



## AFFORDABLE HOUSING PROGRAM RECAPTURE GUIDELINES

Effective October 8, 2008, the Federal Housing Finance Agency amended its Affordable Housing Program ("AHP") regulation and relocated it in the Federal Register to 12 CFR Part 1291 ("AHP Regulation"). In accordance with the AHP Regulation, the monitoring of approved AHP projects continues to be necessary in ensuring the compliance of AHP-assisted projects with the AHP Regulation as well as the specifications of the approved competitive applications. The Federal Home Loan Bank of New York ("FHLB-NY") may determine, via monitoring, evaluating funding requisitions, or receiving notification from a member financial institution ("Member") that AHP subsidy will not be, or is no longer being used for purposes that conform to the objectives set forth in the competitive AHP application or the AHP Regulation. Such a situation would constitute an "Event of Non-Compliance" which may result in the recapture of AHP subsidy.

The AHP Regulation requires Members who pass AHP subsidy on to project sponsors and/or owners to have the recipients of AHP subsidy execute a legally enforceable retention mechanism which is recorded with the appropriate municipality and secures the AHP-assisted property and will authorize the Member to recover subsidy from a project sponsor/owner or subsidy recipient if an Event of Non-compliance should occur which the sponsor/owner or subsidy recipient fails to remedy.

### The Recapture Period

AHP funds are subject to recapture by the FHLB-NY from the time that the Member draws down AHP funds until the preponderance of subsidy has been either properly used or repaid ("Recapture Period").

- a) The Recapture Period for owner-occupied units receiving AHP direct subsidies (include grants issued under the FHLB-NY's First Home Club<sup>SM</sup>) will equal 5 years from the respective date of closing;
- b) The Recapture Period for rental projects will equal 15 years from the date of the issuance of a final Certificate(s) of Occupancy or, if applicable, Certificate(s) of Final Completion;
- c) For subsidized advances, the Recapture Period will equal the term of the subsidized advance (i.e., its maturity date). The Recapture Period may be prematurely terminated with the prepayment in full of a subsidized advance.

### Events of Non-Compliance

An AHP-assisted project may experience an Event of Non-Compliance when it fails to attain a level of performance which was specified and approved at time of application. Examples of Events of Non-Compliance may include, but are not limited to:

- a) Failure of an Member and/or sponsor to submit Monitoring Reports in a timely fashion;
- b) Failure to furnish required project monitoring documentation in a timely fashion;
- c) Failure of a project sponsor to properly maintain their nonprofit status;
- d) Failure of a project to attain its specified priorities/objectives (e.g., property use restrictions, occupancy targets, income restrictions, empowerment activities, long-term retention periods, etc.) regardless of minimal AHP regulatory requirements;
- e) Evidence of fraud or willful non-compliance by a project sponsor or owner;
- f) Failure to ensure or maintain the long-term affordability of all project units in accordance with the specified terms and conditions of the approved AHP Application; or

- g) Failure of a project to demonstrate that AHP subsidy continues to be essential for its financial feasibility (e.g., changes in the financial structure of a project, changes in the sources and uses of funds, violations of the maximum subsidy requirements, etc.).

Until the Event of Non-Compliance is corrected, the FHLB-NY will instruct the Member not to disburse any additional AHP funds to the project. Furthermore, until the Event of Non-Compliance is resolved, the FHLB-NY solely reserves the right to impose various sanctions upon a Member, project, and/or project sponsor as outlined in the FHLB-NY's *AHP Compliance Late Receipt Policy* ([AHP-104](#)).

An Event of Non-Compliance that remains unresolved may cause the FHLB-NY to require the Member to formally demand a project sponsor or subsidy recipient to either fully restore the project to a state of compliance or repay misused AHP subsidy.

## Alternatives to Recapture Proceedings

### 1. Project Modifications

Circumstances beyond the pragmatic control of the sponsor may prevent the project from attaining all of the levels of performance which were specified and approved in the AHP Application. As a last resort, the Member may submit a formal letter to the FHLB-NY requesting a modification of the project as a means of resolving an Event of Non-Compliance.

Prior to the final disbursement of funds from all financing sources to an AHP-assisted project, a Member may request a modification to the specified terms of an approved AHP application (including a request for additional AHP subsidy) if there is or will be a change in the project which materially affects the facts under which the AHP application was originally scored and approved. The FHLB-NY, in its sole discretion, may approve such a request under the following conditions:

- a) The project will continue to meet AHP eligibility requirements;
- b) The application will continue to score and rank high enough to have been approved in its respective competitive funding period, reflective of the modified characteristics; and
- c) The FHLB-NY determines that there is good cause for the modification.

Once an AHP-assisted project has been completed and all funding sources have fully advanced their respective financing commitments, the Member may request a modification to the terms of an approved AHP application (*except* for requesting additional AHP subsidy) if there is or will be a change in the project which materially affects the facts under which the AHP application was originally scored and approved. The FHLB-NY may approve such a request based upon the following:

- a) The project is in financial distress, or is at substantial risk of falling into such distress;
- b) The project sponsor has made best efforts to avoid noncompliance with the terms of the application for subsidy and the AHP Regulation;
- c) The project will continue to meet AHP eligibility requirements; and
- d) The application will continue to score high enough to have been approved in the funding period in which it was originally scored and approved by the FHLB-NY.

### 2. Remediation Periods

If a project *cannot* or *does not* qualify for a modification, the FHLB-NY will require the Member to demand that the sponsor or subsidy recipient restore the project to full compliance as quickly as practicable.

Under such circumstances, the Member may submit a written request to the FHLB-NY for a Remediation Period. The written request should include a formal Plan of Action which the project sponsor will implement during Remediation Period in order to restore the project to compliance. The FHLB-NY, in its sole discretion, may

approve a Remediation Period (for a specified period of time not to exceed 12 months) for a project if the Member or project can effectively justify the request and the Plan of Action is acceptable.

During the Remediation Period, the FHLB-NY, in its sole discretion, also reserves the right to temporarily suspend the project and/or project sponsor from participation in AHP-related activities (i.e., draw downs, extensions, modifications, or submitting new AHP applications).

### **De-Obligation of AHP Subsidy**

The following types of situations may cause the FHLB-NY to un-commit, or de-obligate, any unfunded AHP subsidy that was conditionally committed to a project:

- a) the Member or project sponsor formally withdraws an approved AHP Application;
- b) a project cannot be brought to fruition and the FHLB-NY does not approve an extension of the of the AHP Commitment expiration date;
- c) the FHLB-NY cancels the balance of an AHP Commitment because an Event of Non-Compliance has not been satisfactorily remedied.

### **Recapturing an AHP Direct Subsidy which has not been disbursed to a project**

A Member which has been funded AHP or First Home Club subsidy is required to notify the FHLB-NY immediately upon receiving information that the subsidy will not be or is no longer being used for the purposes approved by the FHLB-NY and the Federal Housing Finance Agency. If a Member has not disbursed all or part of a direct subsidy to a project, the FHLB-NY will require the Member to immediately reimburse the FHLB-NY for the full amount not disbursed.

If the Member does not reimburse the FHLB-NY, the FHLB-NY will then notify the Member that the Member's Demand Deposit Account ("DDA") or any other deposits, credits or moneys of the Member then in the possession of the FHLB-NY will be debited. (The FHLB-NY will provide the Member with advance notice prior to debiting a DDA.) The FHLB-NY will then allocate the amount of recaptured subsidy its AHP liability account in order to finance other eligible projects or households.

In either case, if the subsidy subject to recapture remained in the possession of the Member for more than 30 days, the FHLB-NY may, in its sole discretion, assess the Member a Fed Funds-driven per diem rate of interest.

### **Recapturing an AHP Subsidized Advance which has not been disbursed to a project**

If a Member has not disbursed all or any part of a Subsidized Advance to a project, the FHLB-NY may at its option:

- a) retroactively reprice the advance to the interest rate charged to FHLB-NY members on non-subsidized advances of comparable type and maturity at the time when the original advance was funded;
- b) require immediate repayment of all or any part of the advance (subject to prepayment fees); and/or
- c) assess a recapture fee for misuse of subsidy while the advance remained outstanding.

### **Recapturing an AHP Direct Subsidy which has been disbursed to a project**

If a project sponsor fails to correct the Event(s) of Non-Compliance and the Remediation Period (if applicable) has expired, the Member is accountable for recovering all misused AHP subsidy from a project on a "pro rata" basis as determined by the FHLB-NY. In order to effectively implement the FHLB-NY's recapture requirements, the AHP Regulation requires the Member to have on public record a "soft" secondary lien (or other legally enforceable agreement) secured by the project property which will permit the Member to recover subsidy from the sponsor or subsidy recipient.

In the event that the FHLB-NY needs to initiate recapture proceedings against a project, the Member is responsible for either:

- a) directly reimbursing the FHLB-NY for the amount of direct subsidy subject to recapture; or
- b) providing written notice to the FHLB-NY that foreclosure proceedings will promptly commence.

If the Member, in good faith, opts to directly reimburse the FHLB-NY for any misused AHP subsidy and subsequently recover said funds from the project or subsidy recipient, the FHLB-NY will debit the Member's DDA for the amount AHP subsidy to be recaptured on an agreed upon date. In turn, the FHLB-NY will credit the amount of recaptured subsidy to its AHP liability account in order to fund other eligible projects or households.

If the Member has a recorded lien (or legal agreement) and institutes a foreclosure action against a project or subsidy recipient, the amount of subsidy to be repaid to the FHLB-NY will be the amount recovered from such foreclosure after the payment of any prior liens. The Member must demonstrate to the FHLB-NY that "reasonable efforts" have been made to actively recover all misused AHP or First Home Club subsidy. If the Member is not completely successful in recovering all of the misused AHP or First Home Club subsidy from the sponsor or subsidy recipient, the Member will only be liable for the amount of AHP or First Home Club subsidy that could be recovered through the foreclosure or other legal action.

If the Member has *not* taken steps to record a lien or otherwise safeguard their interest in a project and enforce the AHP Regulation, the Member will be liable for reimbursing the FHLB-NY for the pro rata portion of the misused AHP or First Home Club subsidy.

If the Member does not reimburse the FHLB-NY, the FHLB-NY will then notify the Member that the Member's DDA or any other deposits, credits or moneys of the Member then in the possession of the FHLB-NY will be debited. (The FHLB-NY will provide the Member with advance notice prior to debiting a DDA.) The FHLB-NY will then apply the amount of recaptured subsidy to its AHP liability account in order to fund other eligible projects or households.

The FHLB-NY, in its sole discretion, also reserves the right to temporarily or permanently suspend the Member and/or project sponsor from participation in AHP-related activities (i.e., draw downs, extensions, modifications, or applying for future AHP offerings) if the Member and/or project sponsor failed to demonstrate reasonable efforts in correcting an Event of Non-Compliance. Furthermore, the FHLB-NY reserves the right to temporarily or permanently suspend the Member and/or project sponsor, respectively, from participation in the AHP if there is evidence of fraud or willful non-compliance with respect to the requirements of the AHP.

### **Recapturing an AHP Subsidized Advance which has been disbursed to a project**

If a Member has fully disbursed a Subsidized Advance to a project, the FHLB-NY will at its option:

- a) retroactively reprice the advance to the interest rate charged to FHLB-NY members on non-subsidized advances of comparable type and maturity at the time when the Event of Non-Compliance occurred;
- b) require immediate repayment of all or any part of the advance (subject to prepayment fees); and/or
- c) assess a recapture fee for misuse of subsidy while the advance remained outstanding.

If the Member opts to enforce the default provision of a permanent loan agreement and commence a foreclosure action against a project or subsidy recipient, the amount of subsidy to be repaid to the FHLB-NY will be the amount recovered from such foreclosure after the payment of any prior liens. The Member must demonstrate to the FHLB-NY that "reasonable efforts" have been made to actively recover all misused AHP subsidy. If the Member is not completely successful in recovering all of the misused AHP subsidy from the sponsor or subsidy recipient, the Member will only be liable for the amount of AHP subsidy that could be recovered through the foreclosure or other legal action.

The FHLB-NY, in its sole discretion, reserves the right to temporarily or permanently suspend the Member and/or project sponsor from participation in AHP-related activities (i.e., draw downs, extensions, modifications, or applying for future AHP offerings and/or First Home Club enrollment periods) if the Member and/or project sponsor failed to demonstrate reasonable efforts in correcting an Event of Non-Compliance. Furthermore, the FHLB-NY reserves the right to temporarily or permanently suspend the Member and/or project sponsor, respectively, from participation

in the AHP and/or the First Home Club if there is evidence of fraud or willful non-compliance with respect to the AHP Regulation.

### **Recapturing AHP Subsidy in the Event of the Premature Sale, Transfer, or Refinancing of Rental Projects**

To preclude potential windfall profits from the premature sale of rental projects which were either developed or rehabilitated with AHP subsidy, Members are required, in the event of such a sale or transfer, to provide the FHLB-NY with:

- a) evidence that the sales contract includes a provision that the rental property will continue to be used for the purpose originally intended and continue to be subject to a deed restriction or other legally enforceable retention mechanism;
- b) evidence if the project is refinanced that the project continues to be subject to a deed restriction or other legally enforceable retention agreement; or
- c) reimbursement of the full amount of the AHP subsidy provided to the project.

### **Recapturing AHP Subsidy in the Event of the Premature Sale, Transfer, or Refinancing of Homeownership Project Units**

If an owner-occupant decides to sell or transfer ownership of his or her AHP-assisted unit during the Recapture Period, the AHP subsidy may be transferable following the FHLB-NY's receipt and review of documentation evidencing the new owner-occupant household's income eligibility.

However, a pro rata portion of the approved AHP subsidy or First Home Club grant may be subject to recapture if, during the Recapture Period, a Member notifies the FHLB-NY that:

- a) An owner-occupant has vacated or sublet an AHP-subsidized homeownership unit;
- b) An owner-occupant sells or transfers ownership an AHP-subsidized homeownership unit to a household that does not meet the income eligibility requirements of the AHP, or
- c) An owner-occupant refinances the unit and it is no longer subject to a deed restriction or other legally enforceable retention agreement.