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FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1291

RIN 2590–AA04

Affordable Housing Program Amendments: Federal Home Loan Bank Mortgage Refinancing Authority

AGENCY: Federal Housing Finance Agency.

ACTION: Final rule.

SUMMARY: Section 1218 of the Housing and Economic Recovery Act of 2008 (HERA) requires the Federal Housing Finance Agency (FHFA) to permit the Federal Home Loan Banks (Banks) until July 30, 2010, to use Affordable Housing Program (AHP) homeownership set-aside funds to refinance low- or moderate-income households' mortgage loans. On August 4, 2009, FHFA adopted an interim final rule that amended its AHP regulation to authorize the Banks to provide AHP direct subsidies through their members under their homeownership set-aside programs to assist low- or moderate-income households who qualify for refinancing assistance under eligible federal, state and local targeted refinancing programs, including the Hope for Homeowners Program and the Administration's Making Home Affordable Refinancing Program. The interim final rule also enhanced the ability of the Banks to respond to the mortgage crisis by providing greater flexibility to accelerate their future annual statutory AHP contributions for use in their AHP homeownership set-aside programs in the current year, and by permitting the Banks to adopt multiple housing needs under their Second District Priority scoring criterion under the AHP competitive application program.

FHFA invited comments on the interim final rule and has taken all comments into consideration. Based on the comments received and the considerations discussed in the 2009 interim final rule, FHFA is adopting the interim final rule as a final rule, with the following changes. The final rule provides the Banks with greater flexibility to manage the timing of the counseling required for households, and gives the Banks discretion to permit members to determine, prior to counseling, whether a household could qualify, in conjunction with AHP subsidy, for refinancing under an eligible targeted refinancing program, or to refer households directly to eligible targeted refinancing programs for such determinations. The final rule also permits a Bank, in its discretion, to allow members to enroll households in the AHP refinancing set-aside program prior to counseling. In all cases, the household must obtain the counseling prior to disbursement of the AHP subsidy on behalf of the household. The final rule also permits a Bank to commit AHP subsidies under its set-aside refinancing program to members by the sunset date of July 30, 2010, where a Bank's set-aside operating procedure is to commit subsidies to members rather than directly to households. In order to accommodate this change as well as the earlier enrollment of, and commitment of AHP subsidy to, households, and determinations of whether households could qualify for an eligible targeted refinancing program, the final rule extends the date by which households must have submitted applications for refinancing to an eligible targeted refinancing program from July 30, 2010 to December 31, 2010, which are subsequently approved by the eligible targeted refinancing program. In addition, the final rule makes the payment of counseling costs for assisted households an eligible use of AHP subsidy under the set-aside refinancing program where the costs have not been covered by another source, including the counseling organization, a funding source, or the member.

DATES: The final rule is effective on May 28, 2010.

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SUPPLEMENTARY INFORMATION:

I. Background

A. HERA

Effective July 30, 2008, Division A of HERA, Public Law No. 110–289, 122 Stat. 2654 (2008), created FHFA as an independent agency of the Federal Government. HERA transferred the supervisory and oversight responsibilities over the Federal National Mortgage Association (Fannie Mae), Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, Enterprises), the Banks, and the Bank System's Office of Finance, from the Office of Federal Housing Enterprise Oversight (OFHEO) and the Federal Housing Finance Board (FHFB), respectively, to FHFA. FHFA is responsible for ensuring that the Enterprises and the Banks operate in a safe and sound manner, including being capitalized adequately, and carry out their public policy missions, including fostering liquid, efficient, competitive, and resilient national housing finance markets. The Enterprises and the Banks continue to operate under regulations promulgated by OFHEO and FHFB until such regulations are superseded by regulations issued by FHFA. *See* HERA at sections 1302, 1312, 122 Stat. 2795, 2798.

B. The Banks' Affordable Housing Program

Section 10(j) of the Federal Home Loan Bank Act (Bank Act) requires each Bank to establish an affordable housing program, the purpose of which is to enable a Bank's members to finance homeownership by households with incomes at or below 80 percent of the area median income (AMI) (low- or moderate-income households), and to finance the purchase, construction or rehabilitation of rental projects in which at least 20 percent of the units will be occupied by and affordable for households earning 50 percent or less of AMI (very low-income households). *See* 12 U.S.C. 1430(j)(1) and (2). The Bank Act requires each Bank to contribute 10 percent of its previous year's net earnings to its AHP annually, subject to a minimum annual combined contribution by the 12 Banks of $100 million. *See* 12 U.S.C. 1430(j)(5)(C). Section 1218 of HERA amended section 10(j) by adding a new section 10(j)(2)(C) which requires FHFA to allow the Banks until July 30, 2010, to use AHP homeownership set-aside funds to refinance low- or moderate-income households' first mortgage loans on their primary residences. *See* 12 U.S.C. 1430(j)(2)(C). The Director of FHFA must establish the percentage of set-aside funds eligible for this use by regulation.

The AHP regulation authorizes a Bank, in its discretion, to set aside a portion of its annual required AHP contribution to establish homeownership set-aside programs for the purpose of promoting homeownership for low- or moderate-income households. *See* 12 CFR 1291.6. Under the homeownership set-aside programs, a Bank may provide AHP direct subsidy (grants) to members to pay for down payment assistance, closing costs, and counseling costs in connection with a household's purchase of its primary residence, and for rehabilitation assistance in connection with a household's rehabilitation of an owner-occupied residence. *See* 12 CFR 1291.6(c)(4). Currently, a Bank may allocate up to the greater of $4.5 million or 35 percent of its annual required AHP contribution to homeownership set-aside programs in that year.

C. AHP Refinancing Initiative, Proposed Rule and October 2008 Interim Final Rule

In January 2008, FHFB waived certain homeownership set-aside program provisions of the AHP regulation to allow the Federal Home Loan Bank of San Francisco (San Francisco Bank) to establish a temporary pilot program to provide AHP direct subsidy to enable eligible households with subprime or nontraditional loans held by a San Francisco Bank member or its affiliate to refinance or restructure the loans into affordable, long-term fixed-rate mortgages. *See* FHFB Resolution No. 2008–01 (Jan. 15, 2008). The authority expired on December 31, 2009, without funds being committed.

In April 2008, FHFB published a proposed rule that would have extended the temporary authority to use AHP set-aside funds for mortgage refinancing or restructuring to all 12 Banks. *See* 73 FR 20552 (Apr. 16, 2008). FHFB received 36 comments on the proposal. Commenters who supported use of AHP funds for refinancing recommended flexibility in the rules governing use of the funds so that the Banks and their members would be able to assist a greater number of borrowers in distress, including allowing the use of AHP set-aside funds in conjunction with other federal, state or local mortgage refinancing programs.

Before FHFB took final action on the proposed amendments to the AHP regulation, section 1218 of HERA added section 10(j)(2)(C) to the Bank Act. Title IV of Division A of HERA also required establishment of the Hope for Homeowners Program, a temporary mortgage refinancing program under the Federal Housing Administration (FHA), which will expire on September 30, 2011. To implement the requirements of section 1218 of HERA, on October 17, 2008, FHFA published an interim final rule (2008 interim final rule), which added new § 1291.6(f) to the AHP homeownership set-aside regulation authorizing the Banks, in their discretion, to temporarily establish an AHP set-aside refinancing program. *See* 73 FR 61660 (Oct. 17, 2008). Specifically, § 1291.6(f) authorized the Banks to provide AHP direct subsidy to their members to assist in the refinancing of low- or moderate-income homeowners' mortgage loans under the Hope for Homeowners Program through the use of AHP subsidy to reduce loan principal and pay FHA-approved closing costs. By linking the use of the AHP subsidy with the Hope for Homeowners Program, FHFA intended to leverage and enhance the effectiveness of each program, ensure that the full range of federal assistance to affected homeowners was available quickly, and provide the flexibility that the Banks and their members need to make the AHP refinancing program successful.

FHFA received 40 comments on the 2008 interim final rule. Thirteen commenters generally supported the use of AHP subsidies for refinancing households with unaffordable mortgages, but recommended a number of changes to the rule. The other 27 commenters opposed the use of AHP subsidies for refinancing, citing the ongoing, critical need for AHP homeownership set-aside subsidies to assist home purchases.

D. August 2009 Interim Final Rule

Based on public comments received on the 2008 interim final rule, and in light of continuing adverse conditions of the mortgage market, FHFA determined that in order for the AHP set-aside refinancing program to be implemented successfully for the benefit of the intended households, the scope of the program authority should be broadened and the Banks should have greater flexibility in implementing the program. Accordingly, on August 4, 2009, FHFA published an interim final rule (2009 interim final rule) that authorized the Banks to provide AHP direct subsidy to their members to assist in the refinancing of low- or moderate-income homeowners' mortgage loans under eligible targeted refinancing programs through the use of AHP subsidy to reduce loan principal and pay closing costs. *See* 74 FR 38514 (Aug. 4, 2009). By linking the use of the AHP subsidy with eligible targeted refinancing programs, including the Hope for Homeowners Program and the Administration's Home Affordable Refinance Program (HARP), FHFA intended to leverage and enhance the effectiveness of each program, ensure that the full range of federal, state and local government assistance to affected homeowners was available quickly, and provide the flexibility that the Banks and their members need to make the AHP refinancing program successful. Five Banks are offering refinancing set-aside programs as authorized under the 2009 interim final rule.

FHFA received 11 comment letters on the 2009 interim final rule, representing 12 commenters.[1] Commenters included: seven Banks; one Bank Advisory Council; and four trade associations. All 12 commenters supported the expanded use of AHP subsidies provided under the rule. All five Banks that are offering refinancing set-aside programs commented on the 2009 interim final rule. FHFA did not receive any comments that generally opposed the rule. The **Analysis of the Final Rule** section, below, discusses the comments expressed on particular subjects.

E. HERA Section 1201

Section 1201 of HERA requires the FHFA Director to consider the differences between the Banks and the Enterprises in rulemakings that affect the Banks with respect to the Banks' cooperative ownership structure, mission of providing liquidity to members, affordable housing and community development mission, capital structure and joint and several liability. *See* 12 U.S.C. 4513(f). In preparing the final rule, the Director considered these factors and determined

[1] One letter represented the comments of both a Bank and that Bank's Advisory Council.

that the rule is appropriate, particularly because the rule implements a statutory provision of the Bank Act that applies only to the Banks. *See* 12 U.S.C. 1430(j). FHFA did not receive any comments on whether these factors should result in a revision of the rule as it relates to the Banks.

II. Analysis of the Final Rule

A. Definition of Eligible Targeted Refinancing Program: § 1291.1

The 2009 interim final rule provided that a household's 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 an "eligible targeted refinancing program." An "eligible targeted refinancing program" is defined in § 1291.1 as a program offered by the Department of Housing and Urban Development (HUD), U.S. Department of Agriculture (USDA), Fannie Mae, Freddie Mac, a state or local government, or a state or local housing finance agency (HFA) for the limited purpose of refinancing first mortgages on primary residences for households that cannot afford or are at risk of not being able to afford their monthly payments, as defined by the program, in order to prevent foreclosure. This provision expanded the eligible targeted refinancing programs to include these other eligible targeted refinancing programs, in addition to the Hope for Homeowners Program included in the 2008 interim final rule.

Ten commenters specifically supported expanding the refinance set-aside eligibility to include these additional eligible targeted refinancing programs. No commenters opposed the expansion of the refinance set-aside authority to include these additional eligible targeted refinancing programs, and no commenters addressed the definition of "eligible targeted refinancing program." Three commenters reiterated their comments on the 2008 interim final rule that FHFA should allow AHP subsidy to be used to restructure or refinance mortgages originated by members and purchased by the Banks for their Mortgage Partnership Finance and Mortgage Purchase Program portfolios. One commenter reiterated its previous comment on the 2008 interim final rule that members should also be able to use AHP subsidies to refinance loans in their portfolios with their own funds, within guidelines to be set by the Bank. Like the 2008 and 2009 interim final rules, the final rule does not authorize the use of AHP subsidy in conjunction with such private refinancing outside of eligible targeted refinancing programs for the reasons discussed in the 2009 interim final rule. One commenter suggested that the authority should be expanded to assist other troubled loan restructuring and modification initiatives; however, HERA authorizes AHP subsidies to be used for refinancing only. This temporary authority does not extend to use of the subsidies to assist in restructuring or modifying troubled loans without refinancing them into a new loan.

One commenter expressed concern that the regulation does not permit a Bank member to refinance its own mortgages that it has originated, even though it permits a member to refinance another member's mortgages. The 2009 interim final rule did not preclude a member from using AHP subsidy to assist households that have mortgages in the member's portfolio to be refinanced through an eligible targeted refinancing program. For example, a member that is a participating lender in a state HFA's bond program that is an eligible targeted refinancing program would be able to originate a mortgage under that bond program to refinance a mortgage in its own portfolio. However, as discussed in the 2009 interim final rule, FHFA rejected using AHP subsidy to assist members that are privately refinancing loans, whether in their portfolios or not, because of the regulatory, administrative and operational burdens of safeguarding the households and the AHP subsidies in such transactions.

B. Funding Allocation: § 1291.2(b)(2)(i)

The AHP regulation permits a Bank, in its discretion, to set aside annually, in the aggregate, a maximum of the greater of $4.5 million or 35 percent of its annual required AHP contribution to provide funds to members participating in homeownership set-aside programs, including mortgage refinancing programs established under § 1291.6(f). *See* 12 CFR 1291.2(b)(2)(i). The 2009 interim final rule amended the 2008 interim final rule to require that at least one-third of a Bank's aggregate annual set-aside allocation, including any set-aside allocation for a mortgage refinancing program, be targeted for first-time homebuyers. *See id.* As discussed in the 2009 interim final rule, in the current market where many existing homeowners are unable to sell their homes and purchase move-up homes because their mortgages exceed their homes' value, efforts to promote new home purchases could contribute to recovery and stabilization of the housing market. Ensuring that at least some portion of AHP set-aside subsidies are available for home purchase assistance is also consistent with HERA's establishment of Federal funding for the Neighborhood Stabilization Program (NSP), which provides funding to state and local government programs for purchasing, rehabilitating and renting or selling foreclosed properties. *See* HERA sections 2301 through 2305. A number of state HFAs are using NSP and mortgage-revenue bond funds to assist first-time homebuyers in purchasing these foreclosed properties.

Three commenters specifically supported applying the first-time homebuyers allocation requirement to a Bank's aggregate set-aside allocation, including allocations for both homeownership and set-aside refinancing programs. No commenters opposed this provision. The final rule does not change this provision.

C. Acceleration of Future AHP Contributions: § 1291.2(b)(3)

Under the Bank Act, a Bank must contribute at least 10 percent of its prior year's net earnings to its current year's AHP. *See* 12 U.S.C. 1430(j)(5)(C). The 2009 interim final rule increased the maximum amount that a Bank, in its discretion, may reallot (*i.e.,* accelerate) from the subsequent year's required annual AHP contribution for use in the current year, to the greater of $5 million or 20 percent of the Bank's required annual AHP contribution for the current year. *See* 12 CFR 1291.2(b)(3). As discussed in the 2009 interim final rule, this provision was intended to address the fact that the Banks' earnings potential in the near future is uncertain and more unpredictable than in previous years because of market instability. The enhanced ability to account for accelerated funds from future required AHP contributions would facilitate the Banks making some amount of AHP funding available in the current year during the housing market and economic crisis even when they are uncertain about the amount of the subsequent year's earnings. In addition, because of the uncertainty of future earnings and the possibility that a Bank may find itself in the same situation of having little or no required AHP contribution in the subsequent year, the 2009 interim final rule allowed a Bank to credit the amount of the accelerated contribution against required AHP contributions over one or more of the subsequent five years. Four commenters specifically supported the amendments to the provision for accelerating future AHP contributions for use in the current year. No commenters opposed the amendments. This provision is unchanged in the final rule.

D. General AHP Refinancing Program Authority; Retention Agreements: § 1291.6(f)(1)

Section 1291.6(f)(1) authorizes a Bank, in its discretion, to 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 that meets the requirements in § 1291.6, except for certain specified provisions, as well as with the requirements of part 1291. The 2009 interim final rule required that a household assisted under the AHP set-aside refinancing program be subject to an AHP five-year retention agreement in accordance with § 1291.6(c)(5). As discussed in the 2009 interim final rule, under the Banks' current AHP competitive application and home purchase set-aside programs, AHP retention agreements, which may be subordinate liens or other forms of legally enforceable agreements, are used in conjunction with all types of mortgage financing provided by all federal, state and local agencies, including other FHA programs. Because the AHP regulation requires that AHP subsidy be repaid only from any net gain from the sale or refinancing of the home, the AHP repayment requirement should not interfere with any appreciation or equity sharing requirements of the eligible targeted refinancing programs. Requiring AHP retention agreements for the AHP set-aside refinancing program also maintains consistency between the refinancing program and all other AHP programs, which are subject to the retention agreement requirement.

Six commenters specifically supported the requirement for AHP retention agreements under the AHP set-aside refinancing program. One commenter opposed the retention agreement requirement for the AHP set-aside refinancing program because the retention agreement, which also applies to the AHP homeownership set-aside and competitive application programs, allows a household, under certain circumstances, to subsequently refinance and take out equity without repaying the AHP subsidy. FHFA does not see a reason to treat households obtaining AHP assistance under the set-aside refinancing program differently from households obtaining AHP assistance under the homeownership set-aside or competitive application programs with respect to the retention agreement requirements.

Accordingly, the final rule retains the AHP retention agreement requirement for the set-aside refinancing program.

E. Eligible Loans: § 1291.6(f)(2)

As discussed above, the 2009 interim final rule amended § 1291.6(f)(2) to permit the use of AHP subsidy to assist households that need the subsidy in order to refinance their mortgages under eligible targeted refinancing programs. To be eligible for AHP refinancing assistance, a household must meet the terms of refinancing established by the eligible targeted refinancing program, such as the mortgage debt-to-income ratio, loan-to-value ratio, payment history, type of original loan (*e.g.,* subprime or nontraditional), and reasons for delinquency.[2] The requirements and standards of the other eligible targeted refinancing programs included in the 2009 interim final rule protect borrowers and the integrity of the AHP. Three commenters specifically supported this approach, which is unchanged in the final rule.

Section 1291.6(c)(2)(i) of the existing AHP regulation requires a Bank or member to determine a household's income eligibility at the time the member enrolls the household in the AHP homeownership set-aside program. Consistent with this requirement, the 2009 interim final rule provided that the Bank or member must determine that the household is at or below 80 percent of AMI at the time of enrollment in the AHP set-aside refinancing program. In addition, consistent with the AHP homeownership set-aside and competitive application programs, the 2009 interim final rule did not establish specific requirements for how a Bank should calculate a household's income. Thus, a Bank may make its own calculation of total household income, or may use the eligible targeted refinancing program's calculation of total household income. In this way, a Bank or member may rely on the total household income provided by the eligible targeted refinancing program regardless of when that program calculated the amount.

Four commenters specifically supported the provisions on calculation of household income, and no commenters opposed them. The final rule does not change these provisions.

[2] In addition, pursuant to HERA, the household must have an income at or below 80 percent of AMI, and the household's loan being refinanced must be a first mortgage on an owner-occupied unit that is the household's primary residence.

F. Eligible Uses of AHP Subsidy: § 1291.6(f)(3)

1. Reduction in Outstanding Loan Principal Balance

The 2009 interim final rule permitted use of the AHP subsidy to reduce the outstanding loan principal balance to the eligible targeted refinancing program's maximum loan-to-value ratio even if this results in the household having a mortgage debt-to-income ratio below the program's maximum mortgage debt-to-income ratio. The maximum amount of AHP subsidy that may be provided for the refinancing is the least amount that results in the loan meeting both the program's maximum loan-to-value ratio and maximum mortgage debt-to-income ratio. *See* 12 CFR 1291.6(f)(3). The 2009 interim final rule also made a technical change to clarify that the applicable program underwriting debt-to-income ratio is the mortgage debt-to-income ratio. Three commenters specifically supported the amendment, which is unchanged in the final rule.

2. Loan Closing Costs

To maintain consistency with the AHP home purchase set-aside program, the 2009 interim final rule removed language in the 2008 interim final rule that restricted eligible closing costs under the set-aside refinancing program to FHA-approved closing costs. Two commenters specifically supported this change, and no commenters opposed it. The provision is unchanged in the final rule.

In addition, to maintain consistency with the AHP home purchase set-aside program, the 2009 interim final rule made applicable to the set-aside refinancing program the current requirement of the AHP home purchase set-aside program that the rate of interest, points, fees and any other charges for all loans made in conjunction with the AHP subsidy cannot exceed a reasonable market rate of interest, points, fees and other charges for loans of similar maturity, terms and risk. *See* 12 CFR 1291.6(c)(7). FHFA received no comments specifically addressing this provision, which is unchanged in the final rule.

3. Counseling Costs

The final rule includes a new provision that makes the payment of counseling costs for assisted households an eligible use of AHP subsidy under the set-aside refinancing program. In requiring counseling under the National Foreclosure Mitigation Counseling (NFMC) program, the 2009 interim final rule did not also authorize the use of

AHP subsidies to pay for these counseling costs because counseling under the NFMC program is free to the households and, therefore, AHP subsidy is not needed to pay for the counseling. However, NFMC counselors may charge a household for the cost of obtaining its credit report from a third party. Because the household's credit report is an integral part of foreclosure mitigation counseling and qualification of the household for an eligible targeted refinancing program, the cost of the credit report would be an eligible counseling cost under the AHP. In addition, it is possible that other counseling services used by state and local governments or HFAs for their eligible targeted refinancing programs, as authorized by this regulation, may charge the households for counseling. Consequently, in order to accommodate such cases, the final rule permits the use of AHP subsidy to pay for such counseling costs. This provision is also consistent with similar authorization under the AHP home purchase set-aside and competitive application programs.

Accordingly, § 1291.6(f)(3)(iii) of the final rule permits the use of AHP subsidy to pay for counseling costs to the household under the refinancing set-aside program where the costs are incurred in connection with counseling of homeowners that actually refinance their homes with AHP assistance under the AHP set-aside refinancing program, and the cost of the counseling has not been covered by another source, including the counseling organization, a funding source, or the member.

G. Eligible Lender Participants: § 1291.6(f)(4)

The 2009 interim final rule permitted any member, rather than only members that are FHA-approved lenders, to obtain AHP direct subsidy for the purpose of refinancing an eligible loan. As discussed in the 2009 interim final rule, relatively few Bank members are FHA-approved lenders and many Bank members participate in HFA mortgage-revenue bond programs and are Fannie Mae- and Freddie Mac-approved sellers/servicers. AHP assistance should be available to households based on their qualifications, regardless of whether the member providing the AHP subsidy is FHA-approved. In addition, requiring members to be FHA-approved is too restrictive since the rule permits the use of the AHP subsidy with other eligible targeted refinancing programs in addition to FHA's Hope for Homeowners Program. One commenter specifically supported this change, and no commenters were opposed. The final rule does not change this provision.

The 2009 interim final rule also removed the requirement in the 2008 interim final rule that a Bank must consult with its Advisory Council before determining that a household may use a lender other than a member of the Bank. In addition, § 1291.6(f)(4) of the 2009 interim final rule permitted the Banks the discretionary authority to require a household to obtain its refinancing loan through a member participating as a lender in the eligible targeted refinancing program that is providing the new mortgage to the household.[3] Three commenters specifically supported these changes, and no commenters opposed them. These changes are retained in the final rule.

H. Household Counseling: § 1291.6(f)(5)

Section 1291.6(f)(5) of the 2009 interim final rule required that, prior to enrollment in an AHP set-aside refinancing program, a household seeking AHP assistance must obtain counseling for foreclosure mitigation which would include whether the household qualifies for refinancing by an eligible targeted refinancing program, through the NFMC program or other counseling program used by a state or local government or HFA.[4] By using the counseling requirement as a gateway, Bank members would be able to manage enrollments and commitments of AHP subsidies to households that would be able to use the subsidies. Households determined by a counseling organization to qualify for refinancing under an eligible targeted refinancing program would then be referred to participating Bank members, who would enroll the households in the AHP set-aside refinancing program upon determination of their AHP income eligibility at the time of enrollment. If households contacted a Bank member directly, the member would refer the households to an NFMC program participant, or to a state or local government or HFA counseling program, which would determine whether the households were eligible to have their loans refinanced through an eligible targeted refinancing program before the member would enroll the households in the AHP refinancing set-aside program and commit AHP subsidy.

Much of the NFMC counseling is one-on-one, during which a counselor can determine if a household's loan can be refinanced by one of the eligible targeted refinancing programs and whether AHP subsidy will be needed in order for the household to obtain the refinancing. A primary purpose of the 2009 interim final rule amendment was to ensure that the household receives counseling on a variety of available refinancing options that are suitable for that household. For example, a lender, such as an FHA lender or Fannie Mae/Freddie Mac seller/servicer, may be able to determine if a household is eligible for refinancing under HARP, but is not likely to know if the household has other options if it is not eligible for HARP. Even if the household could not qualify for an eligible targeted refinancing program or would not be eligible for AHP assistance, the NFMC program participant would be able to review the household's individual circumstances and identify other refinancing options that could assist the household. Consequently, under the 2009 interim final rule, when a household contacts a member directly, the member would refer the household to the NFMC program participant or other state or local government or HFA counseling program participant, to determine the household's eligibility for refinancing.

In the 2009 interim final rule, FHFA specifically requested comment on whether a household should be required to obtain counseling for foreclosure mitigation including counseling on whether the household qualifies for refinancing by an eligible targeted refinancing program, prior to enrollment in the AHP set-aside refinancing program. Six commenters specifically supported the counseling requirement, but three of these commenters expressed concern about the requirement that the household obtain the counseling and a determination of whether the household can qualify for an eligible targeted refinancing program prior to being enrolled by a member in the AHP set-aside refinancing program. One of these commenters recommended that counseling be required prior to the transfer of AHP subsidies committed to the household, rather than prior to enrollment. Two of the commenters also expressed concerns about access to in-person counseling for rural households.

[3] Requiring a household to obtain a new mortgage through the member is one of several types of optional household eligibility requirements that a Bank may establish under the AHP home purchase set-aside program. *See* 12 CFR 1291.6(c)(2)(iii).

[4] The 2008 Consolidated Appropriations Bill established and funded the NFMC program to assist households seeking refinancing or restructuring of their mortgages in order to avoid foreclosure. *See* Public Law No. 110–161. The NFMC program, under the auspices of the Congressionally chartered NeighborWorks America, comprises an array of counseling groups including NeighborWorks' partner organizations, the Homeownership Preservation Foundation, HUD's HOPE NOW counseling coalition, the National Urban League, USA Cares (military assistance), and state and local housing finance agency counseling programs.

One commenter recommended that rural households or households with limited access to counseling be referred by members directly to eligible targeted refinancing programs for eligibility determinations until such counseling can be made available to the household. The 2009 interim final rule did not require in-person counseling because the NFMC program provides one-on-one counseling, often by telephone through a toll-free number accessible to rural households, which FHFA deemed to be sufficient in lieu of in-person counseling.

One commenter opposed the requirement that a household obtain the counseling and determination of whether the household qualifies for an eligible targeted refinancing program through the NFMC program. This commenter supported allowing Bank members to provide the counseling to determine if a household could qualify for refinancing under an eligible targeted refinancing program. In establishing the counseling requirement in the 2009 interim final rule, FHFA was concerned that it would be administratively unworkable for members to enroll, and commit AHP subsidy to, any number of households seeking assistance from the AHP set-aside refinancing program without knowing whether such households could obtain refinancing through an eligible targeted refinancing program. FHFA also recognized that the AHP set-aside refinancing program is designed to assist households that could not otherwise qualify for an eligible targeted refinancing program on their own without some amount of AHP subsidy. The nature of the AHP set-aside refinancing program, where AHP subsidy would be used for principal reduction, is such that a household needing AHP subsidy cannot qualify for refinancing under an eligible targeted refinancing program without the AHP subsidy. Consequently, where a household is seeking refinancing eligibility information directly from an eligible targeted refinancing program, a representative of that eligible targeted refinancing program, if unaware of the potential assistance of the AHP refinancing set-aside program, would likely tell the household that it does not qualify for refinancing under that program, thereby ending the household's efforts to refinance. An NFMC program counselor would be aware of the availability of the AHP set-aside refinancing program and have the capacity to sit down with an individual household to determine whether and how the household would be able to qualify under an eligible targeted refinancing program's eligibility and underwriting requirements if it had AHP or other subsidy assistance.

Nevertheless, FHFA recognizes that members may be prepared to accept the responsibility of working with individual households to identify available alternative eligible targeted refinancing programs and their respective eligibility and underwriting requirements, and to go through the process of calculating whether AHP subsidy assistance would allow the households to qualify for one of these eligible targeted refinancing programs. Consequently, § 1291.6(f)(5)(ii) of the final rule permits a Bank, in its discretion, to allow its members to refer potential household applicants for AHP assistance directly to an eligible targeted refinancing program for a determination on the households' eligibility for refinancing under that program, or to allow its members to determine, prior to counseling, whether household applicants for AHP assistance could qualify, in conjunction with AHP subsidy, for refinancing under available eligible targeted refinancing programs. At the same time, the final rule continues to require that the household obtain foreclosure mitigation counseling through an NFMC program or other counseling program used by a state or local government or HFA. Nevertheless, the final rule permits a Bank, in its discretion, to allow members to enroll households in the AHP set-aside refinancing program prior to counseling. In all cases, the household must obtain the counseling prior to disbursement of the AHP subsidy on behalf of the household.

I. Sunset Date: § 1291.6(f)(6)

The 2009 interim final rule provided that the Banks' authority to commit AHP subsidy for refinancing terminates after July 30, 2010, which is the expiration date of the two-year period in section 1218 of HERA. FHFA further stated that it may consider an extension of the sunset date in the future should program experience appear to justify such an extension.

Three commenters supported an extension of the sunset date, with one commenter suggesting September 30, 2011 to coincide with the sunset date for the Hope for Homeowners Program (*see* HERA, section 1402(a) (National Housing Act sec. 257(r))), one commenter suggesting at least December 31, 2010, and one commenter suggesting no specific date. Of the five Banks that are offering a refinancing set-aside program, two did not address the sunset date, two supported FHFA's leaving open the possibility of an extension, and one supported an extension to December 31, 2010.

The final rule retains the sunset date of July 30, 2010 in § 1291.6(f)(6). However, the final rule makes two changes in order to accommodate operational procedures. First, under the homeownership set-aside program, Banks may commit available AHP subsidies in one of two ways. Some Banks commit AHP subsidies under their set-aside programs on an individual household basis as each household is enrolled by a member. Other Banks operate their homeownership set-aside programs using a model in which the Bank commits AHP subsidies on a member-basis, with the Bank committing a specified amount of AHP subsidies to an individual member which that member then uses to commit to individual households as the member enrolls them. The final rule amends § 1291.6(f)(6) to recognize both operational models for set-aside commitments by providing that a Bank may commit AHP subsidy to members or households under its AHP set-aside refinancing program until July 30, 2010.

Second, in light of the amendment permitting Banks to commit AHP subsidies to specific members up until the sunset date and in order to accommodate amendments in the final rule that allow the Banks more flexibility in permitting their members to enroll, and commit AHP subsidies to, households prior to counseling, or to determine whether households could qualify for an eligible targeted refinancing program, the final rule extends the date by which households must have submitted applications for refinancing to an eligible targeted refinancing program from July 30, 2010 to December 31, 2010. The final rule also clarifies that a member may use committed subsidy for a loan submitted to an eligible targeted refinancing program prior to December 31, 2010, that is approved subsequent to December 31, 2010.

J. Competitive Application Program—Second District Priority Scoring Criterion: § 1291.5(d)(5)(vii)

The 2009 interim final rule amended § 1291.5(d)(5)(vii) of the AHP regulation to permit a Bank to establish one or more housing needs in the Bank's district under the Second District Priority scoring criterion, which is used in scoring applications under the AHP competitive application program. The amendment was intended primarily to provide more flexibility in the Banks' capacity to respond to the current housing crisis by allowing the AHP competitive application program to complement the efforts of the AHP set-aside refinancing program and other targeted refinancing programs for foreclosure prevention and HERA's NSP for the disposition of foreclosed properties. FHFA specifically requested comments on whether this scoring change benefits the AHP competitive application program.

Eight commenters specifically supported this amendment, citing the importance of the additional flexibility for the Banks to use their competitive application programs to address a variety of housing needs in their respective districts. FHFA received no comments opposing this amendment, which is unchanged in the final rule.

III. Effective Date

Pursuant to the Administrative Procedures Act, FHFA for good cause finds that the effective date of the final rule should not be delayed for 30 days and that the final rule should become effective on May 28, 2010. *See* 5 U.S.C. 553(d)(3). Section 1218 of HERA requires that FHFA's regulations authorize the use of AHP set-aside subsidy for mortgage refinancing for a two-year period commencing on July 30, 2008, with a resulting sunset date of July 30, 2010. The final rule retains the substance of FHFA's August 4, 2009 interim final rule currently in effect, while amending the regulation to allow the Banks to make administrative changes to the AHP set-aside refinancing program designed to facilitate household participation in the program. Making the final rule effective immediately will enable the Banks to expedite implementation of these program administrative changes. A 30-day delayed effective date could adversely impact households who, as a result of the flexibility of the program administrative changes, could have received the AHP subsidy commitment needed to qualify for an eligible targeted refinancing program or closed on their refinancing mortgage during the 30-day period.

IV. Paperwork Reduction Act

The final rule does not substantively or materially modify the approved information collection entitled "Affordable Housing Program (AHP)," which is assigned control number 2590–0007 by the Office of Management and Budget (OMB). *See http://www.fhfa.gov/webfiles/13095/AHP_Data_Reporting_Instructions.pdf.*

Consequently, FHFA has not submitted any information to OMB for review under the Paperwork Reduction Act of 1995. *See* 44 U.S.C. 3501 *et seq.*

V. Regulatory Flexibility Act

Because no notice of proposed rulemaking is required for this final rule, the provisions of the Regulatory Flexibility Act do not apply. *See* 5 U.S.C. 601(2) and 603(a). Moreover, the final rule applies only to the Banks, which do not come within the meaning of "small entities," as defined in the Regulatory Flexibility Act. *See id.* sec. 601(6).

List of Subjects in 12 CFR Part 1291

Community development, Credit, Federal home loan banks, Housing, Reporting and recordkeeping requirements.

■ For the reasons stated in the preamble, the Interim Final Rule amending 12 CFR part 1291, published at 74 FR 38514 (Aug. 4, 2009), is adopted as final with the following changes:

PART 1291—FEDERAL HOME LOAN BANKS' AFFORDABLE HOUSING PROGRAM

■ 1. The authority citation for part 1291 continues to read as follows:

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

§ 1291.2 [Amended]

■ 2. Amend § 1291.2(b)(2)(i) by removing the phrase "paragraph (f) of this section," and adding in its place "§ 1291.6(f),".

■ 3. Revise § 1291.6(f)(3), (f)(5), and (f)(6) to read as follows:

§ 1291.6 Homeownership set-aside programs.

* * * * *

(f) * * *

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

(i) Reduce the outstanding principal balance of the loan by no more than the amount necessary for the new loan to qualify under both the maximum loan-to-value ratio and the maximum household mortgage debt-to-income ratio required by the eligible targeted refinancing program;

(ii) Pay loan closing costs; or

(iii) Pay for counseling costs only where:

(A) Such costs, including the cost of the homeowner's credit report, are incurred in connection with counseling of homeowners that actually refinance their homes with AHP assistance under the AHP set-aside refinancing program; and

(B) The cost of the counseling has not been covered by another source including the counseling organization, a funding source, or the member.

* * * * *

(5) *Counseling.*—(i) Except as provided in paragraph (f)(5)(ii) of this section, prior to enrollment in an AHP set-aside refinancing program established under this paragraph (f), a household must obtain counseling through the National Foreclosure Mitigation Counseling program or other counseling program used by a state or local government or housing finance agency, for foreclosure mitigation including counseling on whether the household qualifies, in conjunction with AHP subsidy, for refinancing under an eligible targeted refinancing program.

(ii) *Optional requirements.* A Bank, in its discretion, may permit its members, prior to such counseling, to take any of the following actions in paragraphs (f)(5)(ii)(A) through (C) of this section, provided that, in all cases, the household obtains such counseling prior to disbursement of the AHP subsidy on behalf of the household:

(A) Enroll households in the AHP set-aside refinancing program;

(B) Refer households directly to an eligible targeted refinancing program to determine eligibility for refinancing under the eligible targeted refinancing program; or

(C) Determine whether a household could qualify, in conjunction with AHP subsidy, for refinancing under an eligible targeted refinancing program.

(6) *Sunset.*—(i) This paragraph (f) shall expire on July 30, 2010.

(ii) A Bank may commit AHP subsidy to members or households under its AHP set-aside refinancing program until July 30, 2010.

(iii) A member may use the AHP subsidy committed by a Bank pursuant to paragraph (f)(6)(ii) of this section for a loan submitted to an eligible targeted refinancing program on or before December 31, 2010 that is subsequently approved for refinancing under such program.

Dated: May 21, 2010.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

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