of election required under paragraph (g) of this section. Any member directorship that is not filled due to a lack of nominees shall be deemed vacant as of January 1 of the following year and shall be filled by the Bank's board of directors in accordance with § 1261.14(a).

(d) *Voting.* For each directorship to be filled, a member may cast the number of votes determined by the Bank pursuant to § 1261.5. A member may not split its votes among multiple nomi-

nees for a single directorship, and, where there are multiple directorships to be filled, either within the member's voting state or at large, in the case of independent directorships, a member may not cumulatively vote for a single nominee. If any member votes, it shall by resolution of its governing body either authorize the voting for specific nominees or delegate to an individual the authority to vote for specific nominees. To vote, a member shall:

(1) Mark on the ballot the name of not more than one of the nominees for each directorship to be filled. Each nominee so selected shall receive all of the votes that the member is entitled to cast.

(2) Execute and deliver the ballot to the Bank on or before the closing date. A Bank shall not allow a member to change a ballot after it has been delivered to the Bank.

(e) *Counting ballots.* A Bank shall not review any ballot until after the closing date, and shall not include in the election results any ballot received after the closing date. Promptly after the closing date, each Bank shall tabulate the votes cast in the election: for the member directorships, the Bank shall tabulate votes by each voting state; for the independent directorships, the Bank shall tabulate votes for the district at-large. Any ballots cast in violation of paragraph (d) of this section shall be void.

(f) *Declaring results.* (1) For a member directorship, the Bank shall declare elected the nominee receiving the highest number of votes. If more than one member directorship is to be filled for a particular state, the Bank shall declare elected each successive nominee receiving the next highest number of votes until all such open directorships are filled.

(2) For an independent directorship, the Bank shall declare elected the nominee that has received the highest number of votes and has received at least 20 per cent of the number of votes eligible to be cast in the election. If more than one independent directorship is to be filled, the Bank shall declare elected each successive nominee receiving the next highest number of votes for such directorship until all

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such open directorships are filled, provided such successive nominee has received at least 20 per cent of the number of votes eligible to be cast in the election.

(3) In the event of a tie for the last available directorship, the disinterested incumbent members of the board of directors of the Bank, by a majority vote, shall declare elected one of the nominees for whom the number of votes cast was tied.

(4) A Bank shall not declare elected a nominee that it has reason to know is ineligible to serve, nor shall it seat a director-elect that it has reason to know is ineligible to serve.

(5) The Bank shall retain all ballots it receives for at least two years after the date of the election, and shall not disclose how any member voted.

(g) *Report of election.* Promptly following the election, each Bank shall deliver a notice to its members, to each nominee, and to the FHFA that contains the following information:

(1) For each member directorship, the name of the director-elect, the name and location of the member at which he or she serves, his or her title or position at the member, the voting state represented, the expiration date of the term of office, and the number of votes cast for each nominee;

(2) For each independent directorship, the name of the director-elect, whether the director-elect will fill a public interest directorship and, if so, the consumer or community interest represented by such directorship, any qualifications under §1261.6(e), the expiration date of the term of office and the number of votes cast for each nominee;

(3) The number of members voting in the election and the total number of votes cast for each nominee for the member directorships, which shall be reported by state, and the total number of votes cast for each nominee for the independent directorships, which shall be reported for the district at large.

(h) *Failing to fill all independent directorships.* If any independent directorship of a Bank is not filled through the initial election process set forth in this section, the board of directors of the Bank shall identify additional nominee

and shall conduct additional election for the directorship, following the election process set forth in this section. In any such election a nominee shall not be elected unless he or she receives at least 20 percent of the votes eligible to be cast.

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§ 1261.9 Action affecting director elections.

(a) *Banks.* Each Bank, acting through its board of directors, may conduct an annual assessment of the skills and experience possessed by the members of its board of directors as a whole and may determine whether the capabilities of the board would be enhanced through the addition of individuals with particular skills and experience. If the board of directors determines that the Bank could benefit by the addition to the board of directors of individuals with particular qualifications, such as auditing and accounting, derivatives, financial management, organizational management, project development, risk management practices, or the law, it may identify those qualifications and so inform the members as part of its announcement of elections pursuant to §1261.6(a).

(b) *Support for nomination or election.*
(1) A Bank director, officer, attorney, employee, or agent, acting in his or her personal capacity, may support the nomination or election of any individual for a member directorship, provided that no such director may purport to represent the views of the Bank or its board of directors in doing so.

(2) Notwithstanding paragraph (b)(1) of this section, a Bank director, officer, attorney, employee or agent and the board of directors and Advisory Council of a Bank may support the candidacy of any person nominated by the board of directors for election to an independent directorship.

(c) *Prohibition.* Except as provided in paragraphs (a) and (b) of this section, no director, officer, attorney, employee, or agent of a Bank may:

(1) Communicate in any manner that a director, officer, attorney, employee,

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or agent of a Bank, directly or indirectly, supports or opposes the nomination or election of a particular individual for a directorship; or

(2) Take any other action to influence the voting with respect to any particular individual.

§ 1261.10 Independent director conflict of interests.

(a) *Employment interests.* During any independent director's term of service, such director may not serve as an officer, employee, or director of any member of the Bank on whose board the individual sits, or of any recipient of advances from such Bank, and may not serve as an officer of any Bank. An independent director or nominee for any independent directorship shall disclose all such interests to the Bank on whose board of directors the individual serves or which is considering the individual for nomination to its board of directors.

(b) *Holding companies.* Service as an officer, employee, or director of a holding company that controls one or more members of, or one or more recipients of advances from, any Bank is not deemed to be service as an officer, employee or director of a member or recipient of advances if the assets of all such members or all such recipients of advances constitute less than 35 percent of the assets of the holding company, on a consolidated basis.

(c) *Attribution.* For purposes of determining compliance with this section, a Bank shall attribute to the independent director any officer position, employee position, or directorship of the director's spouse.

§ 1261.11 Conflict of interests policy for Bank directors.

(a) *Adoption of conflict of interests policy.* Each Bank shall adopt a written conflict of interests policy that applies to all members of its board of directors. At a minimum, the conflict of interests policy of each Bank shall:

(1) Require the directors to administer the affairs of the Bank fairly and impartially and without discrimination in favor of or against any member;

(2) Require independent directors to comply with § 1261.10(a);

(3) Prohibit the use of a director's official position for personal gain;

(4) Require directors to disclose actual or apparent conflicts of interest and establish procedures for addressing such conflicts;

(5) Provide internal controls to ensure that reports are filed and that conflicts are disclosed and resolved; and

(6) Establish procedures to monitor compliance with the conflict of interests policy.

(b) *Disclosure and recusal.* A director shall disclose to the Bank's board of directors any financial interests he or she has, as well as any financial interests known to the director of any immediate family member or business associate of the director, in any matter to be considered by the Bank's board of directors and in any other business matter or proposed business matter involving the Bank and any other person or entity. A director shall disclose fully the nature of his or her interests in the matter and shall provide to the Bank's board of directors any information requested to aid in its consideration of the director's interest. A director shall refrain from considering or voting on any issue in which the director, any immediate family member, or any business associate has any financial interest.

(c) *Confidential Information.* Directors shall not disclose or use confidential information they receive solely by reason of their position with the Bank to obtain any benefit for themselves or for any other individual or entity.

(d) *Gifts.* Directors shall not accept, and shall discourage their immediate family members from accepting, any gift that the director believes or has reason to believe is given with the intent to influence the director's actions as a member of the Bank's board of directors, or where acceptance of such gift would have the appearance of intending to influence the director's actions as a member of the board.

(e) *Compensation.* Directors shall not accept compensation for services performed for the Bank from any source other than the Bank for which the services are performed.

(f) *Definitions.* For purposes of this section:

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(1) *Immediate family member* means parent, sibling, spouse, child, or dependent, or any relative sharing the same residence as the director.

(2) *Financial interest* means a direct or indirect financial interest in any activity, transaction, property, or relationship that involves receiving or providing something of monetary value, and includes, but is not limited to any right, contractual or otherwise, to the payment of money, whether contingent or fixed. It does not include a deposit or savings account maintained with a member, nor does it include a loan or extension of credit obtained from a member in the normal course of business on terms that are available generally to the public.

(3) *Business associate* means any individual or entity with whom a director has a business relationship, including, but not limited to:

(i) Any corporation or organization of which the director is an officer or partner, or in which the director beneficially owns ten percent or more of any class of equity security, including subordinated debt;

(ii) Any other partner, officer, or beneficial owner of ten percent or more of any class of equity security, including subordinated debt, of any such corporation or organization; and

(iii) Any trust or other estate in which a director has a substantial beneficial interest or as to which the director serves as trustee or in a similar fiduciary capacity.

§ 1261.12 Reporting requirements for Bank directors.

(a) *Annual reporting.* Annually, each Bank shall require each of its directors to execute and deliver to the Bank the appropriate director eligibility certification form prescribed by the FHFA for the type of directorship held by such director. The Bank promptly shall deliver to the FHFA a copy of the certification form delivered to it by each director.

(b) *Report of noncompliance.* At any time that any director believes or has reason to believe that he or she no longer meets the eligibility requirements set forth in the Act or this part, the director promptly shall so notify the Bank and the FHFA in writing. At

any time that a Bank believes or has reason to believe that any director no longer meets the eligibility requirements set forth in the Act or this part, the Bank promptly shall notify the FHFA in writing.

§ 1261.13 Ineligible Bank directors.

Upon a determination by the FHFA or a Bank that any director of the Bank no longer satisfies the eligibility requirements set forth in the Act or this part, or has failed to comply with the reporting requirements of § 1261.12, the directorship shall immediately become vacant. Any director that is determined to have failed to comply with the eligibility or reporting requirements shall not continue to serve as a Bank director. Whenever a Bank makes such a determination, the Bank promptly shall notify the Bank director and the FHFA in writing.

§ 1261.14 Vacant Bank directorships.

(a) *Filling unexpired terms.* As soon as practicable after any vacancy occurs, the board of directors of a Bank shall elect, by a majority vote of the remaining Bank directors sitting as a board, an individual to fill the unexpired term of office of the vacant directorship, regardless of whether the remaining Bank directors constitute a quorum of the Bank's board of directors.

(b) *Verifying eligibility.* The board of directors of a Bank shall elect to a vacant directorship an individual who satisfies all of the eligibility requirements and any of the qualification requirements set forth in the Act and this part that were applicable to his or her predecessor, except that if the vacant directorship is a public interest directorship and the Bank has at least two other public interest directorships that are not vacant, the board of directors of the Bank may elect any individual who is eligible and qualified for any independent directorship. The Bank shall obtain an executed director eligibility certification form prescribed by the FHFA from the individual filling a member directorship. The Bank shall obtain an executed independent director application form prescribed by the FHFA from the individual filling an independent directorship. The Bank shall verify the individual's eligibility

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and shall deliver any independent director application form to the FHFA for its review and comment before allowing the individual to assume the directorship. The Bank shall retain the information it receives in accordance with § 1261.6.

(c) *Notification.* Promptly after allowing the individual to assume the directorship, as provided in paragraph (b) of this section, a Bank shall notify the FHFA and each member located in the Bank's district in writing of the following:

(1) For each member directorship filled by the board of a Bank, the name of the director, the name, location, and FHFA ID number of the member the director serves, the director's title or position with the member, the voting state that the director represents, and the expiration date of the director's term of office; and

(2) For each independent directorship filled by the board of a Bank, the name of the director, the name and location of the organization with which the director is affiliated, if any, the director's title or position with such organization, and the expiration date of the director's term of office.

§ 1261.15 Minimum number of member directorships.

Except with respect to member directorships of a Bank resulting from the merger of any two or more Banks, the number of member directorships allocated to each state shall not be less than the number of directorships allocated to that state on December 31, 1960. The following list sets forth the states whose members held more than one directorship on December 31, 1960:

State	Number of elective directorships on December 31, 1960
California	3
Colorado	2
Illinois	4
Indiana	5
Iowa	2
Kansas	3
Kentucky	2
Louisiana	2
Massachusetts	3
Michigan	3
Minnesota	2
Missouri	2
New Jersey	4
New York	4
Ohio	4

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State	Number of elective directorships on December 31, 1960
Oklahoma	2
Pennsylvania	6
Tennessee	2
Texas	3
Wisconsin	4

§ 1261.16 Temporary rule for 2008 election of directors.

(a) This section applies to the scheduling provisions for the election of directors of the Banks during calendar year 2008. Each Bank shall schedule its elections to allow a reasonable time to accomplish each act and complete the election process by December 31, 2008. As described herein, this section operates in conjunction with §§ 1261.3, 1261.6 and 1261.7, which govern generally the election of directors. The special provisions of this section govern the process for the 2008 elections for Bank directorships in the case of any conflict with the provisions of the other sections of this part.

(b) Each Bank shall notify its members of the commencement of the election process and shall establish a reasonable deadline after delivery of such notice within which nominating certificates must be received by the Bank, pursuant to the requirements of § 1261.6.

(c) After a Bank has accepted member directorship nominations, the Bank shall take the actions specified in § 1261.6(c) within a reasonable time.

(d) No Bank shall accept any completed and executed director eligibility certification form or any independent director application form referred to in § 1261.6(c) and (d) beyond a reasonable deadline established by the Bank.

(e) Each Bank shall deliver to each of its voting members a set of ballot materials, pursuant to the requirements of § 1261.7(a), and shall establish a reasonable period of time for the voting of ballots.

(f) After the closing date established by a Bank, the Bank shall commence the counting of ballots pursuant to the requirements of § 1261.7(e).

(g) Not later than December 31, 2008, each Bank shall declare the results of its election and report the results, pursuant to § 1261.7(f) and (g).

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(h) For any Bank that began a 2008 elective directorship election process after having received the Federal Housing Finance Board's Resolution titled *2008 Designation of Federal Home Loan Bank Directorships*, Resolution No. 2008-10 dated May 14, 2008, if the number of elective directorships designated for election in 2008 in that Resolution for any state is the same as, or is more than, the number of member directorships designated for election in the state in 2008 in the Order of the FHFA Director dated September 8, 2008, then,

as to such states to the extent that the Bank has completed the election process for such directorships in accordance with Federal Housing Finance Board rules up through and including verification of eligibility of nominees, the Bank's election process for member directorships shall be deemed to be in compliance with paragraphs (a), (b), (c) and (d) of this section, as applicable.

(i) This section is effective from September 26, 2008 through December 31, 2008.

SUBCHAPTER E—HOUSING GOALS AND MISSION

PART 1291—FEDERAL HOME LOAN BANKS' AFFORDABLE HOUSING PROGRAM

- Sec.
- 1291.1 Definitions.
- 1291.2 Required annual AHP contributions; allocation of contributions.
- 1291.3 AHP Implementation Plan.
- 1291.4 Advisory Councils.
- 1291.5 Competitive application program.
- 1291.6 Homeownership set-aside programs.
- 1291.7 Monitoring.
- 1291.8 Remedial actions for noncompliance.
- 1291.9 Agreements.
- 1291.10 Conflicts of interest.
- 1291.11 Temporary suspension of AHP contributions.
- 1291.12 Affordable Housing Reserve Fund.

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

SOURCE: 71 FR 59286, Oct. 6, 2006, unless otherwise noted. Redesignated at 73 FR 61664, Oct. 17 2008.

§ 1291.1 Definitions.

As used in this part:

Affordable means that:

(1) The rent charged to a household for a unit that is to be reserved for occupancy by a household with an income at or below 80 percent of the median income for the area, does not exceed 30 percent of the income of a household of the maximum income and size expected, under the commitment made in the AHP application, to occupy the unit (assuming occupancy of 1.5 persons per bedroom or 1.0 persons per unit without a separate bedroom); or

(2) The rent charged to a household, for rental units subsidized with Section 8 assistance under 42 U.S.C. 1437f or subsidized under another assistance program where the rents are charged in the same way as under the Section 8 program, if the rent complied with this § 1291.1 of this part at the time of the household's initial occupancy and the household continues to be assisted through the Section 8 or another assistance program, respectively.

AHP project means a single-family or multifamily housing project for owner-occupied or rental housing that has been awarded or has received AHP sub-

sidy under the competitive application program.

Competitive application program means a program established by a Bank under which the Bank awards and disburses AHP subsidy through a competitive application scoring process pursuant to the requirements of § 1291.5 of this part.

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

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

Director means the Director of the Federal Housing Finance Agency, or his or her designate.

Eligible household means a household that meets the income limits and other requirements specified by a Bank for its competitive application program and homeownership set-aside programs, provided that:

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

(2) In the case of rental housing, the household's income in at least 20 percent of the units may not exceed 50 percent of the median income for the area.

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

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

FHFA means the Federal Housing Finance Agency.

Funding period means a time period, as determined by a Bank, during which the Bank accepts AHP applications for subsidy.

Homeownership set-aside program means a program established by a Bank under which the Bank disburses AHP direct subsidy pursuant to the requirements of § 1291.6 of this part.

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

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

Low- or moderate-income neighborhood means any neighborhood in which 51 percent or more of the households have incomes at or below 80 percent of the median income for the area.

Median income for the area means one or more of the following median income standards as determined by a Bank, after consultation with its Advisory Council, in its AHP Implementation Plan:

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

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

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

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

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

Multifamily building means a structure with 5 or more dwelling units.

Net earnings of a Bank means the net earnings of a Bank for a calendar year after deducting the Bank's annual contribution to the Resolution Funding Corporation required under section 21B of the Act (12 U.S.C. 1441b), and before declaring or paying any dividend under section 16 of the Act (12 U.S.C. 1436). For purposes of this part, "dividend" includes any dividends on capital stock subject to a redemption request even if under GAAP those dividends are treated as an "interest expense."

Owner-occupied project means, for purposes of the competitive application program, one or more owner-occupied units in a single-family or multifamily

building, including condominiums, cooperative housing, and manufactured housing.

Owner-occupied unit means a dwelling unit occupied by the owner of the unit. Housing with 2 to 4 dwelling units consisting of one owner-occupied unit and one or more rental units is considered a single owner-occupied unit.

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

Rental project means, for purposes of the competitive application program, one or more dwelling units for occupancy by households that are not owner-occupants, including overnight and emergency shelters, transitional housing for homeless households, mutual housing, single-room occupancy housing, and manufactured housing.

Retention period means:

(1) Five years from closing for an AHP-assisted owner-occupied unit, or in the case of rehabilitation of a unit currently occupied by the owner where there is no closing, 5 years from the date established by the Bank in its AHP Implementation Plan; and

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

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

Single-family building means a structure with 1 to 4 dwelling units.

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

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

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

(3) Operates a loan pool; or

(4) Is a revolving loan fund.

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

Subsidy means:

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

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

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

Visible means, in either owner-occupied or rental housing, at least one entrance is at-grade (no steps) and approached by an accessible route such as a sidewalk, and the entrance door and all interior passage doors are at least 2 feet, 10 inches wide, offering 32 inches of clear passage space.

[71 FR 59286, Oct. 6, 2006, as amended at 73 FR 61664, Oct. 17, 2008]

§ 1291.2 Required annual AHP contributions; allocation of contributions.

(a) *Annual AHP contributions.* Each Bank shall contribute annually to its Program the greater of:

(1) 10 percent of the Bank's net earnings for the previous year; or

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

(b) *Allocation of contributions.* Each Bank, after consultation with its Advisory Council and pursuant to written policies adopted by the Bank's board of

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directors, shall allocate its annual required AHP contribution as follows:

(1) *Competitive application program.* Each Bank shall allocate annually that portion of its annual required AHP contribution that is not set aside to fund homeownership set-aside programs under paragraph (b)(2) of this section, to provide funds to members through a competitive application program, pursuant to the requirements of this part.

(2) *Homeownership set-aside programs—*
(i) *Allocation amount; first-time homebuyers.* (A) A Bank, in its discretion, may set aside annually, in the aggregate, up to the greater of \$4.5 million or 35 percent of the Bank's annual required AHP contribution to provide funds to members participating in homeownership set-aside programs, including a mortgage refinancing set-aside program established under paragraph (f) of this section, pursuant to the requirements of this part.

(B) If a Bank sets aside funds solely for homeownership set-aside programs other than a mortgage refinancing program established under paragraph (f) of this section, at least one-third of the Bank's aggregate annual set-aside allocation to such programs shall be to assist first-time homebuyers.

(ii) *No delegation.* A Bank's board of directors shall not delegate to Bank officers or other Bank employees the responsibility for adopting its homeownership set-aside program policies.

(3) *Additional funding.* A Bank may allot to its current year's Program from its annual required AHP contribution for the subsequent year, an amount up to the greater of \$2 million or 20 percent of its annual required AHP contribution for the current year.

[71 FR 59286, Oct. 6, 2006 as amended at 73 FR 61664, Oct. 17, 2008]

§ 1291.3 AHP Implementation Plan.

(a) *Adoption; no delegation.* Each Bank, after consultation with its Advisory Council, shall adopt a written AHP Implementation Plan, and shall not amend the AHP Implementation

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Plan without first consulting its Advisory Council. The Bank's board of directors shall not delegate to Bank officers or other Bank employees the responsibility to consult with the Advisory Council prior to adopting or amending the AHP Implementation Plan. The AHP Implementation Plan shall set forth, at a minimum:

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

(2) The Bank's requirements for its competitive application program established pursuant to §1291.5 of this part;

(3) The Bank's requirements for its homeownership set-aside programs, if adopted by the Bank pursuant to §1291.6 of this part;

(4) The Bank's requirements for funding revolving loan funds, if adopted by the Bank pursuant to §1291.5(c)(13) of this part;

(5) The Bank's requirements for funding loan pools, if adopted by the Bank pursuant to §1291.5(c)(14) of this part;

(6) The Bank's requirements for monitoring under its competitive application program and any Bank homeownership set-aside programs, pursuant to §1291.7 of this part;

(7) The Bank's requirements, including time limits, for re-use of repaid AHP direct subsidy, if adopted by the Bank pursuant to §1291.8(f)(2) of this part; and

(8) The retention agreement requirements for projects and households under the competitive application program and any Bank homeownership set-aside programs, pursuant to §1291.9(a)(7) and (a)(8) of this part.

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

(c) *Notification of Plan amendments to the FHFA.* A Bank shall notify the FHFA of any amendments made to its AHP Implementation Plan within 30 days after the date of their adoption by the Bank's board of directors.

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

§ 1291.4 Advisory Councils.

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

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

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

(b) *Terms of Advisory Council members.* Pursuant to policies adopted by the Bank's board of directors, Advisory Council members shall be appointed by the Bank's board of directors to serve for terms of 3 years, which shall be staggered to provide continuity in experience and service to the Advisory Council, except that Advisory Council members may be appointed to serve for terms of 1 or 2 years solely for purposes of reconfiguring the staggering of the 3-year terms. No Advisory Council member may be appointed to serve for more than 3 full consecutive terms. An Advisory Council member appointed to fill a vacancy shall be appointed for the unexpired term of his or her predecessor in office.

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

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

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

(A) The amount of AHP subsidies to be allocated to the Bank's competitive application program and any Bank homeownership set-aside programs;

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

(C) The scoring criteria, related definitions, and any additional optional District eligibility requirements for the competitive application program; and

(D) The eligibility requirements and any priority criteria for any Bank homeownership set-aside programs.

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

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

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

(e) *Expenses.* The Bank shall pay Advisory Council members' travel expenses, including transportation and subsistence, for each day devoted to attending meetings with representatives

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of the board of directors of the Bank and meetings requested by the FHFA.

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

§ 1291.5 Competitive application program.

(a) *Establishment of program.* A Bank shall establish a competitive application program pursuant to the requirements of this part.

(b) *Funding periods and application process—(1) Funding periods.* A Bank may accept applications for AHP subsidy under its competitive application program during a specified number of funding periods each year, as determined by the Bank.

(2) *Eligible applicants.* A Bank shall accept applications for AHP subsidy under its competitive application program only from institutions that are members of the Bank at the time the application is submitted to the Bank.

(3) *Submission of applications.* Except as provided in paragraph (c)(13)(i) of this section, a Bank shall require applications for AHP subsidy to contain information sufficient for the Bank to:

(i) Determine that the proposed AHP project meets the eligibility requirements of paragraph (c) of this section; and

(ii) Evaluate the application pursuant to the scoring guidelines adopted by the Bank pursuant to paragraph (d) of this section.

(4) *Review of applications submitted.* Except as provided in paragraph (c)(13)(ii) of this section, a Bank shall review the applications for AHP subsidy to determine that the proposed AHP project meets the eligibility requirements of paragraph (c) of this section, and shall evaluate the applications pursuant to the Bank's scoring guidelines adopted pursuant to paragraph (d) of this section.

(c) *Minimum eligibility requirements.* Projects receiving AHP subsidies pursuant to a Bank's competitive application program must meet the following eligibility requirements:

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(1) *Owner-occupied or rental housing.* The AHP subsidy shall be used exclusively for:

(i) *Owner-occupied housing.* The purchase, construction, or rehabilitation of an owner-occupied project by or for very low-income or low- or moderate-income households. A household must have an income meeting the income targeting commitments in the approved AHP application at the time it is qualified by the project sponsor for participation in the project.

(ii) *Rental housing.* The purchase, construction, or rehabilitation of a rental project, where at least 20 percent of the units in the project are occupied by and affordable for very low-income households. A household must have an income meeting the income targeting commitments in the approved AHP application upon initial occupancy of the rental unit, or for projects involving the purchase or rehabilitation of rental housing that already is occupied, at the time the application for AHP subsidy is submitted to the Bank for approval.

(2) *Need for subsidy.* (i) The project's estimated sources of funds shall equal its estimated uses of funds, as reflected in the project's development budget. The difference between the project's sources of funds and uses of funds is the project's need for AHP subsidy, which is the maximum amount of AHP subsidy the project may receive. A Bank, in its discretion, may permit a project's sources of funds to include or exclude the estimated market value of in-kind donations and voluntary professional labor or services (excluding the value of sweat equity), provided that the project's uses of funds also include or exclude, respectively, the value of such estimates.

(ii) A project's cash sources of funds shall include any cash contributions by the sponsor, any cash from sources other than the sponsor, and estimates of funds the project sponsor intends to obtain from other sources but which have not yet been committed to the project. In the case of homeownership projects where the sponsor extends permanent financing to the homebuyer, the sponsor's cash contribution shall include the present value of any payments the sponsor is to receive from

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

(iii) A project's cash uses are the actual outlay of cash needed to pay for materials, labor, and acquisition or other costs of completing the project. Cash costs do not include in-kind donations, voluntary professional labor or services, or sweat equity.

(3) *Project costs*—(i) *In general.* (A) Taking into consideration the geographic location of the project, development conditions, and other non-financial household or project characteristics, a Bank shall determine that a project's costs, as reflected in the project's development budget, are reasonable, in accordance with the Bank's project cost guidelines.

(B) For purposes of determining the reasonableness of a developer's fee for a project as a percentage of total development costs, a Bank may, in its discretion, include estimates of the market value of in-kind donations and volunteer professional labor or services (excluding the value of sweat equity) committed to the project as part of the total development costs.

(ii) *Cost of property and services provided by a member.* The purchase price of property or services, as reflected in the project's development budget, sold to the project by a member providing AHP subsidy to the project, or, in the case of property, upon which such member holds a mortgage or lien, may not exceed the market value of such property or services as of the date the purchase price was agreed upon. In the case of real estate owned property sold to a project by a member providing AHP subsidy to the project, or property sold to the project upon which the member holds a mortgage or lien, the market value of such property is deemed to be the "as-is" or "as-rehabilitated" value of the property, whichever is appropriate. That value shall be

reflected in an independent appraisal of the property performed by a state certified or licensed appraiser, as defined in 12 CFR 564.2(j) and (k), within 6 months prior to the date the Bank disburses AHP subsidy to the project.

(4) *Project feasibility*—(i) *Developmental feasibility*. The project must be likely to be completed and occupied, based on relevant factors contained in the Bank’s project feasibility guidelines, including, but not limited to, the development budget, market analysis, and project sponsor’s experience in providing the requested assistance to households.

(ii) *Operational feasibility of rental projects*. A rental project must be able to operate in a financially sound manner, in accordance with the Bank’s project feasibility guidelines, as projected in the project’s operating *pro forma*.

(5) *Financing costs*. The rate of interest, points, fees, and any other charges for all loans that are made for the project in conjunction with the AHP subsidy shall not exceed a reasonable market rate of interest, points, fees, and other charges for loans of similar maturity, terms, and risk.

(6) *Timing of AHP subsidy use*. Some or all of the AHP subsidy must be likely to be drawn down by the project or used by the project to procure other financing commitments within 12 months of the date of approval of the application for AHP subsidy funding the project.

(7) *Counseling costs*. AHP subsidies may be used to pay for counseling costs only where:

(i) Such costs are incurred in connection with counseling of homebuyers who actually purchase an AHP-assisted unit; and

(ii) The cost of the counseling has not been covered by another funding source, including the member.

(8) *Refinancing*. The project may use AHP subsidies to refinance an existing single-family or multi-family mortgage loan, provided that the refinancing produces equity proceeds and such equity proceeds up to the amount of the AHP subsidy in the project shall be used only for the purchase, construction, or rehabilitation of housing units meeting

the eligibility requirements of this paragraph (c).

(9) *Retention*—(i) *Owner-occupied projects*. Each AHP-assisted unit in an owner-occupied project is, or is committed to be, subject to a 5-year retention agreement described in § 1291.9(a)(7) of this part.

(ii) *Rental projects*. AHP-assisted rental projects are, or are committed to be, subject to a 15-year retention agreement described in § 1291.9(a)(8) of this part.

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

(ii) *Revolving loan fund*. Pursuant to written policies adopted by a Bank’s board of directors, a revolving loan fund sponsor that intends to use AHP direct subsidy in accordance with § 1291.5(c)(13) of this part shall:

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

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

(iii) *Loan pool*. Pursuant to written policies adopted by a Bank’s board of directors, a loan pool sponsor that intends to use AHP subsidy in accordance with § 1291.5(c)(14) of this part shall:

(A) Provide evidence of sound asset/liability management practices;

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

(C) Demonstrate the ability to track the use of the AHP subsidy.

(11) *Fair housing*. The project, as proposed, must comply with applicable federal and state laws on fair housing and housing accessibility, including, but not limited to, the Fair Housing Act, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, and the Architectural Barriers Act of 1969, and must demonstrate how the project will be affirmatively marketed.

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(12) *Calculation of AHP subsidy.* (i) Where an AHP direct subsidy is provided to a project to write down the interest rate on a loan extended by a member, sponsor, or other party to a project, the net present value of the interest foregone from making the loan below the lender's market interest rate shall be calculated as of the date the application for AHP subsidy is submitted to the Bank, and subject to adjustment under paragraph (g)(4) of this section.

(ii) Where an AHP subsidized advance is provided to a project, the net present value of the interest revenue foregone from making a subsidized advance at a rate below the Bank's cost of funds shall be determined as of the earlier of the date of disbursement of the subsidized advance or the date prior to disbursement on which the Bank first manages the funding to support the subsidized advance through its asset/liability management system, or otherwise.

(13) *Lending and re-lending of AHP direct subsidy by revolving loan funds.* Pursuant to written policies established by a Bank's board of directors after consultation with its Advisory Council, a Bank, in its discretion, may provide AHP direct subsidy under its competitive application program for eligible projects and households involving both the lending of the subsidy and subsequent lending of subsidy principal and interest repayments by a revolving loan fund, provided the following requirements are met:

(i) *Submission of application.* (A) An application for AHP subsidy under this paragraph (c)(13) shall include the revolving loan fund's criteria for the initial lending of the subsidy, identification of and information on a specific proposed AHP project if required in the Bank's discretion, the revolving loan fund's criteria for subsequent lending of subsidy principal and interest repayments, and any other information required by the Bank.

(B) The information in the application shall be sufficient for the Bank to:

(1) Determine that the criteria for the initial lending of the subsidy, the specific proposed project if applicable, and the criteria for subsequent lending of subsidy principal and interest repay-

ments, meet the eligibility requirements of paragraph (c) of this section; and

(2) Evaluate the criteria for the initial lending of the subsidy, and the specific proposed project if applicable, pursuant to the scoring guidelines established by the Bank pursuant to paragraph (d) of this section.

(ii) *Review of application.* A Bank shall review the application for AHP subsidy to determine that the criteria for the initial lending of the subsidy, the specific proposed project if applicable, and the criteria for subsequent lending of subsidy principal and interest repayments, meet the eligibility requirements of paragraph (c) of this section, and shall evaluate the criteria for the initial lending of the subsidy and the specific proposed project, if applicable, pursuant to the scoring guidelines established by the Bank pursuant to paragraph (d) of this section.

(iii) *Initial lending of subsidy.* (A) The revolving loan fund's initial lending of the AHP subsidy shall meet the eligibility requirements of this paragraph (c), shall be to projects or households meeting the commitments in the approved application for AHP subsidy, and shall be subject to the requirements of §§1291.7(a) and 951.9 of this part, respectively.

(B) If a project or owner-occupied unit funded under this paragraph (c)(13)(iii) is in noncompliance with the commitments in the approved AHP application, or is sold or refinanced prior to the end of the applicable AHP retention period, the required amount of AHP subsidy shall be repaid to the revolving loan fund in accordance with §§1291.8 and 951.9 of this part, and the revolving loan fund shall re-lend such repaid subsidy, excluding the amounts of AHP subsidy principal already repaid to the revolving loan fund, to another project or owner-occupied unit meeting the initial lending requirements of this paragraph (c)(13)(iii) for the remainder of the retention period.

(iv) *Subsequent lending of AHP subsidy principal and interest repayments.* (A) AHP subsidy principal and interest repayments received by the revolving loan fund from the initial lending of the AHP direct subsidy shall be re-lent

by the revolving loan fund in accordance with the requirements of this paragraph (c)(13)(iv), except that the revolving loan fund, in its discretion, may provide part or all of such repayments as nonrepayable grants to eligible projects in accordance with the requirements of this paragraph (c)(13)(iv).

(B) The revolving loan fund's subsequent lending of AHP subsidy principal and interest repayments shall be for the purchase, construction, or rehabilitation of owner-occupied projects for households with incomes at or below 80 percent of the median income for the area, or of rental projects where at least 20 percent of the units are occupied by and affordable for households with incomes at or below 50 percent of the median income for the area, and shall meet all other eligibility requirements of this paragraph (c).

(C) A Bank may, in its discretion, require the revolving loan fund's subsequent lending of subsidy principal and interest repayments to be subject to retention period, monitoring, and recapture requirements as defined by the Bank in its AHP Implementation Plan.

(v) *Return of unused AHP subsidy.* The revolving loan fund shall return to the Bank any AHP subsidy that will not be used according to the requirements in this paragraph (c)(13).

(14) *Use of AHP subsidy in loan pools.* Pursuant to written policies established by a Bank's board of directors after consultation with its Advisory Council, a Bank, in its discretion, may provide AHP subsidy under its competitive application program for the origination of first mortgage or rehabilitation loans with subsidized interest rates to AHP-eligible households through a purchase commitment by an entity that will purchase and pool the loans, provided the following requirements are met:

(i) *Eligibility requirements.* The loan pool sponsor's use of the AHP subsidies shall meet the requirements under this paragraph (c)(14), and shall not be used for the purpose of providing liquidity to the originator or holder of the loans, or paying the loan pool's operating or secondary market transaction costs.

(ii) *Forward commitment.* (A) The loan pool sponsor shall purchase the loans

pursuant to a forward commitment that identifies the loans to be originated with interest-rate reductions as specified in the approved application for AHP subsidy to households with incomes at or below 80 percent of the median income for the area. Both initial purchases of loans for the AHP loan pool and subsequent purchases of loans to substitute for repaid loans in the pool shall be made pursuant to the terms of such forward commitment and subject to time limits on the use of the AHP subsidy as specified by the Bank in its AHP Implementation Plan and the Bank's agreement with the loan pool sponsor, which shall not exceed 1 year from the date of approval of the AHP application.

(B) As an alternative to using a forward commitment, the loan pool sponsor may purchase an initial round of loans that were not originated pursuant to an AHP-specific forward commitment, provided that the entities from which the loans were purchased are required to use the proceeds from the initial loan purchases within time limits on the use of the AHP subsidy as specified by the Bank in its AHP Implementation Plan and the Bank's agreement with the loan pool sponsor, which shall not exceed 1 year from the date of approval of the AHP application. The proceeds shall be used by such entities to assist households that are income-eligible under the approved AHP application during subsequent rounds of lending, and such assistance shall be provided in the form of a below-market AHP-subsidized interest rate as specified in the approved AHP application.

(iii) Each AHP-assisted owner-occupied unit and rental project receiving AHP direct subsidy or a subsidized advance shall be subject to the requirements of § 1291.7(a), 951.8, and 951.9, respectively, of this part.

(iv) Where AHP direct subsidy is being used to buy down the interest rate of a loan or loans from a member or other party, the loan pool sponsor shall use the full amount of the AHP direct subsidy to buy down the interest rate on a permanent basis at the time of closing on such loan or loans.

(15) *Optional District eligibility requirements.* A Bank may require a project

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receiving AHP subsidies to meet one or more of the following additional eligibility requirements adopted by the Bank's board of directors and included in its AHP Implementation Plan after consultation with its Advisory Council:

(i) *AHP subsidy limits.* A requirement that the amount of AHP subsidy requested for the project does not exceed limits established by the Bank as to the maximum amount of AHP subsidy available per member each year, or per member, per project, or per project unit in a single funding period; or

(ii) *Homebuyer or homeowner counseling.* A requirement that a household must complete a homebuyer or homeowner counseling program provided by, or based on one provided by, an organization recognized as experienced in homebuyer or homeowner counseling, respectively.

(16) *Prohibited uses of AHP subsidies.* The project shall not use AHP subsidies to pay for:

(i) *Certain prepayment fees.* Prepayment fees imposed by a Bank on a member for a subsidized advance that is prepaid, unless:

(A) The project is in financial distress that cannot be remedied through a project modification pursuant to § 1291.5(f) of this part;

(B) The prepayment of the subsidized advance is necessary to retain the project's affordability and income targeting commitments;

(C) Subsequent to such prepayment, the project will continue to comply with the terms of the approved AHP application and the requirements of this part for the duration of the original retention period;

(D) Any unused AHP subsidy is returned to the Bank and made available for other AHP projects; and

(E) The amount of AHP subsidy used for the prepayment fee may not exceed the amount of the member's prepayment fee to the Bank.

(ii) *Cancellation fees.* Cancellation fees and penalties imposed by a Bank on a member for a subsidized advance commitment that is canceled.

(iii) *Processing fees.* Processing fees charged by members for providing AHP direct subsidies to a project.

(d) *Scoring of applications—(1) In general.* A Bank shall establish written

scoring guidelines setting forth the Bank's AHP competitive application program scoring criteria and related definitions and point allocations, and implementing other applicable requirements pursuant to this paragraph (d). A Bank shall not adopt additional scoring criteria or point allocations, except as specifically authorized under this paragraph (d).

(2) *Point allocations.* (i) A Bank shall allocate 100 points among the 9 scoring criteria identified in paragraph (d)(5) of this section.

(ii) The scoring criterion for targeting identified in paragraph (d)(5)(iii) of this section shall be allocated at least 20 points.

(iii) The remaining scoring criteria shall be allocated at least 5 points each.

(3) *Fixed point and variable point scoring criteria.* A Bank shall designate each scoring criterion as either a fixed-point or a variable-point criterion, defined as follows:

(i) Fixed-point scoring criteria are those which cannot be satisfied in varying degrees and are either satisfied or not, with the total number of points allocated to the criterion awarded by the Bank to an application meeting the criterion; and

(ii) Variable-point criteria are those where there are varying degrees to which an application can satisfy the criteria, with the number of points that may be awarded to an application for meeting the criterion varying, depending on the extent to which the application satisfies the criterion, based on a fixed scale or on a scale relative to the other applications being scored. A Bank shall designate the targeting and subsidy-per-unit scoring criteria identified in paragraphs (d)(5)(iii) and (d)(5)(viii), respectively, of this section, as variable-point criteria.

(4) *Satisfaction of scoring criteria.* A Bank shall award scoring points to applications for proposed projects based on satisfaction of the scoring criteria adopted by the Bank pursuant to paragraph (d)(5) of this section.

(5) *Scoring criteria.* An application for a proposed project may receive scoring points based on satisfaction of the following 9 scoring criteria:

(i) *Use of donated or conveyed government-owned or other properties.* The financing of housing using a significant proportion, as defined by the Bank in its AHP Implementation Plan, of:

(A) Land or units donated or conveyed by the federal government or any agency or instrumentality thereof; or

(B) Land or units donated or conveyed by any other party for an amount significantly below the fair market value of the property, as defined by the Bank in its AHP Implementation Plan.

(ii) *Sponsorship by a not-for-profit organization or government entity.* Project sponsorship by a not-for-profit organization, a state or political subdivision of a state, a state housing agency, a local housing authority, a Native American Tribe, an Alaskan Native Village, or the government entity for Native Hawaiian Home Lands.

(iii) *Targeting.* The extent to which a project provides housing for very low- and low- or moderate-income households, as follows:

(A) *Rental projects.* An application for a rental project shall be awarded the maximum number of points available under this scoring criterion if 60 percent or more of the units in the project are reserved for occupancy by households with incomes at or below 50 percent of the median income for the area. Applications for projects with less than 60 percent of the units reserved for occupancy by households with incomes at or below 50 percent of the median income for the area shall be awarded points on a declining scale based on the percentage of units in a project that are reserved for households with incomes at or below 50 percent of the median income for the area, and on the percentage of the remaining units reserved for households with incomes at or below 80 percent of the median income for the area.

(B) *Owner-occupied projects.* Applications for owner-occupied projects shall be awarded points based on a declining scale to be determined by the Bank in its AHP Implementation Plan, taking into consideration percentages of units and targeted income levels.

(C) *Separate scoring.* For purposes of this scoring criterion, applications for

owner-occupied projects and rental projects may be scored separately.

(iv) *Housing for homeless households.* The financing of rental housing, excluding overnight shelters, reserving at least 20 percent of the units for homeless households, the creation of transitional housing for homeless households permitting a minimum of 6 months occupancy, or the creation of permanent owner-occupied housing reserving at least 20 percent of the units for homeless households, with the term “homeless households” as defined by the Bank in its AHP Implementation Plan.

(v) *Promotion of empowerment.* The provision of housing in combination with a program offering: employment; education; training; homebuyer, homeownership, or tenant counseling; daycare services; resident involvement in decision making affecting the creation or operation of the project; or other services that assist residents to move toward better economic opportunities, such as welfare to work initiatives.

(vi) *First District priority.* The satisfaction of one of the following criteria, or one of a number of the following criteria, adopted by the Bank and set forth in the Bank’s AHP Implementation Plan, as long as the total points available for meeting the criterion or criteria adopted under this category do not exceed the total points allocated to this category:

(A) *Special needs.* The financing of housing in which at least 20 percent of the units are reserved for occupancy by households with special needs, such as the elderly, mentally or physically disabled persons, persons recovering from physical abuse or alcohol or drug abuse, or persons with AIDS; or the financing of housing that is visitable by persons with physical disabilities who are not occupants of such housing;

(B) *Community development.* The financing of housing meeting housing needs documented as part of a community revitalization or economic development strategy approved by a unit of a state or local government;

(C) *First-time homebuyers.* The financing of housing for first-time homebuyers;

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(D) *Member financial participation.* Member financial participation (excluding the pass-through of AHP subsidy) in the project, such as providing market rate or concessionary financing, fee waivers, or donations;

(E) *Disaster areas and displaced households.* The financing of housing located in federally declared disaster areas, or for households displaced from federally declared disaster areas due to a disaster;

(F) *Rural.* The financing of housing located in rural areas;

(G) *Urban.* The financing of urban infill or urban rehabilitation housing;

(H) *Economic diversity.* The financing of housing that is part of a strategy to end isolation of very low-income households by providing economic diversity through mixed-income housing in low- or moderate-income neighborhoods, or providing very low- or low- or moderate-income households with housing opportunities in neighborhoods or cities where the median income equals or exceeds the median income for the larger surrounding area, such as the city, county, or Primary Metropolitan Statistical Area, in which the neighborhood or city is located;

(I) *Fair housing remedy.* The financing of housing as part of a remedy undertaken by a jurisdiction adjudicated by a Federal, State, or local court to be in violation of title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*), the Fair Housing Act (42 U.S.C. 3601 *et seq.*), or any other Federal, State, or local fair housing law, or as part of a settlement of such claims;

(J) *Community involvement.* Demonstrated support for the project by local government, other than as a project sponsor, in the form of property tax deferment or abatement, zoning changes or variances, infrastructure improvements, fee waivers, or other similar forms of non-cash assistance, or demonstrated support for the project by community organizations or individuals, other than as project sponsors, through the commitment by such entities or individuals of donated goods and services, or volunteer labor;

(K) *Lender consortia.* The involvement of financing by a consortium of at least 2 financial institutions; or

(L) *In-District projects.* The financing of housing located in the Bank's District.

(vii) *Second District priority: defined housing need in the District.* The satisfaction of a housing need in the Bank's District, as defined by the Bank in its AHP Implementation Plan. The Bank may, but is not required to, use one of the criteria listed in paragraph (d)(5)(vi) of this section, provided it is different from the criterion or criteria adopted by the Bank under such paragraph.

(viii) *AHP subsidy per unit—(A) Amount of subsidy.* The extent to which a project proposes to use the least amount of AHP subsidy per AHP-targeted unit. In the case of an application for a project financed by a subsidized advance, the total amount of AHP subsidy used by the project shall be estimated based on the Bank's cost of funds as of the date on which all applications are due for the funding period in which the application is submitted.

(B) *Separate scoring.* For purposes of this scoring criterion, applications for owner-occupied projects and rental projects may be scored separately.

(ix) *Community stability.* The promotion of community stability, such as by rehabilitating vacant or abandoned properties, being an integral part of a neighborhood stabilization plan approved by a unit of state or local government, and not displacing low- or moderate-income households, or if such displacement will occur, assuring that such households will be assisted to minimize the impact of such displacement.

(e) *Approval of AHP applications.* (1) A Bank shall approve applications for AHP subsidy in descending order starting with the highest scoring application until the total funding amount for the particular funding period, except for any amount insufficient to fund the next highest scoring application, has been allocated.

(2) The Bank also shall approve at least the next 4 highest scoring applications as alternates and, within 1 year of approval, may fund such alternates if any previously committed AHP subsidies become available.

(f) *Modifications of approved AHP applications*—(1) *Modification procedure.* If, prior to or after final disbursement of funds to a project from all funding sources, there is or will be a change in the project that would change the score that the project application received in the funding period in which it was originally scored and approved, had the changed facts been operative at that time, a Bank, in its discretion, may approve in writing a modification to the terms of the approved application, provided that:

(i) The project, incorporating any such changes, would meet the eligibility requirements of paragraph (c) of this section;

(ii) The application, as reflective of such changes, continues to score high enough to have been approved in the funding period in which it was originally scored and approved by the Bank; and

(iii) There is good cause for the modification, and the analysis and justification for the modification are documented by the Bank in writing.

(2) *AHP subsidy increases; no delegation.* Modifications involving an increase in AHP subsidy shall be approved or disapproved by a Bank's board of directors. The authority to approve or disapprove such requests shall not be delegated to Bank officers or other Bank employees.

(g) *Procedure for funding*—(1) *Disbursement of AHP subsidies to members.* (i) A Bank may disburse AHP subsidies only to institutions that are members of the Bank at the time they request a draw-down of the subsidies.

(ii) If an institution with an approved application for AHP subsidy loses its membership in a Bank, the Bank may disburse AHP subsidies to a member of such Bank to which the institution has transferred its obligations under the approved AHP application, or the Bank may disburse AHP subsidies through another Bank to a member of that Bank that has assumed the institution's obligations under the approved AHP application.

(2) *Progress towards use of AHP subsidy.* A Bank shall establish and implement policies, including time limits, for determining whether progress is being made towards draw-down and use

of AHP subsidies by approved projects, and whether to cancel AHP application approvals for lack of such progress. If a Bank cancels any AHP application approvals due to lack of such progress, the Bank shall make the AHP subsidies available for other AHP-eligible projects.

(3) *Compliance upon disbursement of AHP subsidies.* A Bank shall establish and implement policies for determining, prior to its initial disbursement of AHP subsidies for an approved project, and prior to each subsequent disbursement if the need for AHP subsidy has changed, that the project meets the eligibility requirements of paragraph (c) of this section and all obligations committed to in the approved AHP application. If a Bank cancels any AHP application approvals due to non-compliance with eligibility requirements of paragraph (c) of this section, the Bank shall make the AHP subsidies available for other AHP-eligible projects.

(4) *Changes in approved AHP subsidy amount where a direct subsidy is used to write down prior to closing the principal amount or interest rate on a loan.* If a member is approved to receive AHP direct subsidy to write down prior to closing the principal amount or the interest rate on a loan to a project, and the amount of AHP subsidy required to maintain the debt service cost for the loan decreases from the amount of AHP subsidy initially approved by the Bank due to a decrease in market interest rates between the time of approval and the time the lender commits to the interest rate to finance the project, the Bank shall reduce the AHP subsidy amount accordingly. If market interest rates rise between the time of approval and the time the lender commits to the interest rate to finance the project, the Bank, in its discretion, may increase the AHP subsidy amount accordingly.

(5) *AHP outlay adjustment.* If a Bank reduces the amount of AHP subsidy approved for a project, the amount of such reduction shall be returned to the Bank's AHP fund. If a Bank increases the amount of AHP subsidy approved for a project, the amount of such increase shall be drawn first from any currently uncommitted or repaid AHP

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subsidies and then from the Bank's required AHP contribution for the next year.

(6) *Project sponsor notification of reuse of repaid AHP direct subsidy.* Prior to disbursement by a project sponsor of AHP direct subsidy repaid to and retained by such project sponsor pursuant to a subsidy re-use program authorized by the Bank under § 1291.8(f)(2) of this part, the project sponsor shall provide written notice to the member and the Bank of its intent to disburse the repaid AHP subsidy to a household satisfying the requirements of this part and the commitments made in the approved AHP application.

(h) *Bank board duties and delegation—*
(1) *Duties.* A Bank's board of directors, after consultation with its Advisory Council, shall be responsible for:

(i) Adoption of the AHP Implementation Plan required pursuant to § 1291.3 of this part; and

(ii) Approving or disapproving the applications for AHP subsidy pursuant to § 1291.5(e) of this part.

(2) *No delegation.* The Bank's board of directors shall not delegate to Bank officers or other Bank employees the responsibilities set forth in paragraph (h)(1) of this section.

§ 1291.6 Homeownership set-aside programs.

(a) *Establishment of program.* A Bank may establish one or more homeownership set-aside programs pursuant to the requirements of this part.

(b) *Eligible applicants.* A Bank shall accept applications for AHP direct subsidy under its homeownership set-aside programs only from institutions that are members of the Bank at the time the application is submitted to the Bank.

(c) *Minimum eligibility requirements.* A Bank's homeownership set-aside programs shall meet the following eligibility requirements:

(1) *Member allocation criteria.* AHP direct subsidies shall be provided to members pursuant to allocation criteria established by the Bank in its AHP Implementation Plan.

(2) *Eligible households.* Members shall provide AHP direct subsidies only to households that:

(i) Have incomes at or below 80 percent of the median income for the area at the time the household is accepted for enrollment by the member in the Bank's homeownership set-aside program, with such time of enrollment by the member defined by the Bank in its AHP Implementation Plan;

(ii) Complete a homebuyer or homeowner counseling program provided by, or based on one provided by, an organization experienced in homebuyer or homeowner counseling, in the case of households that are first-time homebuyers; and

(iii) Are first-time homebuyers, in the case of households receiving funds pursuant to the first-time homebuyer requirement in § 1291.2(b)(2) of this part, and meet such other eligibility criteria that may be established by the Bank in its AHP Implementation Plan, such as a matching funds requirement, homebuyer or homeowner counseling requirement for households that are not first-time homebuyers, or criteria that give priority for the purchase or rehabilitation of housing in particular areas or as part of a disaster relief effort.

(3) *Maximum grant amount.* Members shall provide AHP direct subsidies to households as a grant, in an amount up to a maximum of \$15,000 per household, as established by the Bank in its AHP Implementation Plan, which limit shall apply to all households.

(4) *Eligible uses of AHP direct subsidy.* Households shall use the AHP direct subsidies to pay for down payment, closing cost, counseling, or rehabilitation assistance in connection with the household's purchase or rehabilitation of an owner-occupied unit, including a condominium or cooperative housing unit or manufactured housing, to be used as the household's primary residence.

(5) *Retention agreement.* An owner-occupied unit purchased or rehabilitated using AHP direct subsidy shall be subject to a 5-year retention agreement described in § 1291.9(a)(7) of this part.

(6) *Financial or other concessions.* The Bank may, in its discretion, require members and other lenders to provide

financial or other concessions, as defined by the Bank in its AHP Implementation Plan, to households in connection with providing the AHP direct subsidy or financing to the household.

(7) *Financing costs.* The rate of interest, points, fees, and any other charges for all loans made in conjunction with the AHP direct subsidy shall not exceed a reasonable market rate of interest, points, fees, and other charges for loans of similar maturity, terms, and risk.

(8) *Counseling costs.* The AHP direct subsidies may be used to pay for counseling costs only where:

(i) Such costs are incurred in connection with counseling of homebuyers who actually purchase an AHP-assisted unit; and

(ii) The cost of the counseling has not been covered by another funding source, including the member.

(9) *Cash back to household.* A member may provide cash back to a household at closing on the mortgage loan in an amount not exceeding \$250, as determined by the Bank in its AHP Implementation Plan, and a member shall use any AHP direct subsidy exceeding such amount that is beyond what is needed at closing for closing costs and the approved mortgage amount as a credit to reduce the principal of the mortgage loan or as a credit toward the household's monthly payments on the mortgage loan.

(d) *Approval of AHP applications.* A Bank shall approve applications for AHP direct subsidy in accordance with the Bank's criteria governing the allocation of funds.

(e) *Procedure for funding—(1) Disbursement of AHP direct subsidies to members.*

(i) A Bank may disburse AHP direct subsidies only to institutions that are members of the Bank at the time they request a draw-down of the subsidies.

(ii) If an institution with an approved application for AHP direct subsidy loses its membership in a Bank, the Bank may disburse AHP direct subsidies to a member of such Bank to which the institution has transferred its obligations under the approved AHP application, or the Bank may disburse AHP direct subsidies through another Bank to a member of that Bank that has assumed the institution's obliga-

tions under the approved AHP application.

(2) *Reservation of homeownership set-aside subsidies.* A Bank shall establish and implement policies for reservation of homeownership set-aside subsidies for households enrolled in the Bank's homeownership set-aside program. The policies shall provide that set-aside subsidies be reserved no more than 2 years in advance of the Bank's time limit in its AHP Implementation Plan for draw-down and use of the subsidies by the household and the reservation of subsidies be made from the set-aside allocation of the year in which the Bank makes the reservation.

(3) *Progress towards use of AHP direct subsidy.* A Bank shall establish and implement policies, including time limits, for determining whether progress is being made towards draw-down and use of the AHP direct subsidies by eligible households, and whether to cancel AHP application approvals for lack of such progress. If a Bank cancels any AHP application approvals due to lack of such progress, it shall make the AHP direct subsidies available for other applicants for AHP direct subsidies under the homeownership set-aside program or for other AHP-eligible projects.

(f) *Mortgage refinancing program—(1) General.* A Bank may establish a homeownership set-aside program for the use of AHP direct subsidy by its members to assist in the refinancing of a household's mortgage loan, provided such program meets the requirements of this paragraph (f) and otherwise meets the requirements of part 1291. The provisions of paragraphs (c)(2)(ii), (c)(2)(iii), and (c)(4) through (c)(8) of this section, shall not apply to such program.

(2) *Eligible loans.* A loan is eligible to be refinanced with AHP direct subsidy if the loan is secured by a first mortgage on an owner-occupied unit that is the primary residence of the household, and the loan is refinanced under the Federal Housing Administration's (FHA) HOPE for Homeowners Program established pursuant to Title IV of the Housing and Economic Recovery Act of 2008 and thereby meets all applicable underwriting requirements and other

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standards under Title II of the National Housing Act, as amended by Title IV (12 U.S.C. 1707 *et seq.*).

(3) *Eligible uses of AHP direct subsidy.* Members may provide the AHP direct subsidy to:

(i) Reduce the outstanding principal balance of the loan below the maximum loan-to-value ratio required under the HOPE for Homeowners Program in order to make the refinanced loan affordable to the household by enabling the household to meet the HOPE for Homeowners Program's debt-to-income standards for a low-or moderate-income household; or

(ii) Pay FHA-approved loan closing costs.

(4) *Eligible lender participants.* A Bank may provide the AHP direct subsidy to members that are FHA-approved lenders for the purpose of refinancing an eligible loan with an FHA-insured loan by the member, or, in the Bank's discretion, to members that provide the subsidy to FHA-approved lenders that are not members of the Bank for the purpose of refinancing an eligible loan if, after consulting with the Bank's Advisory Council, the Bank determines that such action would be in the best interests of borrowers in the Bank's district.

(5) *Sunset.* (i) This paragraph (f) shall expire on July 30, 2010, and a Bank may not commit AHP subsidy to households under its refinancing program after such date.

(ii) A lender may use the AHP subsidy committed by such date for a loan submitted to the FHA for approval on or before July 30, 2010 that is approved for refinancing under the HOPE for Homeowners Program after such date.

[71 FR 59286, Oct. 6, 2006, as amended at 73 FR 61664, Oct. 17, 2008]

§ 1291.7 Monitoring.

(a) *Competitive application program—*
(1) *Initial monitoring policies for owner-occupied and rental projects—(i)—Adoption and implementation.* Pursuant to written policies established by a Bank, the Bank shall monitor each AHP owner-occupied and rental project under its competitive application program prior to, and within a reasonable period of time after, project comple-

tion to determine, at a minimum, whether:

(A) The project is making satisfactory progress towards completion, in compliance with the commitments made in the approved AHP application, Bank policies, and the requirements of this part;

(B) Following completion of the project, satisfactory progress is being made towards occupancy of the project by eligible households; and

(C) Within a reasonable period of time after project completion, the project meets the following requirements, at a minimum:

(1) The AHP subsidies were used for eligible purposes according to the commitments made in the approved AHP application;

(2) The household incomes and rents comply with the income targeting and rent commitments made in the approved AHP application;

(3) The project's actual costs were reasonable in accordance with the Bank's project cost guidelines, and the AHP subsidies were necessary for the completion of the project as currently structured;

(4) Each AHP-assisted unit of an owner-occupied project and rental project is subject to AHP retention agreements that meet the requirements of § 1291.9(a)(7) or (a)(8), respectively, of this part; and

(5) The services and activities committed to in the approved AHP application have been provided in connection with the project.

(ii) *Back-up and other project documentation.* The Bank's written monitoring policies shall include requirements for:

(A) Bank review of back-up project documentation regarding household incomes and rents maintained by the project sponsor or owner; and

(B) Maintenance and Bank review of other project documentation in the Bank's discretion.

(iii) *Sampling plan.* The Bank shall not use a sampling plan to select the projects to be monitored under this paragraph (a)(1), but may use a reasonable risk-based sampling plan to review the back-up project documentation.

(2) *Reliance on long-term tax credit monitoring for rental projects.* For completed AHP rental projects that have been allocated federal Low-Income Housing Tax Credits (tax credits), a Bank may, in its discretion, for purposes of long-term AHP monitoring under its competitive application program, rely on the monitoring by the state-designated housing credit agency administering the tax credits of the income targeting and rent requirements applicable under the Low-Income Housing Tax Credit Program, and the Bank need not obtain and review reports from such agency or otherwise monitor the projects' long-term AHP compliance.

(3) *Reliance on other long-term governmental monitoring for rental projects.* For completed AHP rental projects that received funds other than tax credits from federal, state, or local government entities, a Bank may, in its discretion, for purposes of long-term AHP monitoring under its competitive application program, rely on the monitoring by such entities of the income targeting and rent requirements applicable under their programs, provided that the Bank can show that:

(i) The compliance profiles regarding income targeting, rent, and retention period requirements of the AHP and the other programs are substantively equivalent;

(ii) The entity has demonstrated and continues to demonstrate its ability to monitor the project;

(iii) The entity agrees to provide reports to the Bank on the project's incomes and rents for the full 15-year AHP retention period; and

(iv) The Bank reviews the reports from the monitoring entity to confirm that they comply with the Bank's monitoring policies.

(4) *Long-term monitoring policies for rental projects—(i) Adoption and implementation.* In cases where a Bank does not rely on monitoring by a federal, state, or local government entity pursuant to paragraphs (a)(2) or (a)(3) of this section, pursuant to written policies established by the Bank, the Bank shall monitor completed AHP rental projects under its competitive application program, commencing in the second year after project completion to

determine, at a minimum, whether during the full 15-year retention period, the household incomes and rents comply with the income targeting and rent commitments, respectively, made in the approved AHP applications.

(ii) *Annual project owner certifications; backup and other project documentation.* A Bank's written monitoring policies shall include requirements for:

(A) Bank review of annual certifications by project owners to the Bank that household incomes and rents are in compliance with the commitments made in the approved AHP application;

(B) Bank review of back-up project documentation regarding household incomes and rents maintained by the project owner; and

(C) Maintenance and Bank review of other project documentation in the Banks' discretion.

(iii) *Risk factors and other monitoring—(A) Risk factors; other monitoring.* A Bank's written monitoring policies shall take into account risk factors such as the amount of AHP subsidy in the project, type of project, size of project, location of project, sponsor experience, and any monitoring of the project provided by a federal, state, or local government entity.

(B) *Risk-based sampling plan.* A Bank may use a reasonable, risk-based sampling plan to select the rental projects to be monitored under this paragraph (a)(4), and to review the annual project owner certifications, back-up, and any other project documentation. The risk-based sampling plan and its basis shall be in writing.

(5) *Annual adjustment of targeting commitments.* For purposes of determining compliance with the targeting commitments in an approved AHP application for both initial and long-term AHP monitoring purposes under a Bank's competitive application program, such commitments shall be considered to adjust annually according to the current applicable median income data. A rental unit may continue to count toward meeting the targeting commitment of an approved AHP application as long as the rent charged to a household remains affordable, as defined in § 1291.1 of this part, for the household occupying the unit.

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(b) *Homeownership set-aside programs: Monitoring policies*—(1) *Adoption and implementation.* Pursuant to written policies adopted by a Bank, the Bank shall monitor compliance with the requirements of its homeownership set-aside programs, including monitoring to determine, at a minimum, whether:

(i) The AHP subsidy was provided to households meeting all applicable eligibility requirements in §1291.6(c)(2) of this part and the Bank's homeownership set-aside program policies; and

(ii) All other applicable eligibility requirements in §1291.6(c) and §1291.6(f) of this part and the Bank's homeownership set-aside program policies are met, including that the AHP-assisted units are subject to retention agreements required under §1291.6(c)(5) of this part.

(2) *Member certifications; back-up and other documentation.* The Bank's written monitoring policies shall include requirements for:

(i) Bank review of certifications by members to the Bank, prior to disbursement of the AHP subsidy, that the subsidy will be provided in compliance with all applicable eligibility requirements in §1291.6(c) and §1291.6(f) of this part;

(ii) Bank review of back-up documentation regarding household incomes maintained by the member; and

(iii) Maintenance and Bank review of other documentation in the Bank's discretion.

(3) *Sampling plan.* The Bank may use a reasonable sampling plan to select the households to be monitored, and to review the back-up and any other documentation received by the Bank, but not the member certifications required in paragraph (b)(2) of this section. The sampling plan and its basis shall be in writing.

[71 FR 59286, Oct. 6, 2006, as amended at 73 FR 61664, Oct. 17, 2008]

§ 1291.8 Remedial actions for non-compliance.

(a) *Recovery of AHP subsidies.* A Bank shall recover the amount of any AHP subsidies (plus interest, if appropriate) that are not used in compliance with the commitments made in the approved application for AHP subsidy and the requirements of this part, if the

misuse is the result of the actions or omissions of the member, the project sponsor, or the project owner.

(b) *Responsible party for repayment of AHP subsidies.* Except as provided in paragraph (c) of this section:

(1) If the member causes the AHP subsidies to be misused through its actions or omissions, the member shall repay the AHP subsidies to the Bank.

(2) If the project sponsor or owner causes the AHP subsidies to be misused through its actions or omissions, the following shall apply, as determined by the Bank in its discretion:

(i) The member shall recover the AHP subsidies from the project sponsor or owner and repay them to the Bank; or

(ii) The project sponsor or owner shall repay the AHP subsidies directly to the Bank.

(c) *Recovery not required.* Recovery of the AHP subsidies is not required if:

(1) The member, project sponsor, or project owner cures the noncompliance within a reasonable period of time;

(2) The circumstances of noncompliance are eliminated through a modification of the terms of the approved application for AHP subsidy pursuant to §1291.5(f) of this part; or

(3) The member is unable to collect the AHP subsidy after making reasonable efforts to collect it.

(d) *Settlements.* A Bank may settle a claim for AHP subsidies that it has against a member, project sponsor, or project owner for less than the full amount due. If a Bank enters into such a settlement, the FHFA may require the Bank to reimburse its AHP fund in the amount of any shortfall under paragraph (e)(2) of this section, unless:

(1) The Bank has sufficient documentation showing that the sum agreed to be repaid under the settlement is reasonably justified, based on the facts and circumstances of the non-compliance (including the degree of culpability of the non-complying parties and the extent of the Bank's recovery efforts); or

(2) The Bank obtains a determination from the FHFA that the sum agreed to be repaid under the settlement is reasonably justified, based on the facts

and circumstances of the noncompliance (including the degree of culpability of the non-complying parties and the extent of the Bank's recovery efforts).

(e) *Reimbursement of AHP fund*—(1) *By the Bank.* A Bank shall reimburse its AHP fund in the amount of any AHP subsidies (plus interest, if appropriate) misused as a result of the actions or omissions of the Bank.

(2) *By FHFA order.* The FHFA may order a Bank to reimburse its AHP fund in an appropriate amount upon determining that:

(i) The Bank has failed to reimburse its AHP fund as required under paragraph (e)(1) of this section; or

(ii) The Bank has failed to recover AHP subsidy from a member, project sponsor, or project owner pursuant to the requirements of paragraph (a) of this section, and has not shown that such failure is reasonably justified, considering factors such as the extent of the Bank's recovery efforts.

(f) *Use of repaid AHP subsidies*—(1) *Use of repaid AHP subsidies in other AHP-eligible projects.* Except as provided in paragraph (f)(2) of this section, amounts of AHP subsidy, including any interest, repaid to a Bank pursuant to this part shall be made available by the Bank for other AHP-eligible projects.

(2) *Re-use of repaid AHP direct subsidies in same project*—(i) *Requirements.* AHP direct subsidy, including any interest, repaid to a member or project sponsor under a homeownership set-aside program or the competitive application program, respectively, may be repaid by such parties to the Bank for subsequent disbursement to and re-use by such parties, or retained by such parties for subsequent re-use, as authorized by the Bank, in its discretion, after consultation with its Advisory Council, in its AHP Implementation Plan, provided all of the following requirements are satisfied:

(A) The member or the project sponsor originally provided the AHP direct subsidy as down payment, closing cost, rehabilitation, or interest rate buy down assistance to an eligible household to purchase or rehabilitate an owner-occupied unit pursuant to an approved AHP application;

(B) The AHP direct subsidy, including any interest, was repaid to the member or project sponsor as a result of a sale by the household of the unit prior to the end of the retention period to a purchaser that is not a low-or moderate-income household; and

(C) The repaid AHP direct subsidy is made available by the member or project sponsor, within the period of time specified by the Bank in its AHP Implementation Plan, to another AHP-eligible household to purchase or rehabilitate an owner-occupied unit in the same project in accordance with the terms of the approved AHP application.

(ii) *No delegation.* A Bank's board of directors shall not delegate to Bank officers or other Bank employees the responsibility to adopt any Bank policies on re-use of repaid AHP direct subsidies in the same project pursuant to paragraph (f)(2)(i) of this section.

(g) *Suspension and debarment*—(1) *At a Bank's initiative.* A Bank may suspend or debar a member, project sponsor, or project owner from participation in the Program if such party shows a pattern of noncompliance, or engages in a single instance of flagrant noncompliance, with the terms of an approved application for AHP subsidy or the requirements of this part.

(2) *At the FHFA's initiative.* The FHFA may order a Bank to suspend or debar a member, project sponsor, or project owner from participation in the Program if such party shows a pattern of noncompliance, or engages in a single instance of flagrant noncompliance, with the terms of an approved application for AHP subsidy or the requirements of this part.

(h) *Transfer of Program administration.* Without limitation on other remedies, the FHFA, upon determining that a Bank has engaged in mismanagement of its Program, may designate another Bank to administer all or a portion of the first Bank's annual AHP contribution, for the benefit of the first Bank's members, under such terms and conditions as the FHFA may prescribe.

(i) *FHFA actions under this section.* Except as provided in paragraph (d)(2) of this section, actions taken by the FHFA under this section are reviewable under § 907.9 of this chapter.

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§ 1291.9 Agreements.

(a) *Agreements between Banks and members.* A Bank shall have in place with each member receiving an AHP subsidized advance or AHP direct subsidy an agreement or agreements containing, at a minimum, the following provisions, where applicable:

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

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

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

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

(4) *Repayment of AHP subsidies in case of noncompliance—(i) Noncompliance by the member.* The member shall repay AHP subsidies to the Bank in accordance with the requirements of § 1291.8(b)(1) of this part.

(ii) *Noncompliance by a project sponsor or owner—(A) Agreement.* The member shall have in place an agreement with each project sponsor or project owner in which the project sponsor or project owner agrees to repay AHP subsidies to the member or the Bank in accordance with the requirements of § 1291.8(b)(2)(i) or (b)(2)(ii) of this part, respectively (as applicable).

(B) *Recovery of AHP subsidies.* The member shall recover from the project sponsor or project owner and repay to the Bank any AHP subsidy in accordance with the requirements of § 1291.8(b)(2)(i) of this part (if applicable).

(5) *Project monitoring—(i) Monitoring by the member.* The member shall com-

ply with the monitoring requirements applicable to it, as established by the Bank in its monitoring policies pursuant to § 1291.7 of this part.

(ii) *Agreement.* The member shall have in place an agreement with each project sponsor and project owner, in which the project sponsor and project owner agree to comply with the monitoring requirements applicable to such parties, as established by the Bank in its monitoring policies pursuant to § 1291.7 of this part.

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

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

(7) *Retention agreements for owner-occupied units.* The member shall ensure that an AHP-assisted owner-occupied unit is subject to a deed restriction or other legally enforceable retention agreement or mechanism requiring that:

(i) The Bank or its designee is to be given notice of any sale or refinancing of the unit occurring prior to the end of the retention period;

(ii) In the case of a sale or refinancing of the unit prior to the end of the retention period, an amount equal to a pro rata share of the AHP subsidy that financed the purchase, construction, or rehabilitation of the unit, reduced for every year the seller owned the unit, shall be repaid to the Bank from any net gain realized upon the sale or refinancing, unless:

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

(B) The unit is sold to a very low-, or low- or moderate-income household; or

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

(iii) In the case of a direct subsidy, such repayment of AHP subsidy shall be made:

(A) *To the Bank.* If the Bank has not authorized re-use of the repaid AHP subsidy or has authorized re-use of the repaid subsidy but not retention of such repaid subsidy by the member or project sponsor pursuant to §1291.8(f)(2) of this part, or has authorized retention and re-use of such repaid subsidy by the member or project sponsor pursuant to such section and the repaid subsidy is not re-used in accordance with the requirements of the Bank and such section; or

(B) *To the member or project sponsor.* To the member or project sponsor for reuse by such member or project sponsor, if the Bank has authorized retention and re-use of such subsidy by the member or project sponsor pursuant to §1291.8(f)(2); and

(iv) The obligation to repay AHP subsidy to the Bank shall terminate after any foreclosure.

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

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

(ii) The Bank or its designee is to be given notice of any sale or refinancing of the project occurring prior to the end of the retention period;

(iii) In the case of a sale or refinancing of the project prior to the end of the retention period, the full amount of the AHP subsidy received by the owner shall be repaid to the Bank, unless:

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

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

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

(9) *Lending of AHP direct subsidies.* If a member or a project sponsor lends AHP direct subsidy to a project, any repayments of principal and payments of interest received by the member or the project sponsor must be paid forthwith to the Bank, unless the direct subsidy is being both lent and re-lent by a revolving loan fund pursuant to §1291.5(c)(13) of this part.

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

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

(iii) *Treatment of loan prepayment by project.* If all or a portion of the loan or loans financed by an AHP subsidized advance are prepaid by the project to the member, the member may, at its option, either:

(A) Repay to the Bank that portion of the advance used to make the loan

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or loans to the project, and be subject to a fee imposed by the Bank sufficient to compensate the Bank for any economic loss the Bank experiences in re-investing the repaid amount at a rate of return below the cost of funds originally used by the Bank to calculate the interest rate subsidy incorporated in the advance; or

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

(b) *Agreements between Banks and project sponsors or owners.* A Bank shall have in place an agreement with each project sponsor or project owner, in which the project sponsor or project owner agrees to repay AHP subsidies directly to the Bank in accordance with the requirements of §1291.8(b)(2)(ii) of this part (if applicable).

(c) *Application to existing AHP projects and units.* The requirements of section 10(j) of the Act (12 U.S.C. 1430(j)) and the provisions of this part, as amended, are incorporated into all agreements between Banks, members, project sponsors, and project owners receiving AHP subsidies under the competitive application program, and between Banks, members and unit owners under the homeownership set-aside program. To the extent the requirements of this part are amended from time to time, such agreements are deemed to incorporate the amendments to conform to any new requirements of this part. No amendment to this part shall affect the legality of actions taken prior to the effective date of such amendment.

§ 1291.10 Conflicts of interest.

(a) *Bank directors and employees.* (1) Each Bank's board of directors shall adopt a written policy providing that if a Bank director or employee, or such person's family member, has a financial interest in, or is a director, officer, or employee of an organization involved in, a project that is the subject of a pending or approved AHP application, the Bank director or employee shall not participate in or attempt to

influence decisions by the Bank regarding the evaluation, approval, funding, monitoring, or any remedial process for such project.

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

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

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

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

§ 1291.11 Temporary suspension of AHP contributions.

(a) *Request to FHFA.* If a Bank finds that the contributions required pursuant to §1291.2(a) of this part are contributing to the financial instability of the Bank, the Bank may apply in writing to the FHFA for a temporary suspension of such contributions.

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

(i) Severely depressed Bank earnings;

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

(iii) A substantial reduction in Bank advances outstanding.

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

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

(ii) Inordinate operating and administrative expenses; or

(iii) Mismanagement.

[71 FR 59286, Oct. 6, 2006, as amended at 73 FR 61664, Oct. 17, 2008]

§ 1291.12 Affordable Housing Reserve Fund.

(a) *Deposits.* If a Bank fails to use or commit the full amount it is required to contribute to the Program in any year pursuant to § 1291.2(a) of this part, 90 percent of the unused or uncommitted amount shall be deposited by the Bank in an Affordable Housing Reserve Fund established and administered by the FHFA. The remaining 10 percent of the unused and uncommitted amount retained by the Bank should be fully used or committed by the Bank during the following year, and any remaining

portion shall be deposited in the Affordable Housing Reserve Fund.

(b) *Use or commitment of funds.* Approval of applications for AHP subsidies from members sufficient to exhaust the amount a Bank is required to contribute pursuant to § 1291.2(a) of this part shall constitute use or commitment of funds. Amounts remaining unused or uncommitted at year-end are deemed to be used or committed if, in combination with AHP subsidies that have been returned to the Bank or decommitted from canceled projects, they are insufficient to fund:

(1) The next highest scoring AHP application in the Bank's final funding period of the year for its competitive application program;

(2) Pending applications for funds under the Bank's homeownership set-aside programs; and

(3) Project modifications approved by the Bank pursuant to the requirements of this part.

(c) *Carryover of insufficient amounts.* Such insufficient amounts as described in paragraph (b) of this section shall be carried over for use or commitment in the following year in the Bank's competitive application program or homeownership set-aside programs.