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FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1282

RIN 2590-AA27

Enterprise Duty to Serve Underserved Markets

AGENCY: Federal Housing Finance Agency.

ACTION: Notice of proposed rulemaking; request for comments.

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

method for evaluating and rating the Enterprises' compliance with the Duty to Serve each underserved market.

DATES: Written comments must be received on or before [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER].

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

- Agency website: www.fhfa.gov/open-for-comment-or-input.
- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by e-mail to FHFA at RegComments@fhfa.gov to ensure timely receipt by FHFA. Please include "Comments/RIN 2590-AA27" in the subject line of the submission.
- Hand Delivered/Courier: The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590-AA27, Federal Housing Finance Agency, Eighth Floor, 400 7th Street, SW., Washington, DC 20219. The package should be delivered at the 7th Street entrance Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.
- U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service: The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590-AA27, Federal Housing Finance Agency, Eighth Floor, 400 7th Street, SW., Washington, DC 20219. Please note that all mail sent to FHFA via U.S. Mail is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks.

FOR FURTHER INFORMATION CONTACT: Jim Gray, Manager, Office of Housing and Regulatory Policy, (202) 649-3124, or Mike Price, Senior Policy Analyst, Office of Housing and Regulatory Policy, (202) 649-3134. These are not toll-free numbers. The mailing address for each contact is: Federal Housing Finance Agency, 400 7th Street, SW., Washington, DC 20219. The telephone number for the Telecommunications Device for the Hearing Impaired is (800) 877-8339.

SUPPLEMENTARY INFORMATION:

I. Comments

FHFA invites comments on all aspects of this proposed rule, in addition to specific questions provided throughout, and will take all comments into consideration before issuing the final rule. Commenters do not need to answer each question. While FHFA has considered the views commenters submitted on the Duty to Serve proposed rule issued in 2010 in preparing this proposed rule, in view of the significant differences between this proposed rule and the 2010 Duty to Serve proposed rule, commenters on the previous proposed rule must submit a new comment letter on this new proposed rule for their comments to be further considered. Copies of all comments received will be posted without change, including any personal information you provide, such as your name, address, e-mail address and telephone number, on FHFA's web site at http://www.fhfa.gov. In addition, copies of all comments received will be available for examination by the public on business days between the hours of 10 a.m. and 3 p.m., at the Federal Housing Finance Agency, Eighth Floor, 400 7th Street, SW., Washington, DC 20219. To make an appointment to inspect comments, please call the Office of General Counsel at (202) 649-3804.

II. Background

A. Statutory Background

The Safety and Soundness Act provides that the Enterprises "have an affirmative obligation to facilitate the financing of affordable housing for low- and moderate-income families."[1] Section 1129 of HERA amended section 1335 of the Safety and Soundness Act to establish a duty for the Enterprises to serve three specified underserved markets, to increase the liquidity of mortgage investments and improve the distribution of investment capital available for mortgage financing for certain categories of borrowers in those markets.[2] Specifically, the Enterprises are required to provide leadership in developing loan products and flexible underwriting guidelines to facilitate a secondary market for mortgages on housing for very low-, low-, and moderate-income families for manufactured housing, affordable housing preservation, and rural markets.[3] In addition, section 1335(d)(1) requires FHFA to establish, by regulation, a method for evaluating and rating the Enterprises' compliance with the Duty to Serve underserved markets.[4] FHFA is required to separately evaluate each Enterprise's compliance with respect to each underserved market, taking into consideration the following:

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

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[1] 12 U.S.C. 4501(7).
[2] 12 U.S.C. 4565.
[3] 12 U.S.C. 4565(a). The terms "very low-income," "low-income," and "moderate-income" are defined in 12 U.S.C. 4502.
[4] 12 U.S.C. 4565(d)(1).

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

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

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

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

B. Conservatorship

On September 6, 2008, the Director of FHFA appointed FHFA as conservator of the Enterprises in accordance with the Safety and Soundness Act to maintain the Enterprises in a safe and sound financial condition and to help assure performance of their public mission. Since the establishment of FHFA as conservator, the Enterprises have returned to profitability. Through December 31, 2014, the Enterprises have paid a total of $225 billion in dividends payments to the U.S. Department of the Treasury on the senior preferred stock.[6]

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

[6] *See* White House, "Fiscal Year 2016 of the U.S. Government Analytical Perspectives," at 307 (2015), *available at* https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/ap_20_credit.pdf.

While the Enterprises are in conservatorships, the law requires and FHFA expects them to continue to fulfill their core statutory purposes, which include their support for affordable housing. The Enterprise affordable housing goals have continued throughout the conservatorships, with modifications to the levels of the goals. FHFA now proposes a rule to implement the Enterprises' Duty to Serve underserved markets. Consistent with the conservatorships, Enterprise support for affordable housing must be accomplished within the confines of safety and soundness and the goals of conservatorship. The Enterprises' 2015 Conservatorship Scorecard requires the Enterprises to make progress in preparing to implement the Duty to Serve, prior to this rulemaking.

C. Regulatory History

1. Advance Notice of Proposed Rulemaking

The rulemaking for the Duty to Serve commenced in August 2009 with FHFA's publication in the Federal Register of an Advance Notice of Proposed Rulemaking (ANPR) on the Enterprise Duty to Serve underserved markets.[7] FHFA received 100 comment letters in response to the ANPR.

2. 2010 Duty to Serve Proposed Rule

After reviewing the comment letters on the ANPR, FHFA published in the Federal Register on June 7, 2010, a proposed rule on the Duty to Serve.[8] The 45-day comment period for the proposed rule closed on July 22, 2010.

FHFA received 4,019 comments on the proposed rule. Commenters included: individuals, including owners of manufactured homes; trade associations, including manufactured housing trade groups and lender trade groups; policy and housing

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

advocacy groups, including rural housing advocacy groups, organizations representing manufactured home residents, and national and state consumer law organizations; nonprofit organizations; corporations, including manufactured housing construction companies; federal, state, and local government entities, including state and local housing finance agencies; property services groups, including property management companies; manufactured home community homeowners' associations; affordable housing developers and preservation lenders; a legal services group; Members of Congress; and both Enterprises.

FHFA has taken a new look at the issues for this new proposed rule, with the benefit of the comments received on the 2010 Duty to Serve proposed rule and subsequent input from diverse stakeholder groups. The comments and input received and the agency's intervening years of experience with the Enterprises and their operations in the underserved markets have suggested a different approach, sufficiently so that further notice and comment is necessary through this new proposed rule.

As before, the new proposed rule would not itself authorize or prohibit the Enterprises from engaging in any activity. Instead, it would authorize Duty to Serve credit for certain Enterprise activities in furtherance of their Duty to Serve obligations and would propose a framework for evaluating the Enterprises' performance.

III. Duty to Serve Underserved Markets

A. Implementing the Duty to Serve

The Enterprises' public purposes include a broad obligation to serve lower- and moderate-income borrowers. The Safety and Soundness Act establishes a duty for the Enterprises to serve very low-, low-, and moderate-income families in three specific underserved markets. All activities an Enterprise undertakes in furtherance of its Duty to Serve must be consistent with its Charter Act. Nothing in this rulemaking would permit or require an Enterprise to engage in any activity that would be otherwise inconsistent with its Charter Act or the Safety and Soundness Act.

Although the Enterprises are in conservatorships, FHFA expects them to show tangible results in each underserved market and to be a catalyst for mortgage lending to very low-, low-, and moderate-income families in each underserved market consistent with their obligations for safety and soundness. The Enterprises should expect mortgage purchases and activities pursuant to the Duty to Serve to earn a reasonable economic return, which may be less than the return earned on activities that do not serve these underserved markets.[9]

B. Underserved Markets Plans

1. Requirement for Underserved Markets Plans—Proposed § 1282.32

Section 1282.32 of the proposed rule would require each Enterprise to prepare an Underserved Markets Plan identifying the activities and related objectives in each underserved market that it will pursue to serve that market.[10] Each Plan would be mandatory and have a three-year term. The extent to which the Enterprises comply with their Plan obligations would form the basis for FHFA's evaluation of each Enterprise's Duty to Serve performance.

[9] *See* 12 U.S.C. 4513(a)(1)(B)(ii).
[10] The 2010 Duty to Serve proposed rule also would have required that the Enterprises identify their Duty to Serve activities in Underserved Markets Plans.

2. Eligible Activities for Underserved Markets—Proposed §§ 1282.33(b), 1282.34(b), 1282.35(b), 1282.37

Sections 1282.33(b), 1282.34(b), 1282.35(b), and 1282.37 of the proposed rule would specifically define the scope of the activities that could be included in an Underserved Markets Plan for an underserved market and, thus, be eligible for Duty to Serve credit as follows:

<u>Manufactured housing market</u> – Activities that facilitate a secondary market for mortgages on residential properties for very low-, low-, and moderate-income families consisting of: (1) manufactured homes titled as real estate; and (2) manufactured housing communities;

<u>Affordable housing preservation market</u> – Activities that facilitate a secondary market for mortgages on residential properties for very low-, low-, and moderate-income families consisting of affordable rental housing preservation and affordable homeownership preservation; and

<u>Rural market</u> – Activities that facilitate a secondary market for mortgages on residential properties for very low-, low-, and moderate-income families in a "rural area," which would be defined to mean: (1) a census tract outside of a metropolitan statistical area (MSA), as designated by the Office of Management and Budget (OMB); or (2) a census tract that is in an MSA but outside of the MSA's Urbanized Areas and Urban Clusters, as designated by the U.S. Department of Agriculture's (USDA's) Rural Urban Commuting Area (RUCA) codes.

Activities eligible for Duty to Serve credit that also promote residential economic diversity would be eligible for extra credit under § 1282.37 of the proposed rule.

Each of these activities must be in full compliance with applicable federal and state law. The underserved markets and related definitions are further discussed below.

3. Underserved Markets Plan Activities—Proposed § 1282.32(c)(1)

Under § 1282.32(c)(1) of the proposed rule, each Underserved Markets Plan would include activities delineated under one of the following categories:

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

  Proposed Additional Activities may include activities that support other federal, state and local programs not specifically enumerated in the proposed rule that would benefit from such support. Any such program must be eligible under one of the three specified underserved markets. If an Enterprise proposes activities to support other federal, state or local programs in its Underserved Markets Plan, the Enterprise must provide FHFA with clear information that defines the program and its eligibility under one of the three underserved markets consistent with the purpose and scope of this proposed rule. Such programs include, for example, state housing finance agency projects and local government initiatives that seek to provide affordable housing and for which Duty to Serve credit could be available.

- While overall the Enterprises must serve very low-, low-, and moderate-income families in each underserved market, any one activity may, but need not, serve more than one of the qualifying income categories. The Underserved Markets Plans must include a mix of activities serving all three income categories.

Statutory Activities and Regulatory Activities are collectively referred to as "Core Activities" in this Supplementary Information.

The proposed rule would not require an Enterprise to include every Core Activity in its Underserved Markets Plan, but the Plan must describe how the Enterprise considered each Core Activity. If an Enterprise elects not to include a Core Activity in its Plan, it must provide a detailed explanation for its decision in the Plan. There would be no restriction on the number of Additional Activities that an Enterprise may include in its Plan.

FHFA believes that specifying Core Activities for the Enterprises to consider in developing their Underserved Markets Plans, as well as providing the Enterprises the option to designate Additional Activities, will provide the most efficient ways to increase the Enterprises' presence in the three underserved markets and encourage healthy competition between the Enterprises. When one Enterprise is able to marshal its resources to better serve an underserved market, this may encourage the other Enterprise and other institutions to also consider how they could assist that market, and would demonstrate that certain products and services can be reasonably provided in the market.

Additionally, as described in this Supplementary Information and in proposed § 1282.37, the proposed rule would include an opportunity for the Enterprises to earn extra Duty to Serve credit when a qualifying activity in an underserved market also serves to reduce the economic isolation of very low-, low-, and moderate-income households by promoting residential economic diversity.[11] These activities would not be mandatory, but in order to qualify for the extra credit, the Enterprises would need to describe in their Plans the activities in the underserved markets they intend to undertake to promote residential economic diversity.

Requests for Comments

FHFA specifically requests comments on the following questions (please identify the question answered by the number assigned below):

1. How much discretion should the Enterprises have in selecting activities – Core Activities and Additional Activities – to serve the underserved markets?

2. Should FHFA establish specific Regulatory Activities for the underserved markets, or should the Enterprises have broad discretion to decide how to serve these markets?

3. Are the proposed Regulatory Activities, as identified in the proposed rule for each of the underserved markets and described further below, appropriate for accomplishing the Duty to Serve objectives?

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[11] In a separate context, the Federal Home Loan Banks' Affordable Housing Program has long recognized the role of reducing economic isolation in housing affordability and provides incentives for the development of projects that promote economic diversity in the housing market. Under the applicable regulation, a Federal Home Loan Bank may award scoring points for projects that promote "economic diversity," defined as "[t]he financing of housing that is part of a strategy to end isolation of very low-income households by providing economic diversity though 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." *See* 12 CFR 1291.5(d)(5)(vi)(H).

4. Objectives for Each Activity—Proposed § 1282.32(c)(2)

Under § 1282.32(c)(2) of the proposed rule, for each activity set forth in the Underserved Markets Plan, the Plan would be required to describe one or more "Objectives" – specific, measureable tasks to be accomplished by the Enterprise. Objectives would be central to FHFA's Duty to Serve evaluation and rating process.

Examples of Objectives might include an Enterprise's plans and timetable for achieving certain goals for one of its existing activities in an underserved market, or an Enterprise's specific outreach plans for working with lenders to develop innovative programs under a particular activity. Objectives would largely take narrative form but, where appropriate, could include quantitative benchmarks. If quantitative benchmarks form part of an Objective, FHFA's evaluation criteria may include comparing the Objective's quantitative benchmark at the beginning of the evaluation period with a new quantitative benchmark for the Objective calculated at the end of the evaluation period. This comparison would not create specific quantitative targets or evaluate an Enterprise based solely on the volume of loans purchased, which are prohibited by the Safety and Soundness Act.[12] Rather, quantitative benchmarks would be a measurement component of the evaluation process, authorized by the Safety and Soundness Act's establishment of the loan purchase assessment factor. Objectives may cover a single year or multiple years and must meet all of the following requirements:

- <u>Strategic</u>. Directly or indirectly maintain or increase liquidity to an underserved market;

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

- Measurable. Provide measureable benchmarks, which may include numerical targets, that enable FHFA to determine whether the Enterprise has achieved the Objective;

- Realistic. Calibrated so that the Enterprise has a reasonable chance of meeting the Objective with appropriate effort;

- Time-bound. Subject to a specific timeframe for completion by being tied to Plan calendar year evaluation periods; and

- Tied to analysis of market opportunities. Based on assessments and analyses of market opportunities in each underserved market, taking into account safety and soundness considerations.

5. Assessment Factors Incorporated into Objectives—Proposed § 1282.32(c)(3)

Under § 1282.32(c)(3) of the proposed rule, each Underserved Markets Plan Objective would be required to incorporate one or more of the following four statutory assessment factors:

- Outreach Assessment Factor. The outreach assessment factor requires evaluation of "the extent of outreach [by the Enterprises] to qualified loan sellers and other market participants" in each of the three underserved markets.[13] A Plan Objective could describe how an Enterprise would engage market participants, such as through conducting meetings and conferences with current and prospective seller/servicers and providing technical support

[13] *Id*. at (d)(2)(B).

to seller/servicers, in order to accomplish a Plan activity. Market participants could include traditional participants in Enterprise programs, as well as non-traditional participants such as consortia sponsored by banks, and local and state governments.

- Loan Product Assessment Factor. The loan product assessment factor requires evaluation of an Enterprise's "development of loan products, more flexible underwriting guidelines, and other innovative approaches to providing financing to each" underserved market.[14] A Plan Objective could describe, for example, how the Enterprise would reevaluate its underwriting guidelines, which could include empirical testing of different parameters and modification of loan products in an effort to increase the availability of loans to families targeted by the Duty to Serve, consistent with prudent lending practices. FHFA expects the Enterprise to identify underwriting obstacles that could prevent service to very low-, low-, and moderate-income families.
- Loan Purchase Assessment Factor. The loan purchase assessment factor requires FHFA to consider "the volume of loans purchased in each of such underserved markets relative to the market opportunities available to the [E]nterprise."[15] The Safety and Soundness Act further states that FHFA "shall not establish specific quantitative targets nor evaluate the [E]nterprises based solely on the volume of loans purchased."[16] A Plan Objective could include the Enterprise's plans for purchasing loans in particular underserved

[14] *Id*. at (d)(2)(A).
[15] *Id*. at (d)(2)(C).
[16] *Id*.

markets, including its assessments and analyses of the market opportunities available for each underserved market and its expected volume of loan purchases for a given year.

Although the proposed rule would not establish quantitative targets, FHFA would consider the Enterprise's past performance on the volume of loans purchased in a particular underserved market relative to the volume of loans the Enterprise actually purchases in that underserved market in a given year pursuant to its Plan. In reviewing the Plan and the loan purchase assessment factor, FHFA would take into account difficulties in forecasting future performance and the need for flexibility in dealing with unexpected market changes.

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

In addition to the four statutory assessment factors, the proposed rule includes a non-mandatory criterion for evaluating the Enterprises' performance on qualifying

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[17] *Id*. at (d)(2)(D).

[18] 12 U.S.C. 1451 *et seq*. and 12 U.S.C. 1716 *et seq*.

activities (described in this Supplementary Information and in § 1282.37 of the proposed rule), for which the Enterprises could earn additional Duty to Serve credit when they include qualifying activities that promote residential economic diversity in their Underserved Markets Plans. Under this criterion, FHFA would evaluate the Enterprises on the extent to which their qualifying activities promote residential economic diversity in an underserved market in connection with mortgages on: 1) affordable housing in high opportunity areas; or 2) mixed-income housing in areas of concentrated poverty. This would be a criterion for which extra credit may be given for planned activities, but the activities associated with the criterion would not be mandatory activities for the Plans. FHFA specifically requests comments on all aspects of the proposed criterion, including how the residential economic diversity activities for extra credit should be defined and assessed.

Activities in each of the underserved markets would be eligible for extra credit for residential economic diversity ("qualifying activities") except for manufactured housing communities activities, energy efficiency improvement activities, and any Additional Activities determined by FHFA as ineligible. FHFA proposes excluding manufactured housing community activities because of the lack of information on tenants' total monthly housing costs, which would be necessary for FHFA to assess the affordability of the units. Nor is the proposed proxy for determining manufactured housing community affordability, which relies on the income level of the census tract instead of on monthly housing costs, useful for estimating whether a manufactured housing community contributes to residential economic diversity. FHFA also proposes to exclude activities related to energy efficiency improvements as they typically do not relate to the siting of housing and, thus, do not appear to further residential economic diversity.

Requests for Comments

FHFA specifically requests comments on the following questions (please identify the question answered by the number assigned below):

4. Are the requirements for Objectives discussed above appropriate, and should there be any additional requirements?

5. Should Duty to Serve credit be given under the loan products assessment factor for an Enterprise's research and development activities that may not show results in their initial phase, but which may be necessary for long-term product planning and development for underserved markets?

6. Has FHFA adequately defined the scope of extra credit for the proposed residential economic diversity activities? Has FHFA chosen the correct activities that should be excluded from qualifying for extra credit for residential economic diversity activities? Also, see description of proposed **§** 1282.37 and **Requests for Comments.**

6. Underserved Markets Plan Submission and FHFA Review—Proposed § 1282.32(d)(1)

Section 1282.32(d)(1) of the proposed rule would require the Enterprises to submit their proposed Underserved Markets Plans to FHFA at least 180 days before the termination date of the Enterprise's existing Plan, except that the Enterprise's first proposed Plan after the effective date of this regulation must be submitted to FHFA pursuant to FHFA-established timeframes and procedures.

a. Posting of Proposed Underserved Markets Plans, Public Input and Enterprise Review—Proposed § 1282.32(d)(2), 1282.32(d)(3)

Section 1282.32(d)(2) of the proposed rule would provide a process for public input on the Enterprises' proposed Underserved Markets Plans. A number of commenters on the 2010 Duty to Serve proposed rule suggested that the Enterprises' proposed Plans be published for comment because doing so could improve the Enterprises' and FHFA's assessment of the adequacy of the Plans. Commenters stated that public comment could add to the innovation and impact of the Duty to Serve obligations on the underserved markets. Both Enterprises opposed publishing the proposed Plans for public comment on the basis that the Plans would contain proprietary and confidential data and other information. After taking into account the commenters' opposing views, FHFA has concluded that a public input process can be implemented that would promote transparency and increase the opportunity for productive stakeholder input in the Underserved Markets Plan process, while preserving the proprietary and confidential nature of Enterprise data and information. Soliciting public input could help the Enterprises to develop information about underserved market needs and how they might be met so that the Enterprises can make better judgments in formulating their Underserved Markets Plan Activities and Objectives.

Accordingly, the proposed rule would provide that as soon as practical after an Enterprise submits its proposed Plan to FHFA for review, FHFA will post on FHFA's website a public version of the proposed Plan that omits proprietary and confidential data and information. The public would have 45 days to provide input on the public version of the proposed Plan. Seeking public input on the proposed Plans would encourage participation by stakeholders, including lenders, industry participants, local government, community groups, and the broader public. In its discretion, each Enterprise would make revisions to its proposed Plan based on the public input.

b. FHFA Plan Review Process—Proposed §§ 1282.32(d)(4), 1282.32(d)(5), 1282.32(e), 1282.32(f)

The proposed rule would provide that within 60 days after the end of the public input period, FHFA will inform each Enterprise of any FHFA comments on its proposed Plan. The Enterprise would be required to address those comments, as appropriate, through revisions to its proposed Plan pursuant to timeframes and procedures established by FHFA.

After FHFA is satisfied that all of its comments have been addressed, FHFA would issue a "non-objection" to the Plan. The effective date of the Plan would be January 1st of the first evaluation year for which the Plan is applicable, except for the Enterprise's first Plan after the effective date of the final rule, whose term and effective date would be determined by FHFA.

After receiving FHFA's non-objection to its Plan, an Enterprise would post the final Plan on the Enterprise's website with confidential and proprietary information omitted. FHFA would also post the final Plan with confidential and proprietary information omitted on FHFA's website.

7. Modifying Final Underserved Markets Plans—Proposed § 1282.32(g)

Section 1282.32(g) of the proposed rule would permit modifications of final Underserved Markets Plans during the period of the Plans. The 2010 Duty to Serve proposed rule would not have permitted modifications. In their comments on the 2010 proposed rule, both Enterprises stated that they should be able to modify their Plans, citing the uncertainty and volatility in the mortgage markets, and the Enterprises' need to determine whether their market estimates are accurate, assess performance against goals, and update business forecasting. FHFA finds these comments persuasive.

Accordingly, the proposed rule would permit an Enterprise to modify its final Plan during its three-year term, subject to FHFA non-objection. It would also permit FHFA, in its sole discretion, to require an Enterprise to modify a final Plan. Instances in which FHFA might permit or require an Enterprise to modify its Plan include changes in market conditions (including obstacles and opportunities) or significant safety and soundness concerns that arise after an Enterprise implements its Plan. FHFA and the Enterprises may seek public input on any proposed modifications to a final Plan if FHFA determines that public input would assist its consideration of the proposed modifications. Should a final Plan be modified, the modified Plan with confidential and proprietary information omitted would be posted on the Enterprise's and FHFA's websites.

8. Enterprise New Products and New Activities

Enterprise new products and new activities are subject to the prior approval and prior notice requirements, respectively, that FHFA established by regulation pursuant to the Safety and Soundness Act.[19] FHFA expects the Enterprises to meet the loan product assessment factor through activities that do not rise to the level of new products. For example, an Enterprise could modify its underwriting guidelines for existing loan products and develop innovative approaches to financing that do not constitute new products, consistent with safety and soundness and the requirements of conservatorship. However, if an Enterprise determines that a new product or activity would facilitate its

[19] *See* 12 U.S.C. 4541; 12 CFR part 1253.

duty to serve obligations and would be consistent with safety and soundness, it may propose such product or activity for FHFA consideration.

Requests for Comments

FHFA specifically requests comments on the following questions (please identify the question answered by the numbers assigned below):

7. Is there an alternative mechanism to an Underserved Markets Plan that would better enable FHFA to evaluate the Enterprises' Duty to Serve obligations?

8. Should the Enterprises be required to prepare Underserved Markets Plans for terms with a period other than three years?

9. Should public input be sought on the Enterprises' proposed Underserved Markets Plans and, if so, is there a more effective approach than the proposed approach?

C. Underserved Markets

1. Manufactured Housing Market—Proposed § 1282.33

a. Background

Very low-, low-, and moderate-income households have significant housing needs in the current environment. Manufactured housing is widely recognized as a significant source of housing for such households. In the United States, as of 2013, 6.7 million households resided in manufactured housing, or 5.8 percent of all households, according to the 2013 American Community Survey.[20] In many cases, manufactured housing may offer the only affordable homeownership opportunity for lower-income households.[21] In

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[20] Freddie Mac, "2015 Multifamily Outlook - Executive Summary, Multifamily Research Perspectives," at 16 (Feb. 2015), *available at* http://www.freddiemac.com/multifamily/pdf/2015_outlook.pdf.

[21] Both Delaware and North Carolina have statutes that cite the importance of manufactured housing as the only affordable option for many low- and moderate-income households and the impetus for requiring various protections for owners of manufactured housing units. *See* 25 Del. C. § 7040; N.C. Gen. Stat.

2013, the average sales price of a manufactured home was $64,000, while the average sales price of a site-built home, less the cost of the land, was $249,429.[22] Adjusted for size, manufactured homes still have significantly lower average costs per square foot than site-built homes: $43.54 as compared with $93.70.[23]

In developing specific proposals for Enterprise support of activities for the manufactured housing market that would receive Duty to Serve credit, FHFA took into account the needs of very low-, low-, and moderate-income families, the particular importance of manufactured housing, and the availability of its financing for these households. In determining eligible activities for the manufactured housing market, FHFA considered the safety and soundness implications for the Enterprises.

b. Regulatory and Additional Activities—Proposed §§ 1282.33(c), 1282.33(d)

The Safety and Soundness Act provides that the Enterprises "shall develop loan products and flexible underwriting guidelines to facilitate a secondary market for mortgages on manufactured homes for very low-, low-, and moderate-income families."[24] The statute does not enumerate specific activities or programs that the Enterprises must undertake in support of the manufactured housing market. Section 1282.33(b) of the proposed rule would specify eligible activities for the underserved manufactured housing market as activities that facilitate a secondary market for mortgages on residential properties for very low-, low-, and moderate-income families consisting of: i.

160A-383.1 (2001). *See also,* R.I. Gen. Laws 31-44.1-1. Congress has also found that manufactured homes provide a significant resource for affordable homeownership. *See* 42 U.S.C. 5401(a)(2).

[22] *See* U.S. Commerce Department, Census Bureau, "Cost & Size Comparisons For New Manufactured Homes and New Single-Family Site-Built Homes" (2007-2013) [hereinafter "Census Table"], *available at* http://www.census.gov/construction/mhs/pdf/sitebuiltvsmh.pdf. The figure for site-built homes was arrived at by subtracting the "Derived Average Land Price" ($75,071) from the average sales price for a new single-family site built home ($324,500). *See id.*

[23] *Id.*

[24] 12 U.S.C. 4565(a)(1)(A).

manufactured homes titled as real property; and ii. manufactured housing communities. Manufactured homes titled as personal property are excluded from eligibility.

Section 1282.33(c) of the proposed rule would provide Duty to Serve credit for four specific types of activities, which would constitute Regulatory Activities that the Enterprises must address in their Underserved Markets Plans by either indicating how they choose to undertake the Regulatory Activity or the reasons why they will not undertake the Regulatory Activity. The proposed Regulatory Activities are:

1. Mortgages on manufactured homes titled as real property under the laws of the state where the home is located; and
2. Mortgages on manufactured housing communities provided that:
    i. The community has 150 pads or less;
    ii. The community is government-, nonprofit-, or resident-owned; or
    iii. The community has certain minimum specified pad lease protections for tenants.

The Enterprises' Underserved Markets Plans may also include Additional Activities that facilitate a secondary market for mortgages on residential properties for very low-, low- and moderate-income families consisting of manufactured homes titled as real property and manufactured communities, subject to FHFA determination of whether such activities are eligible for Duty to Serve credit.

i. Manufactured Homes—Proposed § 1282.33(c)(1)

Under proposed § 1282.1, "manufactured home" would mean a manufactured home as defined in section 603(6) of the National Manufactured Housing Construction and Safety Standards Act of 1974, and implementing regulations. Manufactured homes are built entirely in the factory, transported to the site, and installed under a federal building code administered by the U.S. Department of Housing and Urban Development (HUD).[25] Activities related to homes manufactured before June 15, 1976, generally referred to as "mobile homes,"[26] would not receive Duty to Serve credit.

Different ownership, titling, and financing structures are available for manufactured housing, and this has a major impact on loan origination, servicing, and securitization requirements and practices. The unit may be titled and owned as personal property (chattel) or as real estate, depending on factors such as the property characteristics and state law. The borrower may or may not own the land underlying the unit. About three-fifths of manufactured housing residents who own their home also own the land on which it is sited.[27] For example, most new manufactured homes are sited on private land and not in manufactured housing communities.[28] Loans financing manufactured homes may be secured by a lien solely on the unit, separate liens on the unit and the underlying land, or a single lien covering both the unit and the underlying

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[25] *See* 42 U.S.C. 5402(6), and implementing regulations.

[26] *See* Manufactured Housing Institute, "Frequently Asked Questions" (website), *available at* http://www.manufacturedhousing.org/lib/showtemp_detail.asp?id=208&cat.

[27] *See* CFPB, "Manufactured-housing consumer finance in the United States," at 6 (Sept. 2014) [hereinafter "CFPB White Paper"], *available at* http://files.consumerfinance.gov/f/201409_cfpb_report_manufactured-housing.pdf. *See* Foremost Insurance Group, "2012 Mobile Home Market Facts" at 8 (2012), *available at* http://www.foremost.com/mobile-home-market-facts/2012-Market-Facts.pdf. *But see* L.A. Kovach, "CFPB Report alleges Manufactured Housing Lending is Expensive, sparks controversial comments from CFED, MHI and other MH industry professionals," *available at* http://www.mhmarketingsalesmanagement.com/home/industry-news/industry-in-focus/8460-cfpb-report-alleges-manufactured-housing-lending-is-expensive-sparks-controversial-comments-from-cfed-mhi-and-other-mh-industry-professionals. According to this article, the President of 21st Mortgage Corporation disputes CFPB's figure for land ownership by manufactured housing borrowers, stating instead that about 26 percent of its chattel loan borrowers reported owning their land. *Id.* Further, he states that some people report owning their land when the land is actually owned by a family member. *Id.*

[28] In 2013, 70 percent of new manufactured homes for residential use were placed on private land but only 30 percent were placed in manufactured housing communities. *See* Census Table, *supra* note 22.

land. The units themselves tend to depreciate in value.[29] After about three years, the typical manufactured home has a wholesale value of about half its original price.[30]

The Safety and Soundness Act provides that in determining whether an Enterprise has complied with the Duty to Serve the manufactured housing market, FHFA may consider loans secured by both real and personal property.[31] As with the 2010 Duty to Serve proposed rule, § 1282.33(c)(1) of this proposed rule would provide credit for Enterprise activities that facilitate a secondary market for manufactured homes titled as real property but not as chattel.

FHFA received comments on the 2010 Duty to Serve proposed rule favoring Enterprise support for chattel financing from the manufactured housing industry, Members of Congress, and some consumer advocates. Many of these commenters noted that chattel is the far greater part of the manufactured housing market and that most manufactured housing borrowers would not have received any assistance under the 2010 Duty to Serve proposed rule. In addition, more than 3,700 individuals commented in support of chattel financing by the Enterprises, generally via form letters. Many emphasized their inability to sell their homes due to a scarcity of chattel financing for

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[29] *See* Martin V. Lavin, Prologue to Saving Chattel Lending, Industry Voices - Letters to the Editor and OpEd by & for MH Industry Pros (June 23, 2011), *available at* http://www.mhmarketingsalesmanagement.com/blogs/industryvoices/tag/saving-chattel-lending/; ASSET-BACKED CERTIFICATES, SERIES 2006-OPT2, Registration Statement No. 333-127352 (Mar. 13, 2006) (Prospectus) ("Because manufactured homes generally depreciate in value, it is unlikely that repossession and resale of a manufactured home will result in the full recovery of the outstanding principal and unpaid interest on the related defaulted Manufactured Housing Contract."), *available at* http://www.sec.gov/Archives/edgar/data/1356081/000088237706000772/d454063_fwp.htm.

[30] *See* Katherine MacTavish, Michelle Eley & Sonya Salamon, "POLICY AND PRACTITIONER PERSPECTIVE: Housing Vulnerability Among Rural Trailer-Park Households," 13 Georgetown J. Poverty Law & Policy at 95, 99 (Spring 2006) [hereinafter "Rural Trailer-Park Households"]. *See generally* Ohio Department of Taxation, PROPERTY TAXATION OF MANUFACTURED AND MOBILE HOMES (Bulletin 11, Rev. Dec. 2002), *available at* http://www.tax.ohio.gov/portals/0/government/dte_bulletin11rev.pdf.

[31] *See* 12 U.S.C. 4565(d)(3).

potential buyers.

The Supplementary Information for the 2010 Duty to Serve proposed rule highlighted performance concerns about chattel lending and also discussed their high interest rates, disadvantageous loan features, and relative paucity of borrower protections.[32] These concerns remain, and some bear reiteration.

There is no current secondary market for recent-vintage, conventional chattel loans[33] and the Enterprises do not buy them.[34] Thus, analyzing performance data for conventional chattel loans is challenging. However, in Fannie Mae's limited experience with chattel loans, the loans performed poorly.[35] Despite Fannie Mae's efforts, the chattel transactions revealed high levels of inconsistency in the quality and standardization of loan documentation. For example, something as basic as the value used in the loan-to-value calculation varied dramatically from dealer to dealer and made

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32 *See* 75 FR 32099, 32103-32104 (June 7, 2010). For a discussion of borrower protections inapplicable to chattel borrowers, *see generally* CFPB, "Manufactured-housing consumer finance in the United States," at 6 (Sept. 2014), *available at* http://files.consumerfinance.gov/f/201409_cfpb_report_manufactured-housing.pdf; Ann M. Burkhart, Bringing Manufactured Housing into the Real Estate Finance System, 37 Pepp. L. Rev. 427 (Mar. 2010). For a discussion of the benefits of chattel financing, *see generally* Letter from Manufactured Housing Association for Regulatory Reform to Cong. Johnson & Cong. Crapo (Oct. 28, 2013), *available at* http://www.mhmarketingsalesmanagement.com/blogs/daily-business-news/wp-content/uploads/2014/03/MHARRO1-sent-to-Ohio-Association-member-addressed-to-Senate-Banking-Committee-1.pdf.

33 *See generally* CFPB White Paper, *supra* note 27, at 38 ("It is likely that most of the loans held in portfolio are chattel loans, for which secondary market demand has been depressed over the last decade."). *But see* Bloomberg, "Manufactured Housing May Be a Key to Unraveling Affordability Puzzle," BloombergBrief/Real Estate (Mar. 6, 2015), *available at* http://newsletters.briefs.bloomberg.com/document/2lz149ood4qz14ihabp/qampa-stephen-wheeler-of-has-capital-?hootPostID=fcb6a370a97507fc986a2e855f0ecf76. A new market entrant, HAS Capital, has a goal of bringing new asset-backed securities collateralized by chattel-financed units to the capital markets within the next 12 to 18 months. *See id.*

34 *See* Fannie Mae, "Manufactured Housing Requirements, Clarifications, and New Forms," at 6 (June 15, 2007), *available at* https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2007/0706.pdf; Freddie Mac, "Manufactured Homes Underwriting Reminders," at 1 (Dec. 2008), *available at* http://www.FreddieMac.com/learn/pdfs/uw/manuf_home.pdf.

35 *See* Fannie Mae, "Manufactured Housing Securities Status Report" (Apr. 15, 2003) (This document is a part of the "Resource Library" of the Financial Crisis Inquiry Commission), *available at* http://fcic-static.law.stanford.edu/cdn_media/fcic-docs/2003-04-15%20Fannie%20Mae%20Manufactured%20Housing%20Securities%20Status%20Report.pdf.

analysis and statistical modeling extremely challenging. In addition, the transactions also had much higher default rates and loss severities, which may be aggravated because the units depreciate substantially, and channels for reselling repossessed units can be limited.[36] Moreover, chattel-titled units sited in manufactured housing communities may further lose value if they are subject to continuously increasing rents for the land on which the units are located.[37]

A 2014 white paper by the Consumer Financial Protection Bureau (CFPB) found that chattel loans have had higher interest rates (range from 50 to 500 basis points higher) and "APRs on chattel loans are about 150 basis points higher on average than for mortgages on manufactured homes," despite the lack of economically substantial differences in income, debt-to-income ratios, credit scores, and loan-to-value ratios with real estate-titled borrowers.[38] These disparities in rates might result in large measure from the significant depreciation in the value of chattel collateral, but the question remains whether this fully accounts for the differential in loan pricing. Chattel loans also lack the benefit of many federal laws and programs that assist real estate-titled borrowers, including in part or in whole, the Making Home Affordable Program of 2009, the Helping Families Save Their Homes Act of 2009, the Fraud Enforcement and Recovery

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[36] *See* Martin V. Lavin, "Guerrilla Servicing, Manufactured Home Merchandiser," at 31-32 (Apr. 2001), *available at* http://www.martylavin.com/writings/4.01%20lavin%20guerilla.pdf. By contrast, the mortgages purchased by Freddie Mac on real estate-financed manufactured housing units have performed within Freddie Mac's expectations. Fannie Mae reports that its mortgages on real estate-financed manufactured housing units, which meet different eligibility requirements than Fannie Mae's standard products, are performing similarly to single-family mortgages overall, although in the event of default, manufactured housing generally results in higher loss severity than other single-family property types.
[37] *See* Martin V. Lavin, "Saving Chattel Lending, Manufactured Home Merchandiser," at 22 (Dec. 2007), *available at* http://www.martylavin.com/writings/saving-chattel-lending.pdf; Kevin Jewell, Consumers Union Southwest Regional Office, "Manufactured Housing Appreciation: Stereotypes and Data" (Apr. 2003), *available at* http://consumersunion.org/pdf/mh/Appreciation.pdf.
[38] *See* CFPB White Paper, *supra* note 27, at 6, 36.

Act of 2009, and the Real Estate Settlement Procedures Act (RESPA).[39] Also, except in those states where the debtor must receive notice of the right to cure a default, a lender can repossess a chattel-titled unit immediately upon default, without prior notice.[40] These repossessions have included circumstances in which units were towed with the residents still in them[41] and of significant damage to the unit's porch, deck, air conditioner, plumbing and septic system.[42]

There are also additional concerns about chattel loans from a secondary market perspective. The risks posed to secondary market investors by bankrupt chattel borrowers are greater than the risks posed by bankrupt real property borrowers. As discussed in a Fannie Mae prospectus:

> "Under certain circumstances, the security interest assigned to the trust [for the chattel loan] may become subordinate to the interests of other parties or may be vulnerable to the creditors of [the loan seller] in a bankruptcy situation. Further, even if steps are taken initially to perfect the security interests in certain of the manufactured homes, if borrowers relocate or sell their manufactured homes, the

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39 *See* Ann M. Burkhart, Bringing Manufactured Housing into the Real Estate Finance System, 37 Pepp. L. Rev. 427, 429-430 (Mar. 1, 2010); CFPB White Paper, *supra* note 27, at 24. CFPB's revised borrower disclosures under the Truth in Lending Act and RESPA will not cover "chattel-dwelling loans." *See* CFPB, TILA-RESPA Integrated Disclosure rule - Small entity compliance guide, at 19 (Sept. 2014), *available at* http://files.consumerfinance.gov/f/201409_cfpb_tila-respa-integrated-disclosure-rule_compliance-guide.pdf.

40 *See* ASSET-BACKED CERTIFICATES, SERIES 2006-OPT2, Registration Statement No. 333-127352 (Mar. 13, 2006) (Prospectus), *available at* http://www.sec.gov/Archives/edgar/data/1356081/000088237706000772/d454063_fwp.htm; Ann M. Burkhart, "Bringing Manufactured Housing into the Real Estate Finance System," 37 Pepp. L. Rev. 427, 449-450 (Mar. 1, 2010). *See also,* Amy J. Schmitz, "Promoting the Promise Manufactured Homes Provide for Affordable Housing," at 393, 13 Journal of Affordable Housing 449 (No. 3) (Spring 2004), *available at* http://lawweb.colorado.edu/profiles/pubpdfs/schmitz/SchmitzAHCDL.pdf ("MH lenders may be especially eager to grab an MH as quickly after default as possible, in light of the perceived high risks of MH lending and fear that MHs decline in value while the loans that they secure go 'underwater'").

41 In re Smith, 296 B.R. 46 (Bnkr. M.D. Ala. 2003); Consumers Union, "Manufactured Housing: A Home That the Law Still Treats Like a Car," at 2-3 (2005). *See also* In re Daniel, 137 B.R. 884 (Mar. 10, 1992).

42 *See* Giese v. NCNB Tex. Forney Banking Ctr., 881 S.W.2d 776, 1994 Tex. App. LEXIS 2084 (Tex. App. Dallas 1994).

> related security interests could cease to be perfected. Certain other laws, including federal and state bankruptcy and insolvency laws and general equity principles may limit or delay a lender's ability to repossess and resell the collateral."[43]

Moreover, insurance comparable to private mortgage insurance protecting the lender, and therefore Freddie Mac and Fannie Mae, is generally unavailable for chattel loans.

FHFA has considered the relative opportunities, needs, and risks in addressing affordable housing needs through the chattel and real estate financing channels and has concluded that, under the proposed rule, the Enterprises may only receive Duty to Serve credit for activities related to facilitating a secondary market for mortgages on individual manufactured homes titled as real estate. While chattel loans may have some benefits for a borrower, such as being easier for the borrower to qualify for financing and having lower closing costs[44] than real estate loans, FHFA believes that the disadvantages to the borrower and the safety and soundness considerations for the Enterprises of currently available chattel loan programs outweigh benefits to the borrower in many instances.

The Enterprises may be able to use their market presence to expand the use of real estate financing for manufactured homes. CFPB estimates that 65 percent of borrowers who own their land financed their units as chattel rather than as real estate,[45] and the

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[43] Fannie Mae, Prospectus Supplement, "Guaranteed REMIC Pass-Through Certificates Fannie Mae REMIC Trust 2000-14," at S-10 (Apr. 10, 2000), *available at* http://www.fanniemae.com/syndicated/documents/mbs/remicsupp/2000-014.pdf.

[44] *See* CFPB White Paper, *supra* note 27, at 36.

[45] CFPB White Paper, *supra* note 27, at 6. The Foremost Insurance Group estimates that 46 percent of manufactured homes that they insure are titled and financed as chattel even though the borrower owns the underlying land. *See* Foremost Insurance Group, "2012 Mobile Home Market Facts" 8 (2012), *available at* http://www.foremost.com/mobile-home-market-facts/2012-Market-Facts.pdf. *But see* L.A. Kovach, "CFPB Report alleges Manufactured Housing Lending is Expensive, sparks controversial comments from CFED, MHI and other MH industry professionals," *available at*

Manufactured Housing Institute states that growing numbers of buyers are opting to place their homes on land they are purchasing or already own.[46] Currently, about three-quarters of the states have statutorily-defined processes for converting a manufactured home's title from chattel to real property.[47] Improvements and changes in titling practices and laws could result in more manufactured homes financed as real estate and, therefore, being eligible for Duty to Serve credit under the rule as proposed. The National Conference of Commissioners on Uniform State Laws has adopted a model law for enactment by the states that would allow a purchaser to elect to title the manufactured home as real property and benefit from many of the same legal protections as owners of site-built homes.[48] Providing secondary market support to the real estate-financed manufactured home market raises the potential for very low-, low-, and moderate-income families to benefit from the associated lower rates, APRs, federal loan modification and refinancing programs, and enhanced consumer protections.

Despite these possibilities for real estate-financing of manufactured homes, FHFA is mindful that some chattel borrowers have significant financing needs now. Many

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http://www.mhmarketingsalesmanagement.com/home/industry-news/industry-in-focus/8460-cfpb-report-alleges-manufactured-housing-lending-is-expensive-sparks-controversial-comments-from-cfed-mhi-and-other-mh-industry-professionals. According to this article, the President of 21st Mortgage Corporation disputes CFPB's figure for land ownership by manufactured housing borrowers, stating instead that about 26 percent of its chattel loan borrowers reported owning their land. *Id.* Further, he states that some people report owning their land when it is actually owned by a family member. *Id.*

[46] *See* Manufactured Housing Institute, "2014 Quick Facts - Trends and Information About the Manufactured Housing Industry" (2014).

[47] CFPB White Paper, *supra* note 27, at 10. Generally, manufactured homes are treated as chattel by default. *Id.*

[48] *See* National Conference of Commissioners on Uniform State Laws (Uniform Law Commission), "Uniform Manufactured Housing Act" (Oct. 1, 2012), *available at* http://www.uniformlaws.org/shared/docs/manufactured_housing/2012_mha_final.pdf. The model act contains an anti-steering provision designed to prevent retailers from steering borrowers towards chattel or real estate titling. *See id.* at section 3(b). For a critique of the model act, *see* Marc J. Lifset, "Proposed ULC Manufactured Home Titling Act" (rev. Oct. 31, 2011), *available at* https://www.aba.com/aba/documents/GeneralCounsel/UniformLaws/LifsetReport.pdf.

current owners of chattel-financed homes are in distress because of their inability to sell their homes or refinance into more affordable loans because chattel financing is unavailable.[49] Moreover, the majority of the manufactured housing market is chattel-financed, with 78 percent of new manufactured housing units placed in 2013 titled as chattel.[50] In view of the significant financing needs of chattel borrowers, the safety and soundness and borrower protection concerns discussed above, FHFA specifically requests comments on what improvements could be made in originating and servicing that would make chattel loans safer for purchase by the Enterprises.

The Enterprises could pilot an initiative to purchase chattel loans, which could familiarize them with the risk and rewards of chattel financing and familiarize their counterparties with the types of origination, servicing, and consumer protection standards that would be required for any permanent chattel financing initiative. However, there may be substantial difficulties with establishing the protections and disclosures necessary to make chattel loans appropriate for Enterprise support. For example, there may be substantial difficulties in developing disclosures for borrowers analogous to those required under RESPA, particularly the prohibition on unearned referral fees and the requirements for disclosures to borrowers of closing costs,[51] and in institutionalizing

[49] The unavailability of financing for chattel-titled units can, in turn, cause deterioration of manufactured housing communities and hinder their ability to obtain financing. *See* Tony Petosa, Nick Bertino & Creighton Weber, "Wells Fargo Multifamily Capital, Manufactured Home Community Financing Handbook," at 5, 17 (9th ed. Spring 2015).

[50] *See* Census Table, *supra* note 22.

[51] For an overview of RESPA and its protections and requirements, *see generally* CFPB Consumer Laws and Regulations – RESPA (Aug. 2013), *available at* http://files.consumerfinance.gov/f/201308_cfpb_respa_narrative-exam-procedures.pdf. For information on payments that may be improper under RESPA, *see generally* "Resolving RESPA's § 8(b) Circuit Split," 73 U. Chi. L. Rev. 1487 (Fall 2006). For information on required disclosures, *see* 12 U.S.C. 2603; Bureau of Consumer Financial Protection--Real Estate Settlement Procedures Act (Regulation X), 12 CFR 1024.1 *et seq*.

these disclosures among market participants. Beyond these operational concerns, developing RESPA-like protections may require legislative and regulatory changes. The same may be true for mandating that chattel borrowers have protections and remedies analogous to those that state law affords real estate borrowers in foreclosure. Given the considerable challenges and considerable investment an Enterprise chattel pilot would entail, the overall benefits of a pilot may be uncertain.

Under § 1282.38(b)(2) of the proposed rule, Duty to Serve credit would not be provided under any of the three underserved markets for Enterprise purchases of Home Ownership and Equity Protection Act (HOEPA) loans, which are not currently eligible for sale to the Enterprises in any event.[52]

Requests for Comments

FHFA specifically requests comments on the following questions (please identify the question answered by the number assigned below):

10. What existing Enterprise criteria (contained in Freddie Mac's Manufactured Homes, Publication Number 387B and Fannie Mae's Selling Guide, B5-2[53]) for support of manufactured home loans titled as real property could be modified to expand support for very low-, low-, and moderate-income families, consistent with Enterprise safety and soundness?

11. Should Enterprise support for manufactured home loans titled as real property be a Regulatory Activity?

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[52] *See* FHFA, 2014 Annual Housing Report, at 15, Fn. 22 (Oct. 30, 2014), *available at* http://www.fhfa.gov/AboutUs/Reports/ReportDocuments/Annual_Housing_Report_2014.pdf.

[53] *See generally* Freddie Mac, 1 Single-Family Seller/Servicer Guide H33 (Sept.1, 2015); Fannie Mae, Selling Guide, B5-2 (Aug. 25, 2015), *available at* https://www.fanniemae.com/content/guide/selling/b/index.html.

12. Should the Duty to Serve rule only give credit for support to manufactured home borrowers with specific needs, such as current borrowers with real estate mortgages with excessive coupon rates (and what should be considered "excessive"), or current borrowers with chattel loans who could benefit from conversion to real estate financing? If so, what kinds of needs would be appropriate?

13. Should the Enterprises receive credit for purchasing chattel loans, on an ongoing or pilot basis? If so what improvements should be made in the process for originating and servicing that would make chattel loans safer for purchase by the Enterprises and safer for borrowers?

14. Should Duty to Serve credit be available for Enterprise support of chattel-titled manufactured homes where the units are sited in manufactured housing communities for which an Enterprise has purchased the blanket loan and the blanket loan purchase qualifies for Duty to Serve credit?

15. If FHFA allows Duty to Serve credit for Enterprise support of chattel lending, should the tenant protections as described in "Manufactured Housing Communities with Tenant Protections—Proposed § 1282.33(c)(2)(iii)" below also be required? How could compliance with borrower and tenant protections be implemented and monitored within the operational systems and capacities of the Enterprises and those of their seller/servicers and other counterparties?

ii. Manufactured Housing Communities—Proposed § 1282.33(c)(2)

Section 1282.33(c)(2) of the proposed rule would provide Duty to Serve credit for Enterprise activities related to facilitating a secondary market for mortgages on certain categories of manufactured housing communities. Under the proposed rule, three specific types of activities would constitute Regulatory Activities that the Enterprises would have to address in their Underserved Markets Plans by indicating how they will undertake one or more of the activities or the reasons why they will not undertake each of the activities. These three Regulatory Activities are:

a. Support for blanket mortgages on manufactured housing communities with 150 pads or less;

b. Support for blanket mortgages on government-, nonprofit-, or resident-owned manufactured housing communities; and

c. Support for blanket mortgages on manufactured housing communities that have certain specified minimum protections for tenants in the pad leases.

A single manufactured housing community that fits more than one of these categories would be eligible for additional Duty to Serve credit.

Proposed § 1282.1 would define "manufactured housing community" as a tract of land under unified ownership and developed for the purpose of providing individual rental spaces for the placement of manufactured homes within its boundaries. The homes, which may be owner-occupied, *i.e.*, chattel-owned, or leased from the community owner, are sited on pads. A unit owner leases the pad on which the owner-occupied unit is located, adding this cost to monthly payments on the chattel loan for the unit. Leased units may include the pad in the rent, or may require a separate rent for the pad. The total housing costs for any manufactured housing community resident typically include monthly utility payments, which can be significant.[54]

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[54] Rural Trailer-Park Households, *supra* note 30, at 95, 101.

There are an estimated 50,000 to 60,000 manufactured home communities nationwide, and they typically have fewer than 200 pads.[55] Manufactured housing communities tend to be in rural and lower-income areas.[56] More than 50 percent of rental manufactured homes are concentrated in eight states.[57]

The development of new affordable manufactured housing communities faces challenges, and the continued existence of many communities that are located closer to urban areas is threatened. Zoning constraints, permit requirements, and rising land values deter the development of new affordable communities, while providing incentives for owners to convert existing communities to uses other than affordable housing.[58] Rent

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[55] Rural Trailer-Park Households, *supra* note 30, at 95, 97. *See also* Manufactured Housing Association for Regulatory Reform, Letter to FHFA, 6-7 (Sept. 2, 2009) (comment letter on FHFA's Duty to Serve Advance Notice of Proposed Rulemaking). This trade association advised that 85 percent of manufactured housing communities have fewer than 100 units. *Id.*

[56] *See* Rural Trailer-Park Households, *supra* note 30, at 95; Housing Assistance Council, RURAL HOUSING RESEARCH NOTE, PRESERVING AFFORDABLE MANUFACTURED HOME COMMUNITIES IN RURAL AMERICA: A CASE STUDY at 3 (Mar. 2011), *available at* http://www.ruralhome.org/storage/documents/rcbi_manufactured.pdf.

[57] Freddie Mac, "2015 Multifamily Outlook - Executive Summary," Multifamily Research Perspectives, at 16-17 (Feb. 2015), *available at* http://www.freddiemac.com/multifamily/pdf/2015_outlook.pdf. The states, in order of highest number of rental manufactured housing units, are North Carolina, Texas, Florida, California, Georgia, South Carolina, Tennessee and Alabama. *Id.*

[58] *See generally* Casey J. Dawkins, C. Theodore Koebel, Marilyn Cavell, Steve Hullibarger, David B. Hattis & Howard Weissman, "Regulatory Barriers to Manufactured Housing Placement in Urban Communities," at 107 (Jan. 2011) (Report to HUD), *available at* http://www.huduser.org/Publications/pdf/mfghsg_HUD_2011.pdf ("Manufactured housing placements, on the other hand, are influenced by a variety of regulatory barriers, including the lack of by-right zoning, burdensome fees, permits, snow load standards, fire codes, zoning codes, subdivision regulations, architectural design standards, and environmental regulations."). *See also* Larry Harwood, "Manufactured Success Today's land-lease communities provide an alternative niche for investment dollars," CIRE Magazine (Mar.-Apr. 2008), *available at* http://www.ccim.com/cire-magazine/articles/manufactured-success. This article describes incentives for investors to convert manufactured housing communities as follows:

> The other advantage of owning the land rather than the homes is that land potentially can be sold or developed for another, more profitable, purpose. If located in a developing area, an older mobile home community can become a very valuable infill location sought after by home builders or commercial property developers and easily can be repurposed with minimum demolition expense. An institutional owner may have the wherewithal to undertake a redevelopment of the land when the time is right. In fact, today's stable cash flows coupled with the possibility of a long-term land play is what motivates some institutional investors to acquire manufactured-home communities. *Id.*

controls on communities in some jurisdictions benefit households, but may also contribute to a community owner's decision to sell or convert affordable communities.[59] At the same time, high-end communities are becoming more popular with investors,[60] and the demand for the limited supply of high-end communities for sale has driven up community prices.[61] Some types of manufactured housing communities have become highly desirable investments and have abundant financing options[62] that may not be available to communities in secondary and tertiary markets, or those that use septic systems and wells.[63]

Fannie Mae has been purchasing blanket loans on manufactured housing communities for more than 15 years. The blanket mortgages purchased by Fannie Mae on manufactured housing communities have performed as well as other multifamily loans in its portfolio.

Freddie Mac only recently entered the manufactured housing community market, but its blanket loan program is now fully operational. To date, the blanket mortgages purchased by Freddie Mac on manufactured housing communities have performed

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59 *See* Sandy Mazza, "State Supreme Court rejects Carson mobile home park owner's rent-control challenge," Daily Breeze (Feb. 3, 2014), *available at* http://www.dailybreeze.com/general-news/20140202/state-supreme-court-rejects-carson-mobile-home-park-owners-rent-control-challenge; Matt Kettmann, "California's Trailer-Parks War: Owners vs. Renters" (Jan. 15, 2011), *available at* http://content.time.com/time/nation/article/0,8599,2042710,00.html.

60 *See* Nancy Olmsted, Marcus & Millichap, "Investor Demand Strong for Manufactured Housing Near Urban Areas," Second Half 2015, Manufactured Housing Research Report, at 1 (2015).

61 *See* Nancy Olmsted, Marcus & Millichap, "Investors Competing for Limited Supply of Manufactured Home Communities," First Half 2015, Manufactured Housing Research Report, at 1 (2015).

62 *See* Tony Petosa, Nick Bertino & Creighton Weber, "Wells Fargo Multifamily Capital, Manufactured Home Community Financing Handbook," at 7 (9th ed. Spring 2015). For a discussion of the high desirability of manufactured housing communities as an investment, *see generally*, Nancy Olmsted, Marcus & Millichap, "Investors Competing for Limited Supply of Manufactured Home Communities," First Half 2015, Manufactured Housing Research Report (2015). *See also,* Larry Harwood, "Manufactured Success Today's land-lease communities provide an alternative niche for investment dollars," CIRE Magazine (Mar.-Apr. 2008), *available at* http://www.ccim.com/cire-magazine/articles/manufactured-success.

63 *See* Nancy Olmsted, Marcus & Millichap, "Investor Demand Strong for Manufactured Housing Near Urban Areas," Second Half 2015, Manufactured Housing Research Report, at 1 (2015).

consistently with Freddie Mac's multifamily portfolio as a whole.

Commenters on the 2010 Duty to Serve proposed rule were divided as to whether the Enterprises should receive Duty to Serve credit for supporting manufactured housing communities. Some commenters favored giving credit only for support of resident-owned manufactured housing communities, other commenters recommended giving credit for not-for-profit-owned communities, while other commenters favored giving credit for both types of communities. FHFA has considered these comments, market changes since 2010, and the housing needs of very low-, low-, and moderate-income households in developing the proposed requirements for the Duty to Serve the manufactured housing market, as further discussed below.

(1) Small Manufactured Housing Communities—Proposed § 1282.33(c)(2)(i)

Section 1282.33(c)(2)(i) of the proposed rule would provide Duty to Serve credit for Enterprise activities related to facilitating a secondary market for mortgages on blanket loans on small manufactured housing communities, defined as communities with 150 pads or less, which would constitute a Regulatory Activity. Duty to Serve credit would be available for these communities regardless of the type of ownership—for-profit, government, nonprofit or resident.

Small manufactured housing communities compose the great bulk of the manufactured housing market, and are likely to be located in lower-income or rural areas.[64] Experience suggests that, much like small multifamily rental properties, small manufactured housing communities are more likely to have lower pad or unit rents and, therefore, may be more affordable to very low-, low-, and moderate-income families.

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[64] *See generally* Rural Trailer-Park Households, *supra* note 30, at 95-97.

Small manufactured housing communities often have fewer, if any, amenities, have less developed site infrastructure, and tend to have long-term residents.[65] While these factors make smaller manufactured housing communities an important source of affordable housing, they can also make financing more difficult to obtain.

Industry observation also indicates that local banks or credit unions frequently originate the loans obtained by smaller manufactured housing communities and hold the loans in portfolio. Although permanent financing may be available on relatively favorable terms in the current market, including less expensive loans with fixed interest rates for 5-year terms,[66] this has not been the case in all market conditions and for all community owners. Similar to the financing options available to small multifamily property owners, the financing more commonly available to owners of small manufactured housing communities has not been fully amortizing and loan terms have often been short, at the end of which time a balloon payment is due. The interest rates for loans on small manufactured housing communities were more likely to be adjustable and may likely have been higher than the rates available to owners of larger communities.

The manufactured housing community blanket loans that the Enterprises have purchased to date have tended to be loans on larger manufactured housing communities. Many of the blanket loans purchased are for age-restricted communities, and are for properties located in only a few states. Duty to Serve credit is not needed to provide an incentive for Enterprise support for blanket loans for well-served manufactured housing

[65] *See generally* Larry Harwood, "Manufactured Success Today's land-lease communities provide an alternative niche for investment dollars," CIRE Magazine (Mar.-Apr. 2008), *available at* http://www.ccim.com/cire-magazine/articles/manufactured-success.

[66] In steep yield curve environments, such as the current market, interest rates are higher for longer-term loans. Some buyers opt for shorter-term loans to take advantage of the lower interest rate.

communities that are less likely to have very low-, low-, or moderate-income families. Although the Enterprises' underwriting guides do not exclude small manufactured housing communities, the Enterprises have not been significantly active in this market segment.

FHFA understands that extra efforts by the Enterprises may be necessary to support small manufactured housing communities due to economies of scale and operational considerations.[67] Nevertheless, the Enterprises could play a role in supporting fixed rate, longer-term, fully amortizing financing than is currently available for some small manufactured housing communities.

(2) Manufactured Housing Communities Owned by Governmental Units or Instrumentalities, Nonprofits, or Residents—Proposed § 1282.33(c)(2)(ii)

Section 1282.33(c)(2)(ii) of the proposed rule would provide Duty to Serve credit for Enterprise activities related to facilitating a secondary market for mortgages on manufactured housing communities owned by governmental units or instrumentalities, nonprofits, or residents, which would constitute a Regulatory Activity.

The purpose of these types of manufactured housing communities is usually to serve lower-income residents. These communities tend to preserve the continued existence of the community, promote fair treatment of tenants, and help preserve permanent affordability.[68] However, these communities often have difficulty obtaining financing due to typically lower profitability relative to communities with higher-income

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[67] *See* George Allen, "Manufactured-Home Communities Come of Age," CCIM Institute (Oct. 1996), *available at* http://www.ccim.com/cire-magazine/articles/manufactured-home-communities-come-age ("It takes 50 to 75 -- or even 100 -- rental home sites to generate an economy of scale that adequately rewards a passive investor, funds a centralized property management operation for a syndicator or real estate investment trust (REIT), and provides a satisfactory comfort factor for most lenders.").

[68] *See generally* Millennium Housing – Mission Statement, *available at* http://www.millenniumhousing.net/asp/Site/About/Mission/index.asp.

residents.[69] One study found that residents of resident-owned communities "have consistent economic advantages over their counterparts in investor-owned communities, as evidenced by lower lot fees, higher average home sales prices, faster home sales, and access to fixed rate home financing."[70] Although government-, nonprofit-, and resident-owned communities currently make up a very small portion of the overall manufactured housing community market, more active support by the Enterprises for these types of ownership may encourage more manufactured housing communities to convert to this form of ownership, with the attendant benefits for the residents.

(3) Manufactured Housing Communities with Tenant Pad Lease Protections—Proposed § 1282.33(c)(2)(iii)

Section 1282.33(c)(2)(iii) of the proposed rule would provide Duty to Serve credit for Enterprise activities related to facilitating a secondary market for blanket loans on manufactured housing communities that have certain specified minimum pad lease protections for tenants, which would constitute a Regulatory Activity.

Business practices of manufactured housing rental community owners with their tenants vary widely, as with all forms of rental housing. For example, some manufactured housing community owners have sharply raised pad rents or unexpectedly canceled leases, particularly where the land has appreciated in value due to urban sprawl.[71] Some community owners have reportedly suppressed tenant complaints and organizing efforts for tenant associations. Tenants have been displaced as a result of

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[69] *See generally* Millennium Housing – Our History, *available at* http://www.millenniumhousing.net/asp/Site/About/History/index.asp.

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

[71] Rural Trailer-Park Households, s*upra* note 30, at 95, 100. *See generally* Laura Flanders, "Affordable Housing for Seniors in the Cross Hairs in Chicago," The Nation (May 15, 2012), *available at* http://www.thenation.com/article/affordable-housing-seniors-cross-hairs-chicago/.

sales of their communities or conversions of their communities to other uses.[72] A nationwide scarcity of available sites for relocation of existing manufactured housing units has also allowed some manufactured housing community owners or managers to enforce restrictive community regulations.[73] The Rhode Island Supreme Court has noted that "special circumstances" exist with manufactured housing communities, and unequal bargaining power may lead to “abuses” by the manufactured housing community owner.[74]

Manufactured housing community tenants face significant costs and difficulties in relocating their units.[75] Relocation costs can total between $3,000[76] and $5,000.[77] Tenants are usually responsible for removing their own skirting, deck, steps, and landscaping prior to moving their units.[78] The tenant may not be able to find a new manufactured housing community in which to live because many communities are full or

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72 Regarding displacement of residents, *see* Shannon Sims, “The odd legal limbo for mobile home owners,” USA Today (May 4, 2015), *available at* http://www.usatoday.com/story/money/2015/05/04/ozy-odd-limbo-mobile-home-owners/26866693/. For a discussion of unequal bargaining power between manufactured community owners and tenants, and related legislative responses, *see* “Validity, construction, and application of mobile home eviction statutes,” 43 A.L.R.5th 705 (1996); Bailey H. Kuklin, “Housing and Technology: The Mobile Home Experience,” 44 Tenn. L. Rev. 765 (Spring 1977).

73 Rural Trailer-Park Households, s*upra* note 30, at 95, 99-100.

74 *See* Kingston Mobile Home Park v. Strashnick, 774 A.2d 847, 853 (R.I. 2001), noted in Brown v. Shumpert, 2003 R.I. Super. LEXIS 125, Superior Court of Rhode Island, Providence (Oct. 2, 2003, Filed C.A. NO.: PC99-5926, C.A. NO.: PC02-2594).

75 Frank Rolfe, “Why Mobile Home Parks Have Such An Unfair Advantage in Commercial Real Estate,” *available at* http://www.mobilehomeuniversity.com/articles/why-mobile-home-parks-have-an-unfair-advantage-in-commercial-real-restate.php. *See also* Drew Harwell, “Mobile home park investors bet on older, poorer America,” Tampa Bay Times (May 17, 2014), *available at* http://www.tampabay.com/news/business/realestate/mobile-home-park-investors-bet-on-older-poorer-america/2180277.

76 William Apgar, Allegra Calder, Michael Collins & Mark Duda, Neighborhood Reinvestment Corporation, “An Examination of Manufactured Housing as a Community-and Asset-Building Strategy,” at 5 (Sept. 2002), *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w02-11_apgar_et_al.pdf.

77 *See* Jessica Nicklos, “Frank & Dave - Their Life in the Affordable Housing Industry and Predictions for the Future,” at 9.

78 *See* Tony Guerra, “The Average Cost to Deliver and Set Up a Mobile Home,” *available at* http://homeguides.sfgate.com/average-cost-deliver-set-up-mobile-home-96554.html.

will not accept used units.[79] Zoning regulations in some counties and municipalities prevent the placement of older units.[80] Currently, neither Enterprise will purchase a mortgage secured by a manufactured home that has been moved.[81]

Pad lease protections in manufactured housing communities are generally a matter of state or local law and, thus, these protections can vary widely.[82] In light of concerns raised about the treatment of tenants in some manufactured housing communities,[83] the proposed rule would include a list of pad lease protections that FHFA believes would be appropriate for Duty to Serve credit. Specifically, the proposed rule would provide that Enterprise support for a manufactured housing community that has, at a minimum, all of the following pad lease protections would receive Duty to Serve credit:

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[79] *See* Consumers Union, "Manufactured Homeowners Who Rent Lots Lack Security of Basic Tenants Rights" (Feb. 21, 2001), *available at* http://consumersunion.org/pdf/manhome.pdf. *But see* Harold D. Hunt, "Keys to Successful Manufactured Housing Communities," Publication 2101, at 4 (June 4, 2015), *available at* http://recenter.tamu.edu/pdf/2101.pdf.

[80] *See* Schanzenbach v. Town of La Barge, 706 F.3d 1277 (10th Cir. 2013); Five C's, Inc. v. County of Pasquotank, 195 N.C. App. 410, 672 S.E.2d 737 (2009). *See generally* David W. Owens, "Manufactured Housing, Modular Housing, and Zoning" (May 2014) (School of Government, The University of North Carolina at Chapel Hill), *available at* https://www.sog.unc.edu/resources/legal-summaries/manufactured-housing-modular-housing-and-zoning.

[81] *See* Fannie Mae, Selling Guide, "B2-3-02: Special Property Eligibility and Underwriting Considerations: Factory-Built Housing (04/15/2014)" (Apr. 15, 2014) ("The unit must not have been previously installed or occupied at any other site or location."), *available at* https://www.fanniemae.com/content/guide/selling/b2/3/02.html; Freddie Mac, 1 Single-Family Seller/Servicer Guide H33.3(b) (Sept.1, 2015).

[82] *See* United States Government Accountability Office, Report to Congressional Requesters, "FEDERAL HOUSING ADMINISTRATION–Agency Should Assess the Effects of Proposed Changes to the Manufactured Home Loan Program," GAO-07-879, at 5 (Aug. 2007), *available at* http://www.gao.gov/new.items/d07879.pdf. The National Consumer Law Center reports, for example, that only 16 states require that manufactured housing community pad leases have some minimum lease term, and only 33 states require grounds for evicting residents from a community. *See* National Consumer Law Center, "Manufactured Housing Resource Guide - Protecting Fundamental Freedoms in Communities," at 4-5 (Oct. 2010), *available at* http://cfed.org/assets/pdfs/groundwork.pdf.

[83] *See* United States Government Accountability Office, Report to Congressional Requesters, "FEDERAL HOUSING ADMINISTRATION–Agency Should Assess the Effects of Proposed Changes to the Manufactured Home Loan Program," GAO-07-879, at 5 (Aug. 2007), *available at* http://www.gao.gov/new.items/d07879.pdf; National Consumer Law Center, "Manufactured Housing Resource Guide - Protecting Fundamental Freedoms in Communities," at 4-5 (Oct. 2010), *available at* http://cfed.org/assets/pdfs/groundwork.pdf.

a. The lease term must be for a minimum of one year and renewable absent good cause;[84]

b. There must be at least 30 days advance written notice of a rent increase;

c. There must be at least a five-day grace period for rent payments, and tenants must have a right to cure defaults on rent payments;

d. If the tenant defaults on rent payments, the tenant must have the right to:

    i. Sell the tenant's unit without having to first relocate it out of the community;

    ii. Sublease or assign the lease for the unexpired term to the new buyer of the tenant's unit without any unreasonable restraint;

    iii. Post "For Sale" signs; and

    iv. Have a reasonable period of time after an eviction to sell the unit; and,

e. Tenants must receive at least 120 days advance notice of a planned sale or closure of the community within which time the tenants, or an organization acting on behalf of a group of tenants, may match any bona fide offer for sale. The community owner shall consider the tenants' offer and negotiate with them in good faith.

FHFA recognizes that an individual tenant is unlikely to be able to purchase a community by himself or herself. For this reason, the pad lease protections would allow tenants 120 days to match any bona fide offer for sale, giving tenants time to form a

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[84] For a discussion of the effects of month-to-month and annual leases, *see* Rupert Neate, "Trailer park king sued by residents in Texas for raising rents," theguardian (May 11, 2015), *available at* http://www.theguardian.com/us-news/2015/may/11/trailer-park-king-sued-by-residents-in-texas-for-raising-rents.

homeowners' association or tenants' association to purchase the community.

FHFA believes that the Enterprises can use their market influence in support of the pad lease protection standards described here becoming more of a norm in the industry. An Enterprise may verify that the pad leases in a manufactured housing community being served by the Enterprise contain, at a minimum, the specified tenant protections at the time the Enterprise purchases the blanket loan by obtaining a certification to this effect from the seller/servicer. Sellers and servicers would not be expected to oversee compliance by the manufactured housing community borrowers with these pad lease provisions. Likewise, FHFA would not require that the covenants in the blanket loan provide for default in the event of non-compliance with the tenant protections by the manufactured housing community borrower. The tenants, in their discretion, would be responsible for pursuing any private relief in those instances that may be available under state law.

Some commenters on the 2010 Duty to Serve proposed rule favored tenant protections for any loan that receives Duty to Serve credit. Although the Enterprises are major participants in the manufactured housing community market and have some degree of influence, this is currently a highly competitive market. Requiring the tenant protections for the Duty to Serve eligibility of every manufactured housing community loan may simply incentivize community owners to seek funding elsewhere.

Manufactured housing communities subject to federal, state or local laws providing pad lease protections equal to or greater than those listed above would meet the requirements of the proposed rule. As an alternative to obtaining a seller/servicer certification of the pad lease protections for a community securing a loan purchased by an

Enterprise, the Enterprise may verify that such laws apply to the community.

c. Evaluating Affordability for Manufactured Housing Communities—Proposed § 1282.39(g)

The Safety and Soundness Act provides that the Enterprises' Duty to Serve manufactured housing activities must be for very low-, low-, and moderate-income families.[85] Under the statute, "very low-income" is defined as having an income of 50 percent or less of the area median income, adjusted for household size; "low-income" is defined as having an income of 80 percent or less of the area median income, adjusted for household size; and "moderate-income" is defined as having an income of 100 percent or less of the area median income, adjusted for household size.[86]

Owners of manufactured housing communities are unlikely to know the incomes of all of their residents at the time a blanket loan for the community is originated or sold to an Enterprise. In order for an Enterprise's purchase of a blanket loan on a manufactured housing community to receive credit under the loan purchase assessment factor, an alternative to requiring the Enterprises to obtain the income of the tenants in the community is needed. FHFA has previously established a proxy methodology for determining affordability for the Enterprises' housing goals that uses total monthly housing costs (rents plus utility costs) instead of incomes.[87] That methodology would be used for determining affordability of multifamily properties under this proposed rule. However, total monthly housing costs (unit owners' total monthly note payments plus pad rent payments adjusted for bedroom size) in manufactured housing communities are generally not known to the owners of the communities. Accordingly, to determine

[85] 12 U.S.C. 4565(a)(1)(A).
[86] 12 U.S.C. 4502.
[87] *See* 80 FR 53392, 53432 (Sept. 3, 2015), *to be codified at* 12 CFR 1282.15(d)(1).

affordability for manufactured housing communities, § 1282.39(g) of the proposed rule would set forth a methodology that would apply to manufactured housing communities, regardless of the type of ownership or size of the community. The methodology would compare the median income for the census tract in which the community is located with the median income for the entire metropolitan area in which the census tract is located.

For example, for a community located in a census tract where the median income does not exceed 100 percent of the median income of the area in which the census tract is located, all residents of the community would be deemed to have incomes not exceeding 100 percent of the area median income and, thus, would meet the definition of "moderate-income" in the Safety and Soundness Act. In this case, the entire unpaid principal balance of the loan on such a community would receive credit, provided the loan meets all other requirements of the regulation.

For a manufactured housing community located in a census tract where the median income exceeds the median income of the area in which the census tract is located, the area median income would be divided by the median income of the census tract to generate a percentage, which would then be multiplied by the unpaid principal balance of the blanket loan. For example, if the census tract's median income is $125,000, the area median income is $100,000, and the unpaid principal balance of the loan is $1,000,000, the Enterprise would receive partial Duty to Serve credit of $800,000, as calculated in the following manner:

Step 1: $100,000 ÷ $125,000 = 80%

Step 2: 80% x $1,000,000 = $800,000

FHFA recognizes that under this proposed methodology, the Enterprises could receive Duty to Serve credit for purchases of mortgages on manufactured housing communities that may have some residents with incomes exceeding the area median income. The proposed methodology takes this into account through the partial credit component of the methodology. FHFA believes that the proposed methodology is a reasonable approach that will result in Duty to Serve credit being provided for manufactured housing communities that largely serve income-eligible households.

Home Mortgage Disclosure Act (HMDA) data for 2013 show that 64 percent of originations of loans on manufactured housing units were for borrowers with incomes at or below 100 percent of area median income. Forty-eight percent of these borrowers were very low- or low-income.[88] Another data series, the American Housing Survey, shows that, as of 2013, the median income for "manufactured housing/mobile home" households was $28,400,[89] while the estimated median income nationwide of all homeowners was $64,400.[90] In 2009, 22 percent of manufactured housing residents had incomes at or below the federal poverty level.[91] While the data do not indicate whether these borrowers reside in manufactured housing communities, they are indicative generally of the lower incomes of manufactured housing residents and suggest a higher

[88] These percentages come from 2013 HMDA data on manufactured housing unit loan originations, including borrowers residing in manufactured housing communities as well as borrowers who owned the land on which their units were located. Borrower income was not reported in HMDA on 14 percent of originations. To arrive at the figures presented (64 percent at or below area median income and 36 percent above area median income), this 14 percent figure was subtracted from the total and the remainder adjusted proportionately as between originations above and below the median. FHFA is unaware of any reason the 14 percent of borrowers would disproportionately have incomes over 100 percent of area median income. The figures presented include home purchase and refinance loans, but not rehabilitation loans.

[89] U.S. Census Bureau, American Housing Survey (2013, Last Revised: May 14, 2015), Table C-09A-AO, *available at* http://www.census.gov/programs-surveys/ahs/data/2013/national-summary-report-and-tables--ahs-2013.html.

[90] *See* U.S. Department of Housing and Urban Development, Notice PDR 2013-01, at 1 (Dec. 11, 2012), *available at* http://www.huduser.org/portal/datasets/il/il13/Medians2013.pdf.

[91] *See* Howard Banker & Robin LeBaron, Fair Mortgage Collaborative, "Toward a Sustainable and Responsible Expansion of Affordable Mortgages for Manufactured Homes," at 9 (Mar. 2013), *available at* http://cfed.org/assets/pdfs/IM_HOME_Loan_Data_Collection_Project_Report.pdf.

likelihood that residents of manufactured housing communities have lower incomes.[92] At the same time, giving Duty to Serve credit for a manufactured housing community that serves both lower-income and higher-income households may be desirable because it may contribute significant benefits to the low- and moderate-income households in the community and to the success and sustainability of the community. There is substantial research on the benefits of mixed-income housing.[93]

Requests for Comments

FHFA specifically requests comments on the following questions (please identify the question answered by the number assigned below):

16. Are there other segments of the manufactured housing market besides those discussed above that warrant Enterprise support under the Duty to Serve, such as communities located in lower-income or economically distressed areas?

17. Is the proposed limit of 150 pads for an eligible small manufactured housing community appropriate? Is there a different threshold that could better achieve the purposes of the Duty to Serve?

18. Are the proposed pad lease protections appropriate? Should any additional pad lease protections be required for an Enterprise to receive Duty to Serve credit?

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[92] Some states have made legislative determinations finding that manufactured housing serves lower- and moderate-income households that might otherwise go without housing. *See generally* N.C. Gen. Stat. 160A-383.1 (2001). *See also* R.I. Gen. Laws section 31-44.1-1; 25 Del. C. section 7040.

[93] *See* HUD Community Planning and Development, "Mixed-Income Housing and the HOME Program" (2003), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=19790_200315.pdf. *See generally* Diane K. Levy, Zach McDade & Kassie Dumlao, "Effects from Living in Mixed-Income Communities for Low-Income Families – A Review of the Literature" (Nov. 2010) (Urban Institute), *available at* http://www.urban.org/research/publication/effects-living-mixed-income-communities-low-income-families/view/full_report; Robert Chaskin & Mark Joseph, The University of Chicago School of Social Service Administration, "Mixed-Income Development Study" (Spring 2009), *available at* https://ssascholars.uchicago.edu/mixed-income-development-study/content/overview-0. *But see* Robert C. Ellickson, "The False Promise of the Mixed-Income Housing Project," 57 UCLA L. Rev. 983 (2010)(concluding that many recent social-scientific studies weaken the case for government support of mixed-income projects).

19. Should the proposed pad lease protections be required for any manufactured housing community, regardless of its ownership or size, to be eligible for Duty to Serve credit?

20. Would the proposed methodology for determining affordability effectively approximate the incomes of the community's tenants? Are there other approaches that could effectively approximate the incomes of manufactured housing community tenants to comply with the Duty to Serve family income requirements, *e.g.*, the size of the blanket loan on the community or the size of the community?

21. Could governing or financing documents for the community provide a proxy for resident incomes? For communities owned by governmental units or instrumentalities, would regulations, handbooks or financing documents specifying income criteria for the residents be an appropriate indicator of tenant incomes? For nonprofit-owned and resident-owned communities, would the founding documents for the community, which describe its mission as serving lower-income families, or financing agreements or other documents from funding sources specifying the required income levels of intended beneficiaries, be appropriate indicators of tenant incomes? Is there any comparable documentation that could be applicable to communities with for-profit owners, *e.g.*, where they have accepted income restrictions in order to accept Section 8 vouchers?

22. Where the loan seller knows the incomes of the tenants of a manufactured housing community at the time an Enterprise purchases the blanket loan on the community, should the incomes be used to determine affordability, and what operational concerns might be associated with transferring the income data to the Enterprises?

23. Are there other loan programs, terms or lending criteria that, if adopted, could increase Enterprise purchases of blanket loans on manufactured housing communities?

24. Should FHFA address geographic diversity of the Enterprises' assistance for manufactured housing as part of the Duty to Serve manufactured housing community financing needs, and if so, how?

25. Since manufactured housing community acquisition loans may support large sales prices on existing communities which, in turn, may drive increases in pad rents and render the communities unaffordable to lower-income households, should acquisition loans be ineligible for Duty to Serve credit? Are there particular instances where acquisition loans benefit very low-, low-, and moderate-income households?

26. Would Enterprise refinance loans be particularly helpful to residents because they are long-term, fixed rate and relatively low-cost, which reduces the pressure on community owners to increase pad rents?

2. Affordable Housing Preservation Market—Proposed § 1282.34

a. Background

The Safety and Soundness Act provides that the Enterprises "shall develop loan products and flexible underwriting guidelines to facilitate a secondary market to preserve housing affordable to very low-, low-, and moderate-income families," including housing projects subsidized under certain specified federal grant, subsidy and mortgage insurance programs enumerated in the Act.[94] Section 1282.34(c) of the proposed rule would provide Duty to Serve credit for Enterprise activities related to facilitating a secondary market for mortgages on housing under any of these statutorily-enumerated programs.

In addition, § 1282.34(d) of the proposed rule would provide Duty to Serve credit for Enterprise activities related to facilitating a secondary market for mortgages for:

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[94] 12 U.S.C. 4565(a)(1)(B).

existing small multifamily properties; energy efficiency improvements on existing multifamily rental properties; energy efficiency improvements on existing owner-occupied single-family properties; affordable homeownership preservation through shared equity homeownership programs; HUD's Choice Neighborhoods Initiative; and HUD's Rental Assistance Demonstration program. Under the proposed rule, each of these activities would constitute a Regulatory Activity that the Enterprises must address in their Underserved Markets Plans by describing how they will undertake the activity or explaining the reasons why they will not undertake the activity. The Plans may also include Additional Activities that support housing for very low-, low-, or moderate-income families consisting of affordable rental housing preservation and affordable homeownership preservation, subject to FHFA determination of whether such activities are eligible for Duty to Serve credit.

b. Interpreting "Preservation"

The Safety and Soundness Act does not define the term "preservation" for the affordable housing preservation market. Preservation strategies for affordable rental housing and homeownership differ.

i. Affordable Rental Housing

For affordable rental housing, preservation is generally understood among affordable housing practitioners to mean preserving the affordability of the rents to tenants in existing properties, including preventing conversion of the properties to market rents at the end of the required long-term affordability retention periods, typically 15 years, which is also the time at which major rehabilitation of the properties is usually needed.[95] This is consistent with the plain meaning of the term "preservation," which is maintaining something in its existing state.[96] The concept of "preservation" in the rental housing context is not generally understood to include new construction of rental properties.

However, the population has been expanding while the stock of affordable rental housing has been shrinking.[97] The rate of new construction of affordable rental housing has not kept pace with the demand.[98] Further, more desirable markets face particular upward rent pressure.[99] One way to preserve affordability is to give credit for newly constructed rental units where long-term affordability is required by regulatory agreements, such as for at least 15 years, the standard affordability retention period for rental housing. In addition, some of the specifically enumerated programs under the affordable housing preservation market in the Safety and Soundness Act involve new construction, arguably indicating congressional intent that support for new construction be included under this market, although Congress may have intended only that support for existing properties under these programs at the point of their expiring regulatory agreements be included in this market.

FHFA specifically requests comments on whether the term "preservation" should be interpreted to allow Duty to Serve credit for Enterprise support for both the purchase

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95 This is the focus of HUD's Office of Affordable Housing Preservation (recently renamed the Office of Recapitalization).

96 *See* Cambridge Dictionaries Online, definition of "preserve."

97 *See* Evidence Matters, Policy Development and Research, Department of Housing and Urban Development, "Preserving Affordable Rental Housing: A Snapshot of Growing Need, Current Threats, and Innovative Solutions," Summer 2013, *available at* http://www.huduser.gov/portal/periodicals/em/em_newsletter_summer_2013_fnl.pdf.

98 *Id*.

99 *Id*.

of permanent construction take-out loans[100] on rental properties with long-term affordability regulatory agreements and the purchase of refinanced mortgages on existing rental properties with long-term affordability regulatory agreements.

ii. Energy Efficiency Improvements on Existing Multifamily Rental Properties

Lowering energy and water use in multifamily buildings will reduce the total amount that tenants spend for the energy and water that they do use, thus reducing their utility consumption. This can be considered "preservation" under the affordable housing preservation market because housing costs are typically defined as rent plus utility costs. Thus, savings in utility consumption that reduce utility expenses may help maintain the overall affordability of rental housing for tenants. Accordingly, under the proposed rule, Enterprise support for energy and water efficiency improvements on existing multifamily properties affordable to very low-, low-, and moderate-income families would be a Regulatory Activity, provided there are verifiable, reliable projections or expectations that the improvements financed by the loan will reduce energy and water consumption by the tenant by at least 15 percent. The reduced utility costs derived from the reduced consumption must not be offset by higher rents or other charges imposed by the property owner, and the reduced utility costs must offset the upfront costs of the improvements within a reasonable time period.

iii. Energy Efficiency Improvements on Single-Family, First-Lien Properties

As with multifamily rental properties, preservation of affordable single-family properties (homeownership or rental) may also encompass lowering home energy costs.

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[100] The Enterprises purchase permanent construction take-out loans but not acquisition/development/construction loans.

Lowering energy costs can help a homeowner to continue to afford mortgage payments and other housing costs and remain in the home or help a tenant afford rent. Under the proposed rule, Enterprise support for energy efficiency improvements on existing single-family, first-lien properties would be a Regulatory Activity provided there are verifiable, reliable projections or expectations that the improvements financed by the loan will reduce utility consumption by the homeowner or tenant by at least 15 percent. The reduced utility costs derived from the reduced consumption must offset the upfront costs of the improvements within a reasonable time period, and in the case of a single-family rental property, the reduced utility costs must not be offset by higher rents or other charges imposed by the property owner.

iv. Shared Equity Programs

For affordable homeownership, there are no regulatory agreements similar to those with affordable rental properties that expire at the 15-year point, when preservation of the units as affordable units to lower-income tenants is in jeopardy and rehabilitation of the property is often needed. Rather, preservation for affordable homeownership entails ensuring that the price of the home is affordable over a long-term period to initial and subsequent purchasers, whether purchasing a newly constructed home or an existing home. Shared equity programs offer this type of sustainable affordable homeownership. Under the proposed rule, Enterprise support of financing under shared equity programs that involve the creation of long-term affordable homeownership would be a Regulatory Activity, as further discussed below.

v. Choice Neighborhoods Initiative

The proposed rule would establish as a Regulatory Activity Enterprise support for HUD's Choice Neighborhoods Initiative (CNI).[101] Created after the enactment of HERA, CNI seeks to preserve and transform distressed, HUD-supported affordable housing. CNI focuses on creating mixed-income housing and investing in neighborhood improvements and upgrades. The proposed rule would provide Duty to Serve credit for Enterprise activities supporting permanent financing under CNI.

vi. Rental Assistance Demonstration Program

The proposed rule would establish as a Regulatory Activity Enterprise support for HUD's Rental Assistance Demonstration (RAD) program.[102] Also created after the enactment of HERA, the RAD program seeks to improve and preserve distressed, HUD-supported affordable housing. The program enables public housing authorities to tap outside sources of capital to renovate and preserve housing affordable to very low-income households. The proposed rule would provide Duty to Serve credit for Enterprise activities supporting permanent financing under the RAD program.

Requests for Comments

FHFA specifically requests comments on the following questions (please identify the question answered by the number assigned below):

27. Are there other options on how to interpret preservation of multifamily or single-family affordable housing that FHFA should consider?

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[101] 42 U.S.C. 1437v; *see also* http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/cn.

[102] Consolidated and Further Continuing Appropriations Act of 2012 (PL 112-55), as amended, 42 U.S.C. 1437f note; *see also* http://portal.hud.gov/hudportal/HUD?src=/RAD.

28. Should FHFA require that preservation activities extend the property's regulatory agreement that restricts household incomes and rents for some minimum number of years, such as 10 years, beyond the date of the Enterprises' loan purchase? If so, what would be an appropriate minimum period of long-term affordability for the extended use regulatory agreement?

29. Should Enterprise purchases of permanent construction takeout loans on new affordable multifamily rental properties with extended-use regulatory agreements that will keep rents affordable for a specified long-term period, such as 15 years or more, receive credit under the affordable housing preservation market? What would be an appropriate period of long-term affordability for the extended-use regulatory agreements?

c. Statutory Activities—Proposed § 1282.34(c)

The Safety and Soundness Act provides that the Enterprises "shall develop loan products and flexible underwriting guidelines to facilitate a secondary market to preserve housing affordable to very low-, low-, and moderate-income families, including housing subsidized under" the following government programs:

- The project-based and tenant-based rental assistance programs under Section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f);
- The program under Section 236 of the National Housing Act (rental and cooperative housing for lower-income families) (12 U.S.C. 1715z-1);
- The program under Section 221(d)(4) of the National Housing Act (housing for moderate-income and displaced families) (12 U.S.C. 1715l);
- The supportive housing for the elderly program under Section 202 of the Housing Act of 1959 (12 U.S.C. 1701q);

- The supportive housing program for persons with disabilities under Section 811 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C. 8013);
- The programs under title IV of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11361 *et seq.*), but only permanent supportive housing projects subsidized under such programs;
- The rural rental housing program under Section 515 of the Housing Act of 1949 (42 U.S.C. 1485);
- The low-income housing tax credit (LIHTC) under Section 42 of the Internal Revenue Code of 1986 (26 U.S.C. 42); and
- Comparable state and local affordable housing programs.[103]

Under § 1282.34(c) of the proposed rule, Duty to Serve credit would be provided for Enterprise activities related to facilitating a secondary market for mortgages on housing under these statutorily-enumerated programs. The Enterprises would be required to address all of the statutory programs in their Underserved Markets Plans by either indicating how they choose to undertake activities under these programs or the reasons why they will not undertake activities under the programs.

Almost all the subsidized rental units covered by the statutorily-enumerated programs are targeted to very low- or low-income families. Across the country, thousands of multifamily properties with federal, state or local subsidies that serve very low- and low-income families are at risk of conversion to market rate rents.[104] Properties

[103] 12 U.S.C. 4565(a)(1)(B).
[104] *See* Joint Center for Housing Studies of Harvard University, "The State of the Nation's Housing 2015," at 33-34 (2015), *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs-sonhr-2015-full.pdf.

become at risk when rent affordability restrictions in the regulatory agreements or subsidies expire upon loan maturity or contract expiration, or upon early sale or refinancing of the property, or when properties have deteriorated and become unsafe or uninhabitable.[105] The Enterprises play an important role in helping to preserve subsidized rental housing by purchasing first lien mortgages that combine refinancing of existing debt with additional financing for rehabilitation, which enables the subsidies and the regulatory agreements to be extended. FHFA will pay particular attention to the number of rental properties nationwide that are at risk of losing their subsidies and the extent of the Enterprises' support for helping to preserve this housing resource.

The Enterprises currently offer specialized loan purchase programs that are designed to provide permanent financing for several of the statutorily-enumerated programs and, in particular, the Section 8 rental assistance and LIHTC programs, and they actively participate in the preservation of this housing stock. However, some of the other statutorily-enumerated programs are either grant programs or FHA full insurance programs for which there is no known role for the Enterprises' loan purchase programs and no history of their participation. The status of each program and the role that the Enterprises could play in assisting each is discussed below.

i. HUD Section 8 Rental Assistance Program

Under HUD's Section 8 rental assistance program, property owners receive rent payment subsidies from HUD covering the difference between the market rent for a unit and the tenant's rent contribution. This program has a rent affordability requirement, which is that 30 percent of the tenant's adjusted gross income contribute to rent and

[105] Stewards of Affordable Housing for the Future, "Housing 'at risk,'" *available at* http://www.poah.org/about/at-risk.htm.

utilities. HUD provides rental assistance in the form of vouchers or certificates that move with the individual household, or through contractual obligations with the property owner, known as Housing Assistance Payment (HAP) contracts.

Both Enterprises purchase loans on properties with Section 8 HAP contracts or with units supported by Section 8 vouchers or certificates. Properties supported by Section 8 rental assistance represent a significant portion of the Enterprises' existing affordable housing loan purchases.

Several commenters on the 2010 Duty to Serve proposed rule stated that the Enterprises' underwriting guidelines were unnecessarily strict and limit their ability to provide adequate support for financing of Section 8-assisted properties. That is because the Enterprises do not recognize all of the Section 8 rental income in their loan underwriting and also require high reserves to protect against annual appropriations risk on HAP contracts.[106] In the commenters' view, the Enterprises' requirements make refinancing more difficult or infeasible, or result in smaller loan amounts with fewer funds available for property rehabilitation. Under the Request for Comments section below, FHFA specifically requests comments on whether there are ways the Enterprises can extend their support for Section 8-assisted properties, including potential changes to their underwriting and reserve requirements that are consistent with safety and soundness.

ii. HUD Section 236 Interest Rate Subsidy Program

Under the Section 236 program, HUD subsidizes the interest rate down to one percent on mortgages on multifamily properties, known as Interest Reduction Payments (IRP), in exchange for restrictions on the rents to affordable levels for the term of the

[106] "Appropriations risk" is the possibility that Congress will appropriate no or less funds for a program than requested by the executive branch.

mortgage, but no fewer than 20 years. HUD data indicate that approximately 110 properties have subsidized interest rate loans that will mature in 2015, 2016 and 2017.[107] HUD permits the optional continuation of IRP assistance when projects assisted under Section 236 are refinanced. Both Enterprises currently have specialized programs to purchase refinanced mortgages on Section 236 subsidized loans that maintain the interest rate subsidy in accordance with HUD requirements. Under the Request for Comments section below, FHFA specifically requests comments on whether there are ways the Enterprises can extend their support for the Section 236 program.

iii. HUD Section 221(d)(4) FHA Insurance Programs

HUD's Section 221(d)(4) FHA insurance program provides financing for the new construction or substantial rehabilitation of multifamily properties, and for permanent financing when construction is completed. The program does not require affordability restrictions on the rents and there are no income limits for tenants, thus properties financed under this program may, and often do, provide market-rate housing.

There is no obvious role for the Enterprises to support projects funded under the Section 221(d)(4) program other than to refinance the original loans and remove the properties from the FHA insurance program. In their comments on the 2010 Duty to Serve proposed rule, both Enterprises stated that activities related to refinancing Section 221(d)(4) loans on affordable housing properties should count towards the Duty to Serve as preservation activities if the properties are affordable and if the use agreement is extended.

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

Under the Requests for Comments section below, FHFA specifically requests comments on whether there are other ways the Enterprises can support properties currently funded under the Section 221(d)(4) program.

iv. HUD Section 202 Housing Program for Elderly Households

HUD's Section 202 program for low-income elderly households is a capital advance program under which HUD provides construction or rehabilitation funds and rental subsidies. Properties financed under this program have long-term use agreements for the term of the loan, which can expire upon early sale or refinancing or at loan maturity and put the properties at risk of conversion to market-rate rents. Refinancing Section 202 properties allows the owners to obtain additional funds for rehabilitation and to extend the rental subsidies and use agreements.[108]

Most Section 202 properties are refinanced through FHA insurance programs, which offer favorable financing terms, including lower debt service coverage ratios, more favorable underwriting treatment of the rental subsidy income, higher loan-to-value ratios, and longer loan terms than are offered by conventional mortgage lenders. Thus, refinancing under the FHA insurance programs usually results in a larger loan amount and more funds available to the owner for rehabilitation and reserves.

By actively pursuing Section 202 refinancing opportunities, the Enterprises would provide owners with more refinancing options and give owners access to adjustable-rate mortgages with lower interest rates and shorter maturities. In 2011, legislative changes to further facilitate refinancing of Section 202 properties were enacted into law. These changes could further increase Enterprise opportunities to support the recapitalization and

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[108] *See* Vincent F. O'Donnell, "Prepayment and Refinancing of Section 202 Direct Loans -- A Summary of HUD Notices H 2002-16 and H 2004-21" (Feb. 25, 2005).

preservation of Section 202 housing. Under the Requests for Comments section below, FHFA specifically requests comments on whether there are other ways the Enterprises can support properties currently funded under the Section 202 program.

v. HUD Section 811 Housing Program for Disabled Households

HUD's Section 811 program is a capital advance and rental assistance program for low-income disabled persons. Section 811 properties carry no debt, and HUD rental subsidies cover the difference between operating expenses and rental income;[109] excess cash flow produced by the properties is minimal. There is no obvious role for the Enterprises to support projects funded under this program and the Enterprises have never supported mortgage financing under this program. However, under the Request for Comments section below, FHFA specifically requests comments on whether there are ways the Enterprises could support the Section 811 program.

vi. McKinney-Vento Homeless Assistance Act Programs

Programs under title IV of the McKinney-Vento Homeless Assistance Act provide supportive housing grants to help homeless persons, especially homeless families with children, transition to independent living. Not-for-profit organizations that develop this supportive housing use a combination of grant and financing sources, and the projects typically do not involve debt financing. There is no obvious role for the Enterprises to support projects funded under this program and the Enterprises have never supported mortgage financing under this program. However, under the Request for Comments section below, FHFA specifically requests comments on whether there are ways the Enterprises can support this program.

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[109] *See* HUD, "Section 811 Supportive Housing for Persons with Disabilities" (HUD Website), *available at* http://www.hud.gov/offices/hsg/mfh/progdesc/disab811.cfm.

vii. USDA Sections 515 Rural Housing Programs

Under USDA's Section 515 program, USDA provides direct loans and rental assistance to develop rental housing for low-income households in rural locations. Both Enterprises currently purchase loans originated under the Section 515 program. Under the Request for Comments section below, FHFA specifically requests comments on whether there are ways the Enterprises can extend their support for the Section 515 program.

viii. Federal Low-Income Housing Tax Credits (LIHTC)

Under the LIHTC program, investors purchase tax credits to provide equity to off-set the development costs of rental housing properties with long-term regulatory agreements that require the housing to remain affordable for very low- or low-income households. The Enterprises offer specialized loan purchase programs to refinance and rehabilitate existing LIHTC properties in conjunction with extension of their regulatory use agreements, and are an important source of financing for preservation of older LIHTC projects.

The Enterprises were significant LIHTC equity investors from the inception of the LIHTC program until the mid-2000s, but ceased investing before entering conservatorship in 2008. To date, FHFA has not approved Enterprise resumption of this activity. The LIHTC equity investment market has also changed and is now highly liquid and dominated by bank and insurance company investors. The Safety and Soundness Act provides for an investment and grants assessment factor when evaluating compliance with the Duty to Serve, and permitting the Enterprises to resume equity investments in LIHTCs would be one way to meet that assessment factor. Under the Requests for

Comments section below, FHFA specifically requests comments on whether the Enterprises should resume equity investments in LIHTC projects.

ix. Comparable State and Local Affordable Housing Programs

In addition to the specifically enumerated programs in the Safety and Soundness Act, the Act provides that the Enterprises shall facilitate a secondary market for "comparable state and local affordable housing programs."[110] Under the proposed rule, an Enterprise may include such programs in its Underserved Markets Plan subject to FHFA determination of whether such programs are eligible for Duty to Serve credit. Examples of such comparable programs for multifamily housing that could receive Duty to Serve credit include support for properties that restrict all or a portion of their units for very low-, low-, or moderate-income families due to participation in density bonuses or property tax abatements, state or local affordable housing programs, state LIHTC programs, programs for redevelopment of government-owned land or buildings as affordable housing, and inclusionary zoning requirements.[111]

Examples of comparable state and local programs for single-family affordable housing that could receive Duty to Serve credit include local neighborhood stabilization programs (NSP) that enable communities to address problems related to mortgage foreclosure and abandonment through the purchase and redevelopment of foreclosed or abandoned homes for very low-, low-, or moderate-income households. After the financial crisis, state and local government NSPs were partially funded by HUD. Most commenters on the 2010 Duty to Serve proposed rule that addressed the issue supported

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

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

giving credit for Enterprise assistance to the HUD-funded NSP, as well as for other state and local foreclosure and abandonment prevention programs. FHFA believes that any NSP or other state or local foreclosure and abandonment prevention programs that benefit very low-, low-, or moderate-income families could receive Duty to Serve credit.

Requests for Comments

FHFA specifically requests comments on the following questions (please identify the question answered by the number assigned below):

30. Are there other ways the Enterprises can support the statutorily-enumerated programs in addition to those discussed above?

31. In what ways, including potential responsible changes to their underwriting and reserve requirements, could the Enterprises prudently extend their support for Section 8-assisted properties?

32. Are there ways in which the Enterprises could extend their support for the HUD Section 236 Interest Rate Subsidy Program?

33. Are there additional ways in which the Enterprises could support properties currently funded under HUD Section 221(d)(4) FHA Insurance Program?

34. Are there other ways in which the Enterprises could support properties currently funded the HUD Section 202 Housing Program for Elderly Households?

35. Are there ways in which the Enterprises could support the HUD Section 811 Housing Program for Disabled Households?

36. Are there ways in which the Enterprises could support McKinney-Vento Homeless Assistance Act programs?

37. Are there other ways in which the Enterprises could extend their support for the USDA Section 515 Rural Housing Program?

38. Are there other federal affordable housing programs that the Enterprises could support that should receive Duty to Serve credit but that are not enumerated in § 1282.34(c) of the proposed rule?

39. What safety and soundness concerns should be considered in determining Enterprise participation in any of the programs discussed above?

40. Are there other state or local affordable housing programs for multifamily or single-family housing that the Enterprises could support that should be eligible to receive Duty to Serve credit in addition to those discussed above?

41. Should FHFA allow the Enterprises to resume LIHTC equity investments? Would the resumption of LIHTC equity investments by the Enterprises benefit the financial feasibility of certain LIHTC projects or would it substitute Enterprise equity funding for private investment capital without materially benefiting the projects?

42. If FHFA allows the Enterprises to resume LIHTC investments, should FHFA limit investments to support for difficult to develop projects in segments of the market with less investor demand, such as projects in markets outside of the assessment areas of large banks or in rural markets or for preservation of projects with expiring subsidies? Are there other issues that FHFA should consider if limiting the types of LIHTC projects appropriate for equity investment by the Enterprises?

43. If FHFA permits the resumption of LIHTC equity investments, should Duty to Serve credit be provided only for LIHTC equity investments in projects with expiring subsidies or projects in need of refinancing, or should Duty to Serve credit also be given for

LIHTC equity investments in new construction projects with regulatory agreements that assure long-term rental affordability?

44. If FHFA allows the Enterprises to resume LIHTC investments, should FHFA limit such investments to those that promote residential economic diversity, for example, by investing in LIHTC properties located in high opportunity areas, as proposed to be defined in § 1282.1, to address concerns raised about the disproportionate siting of LIHTC housing (non-senior) in low-income areas and the effect on residential segregation?

45. Should FHFA consider permitting the Enterprises to act as the guarantor of equity investments in projects by third-party investors provided any such guarantee is safe and sound and consistent with the Enterprise's Charter Act? If so, what types of guarantees should the Enterprises offer?

d. Regulatory and Additional Activities

Section 1282.34(d) of the proposed rule identifies four additional affordable housing preservation activities that would receive Duty to Serve credit. Under the proposed rule, these activities would constitute Regulatory Activities which the Enterprises must address in their Underserved Markets Plans by indicating how they plan to undertake the activity or stating the reasons why they will not. Each proposed Regulatory Activity addresses market segments for which the Enterprises already provide some level of support. Proposed § 1282.34(e) would provide that the Enterprises may also propose Additional Activities that support the financing of mortgages on residential properties for very low-, low-, or moderate-income families consisting of affordable rental housing preservation or affordable homeownership, subject to FHFA determination of whether such activities are eligible for Duty to Serve credit.

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

Section 1282.34(d)(1) of the proposed rule would provide Duty to Serve credit for Enterprise purchase and securitization of loan pools from smaller banks and community-based lenders, specifically, non-depository community development financial institutions, community financial institutions, and federally insured credit unions meeting an asset cap applicable to community financial institutions, where the loan pools are backed by existing small multifamily rental properties consisting of five to not more than fifty units. This activity would constitute a Regulatory Activity that the Enterprises would have to address in their Underserved Markets Plans by indicating how they choose to undertake the activity or the reasons why they will not undertake the activity.

Both Enterprises support financing for small multifamily properties through specialized retail loan programs offered through their lenders. The housing goals regulation publicly released in August 2015 established, for the first time, a subgoal for Enterprise purchases of loans on small multifamily properties that are affordable to low-income households. FHFA expects the subgoal to be met through the Enterprises' retail loan purchase activities. However, several commenters on the 2010 Duty to Serve proposed rule stated that the Enterprises should do more to support the financing needs of small multifamily properties.

Small multifamily properties are often older than larger properties, have fewer, if any, amenities, and tend to have more affordable rents. These factors make small multifamily properties an important source of affordable rental housing and they can also make financing more difficult to obtain. As discussed in the Notice accompanying the final housing goals rule, much of the financing needs of small multifamily property owners are met through loans provided by smaller local and regional banks, and by community-based lenders. Most of these loans are originated for the lenders' own portfolios and the lenders may cease making small multifamily property loans when their portfolio capacity has been reached.

To encourage the Enterprises to expand their support for this market segment, the proposed rule would provide Duty to Serve credit for Enterprise purchases and securitization of loan pools from non-depository community development financial institutions, community financial institutions, and federally insured credit unions meeting an asset cap applicable to community financial institutions, where the loan pools are backed by existing small multifamily rental properties consisting of five to not more than fifty units.

Section 1282.1 of the proposed rule would define "community development financial institution" and "community financial institution" in accordance with the definitions in FHFA's regulation on Federal Home Loan Bank membership. The membership regulation defines a "community development financial institution" as an institution that is certified as a community development financial institution by the Community Development Financial Institutions Fund under the Community Development Banking and Financial Institutions Act of 1994, other than a bank or savings association insured under the Federal Deposit Insurance Act, a holding company for such a bank or savings association, or a credit union insured under the Federal Credit Union Act.[112] The membership regulation defines a "community financial institution"

[112] *See* 12 CFR 1263.1.

generally as an institution whose deposits are insured under the Federal Deposit Insurance Act,[113] and whose total assets are less than $1 billion, as adjusted annually by FHFA for inflation, beginning in 2009, with total assets being calculated as an average over the previous three years.[114] Based on FHFA's most recent inflation adjustment, the asset cap is now $1,123,000,000.[115]

Section 1282.1 of the proposed rule would define a "federally insured credit union" in accordance with the definition of "insured credit union" in the Federal Credit Union Act.[116] The Federal Credit Union Act defines an "insured credit union" as a credit union the member accounts of which are insured under the Federal Credit Union Act.[117]

Over time, a reliable secondary market for loans on small multifamily properties could develop to provide these originating lenders with additional liquidity. Thus, the Duty to Serve regulation could complement the housing goals regulation by encouraging greater and more comprehensive Enterprise support for the liquidity needs of small multifamily properties.

Requests for Comments

FHFA specifically requests comments on the following questions (please identify the question answered by the number assigned below):

46. Are there other affordable housing preservation activities for small multifamily properties beyond those discussed above that should receive Duty to Serve credit?

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113 *Id.*; 12 U.S.C. 1811 *et seq*.
114 *See* 12 CFR 1263.1.
115 *See* 80 FR 6712 (Feb 6, 2015).
116 12 U.S.C. 1752(7).
117 *Id.*

47. Should an Enterprise's purchase and securitization of loan pools from non-depository community development financial institutions, community financial institutions, and federally insured credit unions subject to the asset cap, where the loan pools are backed by existing small multifamily properties, be a Regulatory Activity?

48. How could the Enterprises provide further support for the financing or liquidity needs of small multifamily properties? Should another type of support for small multifamily properties be a specific Regulatory Activity?

49. How could the Enterprises provide support for the liquidity needs of smaller banks and community-based lenders that finance small multifamily properties, for example by buying and securitizing loan pools these lenders have originated? What kind of Enterprise support would encourage these types of lenders to increase their financing of these properties?

50. Do the proposed definitions of "community development financial institution," "community financial institution," and "federally insured credit union" subject to the asset cap sufficiently capture smaller banks and community-based lenders for Duty to Serve purposes?

ii. Energy Efficiency Improvements on Multifamily Properties—Proposed § 1282.34(d)(2)

Section 1282.34(d)(2) of the proposed rule would provide Duty to Serve credit for Enterprise support for energy and water efficiency improvements on existing multifamily properties affordable to very low-, low-, and moderate-income families, provided there are verifiable, reliable projections or expectations that the improvements financed by the loan will reduce energy and water consumption by the tenant by at least 15 percent, the reduced utility costs derived from reduced consumption must not be offset by higher rents or other charges imposed by the property owner, and the reduced utility costs will offset the upfront costs of the improvements within a reasonable time period. This activity would constitute a Regulatory Activity that the Enterprises would have to address in their Underserved Markets Plans by indicating how they choose to undertake the activity or the reasons why they will not undertake the activity.

Improved energy efficiency and reduced energy consumption in multifamily housing is a broadly acknowledged public policy goal. Energy expenses, principally in the form of heating, cooling, water consumption and electricity use (collectively, utilities) consume a growing part of the incomes of very low-, low-, and moderate-income households. When these high utility costs are added to the cost of rent, multifamily housing becomes increasingly unaffordable. In recent years, energy cost increases in multifamily housing have outpaced rent increases (which have significantly exceeded the rate of inflation). A 2011 HUD study found that while average rents increased by 7.6 percent from 2001 to 2009, energy costs to renters increased by almost 23 percent during this same period.[118]

Lowering energy and water use in multifamily buildings will reduce the total amount that tenants spend for the energy and water that they do use, thus reducing their utility consumption. This can be considered "preservation" under the affordable housing preservation market because housing costs are typically defined as rent plus utility costs. Thus, savings in utility consumption that reduce utility expenses may help maintain the overall affordability of rental housing for tenants. Owners of multifamily properties also

[118] *See* Evidence Matters, Policy Development and Research, Department of Housing and Urban Development, "Quantifying Energy Efficiency in Multifamily Rental Housing," Summer 2011, *available at* http://www.huduser.gov/portal/periodicals/em/EM_Newsletter_Summer_2011_FNL.pdf.

benefit from energy efficiency improvements through reduced common area utility expenses, which could relieve pressure on owners to raise rents to cover increased utility costs. Owners also derive indirect benefits from unit-based energy efficiency improvements, including rendering a property more marketable to potential tenants.

Enterprise support for energy efficiency improvements could include specialized loan programs or efforts to educate lenders about the benefits of energy improvements and conservation. Given the Enterprises' market reach, they could have a significant impact on promoting energy efficiency improvements and conservation in a broad range of multifamily properties if lenders were properly educated and incented.

Requests for Comments

FHFA specifically requests comments on the following questions (please identify the question answered by the number assigned below):

51. Should Enterprise support for multifamily properties that include energy improvements resulting in a reduction in the tenant's energy and water consumption and utility costs be a Regulatory Activity?

52. How can the Enterprises provide more outreach to lenders regarding the Enterprises' energy improvement products?

53. Should the Enterprises require the lender to verify before the closing of an energy improvement loan that there are reliable and verifiable projections or expectations that the proposed energy improvements will likely reduce the tenant's energy and water consumption and utility costs and, if so, what standards of reliability, verifiability and likelihood of reduced consumption and costs should be required?

54. Should the Enterprises be required to verify, after the closing of an energy improvement loan, that the energy improvements financed actually reduced the tenant's energy and water consumption and utility costs and, if so, how can they verify this?

55. What if any ongoing monitoring should be required to measure the effectiveness of financed energy improvements in reducing tenants' energy and water consumption and utility costs?

56. For the proposed requirement that the reduced utility costs will offset the upfront costs of the improvements within a reasonable time period, should a reasonable time period be defined and, if so, how?

iii. Energy Efficiency Improvements on Single-Family, First-Lien Properties—Proposed § 1282.34(d)(3)

Section 1282.34(d)(3) of the proposed rule would provide Duty to Serve credit for Enterprise support of energy efficiency improvement loans on single-family (homeownership or rental), first-lien properties affordable to very low-, low-, or moderate-income households, provided that there are verifiable, reliable projections or expectations that the improvements financed by the loans will reduce energy and water consumption by the homeowner or tenant by at least 15 percent, the reduced utility costs derived from the reduced consumption will offset the upfront costs of the improvements within a reasonable time period, and in the case of a single-family rental property, the reduced utility costs must not be offset by higher rents or other charges imposed by the property owner . This activity would constitute a Regulatory Activity that the Enterprises would have to address in their Underserved Markets Plans by indicating how they choose to undertake the activity or the reasons why they will not undertake the activity.

Studies have found that consumers earning below $20,000 a year spend 10 percent of their income on utilities compared to 6 percent spent by consumers with incomes above $70,000.[119] The experience of homeowners at these income levels likely parallels those of the broader consumer category.

Enterprise support for single-family energy efficiency loans with resulting savings accruing to the homeowners or tenants may help lower their total housing costs and thereby help preserve affordable housing. In addition, savings from energy efficiency upgrades may be correlated with better borrower loan performance. A 2013 study found that, controlling for other loan determinants, default risks are on average 32 percent lower in energy efficient homes; some of these lower default risks may benefit very low-, low-, and moderate-income borrowers. The study also found that borrowers in energy efficient homes are 25 percent less likely to prepay their mortgages,[120] a loan characteristic that investors generally find appealing.[121]

However, as comprehensive home energy improvements cost between $5,000 and $15,000, the upfront costs of energy efficiency improvements constitute a significant barrier to very low-, low-, and moderate-income homeowners, who generally lack

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[119] *See* U.S. Bureau of Labor Statistics, "Consumer Expenditure Survey," (July 2013-June 2014), *available at* http://www.bls.gov/cex/#tables_long. These percentages are for all consumers. Homeowners overall spend 7.5 percent of their income for utilities, fuels, and public services. *See* U.S. Bureau of Labor Statistics, "Table 1202: Income before taxes: Annual expenditure means, shares, standard errors, and coefficients of variation, Consumer Expenditure Survey, 2014" (Sept. 2015), *available at* http://www.bls.gov/cex/2014/combined/income.pdf.

[120] *See* Institute for Market Transformation, "Research Report: Home Energy Efficiency and Mortgage Risks," University of North Carolina Center for Community Capital (March 2013), *available at* http://www.imt.org/uploads/resources/files/IMT_UNC_HomeEEMortgageRisksfinal.pdf.

[121] For a discussion of the risks that prepayment poses to investors, *see generally* The Bond Market Association, "An Investor's guide to Pass-Through and Collateralized Mortgage Securities," at 4-6, 13-14, *available at* http://www.freddiemac.com/mbs/docs/about_MBS.pdf.

significant financial resources to pay for such improvements.[122] Financing for single-family energy efficiency loans can be further hampered by lender reluctance to consider energy savings in their loan underwriting procedures.[123] Finally, because identifying energy efficiency as the loan purpose can complicate automated underwriting, borrowers may choose not to specify that the home improvements are intended for energy efficiency purposes.

Fannie Mae currently supports the financing of single-family energy efficiency improvements through its "Energy Improvement Feature" (EI Feature) and HomeStyle Renovation mortgage. [124] EI Feature loans cover both purchase money loans and refinances of preexisting loans. Borrowers can use purchase or refinance proceeds, of up to 10% of the "as completed" appraised value, to finance both the property and energy improvements, as long as certain conditions are met. In all cases, the EI Feature loan must be in first lien position. The EI Feature has seen limited borrower participation, which could be due to one or more of the factors described above or because financing for energy efficiency improvements is already occurring in Fannie Mae's standard business.

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[122] *See* Mark Zimring, Ian Hoffman, Annika Todd, & Megan Billingsley, "Delivering Energy Efficiency to Middle Income Single Family Households," Lawrence Berkeley National Laboratory (December 11, 2011), *available at* http://emp.lbl.gov/publications/delivering-energy-efficiency-middle-income-single-family-households.

[123] *See* Institute for Market Transformation, "Research Report: Home Energy Efficiency and Mortgage Risks," University of North Carolina Center for Community Capital (March 2013), *available at* http://www.imt.org/uploads/resources/files/IMT_UNC_HomeEEMortgageRisksfinal.pdf. Lenders may not want to put the additional time needed in in order to adjust underwriting for energy savings. *See generally* "Green Housing for the 21st Century: Retrofitting the Past and Building an Energy-Efficient Future," Hearings Before the Subcomm. On Housing Transportation, and Community Development of the Committee on Banking Housing and Urban Affairs, 111th Cong., 2d Sess., at 23 (2010) (S. HRG. 111-6,93), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg61989/pdf/CHRG-111shrg61989.pdf.

[124] Fannie Mae also participated in the FHA PowerSaver pilot program, which ended in 2013.

The HomeStyle Renovation mortgage enables a borrower to obtain a purchase transaction or cash-out refinance mortgage to cover the costs of energy improvements to the property. Borrowers can use purchase or refinance proceeds, of up to 50% of the "as completed" appraised value, to finance both the property and the energy improvements, as long as certain conditions are met. In all cases, the HomeStyle Renovation mortgage must be in first lien position.

Freddie Mac does not currently offer loan products specifically for single-family energy efficiency loans, but like Fannie Mae, likely purchases loans with energy efficiency components as part of its standard business.

Given the difficulty of developing functional single-family energy efficiency mortgage products, possible Objectives that could be included in an Underserved Markets Plan might focus initially on developmental actions such as: (i) working with lenders to develop education programs to encourage energy efficiency improvement loans, including conservation programs, for very low-, low-, or moderate-income households in single-family properties; (ii) working with a wider range of locally-based lenders to encourage energy efficiency components in purchase money loans or limited cash-out refinances; and (iii) developing products that result in the introduction of energy efficiency components into loans that meet the proposed rule's requirements.

Requests for Comments

FHFA specifically requests comments on the following questions (please identify the question answered by the number assigned below):

57. How can the Enterprises work with potential lenders to facilitate financing for energy efficiency improvement loans on single-family properties?

58. What is a reasonable time period for the reduced utility costs from energy efficiency improvements to offset the upfront costs of the improvements?

59. Should Enterprise support for single-family properties that include energy improvements resulting in a reduction in the homeowner's or tenant's energy and water consumption and utility costs be a Regulatory Activity?

60. How can the Enterprises provide more outreach to lenders regarding the Enterprises' energy improvement loan products?

61. Should the Enterprises require the lender to verify before the closing of a single-family energy improvement loan that there are reliable and verifiable projections or expectations that the proposed energy improvements will likely reduce energy and water consumption and utility costs and, if so, what standards of reliability, verifiability and likelihood of reduced consumption and costs should be required?

62. Should the Enterprises be required to verify, after the closing of a single-family energy improvement loan, that the energy improvements financed actually reduced energy and water consumption and utility costs and, if so, how can they verify this?

63. For the proposed requirement that the reduced utility costs will offset the upfront costs of the improvements within a reasonable time period, should a reasonable time period be defined and, if so, how?

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

Section 1282.34(d)(4) of the proposed rule would provide Duty to Serve credit for Enterprise activities related to affordable homeownership preservation through shared equity homeownership programs. Shared equity programs include programs administered by community land trusts, other nonprofit organizations, or State or local governments that:

(1) Ensure affordability for at least 30 years or as long as permitted under state law through a ground lease, deed restriction, subordinate loan or similar legal mechanism that makes residential real property affordable to very low-, low-, or moderate-income families. The legal instrument ensuring affordability must also stipulate a preemptive option to purchase the homeownership unit from the homeowner at resale to preserve the affordability of the unit for successive very low-, low-, or moderate-income families;

(2) Monitor the homeownership unit to ensure affordability is preserved over resales; and

(3) Support the homeowners to promote successful homeownership for very low-, low-, or moderate-income families.

Under the proposed rule, this activity would constitute a Regulatory Activity that the Enterprises would have to address in their Underserved Markets Plans by indicating how they choose to undertake the activity or the reasons why they will not undertake the activity.

Affordability of homeownership through shared equity programs is preserved either by:

(1) Resale restrictions through deed restrictions or ground leases administered by governmental units or instrumentalities, or nonprofit entities and designed to keep the home affordable over resales; or

(2) Subordinate loan programs, often called "shared appreciation loan programs," that are administered by governmental units or instrumentalities, or nonprofit entities where second mortgage loans are due upon sale and typically structured with zero percent

interest. Upon sale at market value, the homeowner repays the loan amount and a portion of the appreciation. The government or nonprofit entity uses its share of the appreciation to make the same home affordable to a subsequent income-eligible homebuyer. Shared equity programs utilize various legal mechanisms to preserve affordability, but all shared equity programs make home purchase affordable for a very low-, low-, or moderate-income buyer and limit the homeowner's proceeds upon resale to make the same home affordable to a subsequent income-eligible buyer.

While much of the affordable housing preservation emphasis is on rental housing, homeownership preservation is also important. Homeownership can offer advantages over renting, such as the opportunity to accumulate wealth from tenure, including repaying principal through forced savings, and greater residential control and stability,[125] although it also bears risks for lower-income households.[126] Homeownership continues

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[125] *See* Eric S. Belsky, Christopher E. Herbert, and Jennifer H. Molinksy (Eds), "Homeownership Built to Last" (2014), Cambridge, MA: Joint Center for Housing Studies, Harvard University & Washington, D.C.: Brookings Institution Press, *available at* http://www.brookings.edu/research/books/2014/homeownership-built-to-last. *See also* Christopher E. Herbert & Eric S. Belsky, "The Homeownership Experience of Low-Income and Minority Households: A Review and Synthesis of the Literature," Vol. 10, No. 2, Cityscape: A Journal of Policy Development and Research (2008), *available at* http://www.huduser.org/periodicals/cityscpe/vol10num2/ch1.pdf. Herbert and Belsky note that homeownership is a vehicle for wealth accumulation both through appreciation and the forced savings that come with paying down the principal on a loan. They note that homeownership is one of the few leveraged investments available to families with limited wealth. They list other financial advantages of ownership including: 1) tax law provisions that shield most appreciation in home value from capital gains taxes; 2) insulating buyers from rapidly increasing housing costs; 3) deductibility of mortgage interest and property tax payments which lowers the after-tax cost of homeownership; and 4) permitting secured lending against home equity. Homeownership also arguably offers a range of non-financial benefits, at 7-8.

[126] *See, e.g.*, Carolina Katz Reid, Center for Studies in Demography and Ecology, University of Washington, "Achieving the American Dream? A Longitudinal Analysis of the Homeownership Experiences of Low-Income Households," (CSDE Working Paper 04-04) (Apr. 2004), *available at* https://csde.washington.edu/downloads/04-04.pdf. Reid discusses the following risks of homeownership for low-income households: 1) the risk of leaving homeownership, usually due to divorce or unemployment; 2) high mortgage payments in relation to income; and 3) low-income and minority homeowners have not benefitted as much from homeownership as wealthier, Caucasian buyers. Reid concludes that more emphasis is needed on supporting low-income households after they become homeowners. While Reid did not consider the non-financial benefits of homeownership, Reid notes that almost every person she interviewed expressed satisfaction with having become a homeowner, citing various non-financial benefits. Reid concludes that the challenge in homeownership is developing policies

to be the primary source of wealth among lower-income households.[127] A comprehensive approach to affordable housing preservation should include strategies that preserve not only affordable rental housing, but also affordable homeownership.

The 2010 Duty to Serve proposed rule focused primarily on preserving affordable rental housing and not affordable homeownership. One commenter, a nonprofit engaged in homeownership work, recommended crediting shared equity homeownership activities under the Duty to Serve, citing the importance of broadening the availability of homeownership. Another commenter, a nonprofit focused on rental housing, opposed giving preservation credit to homeownership programs on the basis that it might divert attention from rental housing.

Without detracting from the importance of preserving affordable rental housing, FHFA seeks to encourage enhanced Enterprise support for a variety of shared equity options so that communities would have the flexibility to determine which, if any, shared equity approach best suits their needs and have that option eligible for Duty to Serve credit for the Enterprises. The Enterprises are uniquely positioned to help increase financing for the preservation of affordable homeownership units over the long-term by developing infrastructure that would make it easier for lenders to deliver mortgage loans on shared equity homes to the Enterprises for purchase.

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that make homeownership achievable and sustainable. *See also* Christopher E. Herbert, Daniel T. McCue & Rocio Sanchez-Moyano, Joint Center for Housing Studies, Harvard University, "Is Homeownership Still an Effective Means of Building Wealth for Low-income and Minority Households? (Was it Ever?)," (Sept. 2013), *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/hbtl-06.pdf.

[127] "… home equity contributes a disproportionate share (81 percent) of net wealth among the typical owner in the lowest income quartile, compared with just under a quarter (24 percent) among those in the highest income quartile." Joint Center for Housing Studies, Harvard University, "State of the Nation's Housing Report 2015" (2015), at 17, *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs-sonhr-2015-full.pdf.

Shared equity homes remain affordable for very low-, low-, or moderate-income households for at least 30 years or as long as permitted under state law, for the initial purchaser as well as for any successive income-eligible owners of the home during that period. Shared equity homeownership programs are administered by either government or nonprofit entities. These entities make home purchase affordable to the initial low- or moderate-income household, and ensure the home remains affordable to subsequent lower- or moderate-income purchasers, sale after sale.[128] In return for being able to purchase homes that are affordable, homeowners contractually agree to limit the proceeds they receive upon resale to keep their homes affordable for subsequent income-eligible purchasers.

The affordability of the home is maintained for subsequent purchasers in one of two ways. One way is to restrict the resale price of the home through a deed restriction or a ground lease designed to keep the resale price below market value so the home remains affordable over resales. A second way is to use a shared appreciation loan agreement, in which the resale price remains at the market value, but the amount of subsidy increases in a self-sustaining way to keep pace with the gap between the market value and the lower price at which the home is affordable to low- and moderate-income households. Each time the home is sold, at market rate, the program's share of equity, in the form of the shared appreciation, is retained as "public investment", *i.e.*, the subsidy, and passed along to the new buyer of the same home in the form of a second mortgage. This second mortgage is typically at zero percent interest and is fully due upon sale.

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[128] John Emmeus Davis, National Housing Institute, "Shared Equity Homeownership – The Changing Landscape of Resale-Restricted, Owner-Occupied Housing" (2006), *available at* http://www.nhi.org/pdf/SharedEquityHome.pdf.

While this subsidy retention vehicle is technically a second mortgage, it does not have many of the features commonly associated with mortgage debt.

Shared equity programs usually have requirements that the buyer use the home as a primary residence and qualify for financing, and many allow the administering government or nonprofit entity to charge modest fees that cover the cost of operating the program. The government or nonprofit entity is sometimes referred to as a "sponsor." Under the proposed rule, the government or nonprofit sponsor would have the ongoing responsibility to monitor the home to ensure that affordability is preserved over resales, and support the homeowner where possible. Having a sponsor may also have the effect of minimizing/mitigating potential foreclosures. The proposed rule would require the sponsor to stipulate a preemptive right to purchase the unit from the homeowner at resale for a price determined by a contractual formula that would preserve affordability of the unit.

In contrast, downpayment or closing cost assistance programs, which represent another mechanism for making homeownership affordable to lower-income households, would not meet the purpose of long-term preservation of affordability under the Duty to Serve. In downpayment and closing cost assistance programs, the program sponsor provides a subsidy to the initial homebuyer as a grant, or sometimes as a forgivable loan that converts to a grant generally between five and 15 years after purchase. This assistance helps to make the purchase of a home affordable by lowering the buyer's downpayment or closing costs, usually by a smaller amount than is available through shared equity programs. While the initial homebuyer benefits from any appreciation in the value of the home, this type of assistance does not preserve long-term affordability of the home for subsequent purchasers, because these programs do not restrict the initial homebuyer's return from the sale of the property.[129] Hence, under the traditional downpayment/closing cost assistance model, additional public subsidy would often be required to help subsequent lower-income homebuyers purchase homes.

The three most common contractual arrangements for achieving shared equity homeownership preservation are deed restricted covenants, ground leases, and shared appreciation loans, which are described below.

- <u>Deed Restricted Covenants.</u> A restricted covenant that is appended to an owner-occupied property's deed when a home is purchased at below-market value. The covenant stipulates resale restrictions to ensure the home is sold at an affordable price, usually below-market value, to another eligible household in the future. Restricted covenants are in effect for 30 years or longer, depending upon state law. Restricted covenants are frequently used for single-family units (*e.g.*, condominium and cooperative units) in multifamily homeownership buildings[130], which would also be eligible for Duty to Serve credit. Restricted covenants are also frequently used by inclusionary housing programs.[131]

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[129] The initial homebuyer may be required to repay a portion of the subsidy under certain circumstances if the property is sold during a specified time period. The program may use that repaid subsidy to assist another eligible household with downpayment or closing cost assistance to purchase a home.

[130] While many consumers, developers, realtors and other market participants think of condominiums and cooperatives as multifamily homeownership, loans for individual units are treated as part of the single-family business by lenders and the Enterprises.

[131] Robert Hickey, Lisa Sturvent & Emily Thaden, "Achieving Lasting Affordability through Inclusionary Housing" (Working Paper WP14RH1) (July 2014), Cambridge, MA: Lincoln Institute of Land Policy, *available at* https://www.lincolninst.edu/pubs/2428_Achieving-Lasting-Affordability-through-Inclusionary-Housing.

- Ground Leases. Ground leases are most frequently used by community land trusts, which are nonprofit organizations that provide shared equity homes. Land trusts retain ownership of the land, so the homeowner only needs to purchase the home on that land at an affordable price. A resale formula in the ground lease preserves affordability by stipulating a below-market value price for which the current owner may sell the home to an income-eligible buyer in the future. Leases typically run for 50 to 99 years, depending upon state law.
- Shared Appreciation Loans. Shared appreciation loan programs sell homes at fair market value to income-eligible purchasers, but to make the purchase affordable, the program provides a no-payment second mortgage loan that is fully due upon sale and typically at zero percent interest. The loan documents or an accompanying deed-restricted covenant stipulate the homeowner's share of appreciation upon resale and ensure the home will be sold to another eligible household. The share of the appreciation that goes to the program sponsor is used to increase the shared appreciation loan amount to make the purchase of the home affordable for the subsequent buyer. The mortgages typically have terms of 30 years or longer, depending upon state law. Proprietary shared appreciation loans, where an investor receives part of the equity in exchange for making the home affordable for a single buyer only, do not preserve affordability of the unit for subsequent buyers. Section 1282.38(b)(6) of the proposed rule would specifically provide that shared appreciation loans that fail to meet the requirements discussed above would not receive credit under the Duty to Serve underserved markets.

Preserving homeownership through shared equity programs helps to address the growing gap between what people can afford to pay for housing given what they earn and what they must actually pay for housing given what it costs. A longitudinal study[132] of 53 shared equity programs representing 3,678 homes found in 2014 that the programs:

- Increased access to homeownership: The average household income at the time of purchase under the programs was 65 percent of the area median income and 82 percent were first-time homebuyers. On average, the homes sold for 25 percent below their fair market value to make the purchase affordable.

- Improved likelihood that homeownership would be sustained: Over 93 percent of households under the programs remained homeowners for at least five years. This contrasts with a more limited longitudinal study of households in non-shared equity purchases, which found that less than 50 percent of the first-time, low-income homebuyers in the study maintained ownership for five years.[133]

- Reduced likelihood of foreclosure: Shared equity homeowners, all of whom were lower-income, were one-tenth as likely to be in foreclosure as homeowners in the conventional market across all incomes.

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[132] A "longitudinal study" is a research study that involves repeated observations of the same variables over long periods of time. In this study, the median age of the 53 programs was 15 years, and 15 of the 53 programs were at least 15 years old.

[133] Carolina Katz Reid, Center for Studies in Demography and Ecology, University of Washington, "Achieving the American Dream?: A Longitudinal Analysis of the Homeownership Experiences of Low-Income Households," (CSDE Working Paper 04-04) (Apr. 2004), at 20, *available at* https://csde.washington.edu/downloads/04-04.pdf.

- Built wealth for homeowners: The annual rate of return on the homeowners' downpayments was 7.97 percent. Approximately 62 percent of the households went on to buy a market-rate home in the conventional market.

- Preserved affordable homeownership: The programs retained the affordability of the homes to serve the same income levels, sale after sale.[134]

Shared equity transactions also help to stabilize property values and communities. They can provide housing at affordable prices for long-standing homeowners in the area that help to counter price escalation in gentrifying communities. In addition, shared equity transactions often provide a loss buffer in the form of the difference between the market value and the amount the buyer pays, which can reduce foreclosures, while reducing the relative amount of loss in the value of the home if foreclosure does occur. By reducing foreclosures, shared equity transactions not only improve the outcomes for homebuyers, but also help maintain values of other homes in the neighborhood, thereby enhancing outcomes for the entire community. Shared equity transactions may also permit a household to afford a home in a neighborhood with better schools or other amenities that would otherwise be unaffordable for the household. In particular, shared equity programs can make it possible for teachers, firefighters, police and other modest-income workers to buy homes in the community where they work.

One of the greatest challenges for expanding shared equity homeownership has been the difficulty of accessing conventional mortgage lending for first mortgages on

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[134] Cornerstone Partnership, "Social Impact Report" (2014), *available at* http://myhomekeeper.org/socialimpact.

homes purchased through shared equity mechanisms.[135] For example, a nonprofit community land trust with extensive experience developing and preserving homeownership preservation units has reported that it is having increasing difficulty finding lenders to originate loans with shared equity features. According to the land trust, lenders have advised that shared equity loans are too difficult and expensive to originate because the loans are ineligible for Enterprise automated underwriting and often require the lenders to provide the Enterprises with additional representations and warranties. Shared equity programs across the country report similar experiences.[136] Fannie Mae has recently made automated underwriting available for some shared equity loans.[137]

Both Enterprises have loan purchase products that can be used to varying degrees with shared equity mechanisms, including deed-restricted housing and community land trusts. However, the Enterprises could simplify their requirements for these products and make a greater effort to ensure that the requirements are widely understood. Encouraging Enterprise support for shared equity homeownership could help spur this important market.

Requests for Comments

FHFA specifically requests comments on the following questions (please identify the question by the number assigned below):

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[135] Jeffrey Lubell, Bipartisan Policy Center, "Housing More People More Effectively through a Dynamic Housing Policy" (2015), at 10, *available at* http://bipartisanpolicy.org/library/housing-more-people-more-effectively-through-a-dynamic-housing-policy/.

[136] *See* Emily Thaden, "Results of The 2011 Comprehensive CLT Survey" (January, 2012). Portland, OR: National Community Land Trust Network, *available at* http://cltnetwork.org/wp-content/uploads/2014/01/2011-Comprehensive-CLT-Survey.pdf; Robert Hickey, Lisa Sturvent & Emily Thaden, "Achieving Lasting Affordability through Inclusionary Housing" (Working Paper WP14RH1) (July 2014), Cambridge, MA: Lincoln Institute of Land Policy, *available at* https://www.lincolninst.edu/pubs/2428_Achieving-Lasting-Affordability-through-Inclusionary-Housing.

[137] *See* Fannie Mae Desktop Underwriter Version 9.2 from Aug. 15, 2015, *available at* https://www.fanniemae.com/content/release_notes/du-do-release-notes-08152015.pdf.

64. Are there additional ways that the Enterprises could support long-term affordable homeownership preservation?

65. Should affordable homeownership be preserved for longer than 30 years to qualify for Duty to Serve credit and, if so, for how long?

66. Should Enterprise support for affordable homeownership preservation be a Regulatory Activity?

67. How can the Enterprises provide further support for affordable homeownership preservation beyond those specified above or in the proposed rule?

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

Section 1282.34(d)(5) of the proposed rule would provide Duty to Serve credit for Enterprise activities supporting financing for HUD's Choice Neighborhoods Initiative (CNI).[138] This program seeks to preserve and transform distressed affordable housing by creating mixed-income housing and investing in neighborhood improvements and upgrades, with the ultimate goal of deconcentrating poverty and creating higher-opportunity neighborhoods. The program allows for the location of replacement housing offsite in lower-poverty neighborhoods and assistance to tenants in moving to such neighborhoods to promote the deconcentration of poverty. The Enterprises can support the CNI by purchasing mortgages that provide permanent financing on housing preservation activities that support very low-, low-, and moderate-income households.

[138] 42 U.S.C. 1437v.

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

Section 1282.34(d)(6) of the proposed rule would provide Duty to Serve credit for Enterprise activities supporting financing for HUD's Rental Assistance Demonstration (RAD) program.[139] The program seeks to improve and preserve public housing and other affordable housing supported by older HUD programs by converting the properties' operating funds to project-based vouchers or Section 8 rental assistance contracts. By converting the funds, public housing authorities can access other sources of public and private capital for repair and preservation. While the RAD program is primarily a preservation program for housing affordable to very low-income tenants, the program can also support mixed-income housing as long as all affordable units are replaced. The program includes the use of tenant-based vouchers to support the deconcentration of poverty and movement of low-income tenants to high opportunity areas. The Enterprises can support the RAD program by supporting permanent financing on properties that take advantage of this program.

3. Rural Markets—Proposed § 1282.35

a. Background

i. Overview of Rural Housing

According to the 2010 U.S. Census, 19.3 percent of the U.S. population lives in rural America.[140] Although urban housing needs tend to draw more attention, the housing needs in rural areas are also significant. High rural poverty rates and a declining employment base have led to rural unemployment and underemployment. While the

[139] 42 U.S.C. 1437f note.
[140] *See* U.S. Census Bureau, Frequently Asked Questions, "What percentage of the U.S. population is rural?," *available at* https://ask.census.gov/faq.php?id=5000&faqId=5971.

average homeownership rate in rural areas (73 percent) is higher than the national average homeownership rate (64 percent),[141] housing in rural areas is more likely to be substandard. Rural housing stock, both owner-occupied and rental, exhibits two common characteristics: (1) it is comprised primarily of single-family homes (82 percent)[142], excluding manufactured housing; and (2) a higher percentage of the stock is in substandard condition (6.3 percent) compared to metropolitan areas (5.3 percent).[143] Substandard housing is likely due to aging homes, fewer housing code enforcement efforts, lower homeowner turnover rates, and less disposable income available for dwelling rehabilitation.

Rural communities have more limited access to mortgage credit than urban areas,[144] which severely limits options for decent, clean, and affordable rural housing. Interest rates on home mortgages tend to be higher in rural areas than in urban areas. Those differences may reflect varying expenses associated with mortgage lending and the competitiveness and efficiency of mortgage markets. The smaller population size and the remoteness of many rural areas can raise lender costs. Additionally, rural financial markets, including mortgage markets, generally have fewer competitors than urban markets, and rural communities may lack sufficient internet service that would allow households to access more competitive financing options online. Thus, lenders operating in rural markets may be apt to charge more, provide fewer products and services, or incur

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141 *See* U.S. Census Bureau, "American Housing Survey for the United States: 2011," at 2, Issued September 2013, *available at* https://www.census.gov/content/dam/Census/programs-surveys/ahs/data/2011/h150-11.pdf.
142 *Id.* at 3.
143 *Id.* at 15.
144 *See* Adam Wodka, "Landscapes of Foreclosure: The Foreclosure Crisis in Rural America," NeighborWorks America and the Joint Center for Housing Studies of Harvard University, November 2009, *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w10-2_wodka.pdf.

inefficiently high expenses.[145]

Another obstacle for rural communities is the lack of local capacity to build new homes and renovate existing housing stock. There may be few or no local organizations in rural areas, especially in areas with the greatest needs that have the resources and expertise to undertake rural housing projects. Low density and the lack of volume in rural communities make it difficult for organizations to develop housing, particularly more cost-effective multifamily housing.

Rural housing stock has unique features and challenges. Rural communities are widely scattered, as are individual housing units within those communities. Dwellings may be sited on large parcels and have unique construction and design characteristics. Rural housing markets also tend to have slower housing turnover, and many have seasonal housing needs. Because of the low density of rural markets, a general lack of homogeneity in housing quality and features, and slower or seasonal market turnover, appraisals can be difficult because suitable comparable sales may be few and far between.

Manufactured housing continues to grow in importance as a rural housing choice. Most rural manufactured homes are financed as personal property (chattel), which often features higher interest rates with shorter repayment terms. However, chattel-financed manufactured homes offer an affordable option for many people in rural markets because the cost of a manufactured unit is typically lower than that of a site-built unit and does not include the cost of the underlying land, which the household may rent or already own.

[145] *See* U.S. Department of Agriculture Economic Research Service, "Can Federal Policy Changes Improve the Performance of Rural Mortgage Markets?," Agriculture Information Bulletin No. 724-12, at 1 (Aug. 1998), *available at* http://www.ers.usda.gov/media/564761/aib72412_1_.pdf.

A household may also save money because it does not pay real estate taxes on chattel property, although it may pay personal property taxes on the unit.

USDA mortgage programs help fill some housing needs in rural areas,[146] and benefit from having local agency administrative infrastructure to support the programs. The USDA Section 502 loan program provides very low- and low-income families in rural areas earning no more than 80 percent of area median income up to 100 percent financing to purchase existing or newly constructed dwellings or to purchase sites and construct dwellings in rural areas.

The USDA Section 515 rental housing program provides funding to finance the construction of affordable multifamily rental housing in rural areas for very low-, low-, and moderate-income families, elderly persons, and persons with disabilities. An ongoing challenge is keeping these rental units in rural areas affordable and available for low-income families for two reasons in particular. First, a number of building owners that received Section 515 loans prior to December 15, 1989, are prepaying their mortgages and terminating the government affordability requirements before the end of the original loan term. (Loans made through contracts entered into on or after December 15, 1989 cannot be prepaid).[147] USDA offers incentives to owners not to prepay and continue to restrict the property to low-income occupancy. These incentives include equity loans, reduced interest rates, and additional rental assistance. Second, aging

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146 The Millennial Housing Commission concluded that rural areas are often neglected by major federal housing production programs such as HOME, CDBG, and the Low-Income Housing Tax Credit, and that as a result, USDA programs have been the primary source of rural housing assistance since 1949. *See* Millennial Housing Commission, "Meeting Our Nation's Housing Challenges -- Report of the Bipartisan Millennial Housing Commission Appointed by the Congress of the United States," at 78 (May 30, 2002), *available at* http://govinfo.library.unt.edu/mhc/MHCReport.pdf.

147 *See* Rural Rental Housing Loans (Section 515), September 2002, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=19565_515_RuralRental.pdf.

properties financed with Section 515 loans are physically deteriorating. USDA offers preservation assistance to owners or purchasers of Section 515 properties through its Multifamily Housing Preservation and Revitalization (MPR) demonstration program, which provides no-interest loans, grants to non-profit owners, soft second loans, and debt deferral.[148]

ii. Enterprise Activities in Rural Areas

Under the definition of "rural area" in this proposed rule, which is discussed below, as of the end of 2009, 12.7 percent of Enterprise total residential mortgage loan purchases were in rural areas. As of the end of 2014, 18.5 percent of loans purchased by the Enterprises were in rural areas, representing a 46 percent increase from 2009. Of these loans, 36 percent were for families with incomes at or below 100 percent of area median income.

Difficulties in underwriting loans for rural areas can arise from slower or seasonal market turnover, widely scattered home sites, large lot sizes, and a general lack of homogeneity in the housing stock.[149] In response, the Enterprises have clarified and developed flexible collateral underwriting guidelines for rural markets in guidance released to creditors and appraisers in 2014.[150] The Enterprise guidelines state that they provide clarifications and dispel common industry misconceptions about acceptable

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[148] *See* Housing Preservation & Revitalization Demonstration Loans & Grants, *available at* http://www.rd.usda.gov/programs-services/housing-preservation-revitalization-demonstration-loans-grants.
[149] *See generally* Kerry D. Vandell, "Improving Secondary Markets in Rural America," Proceedings – Rural and Agricultural Conferences, Federal Reserve Bank of Kansas City, 85-120 (Apr. 1997), *available at* https://www.kansascityfed.org/publicat/fra/fra97van.pdf.
[150] *See* Laurie Redmond, "Freddie Mac Property and Appraisal Requirements for Properties Located in Rural Market Areas," Letter to Freddie Mac Sellers, Freddie Mac Bulletin (Apr. 1, 2014), *available at* http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1405.pdf. *See also* Carlos T. Perez, "Property and Appraisal Requirements for Properties Located in Small Towns and Rural Areas," Lender Letter LL-2014-02, Letter to All Fannie Mae Single-Family Sellers, Fannie Mae (Mar. 25, 2014), *available at* https://www.fanniemae.com/content/announcement/ll1402.pdf.

appraisal practices and property eligibility requirements for homes in small towns and rural areas.[151] Consistent with HUD, U.S. Department of Veterans Affairs (VA), and USDA-Rural Development policies, the Enterprises' guidelines remain broad to allow appraisers to accurately observe, analyze and report actual rural market and property conditions. Further, the guidelines allow the appraisers discretion to select comparable sales that may be dated, distant, or dissimilar to a subject property but that best reflect the appraiser's conclusions and opinion of value.[152] This approach recognizes the unique appraisal problems in rural markets discussed above. However, in all cases, the appraisal must contain adequate reasoning and justification for the analysis and conclusions to produce a credible and reliable result.

As part of their Duty to Serve rural markets, the Enterprises would be required to evaluate their current activities in rural areas and identify opportunities to increase those activities. This evaluation could include the Enterprises' working through federal and state programs and with local stakeholders to address liquidity needs in rural markets. At the same time, FHFA recognizes that Enterprise Duty to Serve efforts will not be able to address all housing finance needs in rural markets because of safety and soundness, property eligibility requirements, and other constraints.

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[151] *See* Laurie Redmond, "Freddie Mac Property and Appraisal Requirements for Properties Located in Rural Market Areas," Letter to Freddie Mac Sellers, Freddie Mac Bulletin (Apr. 1, 2014), *available at* http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1405.pdf. *See also,* Carlos T. Perez, "Lender Letter LL-2014-02," Letter to All Fannie Mae Single-Family Sellers, Fannie Mae (Mar. 25, 2014), *available at* https://www.fanniemae.com/content/announcement/ll1402.pdf.

[152] *See* Laurie Redmond, "Freddie Mac Property and Appraisal Requirements for Properties Located in Rural Market Areas," Letter to Freddie Mac Sellers, Freddie Mac Bulletin (Apr. 1, 2014), *available at* http://www.freddiemac.com/singlefamily/guide/bulletins/pdf/bll1405.pdf. *See also,* Carlos T. Perez, "Lender Letter LL-2014-02," Letter to All Fannie Mae Single-Family Sellers, Fannie Mae (Mar. 25, 2014), *available at* https://www.fanniemae.com/content/announcement/ll1402.pdf.

b. Regulatory and Additional Activities

The Safety and Soundness Act provides that the Enterprises "shall develop loan products and flexible underwriting guidelines to facilitate a secondary market for mortgages on housing for very low-, low-, and moderate-income families in rural areas."[153] The statutory language is broad and does not enumerate specific activities or programs that the Enterprises must undertake in support of the rural market; as a result, FHFA has specified only one Core Activity for this market, as further described below.

Section 1282.35(b) of the proposed rule would define eligible activities for the rural market as Enterprise activities that facilitate a secondary market for mortgages on residential properties for very low-, low-, or moderate-income families in rural areas. Section 1282.1 of the proposed rule would define "rural area" as (1) a census tract outside of a metropolitan statistical area (MSA), as designated by OMB, or (2) a census tract that is in an MSA but outside of the MSA's Urbanized Areas (UAs) and Urban Clusters (UCs), as designated by USDA's RUCA codes. The proposed definition of "rural area," which is further discussed below, is intended to give the Enterprises broad flexibility to undertake and receive Duty to Serve credit for activities in rural markets.

The Enterprises are an important source of liquidity to rural markets. As noted above, the Enterprises have increased their purchases of mortgage loans in rural markets over the past five years and have expanded their outreach to community banks and other rural lenders over the past year. Nevertheless, there continues to be a need for outreach, support and capacity-building for rural lenders to facilitate their origination of loans for housing in rural areas, which the Enterprises could purchase. Local lenders may lack

[153] 12 U.S.C. 4565(a)(1)(C).

expertise, volume, or resources to participate in Enterprise mortgage programs, while larger regional and national lenders that serve as aggregators for Enterprise-eligible loans purchased from smaller financial institutions are often not active in rural markets.

The Enterprises' Underserved Markets Plan Activities could include, for example, modifying their underwriting of guidelines for rural loans eligible for purchase, increasing their rural loan purchases, and developing strategies for extending education, outreach and technical assistance to small and rural lenders and other entities, including nonprofit and for-profit organizations, serving rural markets. Plan Activities could also include Enterprise marketing of their products to lenders in rural areas in an effort to increase the number of approved lenders in those areas, or Enterprise purchases or other assistance with mortgages guaranteed under USDA programs or other residential mortgages in rural areas.

The Enterprises' Underserved Markets Plans may also include Additional Activities that support the financing of residential properties for very low-, low-, or moderate-income families in rural areas, subject to FHFA determination of whether such activities are eligible for Duty to Serve credit.

Requests for Comments

FHFA specifically requests comments on the following questions (please identify the question answered by the number assigned below):

68. What types of barriers exist to rural lending for housing and how can the Enterprises best address them?

69. What types of Enterprise activities could help build institutional capacity and expertise among market participants serving rural areas?

Definition of "Rural Area"

A definition of "rural area" is necessary so that FHFA can evaluate the Enterprises' activities in rural markets and measure their performance under their Underserved Markets Plans. There is no single, universally accepted definition of "rural area" because varying definitions achieve different policy objectives.[154] The "rural area" definitions identify people living in rural locations, but the methodologies for defining "rural areas" may be based on differing geographic units that are sometimes combined with population characteristics.

FHFA considered several criteria in developing a "rural area" definition. Many rural residents live in the outlying counties of metropolitan areas. Accordingly, FHFA's "rural area" definition for Duty to Serve purposes should be broad enough to include such counties. Additionally, because of the effect the definition would have on the Enterprises' three-year Underserved Markets Plans and activities creditable under those Plans, a "rural area" definition for the Duty to Serve must allow areas under the definition to remain stable over time. Other agencies' definitions of rural areas may be subject to annual or more frequent changes that may revise the definition and the areas included in the definition, based on policy objectives for particular programs. A "rural area" definition suitable for the Duty to Serve should also be census tract-based to allow for customization, ease of implementation and operational use by incorporating existing Enterprise geocoding systems, which use census tracts.

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

In developing its definition of "rural area," FHFA considered the criteria discussed above, other agency definitions of "rural," and comments received on the 2010 Duty to Serve proposed rule, as discussed below.

USDA Definition of "Rural"

The Housing Act of 1949 defines "rural" and "rural area" generally as: any open country, or any place, town, village, or city which is not part of or associated with an urban area and which: (1) has a population not in excess of 2,500 inhabitants, or (2) has a population in excess of 2,500 but not in excess of 10,000 if it is rural in character, or (3) has a population in excess of 10,000 but not in excess of 20,000, and (A) is not contained within a standard MSA, and (B) has a serious lack of mortgage credit for lower and moderate-income families, as determined by the Secretaries of Agriculture and HUD.[155] Because this definition is implemented and updated by USDA, FHFA would not need to update the areas included in the definition with successive Censuses if the definition were used for the Duty to Serve.

Commenters on the 2010 Duty to Serve proposed rule generally favored using the USDA definition for the Duty to Serve. Several nonprofit organizations stated that the USDA definition is sufficiently broad to cover almost all rural areas, and some stated that it should be used for the sake of consistency. However, one Enterprise commented that the USDA definition presents unacceptable operational risks and recommended consideration of other methodologies, possibly using a combination of classifications.

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[155] 42 U.S.C. 1490. The Agricultural Act of 2014 amended the Housing Act of 1949 definition of "rural" so that areas deemed rural between 2000 and 2010 would retain that designation until USDA receives data from the 2020 decennial Census. The amendments also raised the population threshold for eligibility from 25,000 to 35,000 if the area is rural in nature and has a serious lack of mortgage credit for lower- and moderate-income families. *See* Agricultural Act of 2014, Pub. L. No. 113-79, § 6208, 128 Stat. 861 (2014), *available at* https://www.congress.gov/113/plaws/publ79/PLAW-113publ79.pdf.

The Enterprise stated that unless the USDA maintains accessible archives, the USDA definition would prohibit replication and verification of results once USDA data are updated.

The Government Accountability Office (GAO) found that because MSAs contain both urban and rural areas and have increased substantially in both size and number in recent decades, they may not be good determinants of urban-rural distinctions.[156] Adoption of the USDA definition would also pose significant implementation challenges for the Enterprises as the definition splits census tracts into rural and urban components, increasing the difficulty of use because the Enterprises' existing geocoding programs use whole census tracts. In addition, the Enterprises would have to automate the coding of urban-rural designations based on information currently available only through the USDA website. The USDA website is designed for loan underwriters and originators, which deal in much smaller numbers of transactions than the Enterprises. Because of the significantly larger volume of the Enterprises' transactions, the Enterprises would need the capability to automate the rural-urban designations for large numbers of properties. This would be a costly and time-consuming process for the Enterprises. Moreover, USDA revises its rural-designated areas throughout the year at the state and local field office level, which would further complicate the use of USDA's definition in determining Duty to Serve-creditable Enterprise activity in a given Underserved Markets Plan year.

However, one USDA indicator of rurality was found to be particularly useful in constructing FHFA's definition of "rural area" in the proposed rule. This is USDA's

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

RUCA codes designation.[157] RUCA designations are census tract-based and classify census tracts using measures of population density, urbanization, and daily commuting. RUCA designations are clear, meaningful, and easy to operationalize. As further discussed below, FHFA has incorporated RUCA codes in its proposed definition of "rural area."

CFPB Definition of "Rural"

FHFA also considered CFPB's definition of "rural" used for escrow account requirements on higher-priced mortgage loans. CFPB defines "rural" as counties outside of all MSAs and outside of all micropolitan statistical areas that are adjacent to MSAs, as those terms are defined by OMB and as they are currently applied under USDA "Urban Influence Codes" (UICs) established by the USDA-Economic Research Service (ERS).[158] Additionally, CFPB considers a rural area a census block that is designated as "rural" by the U.S. Census Bureau in the urban-rural classification it completes after each decennial Census.[159]

The first component of the CFPB definition for rural [160] uses counties as the geographic unit. Counties are the most commonly used geographic component of definitions of "rural."[161] They are simple to understand and since county boundaries are stable over time, the definition of "rural" remains stable. CFPB maintains a list of

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[157] http://www.ers.usda.gov/data-products/rural-urban-commuting-area-codes/documentation.aspx.
[158] *See* 80 FR 59944, 59968 (Oct. 2, 2015) *to be codified at* 12 CFR 1026.35(b)(2)(iv)(A), effective January 1, 2016.
[159] *Id.*
[160] *See* 80 FR 59944, 59968 (Oct. 2, 2015) *to be codified at* 12 CFR 1026.35(b)(2)(iv)(A)(1), effective January 1, 2016.
[161] *See* Andrew F. Coburn, A. Clinton MacKinney, Timothy D. McBride, Keith J. Mueller, Rebecca T. Slifkin, & Mary K. Wakefield, "Choosing Rural Definitions: Implications for Health Policy," at 2 (Mar. 2007), *available at* http://www.rupri.org/Forms/RuralDefinitionsBrief.pdf.

counties eligible under its definition of "rural" on its website and updates the list annually.

The second component of the CFPB definition for rural may pose implementation and operational issues for the Enterprises, as the Enterprises rely on geocoding using census tracts rather than census blocks.

U.S. Census Bureau Definition of "Rural"

FHFA also considered the U.S. Census Bureau's metropolitan/urban and non-metropolitan/rural areas designations. The U.S. Census Bureau's urban areas designations represent densely developed territory, encompassing residential, commercial and other non-residential urban land uses. The U.S. Census Bureau designates urban areas after each decennial Census by applying specified criteria to decennial Census and other data and identifies two types of urban areas: (i) UAs of 50,000 or more people; and (ii) UCs of at least 2,500 and less than 50,000 people. The U.S. Census Bureau designates rural areas as those areas encompassing all population, housing and territory not included within a UA or UC.[162] The U.S. Census Bureau's designation of rural areas is stable over time, does not require reliance on external websites or published lists, and is census tract-based. Its designations of UAs and UCs allow for identification of rural census tracts even within counties located within MSAs, which are based on county information, and are appropriate for purposes of the Duty to Serve.

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

FHFA Proposed Definition of "Rural Area"—Proposed § 1282.1

After considering the various criteria, other agencies' definitions of "rural," and the comments received on the 2010 Duty to Serve proposed rule, discussed above, FHFA is proposing to define "rural area" in § 1282.1 by combining two different geographic designations that would incorporate nonmetropolitan areas. Specifically, the proposed rule would define "rural area" as (1) a census tract outside of an MSA, as designated by OMB, or (2) a census tract that is in an MSA but outside of the MSA's UAs and UCs, as designated by USDA's RUCA codes.[163]

FHFA's proposed definition would be census tract-based, which would be more specific than county-based or MSA-based definitions and should better distinguish between rural areas and non-rural areas without excluding outlying counties of metropolitan areas. As discussed above, USDA's RUCA codes classify census tracts using measures of population density, urbanization, and daily commuting, are clear and meaningful, and would be easy for the Enterprises to incorporate into their current operating infrastructures. In short, the Enterprises should be able to easily implement FHFA's proposed definition using their existing geocoding systems and the proposed definition should provide stability to support the multi-year Underserved Markets Plans.

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[163] Primary RUCA code 1 indicates an UA, and primary RUCA codes 4 and 7 indicate UCs; census tracts with these codes would not be included in the Duty to Serve definition of "rural area." A dataset based on this proposed definition is posted at www.fhfa.gov.

Requests for Comments

FHFA specifically requests comments on the following questions (please identify each question by the number assigned below):

70. Would one of the four definitions discussed above better serve Duty to Serve objectives, and if so, why?

71. How could operational concerns about Enterprise implementation under each of the definitions be addressed?

High-Needs Rural Regions and High-Needs Rural Populations—Proposed § 1282.35(c)

Section 1282.35(c) of the proposed rule would provide Duty to Serve credit for Enterprise support of financing of income-eligible housing for high-needs rural regions and high-needs rural populations. Under the proposed rule, this activity would constitute a Regulatory Activity which the Enterprises would have to address in their Underserved Markets Plans by indicating how they choose to undertake the activity or the reasons why they will not undertake the activity.

Section 1282.1 of the proposed rule would define a “high-needs rural region” as any of the following regions, provided it is located in a rural area as defined in the proposed rule: (i) Middle Appalachia; (ii) The Lower Mississippi Delta; or (iii) a colonia. Section 1282.1 would define a “high-needs rural population” as any of the following populations, provided the population is located in a rural area as defined in the proposed rule: (i) members of a Federally recognized Indian tribe located in an Indian area; or (ii) migrant and seasonal agricultural workers. FHFA chose these rural regions and populations because they are characterized by a high concentration of poverty and substandard housing conditions.

The economic distress experienced in these regions and by these populations is evident in their poor housing conditions and unaffordable housing.[164] Manufactured housing is prevalent in these regions and is a significant option for affordable housing.

While these regions and populations share common housing problems, unique challenges in some regions include: a scarcity of suitable building lots and high costs of site development and access in Middle Appalachia; particular affordability problems in the Lower Mississippi Delta; title issues with contract-for-deed (installment financing) for land purchases in colonias; and title issues on Native American lands, which are tribal-owned. These regions and populations are typically assisted by government agencies, local community development corporations, housing finance agencies, and nonprofit organizations, which have helped promote economic growth and improvements in housing conditions through various projects and programs. However, these regions and populations tend to lack the public-private development and financing infrastructure necessary to sustain improvements in housing conditions. Enterprise focus on these regions and populations could help provide increased financial infrastructure that facilitates improvements in housing conditions and affordability.

The high-need regions in the proposed definition are discussed further below.

a. Middle Appalachia. As defined by the Appalachian Regional Commission (ARC), the Appalachia region includes all of West Virginia, and parts of Alabama, Georgia, Kentucky, Maryland, Mississippi, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, and Virginia. The Appalachia region is home

[164] *See* Housing Assistance Council, "Taking Stock: Rural People, Poverty, and Housing at the Turn of the 21st Century," at 37 (2002) [hereinafter "HAC 2002 Study"], *available at* http://www.ruralhome.org/sct-information/mn-hac-research/mn-rrr/245-taking-stock-2000.

to more than 25 million people and covers 420 counties and almost 205,000 square miles.[165] Middle Appalachia is a sub-region of Appalachia, which ARC defines as the 230 ARC-designated counties in Kentucky, North Carolina, Ohio, Tennessee, Virginia, and West Virginia.[166] Middle Appalachia is predominantly rural, with over 80 percent of Middle Appalachia's counties being non-metropolitan.[167]

Substandard housing is a particularly prevalent problem in Middle Appalachia. Eighty percent of counties in the region have higher levels of housing units with inadequate plumbing than the national level.[168] Manufactured housing (not on permanent foundations) is also very common in the region, accounting for 18 percent of all housing units. This is due to limited suitable land (*e.g.*, to support foundations and provide wells or septic systems) for site-built homes as well as low incomes that make other types of housing unaffordable.[169]

b. The Lower Mississippi Delta. As defined by the Lower Mississippi Delta Development Act and the former Lower Mississippi Delta Development Commission, the Lower Mississippi Delta region is comprised of counties and parishes in portions of Arkansas, Louisiana, Mississippi, Missouri, Illinois, Tennessee, Kentucky, and

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165 *See* Appalachian Regional Commission, FINANCIAL STATEMENTS -- As of And For The Years Ended September 30, 2013 and 2012, Note 1 at 8 (Jan. 29, 2014), *available at* http://www.arc.gov/images/aboutarc/members/IG/Report14-09FiscalYear2013FinancialStatementAudit.pdf.

166 *See A*ppalachian Regional Commission, Subregions in Appalachia (Nov. 2009), *available at* http://www.arc.gov/research/MapsofAppalachia.asp?MAP_ID=31. Middle Appalachia comprises the North Central, Central and South Central subregions of Appalachia.

167 *See* HAC 2002 Study, *supra* note 164, at 56.

168 *See* HAC 2002 Study, *supra* note 164, at 60.

169 *See Id.*

Alabama.[170] Technically, the region is not a delta but a 200-mile plain that covers more than 90,000 miles of rivers and streams and more than 3 million acres.[171]

In considering the Lower Mississippi Delta Development Act, the U.S. Senate found that the lower Mississippi River valley is the poorest, most underdeveloped region in the United States, ranking lowest by almost every economic and social indicator.[172] It has an overwhelming need for the development of decent, affordable housing.[173] Challenges in assisting this region have included insufficient local capacity to undertake development efforts, the absence of adequate resources and financing mechanisms, and the lack of collaboration among ongoing efforts in the region.[174]

c. Colonias. In Latin America, the word "colonia" means "neighborhood" or "community." The Cranston-Gonzalez National Affordable Housing Act (NAHA) has two definitions of a "colonia" depending on the applicable housing program. NAHA defines a "colonia" as an "identifiable community" that: (A) is in the State of Arizona, California, New Mexico, or Texas; (B) is in an area of the United States within 150 miles of the U.S.-Mexico border (not including any standard MSA with a population exceeding

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170 *See* Lower Mississippi Delta Development Act, Oct. 1, 1988, P.L. 100-460, Title II, § 201; HAC 2002 Study, *supra* note 164, at 87. The State of Alabama was added in 2000 as a provision of the Consolidated Appropriations Act of 2001, P.L. 106-554 (114 Stat. 2763A-252). *See generally* Eugene Boyd, Congressional Research Service, Federal Regional Authorities and Commissions: Their Function and Design, at 15-25 (Order Code RL33076 (Sept. 21, 2006), *available at* https://www.hsdl.org/?view&did=467086. The Lower Mississippi Delta Commission's operations were terminated on September 30, 1990. *See id.* at 16.

171 *See* HAC 2002 Study, *supra* note 164, at 84.

172 S. Rep. No. 557, 100th Cong., 2d Sess., at 2 (1988). *See also* The Economist, "The Hellhound's Trail -- A Delta town starts to make good," (May 4, 2013), *available at* http://www.economist.com/node/21577093/print.

173 HAC 2002 Study, *supra* note 164, at 89. *See generally* Chico Harlan, "An opportunity gamed away -- For a county in the Deep South that reaped millions from casino business, poverty is still its spin of the wheel," The Washington Post (July 11, 2015), *available at* http://www.washingtonpost.com/sf/business/2015/07/11/an-opportunity-gamed-away/.

174 *See* HAC 2002 Study, *supra* note 164, at 89. *See generally* Chico Harlan, "An opportunity gamed away -- For a county in the Deep South that reaped millions from casino business, poverty is still its spin of the wheel," The Washington Post (July 11, 2015), *available at* http://www.washingtonpost.com/sf/business/2015/07/11/an-opportunity-gamed-away/.

1 million), or is in the United States-Mexico border region (the applicable criterion depends on the particular housing program); (C) is determined to be a colonia on the basis of objective criteria, including lack of potable water supply, lack of adequate sewage systems, and lack of decent, safe and sanitary housing; and (D) was in existence as a colonia before November 28, 1990.[175] Previous statutory definitions of "colonia" also included a requirement that the identifiable community be designated by the state or county in which it is located as a colonia.[176] The definitions used in HUD and USDA programs include criteria from the previous and current statutory definitions, depending on the particular housing program.[177] The NAHA definition as used by HUD and USDA programs also includes other types of colonia communities, such as dense settlements of modular or manufactured homes.[178]

In many cases, state and local jurisdictions play an important role in the level of public controls related to factors such as the initial designation of the colonias, their ongoing conditions, and the political initiative to improve their conditions. Some colonias are incorporated communities under the control of a city, some are unincorporated under the control of the county, and others may be in extra-jurisdictional territories of cities which share some level of control with the county. The political motivation to improve conditions for colonia residents has led to an assortment of projects that combine funding from multiple federal and non-federal sources including

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[175] 42 U.S.C. 1479(f)(8); 42 U.S.C. 5306note.
[176] P.L No. 101-625, 104 Stat. 4290, 4396.
[177] 24 CFR 570.411, 7 CFR 1777.4**.**
[178] 24 CFR 570.411, 7 CFR 1777.4. *See* "Colonias History," *available at* https://www.hudexchange.info/cdbg-colonias/colonias-history/.

local resources.[179] Colonias typically have been formed in response to a need for affordable housing that gives people a sense of ownership.

Lack of decent, affordable single-family and rental housing continues to be a major problem in colonias. While homeownership rates in colonias are similar to national homeownership rates, the percentage of vacant properties in colonias (12 percent) is higher than the percentage of vacant properties nationally (8.4 percent). This may reflect a lack of affordability for acquiring or sustaining ownership by a population characterized by significant poverty, household migration for available farm work, and abandonment of substandard housing. Many colonia residents typically purchase unimproved land rather than improved property, and rely on financing methods such as a contract for deed rather than a traditional mortgage.[180] This may be because traditional lenders are unwilling to make standard mortgages on land without certain infrastructure or on which the improvements may be self-built. Non-traditional lenders may not offer alternatives to contract-for-deed financing even when financing improvements to the land. A contract for deed is a form of installment sale in which the seller does not transfer legal title to the buyer until after the buyer has paid the entire purchase price.[181] As with most installment financing, the homebuyer is usually responsible for maintenance of the property and payment of the taxes and insurance during the contract term and typically loses the right to recover the value of any improvements made to the property. Consequently, a contract for deed lacks some of the borrower protections that a

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[179] *Id.*

[180] *See* Housing Assistance Council, "Housing in the Border Colonias" (Aug. 2013), *available at* http://www.ruralhome.org/storage/documents/rpts_pubs/ts10_border_colonias.pdf.

[181] Peter M. Ward, Heather K. Way & Lucille Wood, "The Contract for Deed Prevalence Project -- A Final Report to the Texas Department of Housing and Community Affairs (TDHCA)," at IV (Aug. 2012), *available at* http://www.tdhca.state.tx.us/housing-center/docs/CFD-Prevalence-Project.pdf.

mortgage provides through lengthier default and foreclosure processes and, in some cases, redemption periods. Contracts for deed are also more likely to carry interest rates applicable to consumer loans, such as 12 percent to 18 percent, which are generally much higher than residential mortgage rates.

If the full NAHA definition were applied for the Duty to Serve, the Enterprises would likely be able to receive little or no Duty to Serve credit for colonias. This is because to be eligible for purchase by the Enterprises, mortgages on residential properties must meet the Enterprises' property eligibility requirements, including project access and infrastructure, presence of site utilities, acceptable property condition, and marketability. The NAHA definition of colonia includes a requirement that the community lack a potable water supply and adequate sewage systems. The Enterprises' property eligibility requirements would not permit them to purchase mortgages on properties that lack potable water supplies and adequate sewage systems. A broader definition of "colonia" that incorporates some but not all of the elements of the NAHA definitions would provide the broadest scope for Duty to Serve credit for Enterprise purchases of mortgage loans and conducting of other activities in colonias.

Accordingly, FHFA proposes to define "colonia" for Duty to Serve purposes as an identifiable community that (A) is designated by a State or county in which it is located as a colonia; (B) is located in the State of Arizona, California, New Mexico, or Texas; and (C) is located in a U.S. census tract with some portion of the tract within 150 miles of the U.S.-Mexico border.

The high-needs populations in the proposed definition are discussed further below.

a. Members of a Federally Recognized Indian Tribe Located in an Indian Area. The federal government now recognizes 337 Native American tribes, predominantly in the Plains region and the American Southwest, and 229 Alaska Native Villages.[182, 183] Approximately 70 percent of homes on Native American lands are owner-occupied; however, Native American tribes and Alaska Native Villages generally own the underlying land to ensure the land is not sold to non-tribal members or non-Alaskan Natives. Consequently, the land and improvements may not have the same transfer rights and may function more like a leasehold estate, deterring traditional lenders from financing mortgages for home purchases because they cannot perfect the lien on the collateral. Despite the high rate of homeownership, there is a demand for rental housing on tribal and Alaska Native Villages Land. However, a shortage of decent, affordable rental properties on such land makes renting less common. This shortage is due in part to many villages being located on rivers or in coastal areas subject to erosion and flooding.[184] Coastal area locations prone to flooding may contribute to a lack of incentive to develop rental housing due to higher costs and risks associated with building in such areas. In addition, housing project development may not be cost effective because costs are generally more expensive on tribal and Alaska Native Village lands due to increased costs to transport construction equipment, labor and materials to isolated, rural locations.[185]

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[182] *See* U.S. Department of Interior Indian Affairs, "Tribal Directory," *available at* http://www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/index.htm.

[183] *See* National Conference of State Legislators (NCSL) website (Updated Feb. 2015), *available at* http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx.

[184] *See* GAO, Alaska Native Villages Report (Dec. 2003), *available at* http://www.gao.gov/products/A08981.

[185] *See* Housing Assistance Council, "Housing on Native American Lands" (Sept. 2013), *available at* http://www.ruralhome.org/storage/documents/rpts_pubs/ts10_native_lands.pdf.

Under the proposed rule, Enterprise activities serving members of Native American tribes or Alaska Native Villages (hereafter referred to as Federally recognized Indian tribes to be consistent with the legal definition used by the Bureau of Indian Affairs (BIA)) in an Indian area that is located in a rural area would be a Regulatory Activity. Section 1282.1 would define a "Federally recognized Indian tribe" in accordance with the BIA definition. BIA defines a "Federally recognized Indian tribe" as "an entity listed on the Department of Interior's list under the Federally Recognized Indian Tribe List Act of 1994, which the Secretary currently acknowledges as an Indian tribe and with which the United States maintains a government-to-government relationship."[186] Section 1282.1 would define "Indian area" in accordance with the HUD definition. HUD defines an "Indian area" as the area within which an Indian tribe operates affordable housing programs or the area in which a Tribally Designated Housing Entity is authorized by one or more Indian tribes to operate affordable housing programs.[187]

b. Migrant and Seasonal Agricultural Workers. The United States has an estimated 1.4 million agricultural workers.[188] Approximately 25 percent of agricultural workers have family incomes below the poverty line, which is roughly twice the national rate.[189]

Because of instability in their work situation, many agricultural workers have

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186 *See* 25 CFR 83.1.
187 *See* 24 CFR 1000.10.
188 *See* Oxfam America & Farm Labor Organizing Committee, "A state of fear: Human rights abuses in North Carolina's tobacco industry," at 17 (2011), *available at* http://www.oxfamamerica.org/static/oa3/files/a-state-of-fear.pdf.
189 *See* Housing Assistance Council, "Housing Conditions for Farmworkers," Research Report, at 1 (Sept. 2013) [hereinafter "HAC Farmworker Report"], *available at* http://www.ruralhome.org/storage/documents/rpts_pubs/ts10-farmworkers.pdf.

atypical and significant housing needs.[190] Migrant agricultural workers travel from place to place to work in agriculture and move into temporary housing while working.[191] Seasonal agricultural workers typically live in a permanent community year-round.[192] Today, fewer agricultural workers follow traditional patterns of migration and instead stay in one place year- round.[193] Nevertheless, inadequate and substandard housing conditions for many agricultural workers have remained unchanged over time.[194]

According to HAC, 85 percent of agricultural workers nationwide obtain their housing through the private market rather than through employers or public programs.[195] More than 60 percent of agricultural worker-occupied housing units are rented, and approximately 35 percent are owner-occupied.[196]

Housing arrangements for agricultural workers tend to vary by region, with the majority of East Coast agricultural workers living in employer-provided housing.[197] The housing stock tends to be group quarters, individual homes or manufactured homes provided and controlled by the employer.[198] The housing may be part of the worker's

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[190] For a discussion of housing difficulties facing migrant farmworkers, *see*, *e.g.*, Lauren Mills, "Poor Housing, Wage Cheats Still Plague Midwest Migrant Farm Workers," IowaWatch.org (Dec. 30, 2013), *available at* http://iowawatch.org/2013/12/30/poor-housing-wage-hassles-still-plague-midwest-migrant-farm-workers/; Murrow, "Harvest of Shame" (1960) (broadcast), *available at* https://www.youtube.com/watch?v=yJTVF_dya7E.

[191] *See* Student Action with Farmworkers, Home United States Farmworker Factsheet, at 1 (2007), *available at* https://saf-unite.org/sites/default/files/usfarmworkerfactsheet.pdf.

[192] *Id.*

[193] *See* HAC Farmworker Report, *supra* note 189, at 3.

[194] *See* HAC Farmworker Report, *supra* note 189, at 1.

[195] *See* HAC Farmworker Report, *supra* note 189, at 4.

[196] HAC Farmworker Report, *supra* note 189, at 4. This report does not specify the housing types for the remaining 5 percent of farmworkers who are not renters or owner-occupants.

[197] *See* J. Keim-Malpass, C.R. Spears-Johnson, S.A. Quandt, & T.A. Arcury, "Perceptions of housing conditions among migrant farmworkers and their families: implications for health, safety and social policy," Rural and Remote Health 15:3076, at 2 (Feb. 13, 2015) [hereinafter "Housing Health Study"], *available at* http://www.rrh.org.au/publishedarticles/article_print_3076.pdf.

[198] *Id.*

compensation.[199] Concerns about some employer-provided housing have included overcrowding, inadequate or dysfunctional bathroom and shower facilities, leaky roofs, lack of heat or ventilation, inadequate or no laundry facilities, insect or rodent infestations, lack of security (locks), and inadequate cooking facilities.[200] The proximity of the housing to insecticide-laced farm fields, and the exposure to mold and dirty drinking water, can raise health concerns.[201]

Unlike their East Coast counterparts, most agricultural workers in California find their own housing[202] as employers offload the costs of their workers' housing.[203] Increasingly, this housing is located in cities.[204] The workers commute to farms, where they labor year round rather than seasonally.[205] Their housing stock sometimes includes unfinished garages, work sheds, barns, vehicles and shacks.[206] It can also include informal clusters of dwellings on a single lot, typically a main house and one or more "back houses."[207]

Section 1282.1 of the proposed rule would define "migrant agricultural workers" and "seasonal agricultural workers" in accordance with the U.S. Department of Labor's (DOL) definitions.[208] DOL defines a "migrant agricultural worker" generally as an

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199 *Id.*
200 *See* Housing Health Study, *supra* note 197.
201 *See* Housing Health Study, *supra* note 197, at 8-11.
202 *See* Housing Health Study, supra note 197, at 2.
203 *See* Don Villarejo, "California's Hired Farm Workers Move to the Cities: The Outsourcing of Responsibility for Farm Labor Housing," at 1 (Jan. 24, 2014) [hereinafter "Move to Cities Study"], *available at* http://www.crla.org/sites/all/files/u6/2014/rju0214/VillarejoFrmLbrHsngHlth_CRLA_012414.pdf.
204 *See generally* Move to Cities Study, *supra* note 203.
205 *See* Move to Cities Study, *supra* note 203, at 15, 17, 18, 27.
206 *See* Don Villarejo, "The Status of Farm Labor Housing – And the Health of Workers," at 12 (Cal. Inst. For Rural Studies, Mar. 6, 2015), *available at* http://www.cirsinc.org/phocadownload/userupload/housing-status_health_us_hired-farm-workers_2015.pdf.
207 *See* Move to Cities Study, *supra* note 203, at 19.
208 DOL's definitions are at 29 CFR 500.20(p) & (r).

individual with agricultural employment of a seasonal or other temporary nature, who is required to be absent overnight from his permanent place of residence. DOL defines a "seasonal agricultural worker" generally as an individual with agricultural employment of a seasonal or other temporary nature, who is not required to be absent overnight from his permanent place of residence when employed on a farm or ranch performing certain specified types of agricultural work, and who is transported, or caused to be transported, to or from the place of employment by means of a day-haul operation.

Requests for Comments

FHFA specifically requests comments on the following questions (please identify the question answered by the number assigned below):

72. Should Enterprise support for housing for high-needs rural regions and high-needs rural populations be a Regulatory Activity?

73. What activities could the Enterprises undertake to provide liquidity and other support to high-needs rural regions and high-needs rural populations?

74. How should FHFA define "colonia" for Duty to Serve purposes?

75. How should FHFA define "member of an Indian tribe," "Federally recognized Indian tribe," and "Indian Area" for Duty to Serve purposes?

76. What specific actions could the Enterprises take to assist the needs of migrant and seasonal agricultural workers?

77. Are there high-needs rural regions and/or high needs rural populations in addition to those identified above that should be included in this section, and, if so, how should they be defined to receive Duty to Serve credit?

78. How might loan sellers and the Enterprises collect data establishing that housing to be

financed would specifically benefit migrant and seasonal agricultural workers?

79. Should FHFA define "high-needs populations" to include other categories of agricultural workers with high-needs housing issues in addition to seasonal and migrant agricultural workers? Should FHFA include agricultural workers in permanent annual employment in the definition?

IV. Evaluating and Rating Enterprise Duty to Serve Performance—Proposed § 1282.36

The Safety and Soundness Act requires FHFA to separately evaluate whether each Enterprise has complied with its Duty to Serve each underserved market and to annually "rate the performance of each [E]nterprise as to the extent of compliance."[209]

Under the proposed rule, FHFA's criteria for evaluating an Enterprise's annual Duty to Serve compliance would be set forth in an evaluation guide. FHFA would prepare a separate evaluation guide for each Enterprise for each evaluation year. FHFA would develop the evaluation guide using the contents of the Enterprise's Plan and the assessment factors. FHFA would provide the evaluation guide to the Enterprise at least 30 days before January 1st of the evaluation year for which the guide is applicable, except that the evaluation guide for the first evaluation year after the effective date of this regulation would be delivered on a date to be determined by FHFA. The evaluation guide would be required to be posted on the respective Enterprise's website and on FHFA's website.

The evaluation guide would allocate a range of potential scoring points, *e.g.*, a maximum of 10 and a minimum of 0, to each Plan activity. The evaluation guide would

[209] 12 U.S.C. 4565(d).

allocate a higher number of potential scoring points to Plan activities that are expected to require greater Enterprise resources and effort and to have a greater impact on the particular underserved market. The aggregate maximum number of scoring points that would be allocated to all of the Plan activities grouped under a particular underserved market would be 100 points.

At the end of the evaluation period, FHFA would compare the evaluation guide criteria to an Enterprise's actual performance under its Plan and assign a score to each Plan activity. The score could not exceed the number of potential scoring points allocated to the Plan activity in the evaluation guide. For example, for a Plan activity that had been allocated a maximum of 10 points in the evaluation guide, FHFA might award 4 points for modest performance and 8 points for good performance. After FHFA has awarded a score to each Plan activity, FHFA would sum the scoring points for all of the Plan activities that are grouped under each underserved market. The sum of those scores would produce an overall composite score ranging from 0 to 100 for each underserved market. Therefore, each Enterprise would have three overall composite scores, one for each underserved market.

The evaluation guide would contain a table that assigns overall composite score numerical ranges for each underserved market to each of the following four overall ratings: "Exceeds," "High Satisfactory," "Low Satisfactory," and "Fails." The four numerical ranges assigned to the overall ratings would include all whole numbers from 0 to 100 with no overlap. An Enterprise's overall rating for each underserved market would be determined by the numerical range within which the Enterprise's overall composite score falls. For example, if the table provides that an overall composite score of between 90 and 100 corresponds to an “Exceeds” rating, then an overall composite score of 93 for a particular underserved market would receive an “Exceeds” rating for that underserved market in that evaluation year. The same table range would apply to each underserved market. A rating of “Exceeds,” “High Satisfactory,” or “Low Satisfactory” would constitute compliance with the Duty to Serve the underserved market. A rating of “Fails” would constitute noncompliance with the Duty to Serve the underserved market.

The 2010 Duty to Serve proposed rule would have established a two-tier evaluation system of “In compliance” or “Noncompliance” for Enterprise performance under each underserved market. In addition, it would have required FHFA to annually assign a rating of “Satisfactory” or “Unsatisfactory” to Enterprise performance for each of the four statutory assessment factors in each of the underserved markets. The evaluation approach in this proposed rule differs from the approach in the 2010 proposed rule. The proposed rule’s new approach to evaluations would enhance specificity by providing four distinct rating tiers instead of two, and would give FHFA the flexibility to make necessary refinements to the evaluation guide scoring process. This would enable the Enterprises to better focus their resources on areas of highest Duty to Serve value in a particular evaluation year and better understand FHFA’s expectations.

Requests for Comments

FHFA specifically requests comments on the following questions (please identify the question answered by the number assigned below):

80. Is there an alternative approach to evaluation of Enterprise Duty to Serve compliance that would enable FHFA to better measure the Enterprises’ Duty to Serve compliance?

81. Should FHFA consider a different rating structure (*e.g.*, a rating structure with fewer or more ratings tiers)?

V. Extra Credit for Residential Economic Diversity Activities—Proposed § 1282.37

While FHFA would rely under the proposed rule on the statutory assessment factors for scoring the Enterprises' performance for each underserved market, FHFA would also grade qualifying activities within each of these markets on any activities the Enterprises planned under a non-mandatory residential economic diversity criterion. To qualify for extra credit, an activity first must be an eligible activity that contributes to an Enterprise's Duty to Serve an underserved market. Under this criterion, FHFA would evaluate the Enterprises on the extent to which their qualifying activities promote residential economic diversity in an underserved market in connection with mortgages on: 1) affordable housing in a high opportunity area; or 2) mixed-income housing in an area of concentrated poverty.

The scoring points awarded for these qualifying activities would be treated as extra credit for an underserved market (extra credit could not move the composite score within such a market above 100 points). FHFA specifically requests comments on how the extra credit should be applied.

In § 1282.1, FHFA proposes to define "high opportunity area" as an area designated by HUD as a "Difficult Development Area" (DDA).[210] DDAs identify areas where it is difficult to create affordable housing due to high rents relative to area median income. The HUD DDAs are generally seen as a proxy for higher opportunity neighborhoods that offer good schools, access to transportation and labor markets, and

[210] 26 U.S.C. 42(d)(5)(B)(iii). For the 2016 DDAs, *see* 80 FR 73201 (Nov. 24, 2015).

other amenities. Beginning in 2016, HUD will define DDAs within metropolitan areas at the zip code level (also known as "Small Area Difficult Development Areas"), rather than the current practice which identifies them based on larger geographic areas. HUD's DDAs are updated annually and are publicly available on HUD's website.

Outside of metropolitan areas, HUD designates DDAs at the county level, which in many instances follow single census tracts. Given the size of many counties and census tracts outside of metropolitan areas, these DDAs often would not be as useful as those in metropolitan areas for purposes of identifying high opportunity areas and are even less useful for counties comprised of multiple census tracts. FHFA specifically requests comments on how to define high opportunity areas outside of metropolitan areas. Analysts have proposed a number of possible definitions that FHFA could utilize, for example, suggesting it may be possible to measure higher opportunity census tracts or block groups based on their rates of poverty, labor force participation, minority concentration and/or assisted housing concentration.[211] In choosing a definition, FHFA would have to balance the comprehensiveness of a definition with its ease of Enterprise implementation, geographic depth, and ability to be updated regularly.

FHFA also wishes to explore whether the Enterprises can support state efforts to increase affordable housing in high opportunity areas. A number of states define such areas and provide incentives to locate housing in these areas in their Low-Income

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[211] For examples of definitions, *see* Margery Turner et al., "Helping Poor Families Gain and Sustain Access to High-Opportunity Neighborhoods," (Washington: The Urban Institute, 2011), *available at* http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412455-Helping-Poor-Families-Gain-and-Sustain-Access-to-High-Opportunity-Neighborhoods.PDF; and Kirk McClure, "Housing Choice Voucher Marketing Opportunity Index: Analysis of Data at the Tract and Block Group Level," (Washington: U.S. Department of Housing and Urban Development, 2011), *available at* http://www.huduser.gov/portal/publications/pdf/Housing_Choice_Voucher_Report.pdf.

Housing Tax Credit Qualified Allocation Plans (QAPs), [212] but definitions are not uniform, and incorporating them into an FHFA definition of “high opportunity area” may introduce operational challenges for the Enterprises.

In § 1282.1, FHFA proposes to define “area of concentrated poverty” as a census tract designated by HUD as a “Qualified Census Tract” (QCT) pursuant to 26 U.S.C. 42(d)(5)(B)(ii), which is generally a tract in which 50 percent of households have incomes below 60 percent of the area median income or that has a poverty rate of 25 percent or more.[213] FHFA proposes to consider activities in these areas that facilitate financing of mixed-income housing as addressing residential economic diversity.

In § 1282.1, FHFA proposes to define “mixed-income housing,” for purposes of residential economic diversity activities for which extra credit may be available, as a multifamily property or development that may include or comprise single-family units and serves very low-, low-, or moderate-income households where at least 25 percent of the units are affordable only to households with incomes above moderate-income levels.

FHFA also recognizes the benefit of Enterprise support for financing of affordable housing that contributes to the revitalization of areas of concentrated poverty. States are required by the LIHTC statute to give preference to projects located in QCTs when their development “contributes to a concerted community revitalization plan.”[214] FHFA considered providing credit for activities as supporting residential economic diversity if they are part of a concerted community revitalization plan in a state QAP.

[212] States create their plans pursuant to 26 U.S.C. 42(m)(1)(B).
[213] HUD designates QCTs on an annual basis. For the 2016 QCTs, see 80 FR 73201 (Nov. 24, 2015).
[214] 26 U.S.C. 42(m)(1)(B)(ii)(III).

However, few states define such plans and it may be difficult to implement the diverse definitions set out by states.

It may be feasible to utilize other federal definitions or designations of areas with comprehensive revitalization plans. For example, FHFA could award credit for activities in areas that have received Choice Neighborhood Planning or Implementation grants, or in neighborhoods designated by HUD or USDA as Promise Zones, which denotes that they are undertaking comprehensive community revitalization.[215]

Requests for Comments

82. Is FHFA's proposed definition of "high opportunity area" the most appropriate? Should the rule use DDAs to define high opportunity areas outside of metropolitan areas, or is there a better definition, such as a factor-based definition, that would be preferable for these areas?

83. How could FHFA incorporate state-defined high opportunity areas (or similar terms) into its definition of high opportunity area? If such state-defined areas are included, how could this be implemented by the Enterprises?

84. Should FHFA consider other or additional definitions of "area of concentrated poverty?" For example, should FHFA consider adopting a definition similar to HUD's proposed designation of census tracts by racial and ethnic concentrations of poverty (RCAPs and ECAPs), which are census tracts with a non-white population of 50 percent

[215] *See* http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/economicdevelopment/programs/pz/overview.

or more and a poverty rate that exceeds 40 percent or is three times the average tract poverty rate for the metro/micro area (whichever is lower)?[216]

85. Should FHFA consider an alternative definition of "mixed-income?" For example, should FHFA incorporate minimum thresholds for the amount of housing affordable to very low-, low-, or moderate-income households in its definition?

86. How should the extra credit activities be evaluated and weighed generally? How should FHFA evaluate and weigh activities related to mixed-income housing in areas of concentrated poverty to incentivize a good mix of such housing?

87. How could FHFA determine whether Enterprise activities are part of or contribute to revitalization plans in areas of concentrated poverty? Are there consistent criteria FHFA could apply to determine what constitutes such a plan and whether such a plan is being implemented in an area of concentrated poverty? Are existing federal designations useful, such as the Promise Zones designation or neighborhoods that receive a CNI grant?

88. Should FHFA incorporate Enterprise efforts supporting CNI as a residential economic diversity activity, rather than as a Regulatory Activity under the affordable housing preservation market?

VI. General Requirements for Credit and General Requirements for Loan Purchases—Proposed §§ 1282.38, 1282.39

Sections 1282.38 and 1282.39 of the proposed rule would set forth general counting requirements for whether and how activities will receive credit under the Duty to Serve regulation. With some exceptions, the counting rules and other requirements would be similar to those in FHFA's housing goals regulation. For example, under

[216] This proposed approach is laid out in U.S. Department of Housing and Urban Development, "AFFH Data Documentation Draft" (2013), *available at* http://www.huduser.gov/portal/publications/pdf/FR-5173-P-01_AFFH_data_documentation.pdf.

appropriate circumstances, a single loan purchase could count toward the achievement of multiple housing goals, and in the same way, a single loan purchase could receive credit under more than one underserved market for Duty to Serve purposes. Also, consistent with the comments received on the 2010 Duty to Serve proposed rule, in most instances, FHFA would measure performance under the loan purchase assessment factor by the number of units financed by the loan purchase.

A. No Credit Under Any Assessment Factor

Enterprise activities under proposed § 1282.38(b) would not receive credit under any assessment factor.

Under proposed § 1282.38(b)(1), contributions to the Housing Trust Fund[217] and the Capital Magnet Fund,[218] and mortgage purchases funded with such grant amounts, would not receive credit under the Duty to Serve regulation.

Under proposed § 1282.38(b)(2), HOEPA mortgages[219] would not receive credit under the Duty to Serve regulation.

Under proposed § 1282.38(b)(3), mortgages on manufactured homes that are not titled as real property under the laws of the state where the property is located would not receive credit under the Duty to Serve regulation.

The proposed rule is tailored to the unique features of certain specialized activities. As previously discussed, energy efficiency improvement loans for existing multifamily rental properties would be eligible for Duty to Serve credit where there are reliable and verifiable projections or expectations that the financed improvements will

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[217] 12 U.S.C. 4568.
[218] 12 U.S.C. 4569.
[219] *See* 15 U.S.C. 1602(bb).

reduce energy and water consumption by the tenant by at least 15 percent, the reduced utility costs derived from the reduced consumption are not offset by higher rents or other charges imposed by the property owner, and the reduced utility costs will offset the upfront costs of the improvements within a reasonable time period. Generally, subordinate liens on multifamily properties would not receive credit under the Duty to Serve regulation. However, because subordinate liens for energy efficiency improvements on existing multifamily properties address a specific need, under proposed § 1282.38(b)(4), such liens would receive credit under the Duty to Serve regulation provided they meet all other requirements in the regulation.

Under § 1282.38(b)(5), subordinate liens on single-family properties would not receive credit under the Duty to Serve regulation. This exclusion applies to all single-family subordinate loans including energy efficiency improvement loans.

As previously discussed, shared appreciation loans that meet the requirements of proposed § 1282.34(d)(4) would be eligible for Duty to Serve credit. Proprietary shared appreciation loans, where an investor receives part of the equity in exchange for making the home affordable for a single buyer only, do not preserve affordability of the unit for subsequent buyers and, therefore, would not meet the requirements of proposed § 1282.34(d)(4). Accordingly, under proposed § 1282.38(b)(6), such loans would not receive credit under the Duty to Serve regulation.

Government-insured and government-guaranteed mortgages that are otherwise eligible for inclusion would count towards the Duty to Serve, in light of the specificity of the needs targeted by the Duty to Serve and the desirability of providing the Enterprises with multiple tools to address those needs.

B. No Credit Under Loan Purchase Assessment Factor

Enterprise activities under proposed § 1282.38(c) would not receive credit under the loan purchase assessment factor.

C. General Requirements for Loan Purchases

In order to receive credit for loan purchases, a loan must be on housing affordable to very low-, low-, or moderate income families, regardless of whether the property is owner-occupied or rental. Sections 1282.17, 1282.18 and 1282.19 of part 1282 define "affordability" for owner occupied and rental units. The tables in these sections adjust the maximum percentage of area median income based on family size and the size of the dwelling unit, as measured by the number of bedrooms.

Under § 1282.39(c) of the proposed rule, Enterprise mortgage purchases financing owner-occupied, single-family properties would be evaluated based on the income of the mortgagor(s) and the area median income at the time the mortgage was originated. Where the income of the mortgagor(s) is not available, the mortgage purchase would not receive credit under the loan purchase assessment factor.

Under proposed § 1282.39(d)(1), mortgage purchases financing single-family rental units and multifamily rental units would be evaluated based on rent and whether the rent is affordable to the income groups targeted by the Duty to Serve.

Under § 1282.39(d)(2), where a multifamily property is subject to an affordability restriction that establishes the maximum permitted income level for a tenant or a prospective tenant or the maximum permitted rent, the affordability of units in the property may be determined based on the maximum permitted income level or maximum permitted rent established under such housing program for those units.

Under proposed § 1282.39(e), when an Enterprise lacks sufficient information on the rents, the Enterprise's performance regarding the rental units may be evaluated using estimated affordability information. The estimated affordability information would be calculated by multiplying the number of rental units with missing affordability information in properties securing the mortgages purchased by the Enterprise in each census tract by the percentage of all moderate-income rental dwelling units in the respective tracts, as determined by FHFA based on the most recent decennial census. The housing goals regulation[220] applies a 5 percent limit on the number of rental units with missing data for which an Enterprise may estimate affordability of rents. Under the proposed rule, there would not be a limit on the number of rental units for which an Enterprise could estimate affordability each year.

Under proposed § 1282.39(f), FHFA would evaluate an Enterprise's volume of loans purchased on manufactured housing communities using unpaid principal balance instead of the number of dwelling units. As previously discussed, due to the lack of data on manufactured housing community residents' incomes and monthly housing costs, under proposed § 1282.39(f), the affordability of a manufactured housing community would be evaluated based on the median income of the census tract in which the manufactured housing community is located. An Enterprise would receive credit for either the total amount or a percentage of the unpaid principal balance of the mortgage financing the community.

[220] 12 CFR 1282.15(e)(3).

VII. Special requirements for Loan Purchases—Proposed § 1282.40

Under proposed § 1282.40, activities such as Enterprise purchases or guarantees of mortgage revenue bonds and purchases of participations in mortgages would be treated as mortgage purchases in the same manner as they would be counted under the housing goals regulation.

Requests for Comments

FHFA specifically requests comments on the following questions (please identify the question answered by the number assigned below):

89. Under the proposed rule, when an Enterprise lacks sufficient information to determine whether a rental unit is affordable, the Enterprise may estimate affordability for the rental unit using the estimation methodology set forth in the proposed rule. Are better methods available for estimating affordability when rent information is missing?

90. Unlike the housing goals regulation, the proposed rule would not limit the number of units with missing data for which an Enterprise could estimate affordability. Should FHFA impose a limit, and if so, what limit should be imposed?

VIII. Enforcement of Duty to Serve—Proposed §§ 1282.41, 1282.42

The Safety and Soundness Act provides that the Duty to Serve underserved markets is enforceable to the same extent and under the same enforcement provisions as are applicable to the Enterprise housing goals, except as otherwise provided.[221] Accordingly, under § 1282.41 of the proposed rule, if an Enterprise receives a "Fails" rating for a particular underserved market in a given year, or if there is a substantial probability that an Enterprise will receive a "Fails" rating for a particular underserved

[221] 12 U.S.C. 4566(a)(4).

market in a given year, FHFA would determine whether the activities in the Enterprise's Underserved Markets Plan are or were feasible. In determining feasibility, FHFA would consider factors such as market conditions and the financial condition of the Enterprise. If FHFA determines that compliance is or was feasible, FHFA would follow the procedures in 12 U.S.C. 4566(b).

Section 1282.42 of the proposed rule includes requirements for an Enterprise to submit to FHFA a housing plan, in the Director's discretion, if the Director determines that the Enterprise did not comply with its Duty to Serve a particular underserved market.

IX. Enterprise Duty to Serve Reporting to FHFA—Proposed § 1282.66

Section 1282.66 of the proposed rule would require each Enterprise to provide to FHFA two quarterly reports, one semi-annual report, and an annual report on its performance and progress toward meeting its Duty to Serve each undeserved market.

Under the 2010 Duty to Serve proposed rule, each Enterprise would have been required to provide three quarterly reports and one annual report to FHFA on its Duty to Serve performance and progress, consistent with the reporting requirements for the Enterprise housing goals. One Enterprise commented that because reporting on progress toward meeting the Duty to Serve underserved markets will take more time than reporting on the housing goals and will require input from business units throughout the Enterprise, reporting should be limited to annual submissions and the proposed quarterly reporting requirements should be eliminated. The other Enterprise commented that semi-annual reporting on Duty to Serve progress would be appropriate. The Enterprise added that, coupled with the existing quarterly reporting under the housing goals, quarterly reporting under the Duty to Serve would pose significant additional burdens on the Enterprise and its resources.

In consideration of these comments, the proposed rule would require each Enterprise to provide to FHFA two quarterly reports, one semi-annual report, and an annual report. To lessen operational concerns, FHFA would require the quarterly reports to address only performance under the loan purchase assessment factor for each underserved market. The Enterprises already have experience providing similar reports for their performance under the housing goals.

The proposed rule would require an Enterprise to report on its Duty to Serve performance for each underserved market in its semi-annual and annual reports. These two reports would be required to contain both narrative and summary statistical information for the Plan Objectives, supported by appropriate transaction-level data. In addition, an Enterprise's annual report would be required to describe the Enterprise's market opportunities for purchasing loans in each underserved market during the evaluation year, to the extent data is available. These opportunities could include market or regulatory factors that may affect lenders' decisions to retain loans in portfolio or sell them, the availability and pricing of credit enhancements from third parties, and competition from other secondary market participants.

In their comments on the 2010 Duty to Serve proposed rule, both Enterprises requested that the due date for submission of their annual Duty to Serve report to FHFA be at least 30 days later than the due date for submission of their Annual Housing Activities Report for the housing goals to FHFA. One Enterprise commented that the 60-day deadline proposed for year-end reporting on Duty to Serve performance would impact its operations and end-of-year transactions, because the timeline for completing transactions and collecting data would not only be compressed, but would occur at the same time that housing goals reporting and financial reporting are taking place. The other Enterprise commented that a staggered schedule would allow the Enterprise to strengthen the controls and processes that govern both regulatory submissions and efficiently allocate resources between them.

In recognition of these operational concerns, the proposed rule would set the due date for the annual Duty to Serve report as the date 75 days after the end of the calendar year. Because it is important that FHFA monitor the Enterprises' Duty to Serve progress on a timely basis, the proposed rule would provide that the quarterly and semi-annual reports would be due within 60 days of the end of the respective quarter.

X. Paperwork Reduction Act

The proposed rule would not contain any information collection requirement that would require the approval of OMB under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.). Therefore, FHFA has not submitted any information to OMB for review.

XI. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. (5 U.S.C. 605(b)). FHFA has considered the impact of the proposed rule under the Regulatory Flexibility Act. The

General Counsel of FHFA certifies that the proposed rule, if adopted as a final rule, is not likely to have a significant economic impact on a substantial number of small entities because the regulation applies to the Enterprises, which are not small entities for purposes of the Regulatory Flexibility Act.

List of Subjects in 12 CFR Part 1282

Mortgages, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons stated in the preamble, under the authority of 12 U.S.C. 4501, 4502, 4511, 4513, 4526, and 4561-4566, FHFA proposes to amend part 1282 of subchapter E of 12 CFR chapter XII, as follows**:**

PART 1282—ENTERPRISE HOUSING GOALS AND MISSION

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

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

2. In § 1282.1(b), add the definitions of “Area of concentrated poverty”, “Colonia”, “Community development financial institution”, “Community financial institution”, “Federally insured credit union”, “Federally recognized Indian tribe”, “High-needs rural population”, “High-needs rural region”, “High opportunity area”, “Indian area”, “Manufactured home”, “Manufactured housing community”, “Migrant agricultural workers”, “Mixed-income housing”, “Residential economic diversity activity”, “Resident-owned manufactured housing community”, “Rural area”, and “Seasonal agricultural workers” in alphabetical order to read as follows:

§ 1282. 1 Definitions.

*** * * * ***

(b) * * *

Area of concentrated poverty, for purposes of subpart C of this part, means a census tract designated by HUD as a Qualified Census Tract pursuant to 26 U.S.C. 42(d)(5)(B)(ii).

* * * * *

Colonia, for purposes of subpart C of this part, means any identifiable community that—

(i) Is designated by the State or county in which it is located as a colonia;

(ii) Is located in the State of Arizona, California, New Mexico, or Texas; and

(iii) Is located in a U.S. census tract with some portion of the tract within 150 miles of the U.S.-Mexico border.

Community development financial institution, for purposes of subpart C of this part, has the meaning in 12 CFR 1263.1.

Community financial institution, for purposes of subpart C of this part, has the meaning in 12 CFR 1263.1.

* * * * *

Federally insured credit union, for purposes of subpart C of this part, has the meaning in 12 U.S.C. 1752(7).

Federally recognized Indian tribe, for purposes of subpart C of this part, has the meaning in 25 CFR 83.1.

* * * * *

High-needs rural population, for purposes of subpart C of this part, means any of the following populations provided the population is located in a rural area:

(i) Members of a Federally recognized Indian tribe located in an Indian area; or

(ii) Migrant and seasonal agricultural workers.

High-needs rural region, for purposes of subpart C of this part, means any of the following regions provided the region is located in a rural area:

(i) Middle Appalachia;

(ii) The Lower Mississippi Delta; or

(iii) A colonia.

High opportunity area, for purposes of subpart C of this part, means an area designated by HUD as a "Difficult Development Area" pursuant to 26 U.S.C. 42(d)(5)(B)(iii).

* * * * *

Indian area, for purposes of subpart C of this part, has the meaning in 24 CFR 1000.10.

* * * * *

Manufactured home, for purposes of subpart C of this part, means a manufactured home as defined in section 603(6) of the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended, 42 U.S.C. 5401 *et seq.*, and implementing regulations.

Manufactured housing community, for purposes of subpart C of this part, means a tract of land under unified ownership and developed for the purposes of providing individual rental spaces for the placement of manufactured homes for residential purposes within its boundaries.

Migrant agricultural workers, for purposes of subpart C of this part, has the meaning in 29 CFR 500.20(p).

Mixed-income housing, for purposes of subpart C of this part, means a multifamily property or development that may include or comprise single-family units that serves very low-, low-, or moderate-income households where at least 25 percent of the units are affordable only to households with incomes above moderate-income levels.

* * * * *

Residential economic diversity activity, for purposes of subpart C of this part, means an Enterprise activity in connection with mortgages on:

(i) Affordable housing in a high opportunity area; or

(ii) Mixed-income housing in an area of concentrated poverty.

* * * * *

Resident-owned manufactured housing community, for purposes of subpart C of this part, means a manufactured housing community for which the terms and conditions of residency, policies, operations and management are controlled by at least 50 percent of the residents, either directly or through an entity formed under the laws of the state.

Rural area, for purposes of subpart C of this part, means:

(i) A census tract outside of a metropolitan statistical area as designated by the Office of Management and Budget; or

(ii) A census tract in a metropolitan statistical area as designated by the Office of Management and Budget that is outside of the metropolitan statistical area’s Urbanized Areas and Urban Clusters, as designated by the U.S. Department of Agriculture’s Rural-Urban Commuting Area codes.

Seasonal agricultural workers, for purposes of subpart C of this part, has the meaning in 29 CFR 500.20(r).

*** * * * ***

3. Add subpart C to read as follows:

Subpart C—Duty to Serve Underserved Markets

§ 1282.31 General.

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

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

§ 1282.32 Underserved Markets Plan.

(a) General. Each Enterprise must submit to FHFA an Underserved Markets Plan describing the activities and objectives that it will undertake to meet its duty to serve each underserved market.

(b) Term of Plan. The Plan must cover a period of three years except for the

Enterprise's first Plan which shall have the term as provided for in paragraph (d)(1) of this section.

(c) Plan content—(1) Activities. The Plan must address how the Enterprise will undertake each statutory and regulatory activity associated with each underserved market, as provided in §§ 1282.33, 1282.34 and 1282.35, or identify reasons for not undertaking the statutory or regulatory activity. Any residential economic diversity activities and objectives that the Enterprise will undertake for extra credit under § 1282.37 must also be described in the Plan. Plans may also include additional eligible activities that serve an underserved market. Activities may cover a single year or multiple years.

(2) Objectives. Plan activities must be comprised of objectives, which may cover a single year or multiple years. Objectives must meet all of the following requirements:

(i) Strategic. Directly or indirectly maintain or increase liquidity to an underserved market;

(ii) Measurable. Provide measureable benchmarks, which may include numerical targets, that enable FHFA to determine whether the Enterprise has achieved the objective;

(iii) Realistic. Be calibrated so that the Enterprise has a reasonable chance of meeting the objective with appropriate effort;

(iv) Time-bound. Be subject to a specific timeframe for completion by being tied to Plan calendar year evaluation periods; and

(v) Tied to analysis of market opportunities. Be based on assessments and analyses of market opportunities in each underserved market, taking into account safety and soundness considerations.

(3) Assessment Factors. Each Plan objective must meet one of the assessment factors set forth in § 1282.36(b).

(d) Plan Procedures—(1) Submission of proposed Plans. Each Enterprise must submit a proposed Plan to FHFA at least 180 days before the termination date of the Enterprise's existing Plan, except that the Enterprise's first proposed Plan must be submitted to FHFA pursuant to the timeframe and procedures established by FHFA after the effective date of this part.

(2) Posting of proposed Plans and public input. As soon as practical after an Enterprise submits its proposed Plan to FHFA for review, FHFA will post on FHFA's website a public version of the proposed Plan that omits proprietary and confidential data and information. The public will have 45 calendar days from the date the proposed Plan is posted on FHFA's website to provide input to FHFA on the proposed Plan.

(3) Enterprise review. In its discretion, each Enterprise may make revisions to its proposed Plan based on the public input.

(4) FHFA review. FHFA will review each Enterprise's proposed Plan and within 60 days of the end of the public input period, will inform each Enterprise of any FHFA comments on the Enterprise's proposed Plan. The Enterprise must address those comments, as appropriate, through revisions to its proposed Plan pursuant to timeframes and procedures established by FHFA.

(5) Non-objection to Plans. After FHFA is satisfied that all of its comments have

been addressed, FHFA will issue a non-objection to the Plan.

(e) Effective date of Plans. The effective date of the final Plan will be January 1st of the first evaluation year for which the Plan is applicable, except for the Enterprise's first Plan whose term and effective date will be determined by FHFA.

(f) Posting of final Plans. Each Enterprise's final Plan will be posted on the respective Enterprise's website and on FHFA's website. Confidential and proprietary data and information will be omitted from the posted final Plans.

(g) Modification of final Plans. At any time after implementation of a final Plan, an Enterprise may request to modify its final Plan, subject to FHFA non-objection, or FHFA may require an Enterprise to modify its final Plan. FHFA and the Enterprise may seek public input on any proposed modifications if FHFA determines that public input would assist its consideration of the proposed modifications. If a final Plan is modified, the modified Plan with confidential and proprietary information omitted will be posted on the Enterprise's and FHFA's websites.

§ 1282.33 Manufactured housing market.

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

(b) Eligible activities. Enterprise activities eligible to be included in an Underserved Markets Plan for the manufactured housing market are activities that facilitate a secondary market for mortgages on residential properties for very low-, low-, or moderate-income families consisting of:

(1) Manufactured homes titled as real property; and

(2) Manufactured housing communities.

(c) Regulatory activities. Enterprise activities related to the following will receive credit under the manufactured housing market:

(1) Mortgages on manufactured homes titled as real property under the laws of the state where the home is located; and

(2) Mortgages on manufactured housing communities provided that:

(i) The community has 150 pads or less;

(ii) The community is owned by a governmental unit or instrumentality, owned by a nonprofit, or resident-owned; or

(iii) The community's pad leases have the following pad lease protections at a minimum:

(A) Minimum one-year renewable lease term unless there is good cause for nonrenewal;

(B) Minimum thirty-day written notice of rent increases;

(C) Minimum five-day grace period for rent payments, and right to cure defaults on rent payments;

(D) If a tenant defaults on rent payments, the tenant has the right to: sell the manufactured home without having to first relocate it out of the community; sublease or assign the pad lease for the unexpired term to the new buyer of the tenant's manufactured home without any unreasonable restraint; post "For Sale" signs; and have a reasonable time period after eviction to sell the manufactured home;

(E) Right for tenants to receive at least 120 days advance notice of a planned sale or closure of the community, within which time the tenants, or an organization acting on behalf of a group of tenants, may match any bona fide offer for sale. The community owner shall consider the tenants' offer and negotiate with them in good faith.

(d) Additional activities. An Enterprise may include in its Underserved Markets Plan other activities to serve very low-, low-, or moderate-income families in the manufactured housing market consistent with paragraph (b) of this section, subject to FHFA determination of whether such activity is eligible to receive credit.

§ 1282.34 Affordable housing preservation market.

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

(b) Eligible activities. Enterprise activities eligible to be included in an Underserved Markets Plan for the affordable housing preservation market are activities that facilitate a secondary market for mortgages on residential properties for very low-, low-, or moderate-income families consisting of affordable rental housing preservation and affordable homeownership preservation.

(c) Statutory activities. Enterprise activities related to housing projects under the following programs will receive credit under the affordable housing preservation market:

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

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

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

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

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

(6) Permanent supportive housing projects subsidized under Title IV of the McKinney-Vento Homeless Assistance Act, 42 U.S.C. 11361, *et seq.*;

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

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

(9) Other comparable affordable housing programs administered by a state or local government that preserve housing affordable to very low-, low-, and moderate-income families. An Enterprise may include in its Underserved Markets Plan programs pursuant to this paragraph (c)(9), subject to FHFA determination of whether such programs are eligible to receive credit.

(d) Regulatory activities. Enterprise activities related to the following will receive credit under the affordable housing preservation market:

(1) Purchasing and securitizing loan pools from a community development financial institution, community financial institution, or federally insured credit union

whose total assets are within the asset cap set forth in the definition of “community financial institution” in § 1282.1, where the loan pools are backed by existing small multifamily rental properties consisting of five to not more than fifty units;

(2) Energy efficiency improvements on existing multifamily rental properties provided there are verifiable, reliable projections or expectations that the improvements financed by the loan will reduce energy and water consumption by the tenant by at least 15 percent, the reduced utility costs derived from the reduced consumption must not be offset by higher rents or other charges imposed by the property owner, and the reduced utility costs will offset the upfront costs of the improvements within a reasonable time period;

(3) Energy efficiency improvements on existing single-family, first-lien properties, provided that there are verifiable, reliable projections or expectations that the improvements financed by the loan will reduce energy and water consumption by the homeowner or tenant by at least 15 percent, the reduced utility costs derived from the reduced consumption will offset the upfront costs of the improvements within a reasonable time period, and in the case of a single-family rental property, the reduced utility costs must not be offset by higher rents or other charges imposed by the property owner;

(4) Affordable homeownership preservation through shared equity homeownership programs. Shared equity programs include programs administered by community land trusts, other nonprofit organizations, or State or local governments or instrumentalities that:

(i) Ensure affordability for at least 30 years or as long as permitted under state law through a ground lease, deed restriction, subordinate loan or similar legal mechanism that makes residential real property affordable to very low-, low-, or moderate-income families. The legal instrument ensuring affordability must also stipulate a preemptive option to purchase the homeownership unit from the homeowner at resale to preserve the affordability of the unit for successive very low-, low-, or moderate-income families;

(ii) Monitor the homeownership unit to ensure affordability is preserved over resales; and

(iii) Support the homeowners to promote successful homeownership for very low-, low-, or moderate-income families;

(5) Choice Neighborhoods Initiative, as authorized by 42 U.S.C. 1437v; and

(6) HUD's Rental Assistance Demonstration program, as authorized by 42 U.S.C.1437f note.

(e) Additional activities. An Enterprise may include in its Underserved Markets Plan other activities to serve very low-, low-, or moderate-income families in the affordable housing preservation market consistent with paragraph (b) of this section, subject to FHFA determination of whether such activities are eligible to receive credit.

§ 1282.35 Rural markets.

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

(b) Eligible activities. Enterprise activities eligible to be included in an

Underserved Markets Plan for the rural market are activities that facilitate a secondary market for mortgages on residential properties for very low-, low-, or moderate-income families in rural areas.

(c) Regulatory activities. Enterprise activities serving high-needs rural regions or high-needs rural populations will receive credit under the rural market.

(d) Additional activities. An Enterprise may include in its Underserved Markets Plan other activities to serve very low-, low-, or moderate-income families in rural areas consistent with paragraph (b) of this section, subject to FHFA determination of whether such activities are eligible to receive credit.

§ 1282.36 Evaluations and assigned ratings.

(a) Evaluation of compliance. In determining whether an Enterprise has complied with the duty to serve each underserved market, FHFA will annually evaluate and rate the Enterprise's duty to serve performance based on the Enterprise's implementation of its Underserved Markets Plan during the relevant evaluation year. FHFA's evaluation will be in accordance with evaluation criteria set forth in a separate, FHFA-prepared evaluation guide.

(b) Assessment factors. (1) FHFA's evaluation of each Enterprise's performance will take into consideration four assessment factors, as provided in paragraphs (b)(2) through (5) of this section.

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

(3) Loan product assessment factor. FHFA will evaluate the Enterprise on its

development of loan products, more flexible underwriting guidelines and other innovative approaches to providing financing in each underserved market.

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

(5) Investments and grants assessment factor. FHFA will evaluate the Enterprise on the amount of its investments and grants in projects that assist in meeting the needs of each underserved market.

(c) Evaluation guide—(1) Annual evaluation guides. FHFA will prepare a separate evaluation guide for each Enterprise for each evaluation year. FHFA will develop the evaluation guide using the contents of the Enterprise's Plan and the assessment factors provided in paragraph (b) of this section. The evaluation guide will allocate a maximum number of potential scoring points to each Plan activity that an Enterprise will pursue during the evaluation year covered by the evaluation guide. Each evaluation guide will allocate a total of 100 potential scoring points to all of the Plan activities grouped under a particular underserved market.

(2) Determination of overall composite scores for each underserved market. At the end of the evaluation year covered by the evaluation guide, FHFA will award a score to each Plan activity covered by the evaluation guide. The score for each Plan activity will be based on FHFA's assessment of how well the Enterprise performed the Plan activity and associated objectives during the evaluation year. FHFA will also award any extra credit it determines is appropriate for qualifying residential economic diversity activities as provided for in § 1282.37. The score cannot exceed the maximum number of

potential scoring points allocated to the Plan activity in the evaluation guide. After FHFA has awarded a score to each Plan activity, FHFA will sum the scoring points for all of the Plan activities that are grouped under each underserved market. The sum of those scores will produce an overall composite score ranging from zero to 100 for each underserved market.

(3) Determination of overall rating and compliance. The evaluation guide will contain a table that allocates overall composite score numerical ranges to each of the following four overall ratings: "Exceeds," "High Satisfactory," "Low Satisfactory," and "Fails." An Enterprise's overall rating for each underserved market will be determined by the numerical range within which the Enterprise's overall composite score falls. A rating of "Exceeds," "High Satisfactory" or "Low Satisfactory" will constitute compliance with the duty to serve the underserved market. A rating of "Fails" will constitute noncompliance with the duty to serve the underserved market.

(4) Delivery of evaluation guide. FHFA will provide the evaluation guide to the Enterprise at least 30 days before January 1st of the evaluation year for which the guide is applicable, except that the evaluation guide for the first evaluation year after the effective date of this part will be provided to the Enterprise on a date to be determined by FHFA.

(5) Posting of evaluation guide. The evaluation guide will be posted on the respective Enterprise's website and on FHFA's website.

§ 1282.37 Extra credit for qualifying residential economic diversity activities.

(a) Where an Enterprise includes a qualifying activity to promote residential economic diversity in its Underserved Markets Plan, FHFA will evaluate the extent to which the activity promotes residential economic diversity in an underserved market in connection with mortgages on: affordable housing in a high opportunity area; or mixed-income housing in an area of concentrated poverty. This criterion will be considered in connection with activities for which extra credit may be given, but the activities associated with this criterion are not mandatory. To qualify for extra credit, an activity first must be an eligible activity that contributes to an Enterprise's duty to serve an underserved market. Eligible activities in each of the underserved markets may qualify for extra credit for residential economic diversity except for manufactured housing communities activities, energy efficiency improvement activities, and any additional activities determined by FHFA to be ineligible.

(b) FHFA's evaluation of residential economic diversity activities under this section will occur as part of its review under § 1282.36.

§ 1282.38 General requirements for credit.

(a) General. FHFA will determine whether an activity will receive credit under the duty to serve underserved markets. In this determination, FHFA will consider whether the activity facilitates a secondary market for financing mortgages: on manufactured homes for very low-, low-, and moderate-income families; to preserve housing affordable to very low-, low-, and moderate-income families; and on housing for very low-, low-, and moderate-income families in rural areas. If FHFA determines that an activity will receive credit or extra credit under the duty to serve underserved markets, the activity will receive such credit under the relevant assessment factor for each underserved market it serves.

(b) No credit under any assessment factor. Enterprise activities related to the following will not receive credit under the duty to serve underserved markets under any assessment factor, even if the activity otherwise would receive credit under any other section of this subpart:

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

(2) HOEPA mortgages;

(3) Mortgages on manufactured homes not titled as real property under the laws of the state where the property is located;

(4) Subordinate liens on multifamily properties, except for subordinate liens originated for energy efficiency improvements on existing multifamily rental properties that meet the requirements in § 1282.34(d)(2);

(5) Subordinate liens on single-family properties;

(6) Shared appreciation loans that do not satisfy all of the requirements in § 1282.34(d)(4) of this part; and

(7) Any combination of factors in paragraphs (b)(1) through (b)(6) of this section.

(c) No credit under loan purchase assessment factor. The following activities will not receive credit under the loan purchase assessment factor, even if the activity otherwise would receive credit under § 1282.40:

(1) Purchases of mortgages to the extent they finance any dwelling units that are secondary residences;

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

(3) Purchases of mortgages or interests in mortgages that previously received

credit under any underserved market within the five years immediately preceding the current performance year;

(4) Purchases of mortgages where the property or any units within the property have not been approved for occupancy;

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

(6) Purchases of State and local government housing bonds except as provided in § 1282.40(h); and

(7) Any combination of factors in paragraphs (c)(1) through (6) of this section.

(d) FHFA review of activities. FHFA may determine whether and how any activity will receive credit under the duty to serve underserved markets, including treatment of missing data. FHFA will notify each Enterprise in writing of any determination regarding the treatment of any activity.

(e) The year in which an activity will receive credit. An activity will receive credit under the duty to serve underserved markets in the year in which the activity is completed. FHFA may determine that partial credit is appropriate for an activity that begins in a particular year but is not completed until a subsequent year, except that activities under the loan purchase assessment factor will receive credit in the year in which the Enterprise purchased the mortgage.

(f) Credit under one assessment factor. An activity or objective will receive credit only under one assessment factor in a particular underserved market.

(g) Credit under multiple underserved markets. An activity, including dwelling units financed by an Enterprise's mortgage purchase, will receive credit for each underserved market for which such activity qualifies in that year.

§ 1282.39 General requirements for loan purchases.

(a) General. This section applies to Enterprise mortgage purchases that may receive credit under the loan purchase assessment factor for a particular underserved market. Only dwelling units securing a mortgage purchased by the Enterprise in that year and not specifically excluded under § 1282.38(b) and (c), may receive credit.

(b) Counting dwelling units. Except as provided in paragraph (f) of this section, performance under the loan purchase assessment factor will be measured by counting dwelling units affordable to very low-, low-, and moderate-income families.

(c) Credit for owner-occupied units. (1) Mortgage purchases financing owner-occupied single-family properties will be evaluated based on the income of the mortgagor(s) and the area median income at the time the mortgage was originated. To determine whether mortgages may receive credit under a particular family income level, *i.e.*, very low-, low-, or moderate-income, the income of the mortgagor(s) is compared to the median income for the area at the time the mortgage was originated, using the appropriate percentage factor provided under § 1282.17.

(2) Mortgage purchases financing owner-occupied single-family properties for which the income of the mortgagor(s) is not available will not receive credit under the loan purchase assessment factor.

(d) Credit for rental units—(1) Use of rent. Except as provided in paragraph (g) of this section, mortgage purchases financing single-family rental units and multifamily rental units will be evaluated based on rent and whether the rent is affordable to the income groups targeted by the duty to serve. A rent is affordable if the rent does not exceed the maximum levels as provided in § 1282.19.

(2) Affordability of rents based on housing program requirements. Where a multifamily property is subject to an affordability restriction under a housing program that establishes the maximum permitted income level for a tenant or a prospective tenant or the maximum permitted rent, the affordability of units in the property may be determined based on the maximum permitted income level or maximum permitted rent established under such housing program for those units. If using income, the maximum income level must be no greater than the maximum income level for each income group targeted by the duty to serve, adjusted for family or unit size as provided in § 1282.17 or § 1282.18, as appropriate. If using rent, the maximum rent level must be no greater than the maximum rent level for each income group targeted by the duty to serve, adjusted for unit size as provided in § 1282.19.

(3) Unoccupied units. Anticipated rent for unoccupied units may be the market rent for similar units in the neighborhood as determined by the lender or appraiser for underwriting purposes. A unit in a multifamily property that is unoccupied because it is being used as a model unit or rental office may receive credit only if the Enterprise determines that the number of such units is reasonable and minimal considering the size of the multifamily property.

(4) Timeliness of information. In evaluating affordability for single-family rental properties, an Enterprise must use tenant income and area median income available at the time the mortgage was originated. For multifamily rental properties, the Enterprise must

use tenant income and area median income available at the time the mortgage was acquired.

(e) Missing data or information for rental units. (1) When calculating unit affordability, rental units for which bedroom data are missing will be considered efficiencies.

(2) When an Enterprise lacks sufficient information to determine whether a rental unit in a single-family or multifamily property securing a mortgage purchased by the Enterprise receives credit under the loan purchase assessment factor because rental data are not available, the Enterprise's performance with respect to such unit may be evaluated using estimated affordability information. The estimated affordability information is calculated by multiplying the number of rental units with missing affordability information in properties securing the mortgages purchased by the Enterprise in each census tract by the percentage of all moderate-income rental dwelling units in the respective tracts, as determined by FHFA based on the most recent decennial census.

(f) Credit for manufactured housing communities. Performance under the loan purchase assessment factor for manufactured housing communities will be measured based on the unpaid principal balance of the mortgage at the time of acquisition.

(g) Determining affordability for manufactured housing communities. Affordability for a manufactured housing community will be evaluated based on the median income of the census tract in which the manufactured housing community is located as provided below.

(1) If the median income of the census tract in which the manufactured housing community is located is less than or equal to area median income, the Enterprise will receive credit for the full unpaid principal balance of the loan.

(2) If the median income of the census tract in which the manufactured housing community is located exceeds the area median income, the Enterprise will receive partial credit for the loan purchase. The percentage of the unpaid principal balance of the loan that will receive credit will be determined by dividing the area median income by the median income of the census tract and multiplying the quotient by the unpaid principal balance of the loan.

(h) Application of median income. (1) To determine an area's median income under §§ 1282.17 through 1282.19 and the definitions in § 1282.1, the area is:

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

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

(2) When an Enterprise cannot precisely determine whether a mortgage is on dwelling unit(s) located in one area, the Enterprise must determine the median income for the split area in the manner prescribed by the Federal Financial Institutions Examination Council for reporting under the Home Mortgage Disclosure Act (12 U.S.C. 2801 *et seq.*), if the Enterprise can determine that the mortgage is on dwelling unit(s) located in:

(i) A census tract; or

(ii) A census place code.

(i) Newly available data. When an Enterprise uses data to determine whether a dwelling unit receives credit under the loan purchase assessment factor and new data is released after the start of a calendar quarter, the Enterprise need not use the new data until the start of the following quarter.

§ 1282.40 Special requirements for loan purchases.

(a) General. Subject to FHFA's determination of whether an activity will receive credit under a particular underserved market, the activities identified in this section will be treated as mortgage purchases as described and receive credit under the loan purchase assessment factor. An activity that is covered by more than one paragraph below must satisfy the requirements of each such paragraph.

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

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

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

(2) When an Enterprise provides a specific contractual obligation to ensure timely payment of amounts due under any mortgage originally insured by a public purpose mortgage insurance entity or fund, the Enterprise may, on a case-by-case basis, seek

approval from the Director for such transactions to receive credit under the loan purchase assessment factor for a particular underserved market.

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

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

(e) Cooperative housing and condominiums. (1) The purchase of a mortgage on a cooperative housing unit ("a share loan") or a mortgage on a condominium unit will be treated as a mortgage purchase. Such a purchase will receive credit in the same manner as a mortgage purchase of single-family owner-occupied units, *i.e.*, affordability is based on the income of the mortgagor(s).

(2) The purchase of a blanket mortgage on a cooperative building or a mortgage on a condominium project will be treated as a mortgage purchase. The purchase of a blanket mortgage on a cooperative building will receive credit in the same manner as a mortgage purchase of a multifamily rental property, except that affordability must be determined based solely on the comparable market rents used in underwriting the blanket loan. If the underwriting rents are not available, the loan will not be treated as a mortgage purchase. The purchase of a mortgage on a condominium project will receive credit in the same manner as a mortgage purchase of a multifamily rental property.

(3) Where an Enterprise purchases both a blanket mortgage on a cooperative building and share loans for units in the same building, both the mortgage on the

cooperative building and the share loans will be treated as mortgage purchases. Where an Enterprise purchases both a mortgage on a condominium project and mortgages on individual dwelling units in the same project, both the mortgage on the condominium project and the mortgages on individual dwelling units will be treated as mortgage purchases.

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

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

(h) Mortgage revenue bonds. The purchase or guarantee by an Enterprise of a mortgage revenue bond issued by a State or local housing finance agency will be treated as a purchase of the underlying mortgages only to the extent the Enterprise has sufficient information to determine whether the underlying mortgages or mortgage-backed securities serve the income groups targeted by the duty to serve.

(i) Seller dissolution option. (1) Mortgages acquired through transactions involving seller dissolution options will be treated as mortgage purchases only when:

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

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

(2) FHFA may grant an exception to the one-year minimum lockout period described in paragraphs (i)(1)(i) and (ii) of this section, in response to a written request

from an Enterprise, if FHFA determines that the transaction furthers the purposes of the Enterprise's Charter Act and the Safety and Soundness Act.

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

§ 1282.41 Failure to comply.

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

§ 1282.42 Housing plans.

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

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

(1) Be feasible;

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

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

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

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

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

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

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

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

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

§ 1282.66 Enterprise reports on duty to serve.

(a) First and third quarter reports. Each Enterprise must submit to FHFA a first and third quarter report on its activities and objectives in its Underserved Markets Plan for the loan purchase assessment factor for each underserved market. The report must include detailed information on the Enterprise's progress towards meeting the activities and objectives. The Enterprise must submit the first and third quarter reports within 60 days of the end of the respective quarter.

(b) Semi-annual report. Each Enterprise must submit to FHFA a semi-annual report on all of the activities and objectives in its Underserved Markets Plan for each underserved market. The report must include detailed information on the Enterprise's progress towards meeting the activities and objectives. The Enterprise must submit the semi-annual report within 60 days of the end of the second quarter.

(c) Annual report. To comply with the requirements in sections 309(n) of the Fannie Mae Charter Act and 307(f) of the Freddie Mac Act and for purposes of FHFA's Annual Housing Report to Congress, each Enterprise must submit to FHFA an annual report on all of the activities and objectives in its Underserved Markets Plan for each underserved market no later than 75 days after the end of each calendar year. For each underserved market, the annual report must include, at a minimum: a description of the Enterprise's market opportunities for loan purchases during the evaluation year to the extent data is available; the volume of qualifying loans purchased by the Enterprise; a comparison of the Enterprise's loan purchases with its loan purchases in prior years; and a comparison of market opportunities with the size of the relevant markets in the past, to the extent data are available.

Dated: December 10, 2015.

Melvin L. Watt,
Director, Federal Housing Finance Agency.

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